BRB No. 05-0954

GEORGE MEDINA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 07/26/2006
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Amy M. Stone (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Peter A. Clarkin (McKenney, Jeffrey & Quigley), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2003-LHC-02715) of Administrative Law Judge Colleen A. Geraghty 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b) (3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant alleged that he was exposed to asbestos during the course of his

employment for employer from 1964 to 1968. He then worked elsewhere for approximately 10 years. Claimant returned to work for employer from 1978 to 1996, when he voluntarily retired; claimant alleged he was exposed to asbestos during the course of his employment from 1978 to 1980. Claimant also smoked cigarettes from approximately 1960 to 1997. He was diagnosed with lung cancer in February 2000. Claimant underwent surgery to remove the upper right lobe of the lung in May 2000, as well as chemotherapy and radiation treatment. Claimant sought benefits under the Act, alleging that his lung cancer is due, in part, to asbestos exposure during the course of his employment for employer.

In her decision, the administrative law judge found claimant entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), linking the lung cancer to his employment with employer. The administrative law judge found the opinions of Drs. Teiger, Gerardi, and Kenneth Kern that, in the absence of evidence of asbestosis or asbestos-related lung disease, claimant's asbestos exposure at work did not contribute to his lung cancer, established rebuttal of the presumption. However, on weighing the evidence, the administrative law judge credited interpretations of CT scans conducted on February 23 and April 24, 2000, and a chest x-ray administered on May 12, 2000, as establishing that claimant has asbestos-related lung disease. Based on the absence of any evidence that Drs. Teiger, Gerardi, and David Kern actually reviewed these specific test results, the administrative law judge concluded that claimant established that he had an asbestos-related disease and that therefore his lung cancer is due, in part, to work exposure to asbestos. The administrative law judge found that claimant is a voluntary retiree, and she awarded him permanent partial disability benefits for a 60 percent permanent lung impairment commencing February 15, 2000, when he was diagnosed with lung cancer. *See* 33 U.S.C. §908(c)(23). Employer's claim for Section 8(f) relief, 33 U.S.C. §908(f), was denied, inasmuch as employer failed to establish that claimant had a pre-existing permanent partial disability.

On appeal, employer challenges the administrative law judge's finding that claimant's lung cancer is related to his employment. Claimant responds, urging affirmance.

Employer argues that in finding that claimant established he has a work-related injury the administrative law judge improperly substituted her opinion for those of the expert medical witnesses, inasmuch as Drs. Teiger, Gerardi, and David Kern opined that the test results credited by the administrative law judge did not demonstrate the presence of asbestosis or asbestos-related lung disease.[1] Employer thus avers that claimant did not

[1] Employer also argues that the administrative law judge relied upon medical evidence not subject to qualification and scrutiny in contravention of the Federal Rules of Evidence as required by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Specifically, the medical tests credited by the administrative law judge do not state the identity of the physician interpreting the CT scans or chest x-ray, the methodology utilized, or the

establish that his lung cancer is work-related.

In order to be entitled to the Section 20(a) presumption that claimant's condition is causally related to his employment, claimant must establish a *prima facie* case by establishing the existence of a harm and that an accident occurred at work or working conditions existed that could have caused the harm. *See, e.g., Marinelli v. American Stevedoring, Ltd*, 34 BRBS 112 (2000), *aff'd* 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). In order to rebut the Section 20(a) presumption, an employer must produce substantial evidence demonstrating that claimant's employment did not cause or contribute to his injury. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *see also Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dep't of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established, with claimant bearing the burden of persuasion. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

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reliability of the findings. We reject employer's contention, inasmuch as the specific requirements discussed in *Daubert* and *Kumho Tire Company* are inapplicable to cases arising under the Act. Section 23(a) of the Act provides:

> In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board 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 also* 20 C.F.R. §§702.338, 702.339; 29 C.F.R. §18.401 (defining relevant evidence), §18.402. Thus, the administrative law judge has wide discretion in admitting relevant evidence. *Olsen v. Triple A Machine Shops, Inc.* 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, Nos. 91-70642, 92-70444 (9th Cir. 1993); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). Moreover, employer is not challenging the admissibility of this evidence, but the weight accorded it by the administrative law judge. *Casey v. Georgetown Univ. Medical Center*, 31 BRBS 147 (1997); 20 C.F.R. §§702.338, 702.339. These test results are probative evidence of the presence of asbestos-related lung disease, and the administrative law judge has the discretion to determine the weight to be accorded them. *See Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *see generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

In weighing the evidence as a whole, the administrative law judge credited the opinions of Drs. Teiger and Gerardi that there must be some evidence of asbestosis or asbestos-related lung disease in order to attribute claimant's lung cancer in part to asbestos exposure.[2] The administrative law judge found that CT scans conducted on February 23 and April 24, 2000, and a chest x-ray administered on May 12, 2000, were interpreted as showing evidence of asbestos-related lung disease, as demonstrated by pleural scarring and fibrosis. Moreover, the administrative law judge found that the reports and deposition testimony of Drs. Teiger, Gerardi, and David Kern do not establish that they actually reviewed these specific test results. Inasmuch as Drs. Teiger and Kern indicated that such evidence would link claimant's lung cancer to his asbestos exposure, the administrative law judge concluded that claimant established that his lung cancer is due, in part, to work exposure to asbestos.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *see also Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). In their deposition testimony, Drs. Teiger, Gerardi, and David Kern defined asbestosis as parenchymal or interstitial fibrosis. EXs 7 at 32, 8 at 41; CX 39 at 61. They opined that the test results they reviewed did not show evidence of asbestos-related lung disease. EX 7 at 19-20, 41, 8 at 23-24; CX 39 at 33, 61, 82-83. Dr. Kern stated he would like to have seen such evidence, although his opinion that claimant's lung cancer was due to the combination of asbestos exposure and cigarette smoking was based on claimant's asbestos exposure alone. CX 39 at 23, 40-42. Dr. Teiger opined that he would link claimant's lung cancer to asbestos exposure if there were some signs of asbestosis. EX 7 at 51. Dr. Gerardi stated that there must be evidence of pulmonary fibrosis in order to link lung cancer to asbestos exposure. EX 8 at 24-26.

The administrative law judge credited the February 23 and April 24, 2000, CT scans and a May 12, 2000, chest x-ray as showing evidence of asbestos-related lung disease. Decision and Order at 9. The February 23, 2000, CT scan was interpreted as showing prominent interstitial markings and chronic interstitial fibrotic changes. CX 9 at 2. The April 24, 2000, CT scan showed bilateral interstitial fibrosis. CX 15. The May 12, 2000, chest x-ray showed bilateral linear parenchymal scars and pleural scarring. CX 20. The administrative law judge found there is no definitive evidence that Drs. Teiger, Gerardi, or Kern actually interpreted these tests or reviewed the test results. Decision and Order at 9. Dr. Teiger's report explicitly references all the medical records he reviewed, and does not contain a reference to the tests credited by the administrative law judge. EX

[2] The administrative law judge found Drs. Teiger, Gerardi and David Kern were equally qualified experts. She did not credit Dr. David Kern's opinion that even without evidence of asbestosis, claimant's asbestos exposure was such that his cancer was related to it.

9 at 1; *see also* EX 7 at 10-11. In his deposition testimony, Dr. Gerardi stated that he reviewed CT scan results from 2000 to 2002, but he specifically references an x-ray conducted the date of his July 31, 2002, examination, CT scans conducted through February 6, 2000, and a CT scan dated May 24, 2002.[3] EXs 8 at 7-8, 17; 11 at 1, 6. Dr. David Kern stated that he reviewed claimant's medical records, including x-rays and CT scans, but there is no listing of the specific records he was provided. CX 39 at 21, 61. Thus, contrary to employer's contention, the record supports the administrative law judge's inference that Drs. Teiger, Gerardi, and Kern did not review the test results the administrative law judge credited to find evidence of asbestos-related lung disease. Furthermore, the administrative law judge rationally concluded that the interpretations of these CT scans and the x-ray establish the presence of an asbestos-related disease. *Burns*, 41 F.3d 1555, 29 BRBS 28(CRT). Thus, based on the medical opinions that such a condition is necessary to relate lung cancer to asbestos exposure, the administrative law judge rationally found that this prerequisite was established and that claimant's lung cancer is related, at least in part, to his asbestos exposure. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As the administrative law judge's findings of fact are rational and supported by substantial evidence, we affirm her conclusion that claimant established he has a work-related injury.[4] *Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT); *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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[3] In his report, Dr. Kenneth Kern states he relied on chest x-rays and the CT scan conducted on February 6, 2000. EX 13 at 1.

[4] Given our affirmance of the administrative law judge's finding, we need not address claimant's contentions, raised in his response brief, concerning the administrative law judge's interlocutory orders. Prior to the hearing, employer had not complied with claimant's discovery requests. At the hearing, the parties worked out an agreement as to a time frame in which employer would respond to a more limited request. Employer did not respond on time, and claimant moved for sanctions. Employer responded with a request for additional time. The administrative law judge denied employer's request, finding it to be untimely. The administrative law judge further granted claimant's motion for sanctions. She stated, "the Employer's defenses to the issue of causation are stricken and the issue of causation is deemed to be established adversely to the Employer." Order Granting Motion for Sanctions at 4. Employer's subsequent motion for reconsideration was denied. As the administrative law judge nonetheless addressed the causation issue on the merits, we need not address claimant's contention that employer's failure to raise any issues concerning the administrative law judge's interlocutory orders entitles claimant to a finding of causation as a matter of law.

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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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REGINA C. McGRANERY
Administrative Appeals Judge