

G.K. )  
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 Claimant-Petitioner )  
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 v. )  
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 NORTHROP GRUMMAN SHIP SYSTEMS, ) DATE ISSUED: 10/24/2008  
 INCORPORATED )  
 )  
 Self-Insured )  
 Employer-Respondent ) DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Lloyd N. Frischhertz and Dominick F. Impastato, III (Frischhertz & Associates, LLC), New Orleans, Louisiana, for claimant.

Richard S. Vale, Frank J. Towers, and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2006-LHC-1349) of Administrative Law Judge Lee J. Romero, Jr., 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, a first class electrician, alleged that exposure to asbestos during the course of his employment caused, accelerated or affected his pulmonary condition. As claimant continues to work, he filed a claim for medical benefits only. Employer contended that claimant's pulmonary condition is solely the result of smoking.

In his Decision and Order, the administrative law judge found claimant entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), based upon the opinions of Drs. Wallis and Brown that the restrictive component of claimant's chronic obstructive pulmonary disease (COPD) is due to asbestos exposure. The administrative law judge found that employer established rebuttal of the presumption based on the opinions of Drs. LaNasa and Emory that claimant's pulmonary impairment is due to smoking and not to asbestos exposure. Upon weighing all of the medical evidence, the administrative law judge found that claimant failed to establish a relationship between his asbestos exposure and his pulmonary impairment. Therefore, the administrative law judge denied the claim for medical benefits.

On appeal, claimant contends he has asbestos-related pleural plaques which contribute to his pulmonary impairment. Claimant contends, therefore, that the administrative law judge erred in finding the Section 20(a) presumption rebutted and in finding that claimant does not have a work-related injury based on the record as a whole. Thus, claimant contends he is entitled to medical benefits for a work-related condition. Employer responds, urging affirmance of the administrative law judge's decision.

We first address claimant's contention that he has pleural plaques related to asbestos exposure. Pleural plaques constitute an injury within the meaning of the Act, as "something has gone wrong with the human frame." *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 59 (1989) (claimant entitled to medical monitoring for non-disabling pleural plaques), citing *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (*en banc*); see also *Crawford v. Director, OWCP*, 932 F.2d 152, 24 BRBS 123(CRT) (2<sup>d</sup> Cir. 1991). Dr. LaNasa stated claimant has pleural plaques, see, e.g., JX-1A at 29, as did Dr. Wallis. JX 12 at 25, 27. Dr. Emory would not definitively state that claimant has pleural plaques. JX 3 at 21, 46. If claimant has pleural plaques related to asbestos exposure, he is entitled to medical benefits if a physician states medical care is necessary to monitor or treat this condition, regardless of whether the condition impairs claimant. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5<sup>th</sup> Cir. 1993). The administrative law judge did not separately address whether claimant has pleural plaques related to asbestos exposure and is entitled to medical benefits for this condition. We therefore remand the case for the administrative law judge to do so. 33 U.S.C. §§907, 920(a); *Crawford*, 932 F.2d 152, 24 BRBS 123(CRT).

Claimant's next contention assumes the existence of asbestos-related pleural plaques. He contends that the pleural plaques aggravated or combined with his COPD such that his entire respiratory impairment is work-related. Claimant asserts that the administrative law judge erred in finding the Section 20(a) presumption rebutted because he did not apply the aggravation rule. Claimant also contends the administrative law judge's weighing of the evidence as a whole is erroneous.

The administrative law judge invoked the Section 20(a) presumption based on the opinions of Drs. Wallis and Brown that the restrictive component of claimant's COPD is most likely due to asbestos exposure. Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition is not due, even in part, to the working conditions. *See, e.g., Orto Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5<sup>th</sup> Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5<sup>th</sup> Cir. 1999). Under the aggravation rule, if claimant's work injury aggravates, contributes to, or combines with a pre-existing condition, the entire resulting condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5<sup>th</sup> Cir. 1986) (*en banc*). Thus, in order to rebut the Section 20(a) presumption, employer must produce substantial evidence that claimant's condition was not aggravated or contributed to by the work injury. *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982); *see also Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT). The administrative law judge found that employer established rebuttal of the Section 20(a) presumption based upon the opinions of Dr. LaNasa, claimant's treating physician, and Dr. Emory.

Dr. LaNasa, a Board-certified pulmonologist, opined that claimant's pulmonary condition, which she stated is COPD and emphysema, is the result of his cigarette smoking. JX 1 at 13. She testified on depositions in 2006 and 2007 that claimant's pleural plaques did not cause any part of claimant's symptoms of wheezing, coughing and shortness of breath. JX 1 at 23; JX 1A at 23, 40. Dr. LaNasa stated the pleural plaques are of no clinical significance and do not contribute, even in a small way, to claimant's borderline restrictive impairment or his shortness of breath. JX 1A at 22-23, 40. Dr. LaNasa also stated that claimant does not have asbestosis. JX 1A at 11. Dr. Emory, who is Board-certified in internal, pulmonary and critical care medicine, stated that claimant has COPD and emphysema related to smoking. JX 3 at 17-18, 25. He stated that claimant has no evidence of asbestosis or any pulmonary difficulties arising out of his employment. *Id.* at 21-22. Dr. Emory stated that pleural plaques do not limit lung function and cannot worsen COPD. *Id.* at 41, 47.

We affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption based upon the opinions of Drs. LaNasa and Emory. The administrative law judge acknowledged the aggravation rule, *see* Decision and Order at 23, and rationally found these opinions sufficient to establish that claimant's pulmonary condition and symptoms are neither caused nor aggravated by his work exposure to asbestos. Both physicians specifically testified that claimant does not have asbestosis and that pleural plaques have not had any effect on claimant's respiratory condition. As these opinions constitute substantial evidence that claimant's condition is not caused or aggravated by his work exposure to asbestos, the administrative law judge properly found

the Section 20(a) presumption rebutted. *Ortco Contractors*, 332 F.3d 283, 37 BRBS 35(CRT).

Once the Section 20(a) presumption is rebutted it drops from the case and claimant bears the burden of establishing the work-relatedness of his pulmonary condition. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997). The administrative law judge found that claimant did not establish he has a restrictive lung condition due to asbestos exposure. The administrative law judge also found that claimant did not establish his obstructive lung condition is due to or aggravated by asbestos exposure. Decision and Order at 25-27. In this regard the administrative law judge declined to credit the opinions of Drs. Wallis or Dr. Brown.

Drs. Wallis, who is Board-certified in internal medicine and pediatrics, stated that claimant has a combination of restrictive and obstructive conditions due to smoking and asbestos exposure. JX 12 at 38, 66. The administrative law judge noted that Dr. Wallis agreed with Dr. LaNasa that claimant's mild pleural plaques could not aggravate his COPD. *Id.* at 43. The administrative law judge also found conclusory Dr. Wallis's statement that if claimant were exposed to asbestos then he has asbestosis, *id.* at 74, and that asbestos exposure contributed to claimant's respiratory impairment. The administrative law judge gave little weight to the deposition testimony of Dr. Brown who testified from memory that claimant's pulmonary impairment is due to both smoking and asbestos exposure. JX 13. The administrative law judge noted that Dr. Brown did not write a report of his examination of claimant and that his opinion is not supported by the gallium study as purported. The administrative law judge found Dr. Brown's testimony rambling and at times incoherent. Decision and Order at 26.

The administrative law judge concluded that he could not find the opinions of Drs. Wallis entitled to greater weight than those of Drs. LaNasa and Emory, which he found to be credible and well-reasoned. *Id.* at 27. He noted additionally that their opinions regarding the non-existence of asbestosis is buttressed by x-rays read as negative for asbestosis by Dr. Matthews, a B-reader. Therefore, as claimant did not sustain his burden of persuading the administrative law judge that his COPD/emphysema is related to his employment exposure to asbestos, the administrative law judge denied the claim for medical benefits for this condition. It is well established that the administrative law judge is entitled to determine the weight to be accorded to the evidence of record and that the Board cannot reweigh the evidence. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). The administrative law judge's finding that he could not accord greater weight to the opinion of Dr. Wallis than to those of Drs. LaNasa and Dr. Emory is within his discretion as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). As claimant did not sustain his burden of

establishing the work-relatedness of his respiratory impairment, *see Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996), we affirm the administrative law judge's denial of medical benefits for this condition. *See, e.g., Wendler v. American National Red Cross*, 23 BRBS 408 (1990) (McGranery, J., dissenting on other grounds).

Accordingly, we remand the case for the administrative law judge to specifically address whether claimant has asbestos-related pleural plaques and is entitled to any medical benefits for this condition. The administrative law judge's Decision and Order denying medical benefits for claimant's respiratory impairment is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge