

BRB No. 99-283

ADLINE L. BARNEY )  
(Widow of TOMMIE BARNEY) )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 RYAN WALSH, INCORPORATED ) DATE ISSUED: Nov. 26, 1999  
 )  
 Self-Insured )  
 Employer-Respondent )  
 )  
 and )  
 )  
 COOPER/T. SMITH STEVEDORING )  
 COMPANY, INCORPORATED )  
 )  
 Self-Insured )  
 Employer-Respondent )  
 )  
 and )  
 )  
 STRACHAN SHIPPING COMPANY )  
 )  
 Self-Insured )  
 Employer-Respondent )  
 )  
 and )  
 )  
 DALTON STEAMSHIP CORPORATION )  
 )  
 Employer-Respondent ) DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Jr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Richard P. Salloum (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for Ryan Walsh, Incorporated.

Robert E. Thomas (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for Strachan Shipping Company.

Douglas L. Brown (Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, L.L.C.), Mobile, Alabama, for Cooper/T. Smith Stevedoring Company, Incorporated.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-884) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant is the widow of Mr. Barney (decedent), who died on September 15, 1988. Claimant asserted that decedent's lung cancer and death were related to his asbestos exposure during his more than 30 years as a longshoreman in various shipyards. The death certificate states only that the immediate cause of death was cardiopulmonary arrest due to lung cancer. In his Decision and Order, the administrative law judge denied claimant death benefits, concluding that claimant did not sustain her burden of establishing the work-relatedness of decedent's death based on the record as a whole.

On appeal, claimant contends that the administrative law judge erred in finding that the opinions of Drs. Bass and Schulte are sufficient to establish rebuttal of the Section 20(a) presumption. Employers Ryan Walsh, Cooper/T. Smith Stevedoring, and Strachan Shipping each respond in support of the administrative law judge's denial of benefits.<sup>1</sup> Claimant filed a reply brief reiterating her contentions.

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<sup>1</sup>Employer Dalton Steamship Corporation did not appear before the administrative law

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judge and has not responded to claimant's appeal to the Board.

Claimant argues that the opinions of Drs. Bass and Schulte are insufficient to establish rebuttal of the Section 20(a) presumption as they are not based on a reasonable degree of medical certainty, and thus that an award of death benefits pursuant to Section 9, 33 U.S.C. §909, is appropriate in this case. Section 20(a) of the Act, 33 U.S.C. §920(a), presumes, in the absence of substantial evidence to the contrary, that a claim for death benefits comes within the provisions of the Act, *i.e.*, that the death was work-related. See *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11 (CRT)(1st Cir. 1982). Once, as in the instant case, the Section 20(a) presumption is invoked,<sup>2</sup> the burden shifts to employer to rebut the presumption with substantial evidence that decedent's death was not caused or accelerated by his work. See *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991)(*en banc*), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993). If employer produces substantial evidence severing the connection between the death and the employment, the presumption no longer controls and the issue of causation must be resolved on the whole body of proof, with claimant bearing the burden of persuasion. See *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); see generally *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

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<sup>2</sup>The administrative law judge invoked the Section 20(a) presumption based on Dr. Lorino's opinion that decedent's asbestos exposure could have caused or at least contributed to the cancer that caused decedent's death. Decision and Order at 6; Ryan Walsh Ex. 17; Cl. Exs. 15, 19; Cooper/T. Smith Ex. 5; Strachan Shipping Ex. 10.

The administrative law judge found the Section 20(a) presumption rebutted by the opinions of Drs. Bass and Schulte. Based on a review of decedent's medical records, Dr. Bass opined that they did not support a diagnosis of underlying asbestosis and therefore it was more likely than not that asbestos exposure did not play a role in the development of decedent's lung cancer.<sup>3</sup> Ryan Walsh Ex. 18; Cooper/T. Smith Ex. 9. Dr. Schulte, decedent's treating physician for the seven months prior to decedent's death, stated that asbestos exposure did not contribute to decedent's lung cancer, and that his lung cancer was a result of cigarette smoking. Dr. Schulte based his opinion on his experience in treating lung cancer in persons with a smoking history, Ryan Walsh Ex. 14 at 21; Cl. Ex. 24 at 21; Cooper/T. Smith Ex. 4 at 21, and also explained that, based on decedent's x-rays and pulmonary function studies, he had no evidence that decedent had asbestosis or asbestos-related disease; he merely acknowledged that there is an increased incidence of lung cancer in smokers with asbestos exposure over smokers without such exposure. Ryan Walsh Ex. 14 at 19, 22; Cl. Ex. 24 at 19, 22; Cooper/T. Smith Ex. 4 at 19, 22.

The administrative law judge's finding that the opinions of Drs. Bass and Schulte are sufficient to establish rebuttal of the Section 20(a) presumption is affirmed. Their unequivocal opinions that decedent's lung cancer was not due to exposure to asbestos are based on the absence of any indicia of asbestos-related conditions. Their opinions therefore are to a reasonable degree of medical certainty; they need not rule out every theoretical possibility in order to constitute substantial evidence sufficient to rebut the Section 20(a) presumption. See *Conoco, Inc. v. Director, OWCP*, F.3d , No. 98-60662, 1999 WL 979694 (5th Cir. Nov. 12, 1999); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998); *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986). As claimant does not challenge the administrative law judge's weighing of the evidence on the record as a whole, crediting the opinions of Drs. Schulte and Bass over that of Dr. Lorino, we affirm the administrative law judge's finding that claimant did not establish the work-relatedness of decedent's death.<sup>4</sup>

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<sup>3</sup>In his deposition, Dr. Bass conceded that there was some theoretical likelihood that asbestosis can be a contributing factor to lung cancer without that person's having been diagnosed with asbestosis, and that it was theoretically possible to have asbestosis with no radiological evidence of it and no measurable lung function impairment. Ryan Walsh Ex. 32 at 14-15. Decedent's medical records do not indicate a diagnosis of asbestosis or asbestos-related disease. Ryan Walsh Ex. 13; Cl. Exs. 20, 21; Cooper/T. Smith Ex. 3.

<sup>4</sup>In support of her claim, claimant submitted Dr. Lorino's opinion and an article on asbestos written by Dr. Brody. Dr. Lorino opined that "Mr. Barney's exposure to asbestos, in

Thus, the administrative law judge's denial of death benefits is affirmed.

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all probability, was a major contributing factor to him (sic) developing carcinoma of the lung," Ryan Walsh Ex. 17; Cl. Ex. 15; Strachan Shipping Ex. 10, and subsequently testified that decedent's "exposure to asbestos was a contributing factor in him (sic) developing lung cancer, which resulted in his death." Cl. Ex. 19 at 21-22; Cooper/T. Smith Ex. 5 at 21-22. Dr. Brody's article indicated that the incidence of lung cancer in asbestos workers who do not smoke is very low whereas the risk of developing a lung tumor among smoking asbestos workers can be as high as 50 times greater than in nonsmokers depending upon the duration of exposure. Cl. Ex. 26 at 16. The article also indicated that lower lobe cancer (which decedent had) is more likely contributed to by a combination of asbestos exposure and smoking rather than by smoking alone. Cl. Ex. 26 at 5. Additionally, the article noted that a clinical diagnosis of asbestosis is not always necessary in asbestos-related cancer. Cl. Ex. 26 at 5.

Accordingly, the administrative law judge's Decision and Order denying death benefits is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge