

BRB Nos. 91-1046
and 91-1046A

SARAH S. HARRIS)	
(Widow of MARCELLUS HARRIS))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	
AND DRY DOCK COMPANY)	DATE ISSUED:
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	DECISION and ORDER

Appeals of the Decision and Order of Michael P. Lesniak, Administrative Law Judge,
United States Department of Labor.

Robert E. Walsh and Charles S. Montagna (Rutter & Montagna), Norfolk, Virginia, for
claimant.

Mary W. Adelman (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-
insured employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the widow of Marcellus Harris (decedent), appeals and employer cross-appeals, the Decision and Order (89-LHC-3398) of Administrative Law Judge Michael P. Lesniak 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 F.2d 359 (1965); 33 U.S.C. §921(b)(3).

Decedent worked for employer as a shipfitter from May 1939 until February 1984, during which time he was exposed to asbestos. Claimant and decedent were married on January 18, 1967; however, in 1974, claimant separated from decedent due to his conduct. Decedent, who smoked at least one and one-half packs of cigarettes a day, was diagnosed in March 1984 as suffering from lung cancer and, on June 3, 1984, he died due to that disease; an autopsy was not performed. At the

time of decedent's death, he remained legally married to claimant, although he apparently was living with another woman. Claimant testified that she was never financially dependent on decedent, even when they lived together. While this financial independence continued after the separation, claimant never filed for a divorce and was never served with divorce papers by decedent. Claimant further testified that she and decedent went to family functions together after their separation and that they talked about getting back together.

Claimant saw an attorney about this case for the first time on April 18, 1988. She subsequently filed her claim for death benefits under Section 9 of the Act, 33 U.S.C. §909, on April 6, 1989, alleging that decedent's death arose out of and in the course of his employment with employer.

In his Decision and Order, the administrative law judge credited claimant's testimony and found that claimant was living apart from decedent for "justifiable cause" under Section 2(16) of the Act, 33 U.S.C. §902(16). He further found that claimant had not severed the conjugal nexus of her marriage to decedent at the time of his death, and thus determined that claimant was a widow within the meaning of the Act. Next, the administrative law judge found that claimant was not aware of the potential connection between decedent's asbestos exposure and his death until her lawyer mentioned it to her in 1988. He therefore found that claimant's claim for death benefits was timely filed pursuant to Section 13(b)(2) of the Act, 33 U.S.C. §913(b)(2). However, the administrative law judge determined that, based on the opinion of Dr. Ross, employer established rebuttal of the Section 20(a), 33 U.S.C. §920(a), presumption of causation. The administrative law judge then analyzed the evidence as a whole and, after again crediting the opinion of Dr. Ross, found that decedent's exposure to asbestos did not contribute to his death. He therefore denied death benefits.

On appeal, claimant challenges the administrative law judge's findings regarding both rebuttal of the Section 20(a) presumption and causation. Employer responds, urging affirmance of the administrative law judge's denial of benefits. Employer has filed a protective cross-appeal, contending that the administrative law judge erred in determining that claimant was a widow under Section 2(16) of the Act, and in determining that claimant's claim for death benefits was timely filed pursuant to Section 13(b)(2) of the Act.

I. Section 2(16).

In its protective cross-appeal, employer contends that the administrative law judge erred in finding that claimant was a widow within the meaning of Section 2(16) of the Act. Specifically, employer avers that the following factors compel a finding that claimant was not decedent's widow: (a) claimant was not financially dependent on decedent; (b) decedent did not desert claimant, rather, claimant deserted decedent; and, (c) assuming claimant's separation from decedent was for a justifiable cause, there was no conjugal nexus between claimant and decedent at the time of death.

Section 2(16) of the Act provides:

The terms "widow or widower" includes only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of

his or her desertion at such time.

33 U.S.C. §902(16). In this case, it is uncontested that claimant was neither "living with" nor "dependent" upon decedent at the time of his death. Additionally, claimant conceded that she moved out of the house she shared with decedent, and thus, no claim for desertion was made. Therefore, the sole issue before the administrative law judge was whether claimant was living apart from decedent for "justifiable cause" at the time of his death.

In determining whether a spouse is living apart for justifiable cause or by reason of desertion, the essential requirement is a conjugal nexus between the claimant and the decedent subsisting at the time of death. *Thompson v. Lawson*, 347 U.S. 334, 366-367 (1954).¹ The Board has held that before reaching the issue of conjugal nexus, the claimant bears the burden of proving that the parties were living apart for justifiable cause. See *Denton v. Northrop Corp.*, 21 BRBS 37, 42 (1988); *Meister v. Ranch Restaurant*, 8 BRBS 185 (1978), *aff'd*, 600 F.2d 280 (D.C. Cir. 1979)(table). In the instant case, the administrative law judge credited claimant's testimony regarding her relationship with decedent and thereafter found that she justifiably left decedent in 1974 because he continually refused to financially contribute to the household, he wasted money on alcohol, and he was unfaithful to her. See Decision and Order at 15. In considering the question of whether claimant maintained a conjugal nexus with decedent, the administrative law judge credited claimant's testimony and made the following findings: claimant attempted marriage counseling before and after the separation; she never intended to file for divorce; she and decedent continued to file joint income tax returns until the year that decedent did not share a refund with her; decedent continued to carry claimant on his health plan with employer; employer paid claimant \$6,499.25 in health benefits, *see* Emp. Ex. 10;² claimant and decedent attended family functions together; decedent gave claimant \$3,000 when her house suffered a fire; claimant and decedent continued to have sexual relations until claimant caught an infection from decedent; they continued to spend claimant's birthday together, and they last had sexual relations on claimant's birthday in 1983. See Decision and Order at 16. Based on these findings, the administrative law judge concluded that claimant did not choose to sever the conjugal nexus of her marriage at the time of decedent's death. He therefore found that claimant was a widow within the meaning of Section 2(16).

¹Employer asserts that in *Thompson*, the Supreme Court held that the terms "for justifiable cause" and "by reason of desertion" are synonymous. Employer misconstrues the Court's language in this regard. Although the Supreme Court did not expressly address "justifiable cause" in *Thompson*, a case which involved desertion, the Court nevertheless stated in a footnote that: "It is not contended before us that in the circumstances of this case the phrase `for justifiable cause' has a different reach than the phrase `by reason of his desertion.'" *Thompson*, 347 U.S. at 336 n. *. The Court held that since the claimant made a conscious choice to terminate her prior conjugal relationship by embarking upon another permanent relationship, she was not a widow within the meaning of Section 2(16). *Id.*, at 337.

²Indeed, subsequent to decedent's death, employer purchased for claimant a Surviving Spouse Annuity, which pays claimant a total of \$103.60 per month. See Cl. Ex. 4.

Inasmuch as it was within the administrative law judge's discretion to credit claimant's testimony, *see Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963), and the administrative law judge's decision to do so in the instant case is neither inherently incredible nor patently unreasonable, we affirm the administrative law judge's finding that claimant was a widow within the meaning of Section 2(16), as that determination is supported by substantial evidence and in accordance with law. *See Kennedy v. Container Stevedoring Co.*, 23 BRBS 33 (1989); *Denton*, 21 BRBS at 37; *see generally Griffin v. Bath Iron Works Corp.*, 25 BRBS 26 (1991).

II. Section 13(b)(2).

Employer additionally challenges the administrative law judge's finding that the instant claim was timely filed. Specifically, employer asserts that since claimant knew that decedent was exposed to asbestos while working for employer, she should have been aware at the time of his death of the potential relationship between decedent's work environment and his death. Thus, employer avers that claimant was under a duty to file her claim for death benefits within two years of decedent's death on June 3, 1984, pursuant to Section 13(b)(2) of the Act.

Section 13(b)(2) provides:

Notwithstanding the provisions of subsection (a) of this section, a claim for compensation for death or disability due to an occupational disease which does not immediately result in such death or disability shall be timely if filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability, or within one year of the date of the last payment of compensation, whichever is later.

33 U.S.C. §913(b)(2)(1988). Section 20(b) of the Act, 33 U.S.C. §920(b), creates a presumption that a claim was timely filed. *See, e.g., Shaller v. Cramp Shipbuilding and Dry Dock Co.*, 23 BRBS 140 (1989). In the instant case, the administrative law judge found that claimant was unaware of the potential connection between decedent's asbestos exposure and his death until her lawyer mentioned it to her in 1988. *See* Decision and Order at 17. Specifically, when considering the question of when a reasonable person would have been aware of this potential connection, the administrative law judge found that since decedent was never diagnosed with asbestosis, claimant would not have been aware of the potential relationship between decedent's asbestos exposure and his death prior to 1988.³ The administrative law judge therefore concluded that claimant's claim for death benefits

³ The administrative law judge stated: "The average 'reasonable' person is not a doctor, lawyer or industrial hazard expert. Unless someone raised the disease of asbestosis, I do not believe the

was timely under Section 13(b)(2). Employer's bare assertion that claimant should have been aware of the potential connection between decedent's death and his shipyard employment in 1984 when decedent died of lung cancer, merely because she knew that he was exposed to asbestos, is insufficient to rebut the Section 20(b) presumption. *See generally Martin v. Kaiser Company, Inc.*, 24 BRBS 112, 123-124 (1990). Accordingly, as there is no evidence sufficient to establish that claimant was or should have been aware of a relationship between the decedent's death and his employment prior to 1988, we reject employer's allegation of error, and we affirm the administrative law judge's finding that the instant claim was timely filed pursuant to Section 13(b)(2) of the Act.

III. Section 20(a).

Section 9 of the Act provides for death benefits to certain survivors "if the injury causes death." 33 U.S.C. §909(1988). Where the immediate cause of death was not work-related, an eligible survivor may qualify for Section 9 death benefits if the employee had a work-related medical condition that hastened his death. *See Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1982)(Ramsey, C.J., dissenting).

Under the Act, once a *prima facie* case is established, claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption linking the decedent's death to his employment. *See Fineman*, 27 BRBS at 104. Upon invocation of the presumption, the burden shifts to the employer to present specific and comprehensive evidence sufficient to sever the causal connection between the death and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). The unequivocal testimony of a physician that no relationship exists between an injury and an employee's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

Initially, claimant contends that the administrative law judge erred in finding the Section 20(a) presumption rebutted. Specifically, claimant contends that the evidence credited by the administrative law judge was insufficient to rebut the presumption. We disagree. After setting forth the medical evidence of record, the administrative law judge, based upon the testimony of Dr. Ross, found that employer rebutted the presumption. Dr. Ross testified that before he accepts that asbestos exposure is related to the development of lung cancer in a patient, a diagnosis of asbestosis is required. *See Transcript at 148-149.* In the instant case, after reviewing decedent's medical records, Dr. Ross concluded that decedent did not suffer from asbestosis and, therefore, that his employment with employer did not contribute to his lung cancer and death. *See Transcript at 172.* Dr. Ross based his finding that decedent did not have asbestosis on several factors, including: (1) He saw no

average person would have made the connection." Decision and Order at 17-18.

x-ray evidence of asbestosis;⁴ (2) When decedent was first hospitalized in 1984, there were findings of decreased breath sounds bilaterally with diffuse bronchi and rales bilaterally. One month later his lungs were said to be clear; this is consistent with a diagnosis of chronic bronchitis, not asbestosis; (3) Dr. Colby's finding that there were no asbestos bodies in the lung tissue; and (4) Decedent was a heavy smoker. Although Dr. Ross responded to a question from the administrative law judge by stating that, considering decedent's 34 years of asbestos exposure and his smoking history, he would be hard pressed "to not say it's possible that asbestos played a role," *see* transcript at 211, Dr. Ross subsequently reaffirmed his prior conclusion that decedent's lung cancer was caused by his cigarette smoking and he could not consider his asbestos exposure to be of any significance. Tr. at 211-212.

Contrary to claimant's contentions, Dr. Ross' testimony with regard to causation is not equivocal. Rather, a complete review of Dr. Ross' testimony indicates his belief that decedent's lung cancer and death were unrelated to his work-related exposure to asbestos. We hold, therefore, that this opinion by Dr. Ross constitutes substantial evidence to support a finding that the decedent's death was neither caused nor hastened by his work-related exposure to asbestos; accordingly, we affirm the administrative law judge's finding that the Section 20(a) presumption was rebutted. *See Devine*, 23 BRBS at 279; *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Claimant next contends that the administrative law judge erred in finding, based upon the record as a whole, that employer established the lack of a causal relationship between the decedent's death and his work-related exposure to asbestos. Specifically, claimant alleges that the administrative law judge erred in crediting the opinion of Dr. Ross over the opinions of Drs. Schulz and Schrepers.

Dr. Schulz, who is Board-certified in internal medicine with a subspecialty in medical oncology, began treating decedent in March 1984, after the decedent had been diagnosed as having small cell anaplastic carcinoma. In a report dated November 14, 1988, Dr. Schulz stated:

While small cell carcinoma of the lung is most highly correlated etiologically with cigarette smoking, there is a four to five fold increased risk of carcinoma of the lung in patients who have both cigarette smoking and asbestos exposure history. Apportionment of the risks to either

⁴Dr. Ross agreed that a March 1984 x-ray showed mild blunting of the right costophrenic angle, representing either pleural effusion or pleural scarring. However, a 1967 x-ray showed the same blunting. According to Dr. Ross, this demonstrated that there were no progressive changes, and thus no pleural effusion. He stated that people may be exposed to asbestos for years and develop pleural changes and never get asbestosis. What is required is a finding of interstitial fibrosis in the lungs. Tr. at 160. To have such finding by x-ray evidence, the presence of very fine, irregular, linear opacities is required. After reading decedent's x-rays, Dr. Ross did not find these markings. Tr. at 162.

insult is very difficult . . .

Emp. Ex. 4. After reviewing several medical articles relating to the connection between asbestos exposure and cancer,⁵ Dr. Schulz testified that because decedent had been exposed to asbestos for approximately thirty years, there was a 75 percent chance his cancer was related to his asbestos exposure. Cl. Ex. 7 at 9. He further testified that a person who smokes cigarettes and is exposed to asbestos has a 5 times greater chance of developing lung cancer than a person who is just a cigarette smoker. In contrast to the opinion of Dr. Ross, Dr. Schulz stated that a diagnosis of asbestosis was not necessary in order to relate a person's asbestos exposure with lung cancer. *Id.* at 13. Dr. Schepers, after reviewing decedent's medical records, x-rays, and biopsy slides, opined that the decedent's x-rays revealed moderately severe asbestosis before decedent developed lung cancer,⁶ the biopsy specimen revealed cancer cells which showed vacuoles in the nuclei and the cytoplasm, and stated that such cells are commonly seen in cases of asbestosis, and that it was his opinion that decedent's asbestos exposure constituted a substantial contributing cause of decedent's cancer and death. Cl. Exs. 5a, b, d, f. Dr. Colby, a physician at the Mayo Clinic, reviewed decedent's biopsy slides and identified small cell undifferentiated carcinoma typical of bronchogenic origin. Dr. Colby, who did not see asbestos bodies on any of the slides, subsequently stated that he "would agree that the biopsy specimen does not show any

histologic evidence that asbestos exposure contributed to Mr. Harris' lung cancer, but by the same token, it does not exclude asbestos exposure as a factor." Emp. Ex. 5.⁷

In the instant case, the administrative law judge credited the testimony of Dr. Ross that there was no relationship between the decedent's death and his work-related exposure to asbestos, over the opinions of Drs. Schulz and Schrepers, finding that Dr. Ross' opinion was well-reasoned and more consistent than the opinion of Dr. Schulz, and that Dr. Schepers' opinion was discredited by the findings of Dr. Colby. *See* Decision and Order at 19-20. Specifically, in declining to credit the opinion of Dr. Schulz, the administrative law judge stated that Dr. Schulz failed to show how

⁵Dr. Schulz relied specifically on the studies performed by Dr. Enterline and Dr. Selikoff. Cl. Ex. 7 at 11.

⁶Specifically, Dr. Schepers interpreted the x-rays as showing bilateral pleural fibrosis, with blunting of both costophrenic angles. Cl. Ex. 5f.

⁷In a letter dated August 16, 1990, Dr. Colby stated his disagreement with Dr. Schepers' assessment that decedent's respiratory cell arises from distal tract epithelium, and are commonly seen in cases of asbestosis and rarely in cigarette smokers who have had no asbestos dust exposures. Dr. Colby reaffirmed his opinion that any cytologic changes seen in either benign cells or cancer cells cannot be used to confirm the presence of asbestos-related changes in decedent's lung tissue, and further stated that he did not know of any way to tell the difference between respiratory cells from individuals with asbestosis and those from cigarette smokers without a history of asbestos exposure. Emp. Ex. 5.

decedent's profile matched the epidemiological studies upon which he relied, was "hazy" about decedent's smoking history, based his testimony upon the medical articles supplied to him by claimant's counsel, which the administrative law judge characterized as hearsay evidence, and did not have the benefit of a pathological postmortem study that would tell him whether decedent had asbestos particles in his lungs.⁸ *See id.* at 19.

Questions of witness credibility are for the administrative law judge as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Thus, in weighing the evidence, the administrative law judge is not bound to accept the opinion or theory of any particular witness, *see Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); rather, the administrative law judge is entitled to evaluate the credibility of all witnesses and draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In reviewing an administrative law judge's credibility determinations, the Board will affirm the administrative law judge's findings if they are rational. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

⁸The administrative law judge also determined that Dr. Schulz was not entitled to greater weight as decedent's treating physician, as he began treating decedent only a few months prior to his death. *See* Decision and Order at 18-19 n. 10.

In the instant case, the administrative law judge's decision not to credit Dr. Schulz's opinion because, *inter alia*, that physician relied upon supportive medical articles supplied to him by claimant's counsel, while crediting the opinion of Dr. Ross, who conceded that he was not aware of *any* study which supported his opinion that a diagnosis of asbestosis was required before asbestos exposure can be related to a person's lung cancer, *see* transcript at 200, appears irrational. Furthermore, we note that Dr. Ross, who concluded that decedent did not suffer from asbestosis and that decedent's death was not related to his asbestos exposure, additionally testified that a diagnosis of asbestosis can be made when interstitial fibrosis is present in combination with a history of asbestos exposure. *See* Transcript at 141-142. Prior to crediting Dr. Ross' testimony, the administrative law judge credited claimant's lay witnesses and found that decedent had been exposed to asbestos over many years. *See* Decision and Order at 18. Additionally, the administrative law judge credited Dr. O'Connell's x-ray readings over the readings of Dr. Ross.⁹ Dr. O'Connell, who found a progression of pleural plaque and blunting of the costophrenic angle along with interstitial lung disease, concluded that decedent had progressive changes of pleural plugging and interstitial fibrosis consistent with an asbestos-related lung disorder. Cl. Ex. 6a. The administrative law judge specifically credited this finding.¹⁰ Thus, the administrative law judge, after specifically crediting testimony which established that the decedent had interstitial fibrosis in combination with a history of asbestos exposure, thereafter credited Dr. Ross' opinion that the decedent did not suffer from asbestosis, although Dr. Ross acknowledged such a diagnosis is proper if a combination of interstitial fibrosis and asbestos exposure exists. *See* Transcript at 160. Based upon these inconsistencies in his credibility determinations, we hold that the administrative law judge's findings regarding causation cannot stand; we therefore vacate the administrative law judge's determination that no relationship exists between the decedent's death and his work-related exposure to asbestos, and we remand the case to the administrative law judge to reconsider the evidence as a whole on this issue. On remand, the administrative law judge must resolve the inconsistencies which resulted from his credibility determinations and reconsider the issue of causation.

⁹The administrative law judge credited Dr. O'Connell over Dr. Ross in this regard based on Dr. O'Connell's credentials as a Board-certified radiologist. Decision and Order at 21.

¹⁰The administrative law judge noted that Dr. O'Connell did not comment on whether decedent's asbestos exposure related to his cancer and did not specifically diagnose asbestosis. Decision and Order at 20-21.

Accordingly, the administrative law judge's finding that decedent's exposure to asbestos did not contribute to his death is vacated, and the case is remanded for reconsideration consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge