

BRB No. 93-1375

MARION HOWELL (Widow of OTIS A. HOWELL))	
)	
Claimant-Respondent)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY)	DATE ISSUED:
)	
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-Granting Benefits For Asbestosis, Granting Survivor's Benefits, And Granting The Employer's Petition For Relief Under Section 8(f) Of The Act of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gary R. West (Patten, Wornom & Watkins), Newport News, Virginia, for claimant.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (92-LHC-2479) of Administrative Law Judge Richard K. Malamphy awarding benefits 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 if they 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).

Decedent worked for employer, where he was exposed to asbestos, at various times between 1947 and 1953. On February 22, 1990, more than a year after he had retired, he was diagnosed with asbestosis. On April 19, 1990, decedent was diagnosed with lung cancer, and he died as a result of this disease on March 21, 1992. On July 17, 1990, decedent filed a disability claim for occupational lung disease, including asbestosis and mesothelioma. After decedent's death, his widow, the claimant in the present case, filed a death benefits claim under Section 9 of the Act, 33 U.S.C. §909, based on occupational lung disease including lung cancer and asbestosis. No hearing was held inasmuch as the parties requested a decision based solely on the documentary evidence.

The issues before the administrative law judge were whether decedent suffered from an occupationally related lung disease that contributed to his disability and death and whether employer is entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f). The parties stipulated that decedent's death resulted from lung cancer but disagreed as to whether this condition was related to his employment. Employer maintained that decedent's lung cancer was solely attributable to cigarette smoking, arguing that lung cancer cannot be causally-related to asbestos exposure in the absence of the disease of asbestosis, which it asserted decedent did not have. Claimant averred that decedent's lung cancer was due, at least in part, to occupational exposure to asbestos.

The administrative law judge found that decedent had the occupational disease of asbestosis, which was a significant factor in his death. He thus awarded total disability benefits from February 22, 1990, the date decedent was diagnosed with asbestosis, until March 21, 1992, the date of death. He also awarded claimant death benefits and found employer entitled to relief from continuing compensation liability pursuant to 33 U.S.C. §908(f).

Employer appeals the award of disability and death benefits, contending that the administrative law judge's decision is not supported by substantial evidence, that it does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §554 *et seq.*, and that the administrative law judge erred in applying the "true doubt" rule to find that decedent's lung cancer and death were caused by work-related asbestos exposure. Claimant responds, urging affirmance. Employer also submitted two letters citing additional authority, including the United States Supreme Court's decision in *Director, OWCP v. Greenwich Collieries.*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994), and asserted that this decision supports reversal of the administrative law judge. Apparently in response to employer's citation of authority, claimant filed a Memorandum in Opposition to Employer's Motion for Summary Reversal, in which she argues that the administrative law judge's use of the "true doubt" rule to find that decedent had asbestosis was harmless error because the issue in the case was not whether decedent had asbestosis but whether occupational exposure to asbestos contributed to decedent's disability and death.

In this case, the parties agree regarding the extent of disability under Section 8 of the Act, 33 U.S.C. §908, due to decedent's lung condition. Section 9 of the Act, moreover, provides for death benefits to a deceased employee's widow "if the injury causes death." 33 U.S.C. §909 (1988). The issue in this case thus turns on the existence of a causal relationship between decedent's lung

condition, which the parties agree resulted in his disability and death, and his employment exposure to asbestos.

Pursuant to Section 20(a), 33 U.S.C. §920(a), claimant is entitled to a presumption that decedent's disability and death arose from his employment if he establishes that he suffered a harm and worked under conditions which could have caused that harm. In order to rebut the presumption, employer must present specific and comprehensive evidence that decedent's employment neither directly caused his condition nor aggravated, accelerated, or combined with it to result in his disability and death. *See, e.g., Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). If work exposure to a harmful substance played a causative role in the development of the condition leading to decedent's death, such that it hastened death, then the death is work-related. *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). *See also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979, 16 BLR 2-90, 2-92 (4th Cir. 1992), *cert. denied*, U.S. , 113 S.Ct. 969 (1993)(Black Lung case holding that if a medical condition hastens death, it contributes to it).

In analyzing the work-relatedness of decedent's lung cancer, the administrative law judge found that claimant was entitled to application of the Section 20(a) presumption, but he applied it to presume that if decedent was found to have asbestosis, this disease was presumed related to shipyard exposure to asbestos. The administrative law judge then found that based on the diagnosis of asbestosis by Drs. Maddox, Frable, Legier, Baker, and Shaw, claimant invoked Section 20(a). After considering the conflicting evidence as to whether decedent, in fact, had asbestosis, the administrative law judge concluded that as "one can assume that the evidence is in equipoise," the Section 20(a) presumption had been rebutted. Decision and Order at 15. He then stated that "there is substantial evidence in this case to support a diagnosis of asbestosis, and with consideration of the true doubt rule, I find that asbestosis had been established." *Id.* After noting that Section 20(a) presumes in the absence of substantial evidence to the contrary that decedent's death was work-related, the administrative law judge ultimately found that occupationally-related asbestosis was a significant factor in decedent's death from lung cancer.

The administrative law judge's causation analysis in this case cannot be affirmed, as his reasoning is faulty. As it is undisputed that decedent suffered from lung cancer, which resulted in his disability and death, and the record is replete with evidence that conditions existed at employer's facility which could have caused this condition, claimant is entitled to the Section 20(a) presumption that decedent's lung condition was work-related. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). Inasmuch as the Section 20(a) presumption was invoked, the burden shifted to employer to establish that decedent's lung disease was not caused, aggravated, or accelerated by his exposure to harmful substances, *e.g.*, asbestos. *See generally Konno v. Young Bros., Ltd.*, 28 BRBS 57, 62 (1994); *Suseoff v. The San Francisco Stevedoring Co.*, 19 BRBS 149, 151-152 (1986). We note that the disability and death benefits claims were not based solely on the disease of asbestosis but also included asbestos-related lung cancer. Thus, in order to establish rebuttal, employer was required to establish that asbestos exposure played no role in decedent's death or disability.

In analyzing causation, the administrative law judge recognized that employer's theory of the case rested on medical opinions concluding that in order for decedent's lung cancer to be related to asbestos exposure, decedent must have had the disease of asbestosis. The administrative law judge correctly noted that employer presented evidence in support of its argument that decedent not have asbestosis, specifically the opinions and credentials of Drs. Ross, Fairman, Craighead, and Churg.¹ The administrative law judge also discussed the contrary evidence, finding that three pathologists, Dr. Legier, Maddox, and Frable, and two other physicians, Dr. Baker, a pulmonary specialist, and Dr. Shaw, claimant's treating physician, implicated either asbestosis or asbestos exposure as a causative factor in decedent's disability and death.² After observing that it appeared that Dr. Ross

¹Dr. Ross, a pulmonary expert, after reviewing decedent's medical records, pulmonary function studies and x-rays, opined that since decedent did not have asbestosis, his small cell carcinoma of the lung was caused by cigarette smoking and was not related to asbestos exposure. Ex. 22 at 11-12 Ex. 23. Dr. Fairman, an associate professor of pulmonary medicine, after examining decedent on August 4, 1991, opined that his pulmonary function tests indicated an obstructive defect but no restrictive defect indicative of asbestosis and that his cancer was most likely due to years of exposure to cigarette smoke. Ex. 18 at 21. Dr. Craighead, a pathologist, indicated in a report dated May 31, 1991, that decedent did not have asbestosis and that his lung cancer was due entirely to cigarette use and was not caused by exposure to asbestos in any way. Ex. 28 at 20, 28. Dr. Churg, a pathologist, after reviewing decedent's pathology and medical records, opined that because the pathology samples did not contain evidence of diffuse interstitial fibrosis indicative of asbestosis, decedent's lung cancer was not in any way related to asbestos exposure but was caused entirely by smoking. Ex. 31.

²Based on an examination conducted on February 22, 1990, Dr. Baker, a pulmonary specialist, diagnosed pulmonary asbestosis based on decedent's history, shortness of breath, physical findings of non-clearing crackles and chest x-ray findings. Cx. 1. In addition, he diagnosed obstructive airway disease and chronic gastrointestinal disease. In a report dated April 5, 1990, Dr. Shaw, who treated decedent during a 1990 hospitalization, diagnosed carcinoma of the lung, arteriosclerotic cardiovascular disease, and asbestosis by history. Cx. 5. In a report dated March 21, 1992, Dr. Maddox, the autopsy prosector, found that decedent had moderate panacinar emphysema, as well as numerous hyaline pleural plaques, mild diffuse fibrosis, and a few scattered ferruginous bodies indicative of asbestos-associated pleural fibrosis consistent with the prior diagnosis of clinical asbestosis by Dr. Baker. Cx. 7. Dr. Maddox further stated that decedent had a markedly increased asbestos fiber count consistent with parenchymal asbestosis, that he had a metastatic tumor of the lung, and that he died of respiratory failure caused by a small cell carcinoma and underlying chronic lung disease. It was Dr. Maddox's belief to a reasonable degree of medical certainty that both cigarette smoking and asbestos exposure contributed to the chronic lung disease and carcinoma of the lung. In a report dated August 7, 1991, Dr. Legier, a pathologist, found that decedent's x-rays and clinical findings as well as his pulmonary function tests and blood analysis, strongly suggest the presence of pleural and parenchymal abnormalities which fit with asbestos-induced lung disease. He opined to a reasonable degree of medical certainty that occupational exposure to asbestos was a significant contributory factor, as was smoking, in the development of his metastatic small cell carcinoma. Cx. 10. In a report dated July 17, 1992, after reviewing past documents and the latest

had not been a practicing physician during the past ten years, and considering the credentials of Drs. Craighead and Churg, the administrative law judge stated that he found the opinions of Drs. Legier, Maddox, and Frable to be well-reasoned and quite credible. Despite this discussion, the administrative law judge did not base his ultimate conclusions on his weighing of the relevant medical evidence. Thus, although the administrative law judge purported to invoke Section 20(a) and find it rebutted, he did not find rebuttal based on his evaluation of employer's evidence. Rather, he did so based on his erroneous belief that rebuttal was appropriate by virtue of the "true doubt" rule if "one can assume that the evidence is in equipoise." Upon determining that rebuttal had been established, he then stated that there was substantial evidence to support a diagnosis of asbestosis. While there is indeed evidence supportive of such a finding, the administrative law judge went on to conclude that, with consideration of the "true doubt" rule, asbestosis had been established.

Subsequent to the issuance of the administrative law judge's decision, the United States Supreme Court held in *Greenwich Collieries* that application of the "true doubt" rule is invalid because it violates Section 7(c) of the APA, which places the "burden of proof" on a proponent of a rule or order by easing the claimant's burden of providing the validity of his claim.³ *Id.*, 114 S.Ct. at 2257, 2259, 28 BRBS at 46, 48 (CRT). In this case, the administrative law judge's reliance upon the "true doubt" rule requires remand of the case, because the administrative law judge has not weighed or evaluated the medical evidence. As previously discussed, Section 20(a) is invoked in this case, and it links claimant's lung disease to his employment. Employer may rebut the Section 20(a) presumption by producing specific and comprehensive evidence severing the presumed causal connection. Inasmuch as the administrative law judge in the present case never evaluated the relevant evidence to determine whether it was sufficient to establish the lack of a causal nexus, we vacate his finding of rebuttal and remand the case for him to reconsider this issue in light of all relevant evidence, specifically identifying the evidence he relies upon and his reasons for relying upon it, consistent with the requirements of the APA. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

If the administrative law judge determines that Section 20(a) is rebutted, he must weigh all the evidence *pro* and *con*. In this case, the administrative law judge ultimately purported to do so, concluding that asbestosis was a significant factor in causing decedent's lung cancer. We are unable to affirm his determination in this regard, however, because his findings rest on application of the "true doubt" rule, as previously discussed, and he did not fully consider the relevant evidence. Although the administrative law judge properly recognized that Drs. Fairman, Craighead, Legier,

autopsy slides, Dr. Legier opined that decedent died of small cell anaplastic carcinoma of the lung contracted as a consequence of both past smoking and occupational exposure to asbestos. Cx. 11.

³Contrary to the findings of the administrative law judge, the "true doubt" rule never applied in employer's favor to the issue of rebuttal; it operated in favor of the injured employee in resolving the issue of whether causation was established on the record as a whole after the Section 20(a) presumption had been rebutted where the evidence was in "equipoise." *See Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18, 21 (1995)(decision on recon.).

Maddox, Ross, Churg, and Frable provided relevant testimony, he never explicitly weighed this evidence or identified the evidence he was crediting and his reasons for crediting it, as is required by the APA. Moreover, to the extent that the administrative law judge viewed the testimony of Drs. Ross and Craighead as corroborative of the administrative law judge's conclusion that asbestosis was a significant factor in causing decedent's lung cancer, we agree with employer that the administrative law judge mischaracterized this evidence. The administrative law judge noted that "[w]hile Drs. Ross and Craighead concluded that Mr. Howell did not have asbestosis, these physicians acknowledge that asbestos exposure (or asbestosis) can increase the probability that carcinoma will occur in the lungs of the cigarette smoker." Decision and Order at 15-16. In actuality, however, Drs. Craighead and Ross, as well as Dr. Churg, indicated that while it has been claimed in the medical literature that asbestos increases the likelihood that carcinoma will develop in the lungs of a cigarette smoker, it was their opinion that this was true only in cases where exposure to asbestos was of sufficient severity and duration to result in the disease process asbestosis, and that inasmuch as claimant did not have the fibrosis indicative of asbestosis, asbestos exposure was not a contributing factor in decedent's death.

Since the administrative law judge did not properly weigh the relevant evidence, we vacate his finding that decedent's lung condition was work-related. If on remand the administrative law judge finds that the Section 20(a) presumption has been rebutted, he should weigh the medical evidence as a whole to determine whether asbestos exposure played a direct or indirect causative role in decedent's disabling and ultimately fatal lung disease. These findings must be made without application of the "true doubt" rule, consistent with *Greenwich Collieries*. In weighing the evidence, the administrative law judge must also apply the aggravation rule, as decedent's disability and death are work-related if his employment exposure aggravated, accelerated or combined with other causes to result in the disability and death.

Accordingly, the administrative law judge's findings regarding causation are vacated, and the case is remanded for further consideration of this issue consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge