U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 17-0154

REBECCA DOMINGUEZ (Granddaughter of MARI RUBI, deceased, Widow of JOHN RUBI)	)	
Claimant-Petitioner	)	
v.	)	
BETHLEHEM STEEL CORPORATION	)	DATE ISSUED: Dec. 6, 2017
and	)	
ABERCROMBIE, SIMMONS & GILLETTE, INCORPORATED OF FLORIDA	)	
Self-Insured Employer/ Third-Party Administrator	)	DECISION and ORDER

Appeal of the Decision and Order Denying Death Benefits of William J. King, Administrative Law Judge, United States Department of Labor.

Alan R. Brayton and John R. Wallace (Brayton Purcell LLP), Novato, California, for claimant.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Death Benefits (2015-LHC-00071) of Administrative Law Judge William J. King 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 administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

John Rubi, the decedent, worked as a welder for employer in 1957 and was exposed to asbestos during the course of that employment. Decision and Order at 5-6. Employer was decedent's last longshore employer.[1] Decedent was diagnosed in 2001 with pulmonary symptoms and findings consistent with asbestos exposure. *Id*. at 5. He was diagnosed with stomach cancer in 2003 and asbestosis in 2004. *Id*. Decedent had a recurrence of stomach cancer in 2007 from which he died on June 30, 2009. *Id*. Decedent's widow filed a claim for death benefits.[2] 33 U.S.C. §909.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that decedent's death was related to asbestos exposure with employer. The administrative law judge found the opinion of Dr. Leonard, that decedent's stomach cancer and death were not related to asbestos exposure, sufficient to rebut the presumption. Decision and Order at 9-10. The administrative law judge declined to credit the opinions of Drs. Ganzhorn, Schwartz, Luros and Hammer that asbestos exposure caused decedent's cancer, finding their opinions were not substantiated. *Id*. at 10-14. The administrative law judge therefore concluded that claimant failed to establish that asbestos exposure caused decedent's cancer.

The administrative law judge also found claimant entitled to the Section 20(a) presumption that decedent's death was hastened by respiratory failure that was related, in part, to decedent's asbestos exposure and that the opinion of Dr. Leonard rebutted the presumption. Decision and Order at 14-15. The administrative law judge declined to credit the opinions of Drs. Ganzhorn, Schwartz, Luros and Hammar that decedent's death was accelerated by his asbestosis. *Id*. at 15-16. The administrative law judge found there is no evidence that decedent suffered respiratory symptoms due to asbestosis at the time of his death. Accordingly, the administrative law judge concluded that claimant failed to show that decedent's death was accelerated by his work-related asbestosis, and he denied the claim for death benefits. *Id*. at 17.

On appeal, claimant challenges certain evidentiary rulings and the administrative law judge's finding that asbestos exposure did not cause or contribute to decedent's fatal gastric cancer or hasten his death. Employer did not file a response brief.

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[1] Decedent worked for employer for approximately 30 days in 1957. Decision and Order at 6.

[2] Decedent's widow died on November 5, 2016. By Order dated April 5, 2017, the Board granted the motion to substitute her granddaughter (claimant) as the petitioner in this appeal.

Claimant first objects to the administrative law judge's denial of her motion to exclude the testimony and reports of Dr. Leonard, contending he is not qualified to opine as to the cause of decedent's stomach cancer and death and that his opinion lacks a medical foundation.[3] An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if the challenging party shows them to be arbitrary, capricious, an abuse of discretion or contrary to law. *See Collins v. Electric Boat Corp.*, 45 BRBS 79 (2011); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

In denying claimant's objection to the admission of Dr. Leonard's report and testimony, the administrative law judge stated that he would address Dr. Leonard's qualifications when he weighed the evidence. Decision and Order at 3. Citing Section 23(a) of the Act, 33 U.S.C. §923(a), and Section 702.339 of the regulations, 20 C.F.R. §702.339, the administrative law judge stated that a physician's lack of specialized expertise does not preclude admission of his medical opinion, but is relevant to determining the opinion's evidentiary weight. *Id.* at 3 n.7. The administrative law judge subsequently detailed Dr. Leonard's qualifications.[4] *Id.* at 8.

We reject claimant's contention or error. Section 23(a) of the Act provides:

> In making an investigation or inquiry or conducting a hearing the [administrative law judge] shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

33 U.S.C. §923(a); *see* 20 C.F.R. §702.339 (same); *see also* 33 U.S.C. §919(d); 20 C.F.R. §702.338 ("The administrative law judge shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are

[3] Specifically, claimant objects to Dr. Leonard's limited oncology training and his basing his opinion, in part, on his review of 19 studies and five textbooks. *See* Tr. at 185-187, 191.

[4] The administrative law judge stated that: Dr. Leonard is board-certified in internal medicine and board-eligible in pulmonary medicine and cardiology; his career up to the mid-1990s consisted of critical care and respiratory therapy; and he performs medical-legal evaluations of respiratory illness and asbestos-related cases. Decision and Order at 8; Tr. at 154-156.

relevant and material to such matters").[5] Pursuant to Section 23(a) and the applicable regulations, claimant has not established that the administrative law judge abused his discretion in admitting into evidence the relevant hearing and deposition testimony of Dr. Leonard. *See G.K.* [*Kunihiro*] *v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd mem sub nom. Director, OWCP v. Matson Terminals, Inc.*, 442 F. App'x 304 (9th Cir. 2011); *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997) (*Daubert* standard not applicable in view of Section 23(a) of the Act).

Employer also submitted Dr. Leonard's written reports, dated February 2013 and August 2013, based on his review of decedent's medical records. Claimant objected to the admission of the February report, as it was prepared in relation to decedent's state workers' compensation claim, in which claimant's counsel was not involved, and employer's counsel had indicated he would not rely on the report in the federal proceedings. Decision and Order at 2. The administrative law judge sustained the objection, but erroneously excluded the August 2013 report instead of the February 2013 report. *Id.*; *see* Tr. at 15, 157-160; Cl. Pet. for Rev. and Br. at ex 1. Claimant requests that the Board strike the February 2013 report. As the administrative law judge sustained claimant's objection, we grant her request to strike Dr. Leonard's February 26, 2013 report (RX 1).[6]

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[5] The Rules of Practice and Procedure before the Office of Administrative Law Judges define "relevant evidence" as:

> evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

29 C.F.R. §18.401.

[6] The administrative law judge cited Dr. Leonard's February 2013 report with respect to his finding that employer rebutted the Section 20(a) presumption that decedent's death was hastened by his asbestosis. Decision and Order at 15, n.119, n.122. Specifically, Dr. Leonard opined in that report that there is no evidence that decedent died of respiratory failure and that asbestosis in no way contributed to death. *Id*. The administrative law judge also cited Dr. Leonard's deposition and hearing testimony that decedent's sole cause of death was gastric cancer with no contributing cause, that decedent was able to adequately oxygenate when his respiratory function was tested four months prior to his death, and that there was no evidence that decedent's pneumonia at the time of death was a contributing cause of death. *Id*. at 15, n.118, n.120, n.123; *see* Tr. at 179; EX 3 at 31. Claimant cross-examined Dr. Leonard at his deposition and the formal hearing. *See* Tr. at 184; EX 3 at 34. As Dr. Leonard reached the same conclusion in the admissible evidence developed after the February 2013 report to which claimant

Claimant also objects to the administrative law judge's exclusion from evidence of a journal article, American Thoracic Society, *Documents, Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestosis*, Amer. J. of Resp. and Critical Care Medicine, pgs. 691-715, vol. 170 (2004). Decision and Order at 2; CX 28 (excluded). Claimant contends the administrative law judge's decision must be reversed because, after admitting the exhibit at the hearing without objection, Tr. at 43, he excluded it in his decision without affording claimant notice and an opportunity to respond. Decision and Order at 2.

In excluding the journal article, the administrative law judge stated, "Statements from publications need not be admitted into evidence because they are not offered to prove the truth of what they assert and then (sic) have no evidentiary value." Decision and Order at 2. In this case, the excluded article was cited by Dr. Ganzhorn in his report concerning the method by which asbestosis is diagnosed and by claimant's counsel at the hearing in qualifying Dr. Ganzhorn as an expert witness in asbestos-related disease. Tr. at 43-47; CX 8 at 8-9. During the deposition of Dr. Schwartz, claimant's counsel also referenced a table in the article listing the criteria for diagnosing asbestosis. CX 30 at 12-13.

In this case, the parties stipulated that decedent had asbestosis, so the excluded evidence was not necessary to establish this element of the claim. Decision and Order at 5. In addition, the administrative law judge did not decline to credit any physicians' opinions based on their professional qualifications. Moreover, the article addresses non-malignant diseases, whereas the issue in this case concerns the relationship, if any, between asbestos and malignant stomach cancer. Thus, although the administrative law judge should have given claimant advance notice of his decision to exclude already admitted evidence, claimant has not established that this action constitutes reversible error given the limited evidentiary value of the article. *See generally Collins*, 45 BRBS 79; *Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986). Therefore, we reject claimant's contention. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010) (harmless error principle applies in cases arising under the Act).

Claimant next challenges the administrative law judge's finding that employer rebutted the Section 20(a) presumption linking claimant's stomach cancer to asbestos exposure. Claimant contends that, although Dr. Leonard opined that claimant's stomach cancer was not related to asbestos exposure, Dr. Leonard's opinion has no medical or scientific foundation. Where, as here, the Section 20(a) presumption is invoked, the

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had the opportunity to respond, the administrative law judge's error in admitting the February 2013 report is harmless. *See generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *see* discussion, *infra*.

burden shifts to employer to rebut the presumption with substantial evidence that decedent's stomach cancer was not caused by his work exposure to asbestos. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

Employer's burden on rebuttal is one of production rather than persuasion; the credibility of the witnesses and contrary evidence are not weighed at this stage. *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *cf. Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008) (if the administrative law judge rationally rejects the premise underlying a doctor's opinion, the opinion is not "substantial evidence to the contrary"). In this case, the administrative law judge rationally found Dr. Leonard's opinion that decedent's stomach cancer and death were not related to asbestos exposure constitutes substantial evidence that rebuts the Section 20(a) presumption.[7] *See* Tr. at 160, 174; *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT) ("the ALJ's task is to decide, as a legal matter, whether the employer submitted evidence that could satisfy a reasonable factfinder that the claimant's injury was not work-related."). Accordingly, we affirm the administrative law judge's finding that Dr. Leonard's opinion constitutes substantial evidence rebutting the Section 20(a) presumption that decedent's stomach cancer and death were due to asbestos exposure. *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT); *Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004).

Claimant next challenges the administrative law judge's finding, based on the record evidence as a whole, that she did not establish that decedent's stomach cancer and death were due to his asbestos exposure. Claimant contends the administrative law judge applied an erroneously high burden of proof, as she need establish only that decedent's asbestosis could have caused his gastric cancer. Claimant also challenges the administrative law judge's weighing of the evidence.

We reject claimant's contention that she need only show that asbestos exposure could have caused decedent's cancer. If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). The administrative law judge then must weigh all the relevant evidence and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion of establishing by a preponderance of the evidence that there is an actual casual relationship between decedent's cancer and his asbestos exposure. *Id.*; *see also Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Thus,

[7] Moreover, Drs. Ganzhorn and Leonard testified that there are many scientific studies indicating there is no causative relationship between asbestos exposure and stomach cancer. Tr. at 122, 130-134, 161, 173. Claimant's contention that there is no medical foundation for Dr. Leonard's opinion thus is without merit.

contrary to claimant's contention, the administrative law judge properly stated that, "Claimant has the burden of establishing a causal relationship between asbestos and stomach cancer by a preponderance of the evidence." Decision and Order at 10; *see Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

The administrative law judge found that claimant's medical experts established an associative relationship between asbestos exposure and stomach cancer, which was rebutted by Dr. Leonard's testimony that these studies fail to establish that there is a demonstrated causal relationship between the exposure and the cancer or that decedent died of asbestos-related gastric cancer.[8] Decision and Order at 9. The administrative law judge found claimant established that decedent died from gastric cancer. *Id*. at 10. However, the administrative law judge found that an autopsy and examination of decedent's digestive tract did not show any evidence of asbestos fibers. CX 11 at 9. Moreover, there is no autopsy evidence of decedent's stomach, and the administrative law judge found the absence of such direct physical evidence detracts from claimant's case. Decision and Order at 10-11, 14; *see also* Tr. at 126. The administrative law judge also found that claimant's medical experts did not engage in a differential diagnosis to show that decedent's cancer was caused by asbestos exposure. Specifically, although the physicians identified other risk factors for gastric cancer, they did not address them in this case. These risk factors included a possible genetic component, as decedent's two sisters suffered from stomach cancer and his brother had esophageal cancer, and decedent's history of radiation exposure.[9] Decision and Order at 10.

The administrative law judge next individually addressed, and declined to credit, the opinions of Drs. Ganzhorn, Luros, Hammar, and Schwartz that decedent's stomach cancer and death were related to his asbestos exposure. Decision and Order at 11-14. The administrative law judge reiterated that "the record is devoid of evidence to show that asbestos traveled to Decedent's stomach." *Id*. at 14; *see* n.7, *supra*. The administrative law judge also found that none of the decedent's contemporaneous medical records or treating physicians mention a link between decedent's cancer and asbestos exposure and none of claimant's medical experts relied on medical literature describing a general causal relationship between asbestos exposure and gastric cancer.

[8] As opposed to a causative relationship, where there is evidence that asbestos exposure causes a particular cancer, such as lung cancer or mesothelioma, an associative relationship describes a person who had asbestos exposure and a particular type of cancer, but there is no direct evidence that asbestos exposure actually caused the cancer. *See* Tr. at 162-163.

[9] Decedent's job duties for the Defense Department from 1970 to 1987 included duties that involved radiation exposure. *See* Tr. at 92-93; CX 15 at 10 (p. 492).

Id. The administrative law judge concluded that, "Claimant failed to establish that it is more likely than not that asbestos exposure caused Decedent's gastric cancer." *Id*.

It is well-established that an administrative law judge is entitled to weigh the medical evidence and to draw his own inferences therefrom; he has the prerogative to credit one medical opinion over that of another and is not bound to accept the opinion or theory of any particular medical examiner. *See Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Moreover, it is impermissible for the Board to substitute its views for those of the administrative law judge; thus, the administrative law judge's findings may not be disregarded merely on the basis that other inferences and conclusions also could have been drawn from the evidence. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003); *Duhagon*, 169 F.3d at 618, 33 BRBS at 2-3(CRT); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988). In this case, claimant's expert, Dr. Ganzhorn, testified there must be asbestos fibers present in the stomach for asbestos-related stomach cancer. Tr. at 125. The administrative law judge rationally found that the record lacks such evidence, as well as any studies supporting the physicians' opinions that there is a causative link between stomach cancer and asbestos exposure. Accordingly, we affirm the administrative law judge's rejection of claimant's evidence and his consequent finding that claimant did not establish that decedent's stomach cancer was related to asbestos exposure. *See Hice v. Director, OWCP*, 48 F.Supp. 2d 501 (D.Md. 1999); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

Claimant next argues that the decedent's death certificate, CX 4, listing interstitial fibrosis as a contributing cause of death, the opinion of Dr. Ganzhorn that decedent's pneumonia at the time of death was related to his asbestosis and hastened his death, and the alleged irrelevance of Dr. Leonard's reliance on decedent's oxygen saturation level preceding his death establish that the administrative law judge erred in finding that decedent's death was not hastened by asbestosis. It is well-established that "to hasten death is to cause it." *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *see also Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Friend v. Britton*, 220 F.2d 820 (D.C. Cir.), *cert. denied*, 350 U.S. 836 (1955). The pertinent inquiry in this regard concerns whether decedent's death was due in part to his work-related asbestosis, and not whether his underlying stomach cancer was caused by his asbestosis. *See, e.g., Conoco, Inc. v. Director, OWCP* [*Prewitt*], 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

The administrative law judge found claimant entitled to the Section 20(a) presumption that decedent's death was hastened by interstitial fibrosis alone, or by asbestosis-related pneumonia, based on the opinions of Drs. Schwartz, Hammar,

Ganzhorn and Luros.[10] Decision and Order at 14. The administrative law judge found that the opinion of Dr. Leonard, that decedent's sole cause of death was gastric cancer, rebutted the presumption. *Id*. at 15. The administrative law judge found there is no evidence that decedent had respiratory problems at the time of his death or that decedent was treated for pneumonia, and that none of decedent's treating doctors noted concerns with decedent's respiratory system, notwithstanding the asbestosis diagnosis. The administrative law judge found that none of claimant's medical experts adequately explained the basis for any relationship between decedent's asbestos exposure and his susceptibility to, or increased symptomatology from, pneumonia. *Id*. at 16. For these reasons, the administrative law judge declined to credit the opinions of Drs. Schwartz, Hammar, Ganzhorn and Luros. *Id*. at 15-16. The administrative law judge found that, while Dr. Salyer detected pneumonia on autopsy,[11] neither Dr. Salyer nor Dr. Weinart, who signed the death certificate, listed pneumonia as a cause of death or a contributing factor. *Id*. at 15; *see* CXs 4, 7. The administrative law judge thus concluded claimant failed to establish that decedent's death was hastened by his asbestos exposure. *Id*. at 17.

In *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, stated, "our court will interfere only where the credibility determinations conflict with the clear preponderance of the evidence, or where the determinations are inherently incredible or patently unreasonable." *Ogawa*, 608 F.3d at 642, 44 BRBS at 47(CRT). In this case, the administrative law judge rationally declined to give dispositive weight to the opinions of Drs. Schwartz, Hammar, Ganzhorn and Luros that decedent's death was hastened by asbestos exposure because the opinions are not supported by the decedent's medical records preceding his death. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001). As the administrative law judge's conclusion that claimant failed to establish by a preponderance of the evidence that decedent's death was hastened by asbestos exposure is rational and supported by substantial evidence, we affirm the denial of death benefits. *Id*.

[10] Drs. Ganzhorn and Luros opined that decedent's asbestosis affected his ability to survive pneumonia. Tr. at 80-83, 141-144; CX 12 at 457-458. Dr. Hammer opined that asbestosis, as well as gastric cancer, caused decedent's death. CX 11 at 303. Dr. Schwartz opined that interstitial fibrosis hastened death because it was listed on the death certificate as a contributing factor. CX 30 at 8, 15-17.

[11] Dr. Ganzhorn testified that pneumonia often precedes death due to advanced cancer and that decedent was malnourished from his stomach cancer. Tr. at 80. For these reasons, Dr. Ganzhorn opined that decedent was a "prime candidate" for pneumonia. *Id*. at 81.

Accordingly, we grant claimant's motion to exclude Dr. Leonard's February 2013 report, RX 1, from the administrative record. In all other respects, the administrative law judge's Decision and Order Denying Death Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge