U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 23-0235

THEONI SALCEDO (Widow of JUAN R. SALCEDO) Claimant-Petitioner v. AUTOMATIC TUBE COMPANY and AMERICAN STERILIZER COMPANY and LIBERTY MUTUAL INSURANCE COMPANY Employers/Carrier-Respondents	)	**NOT-PUBLISHED** DATE ISSUED: 12/20/2024 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Susan Hoffman, Administrative Law Judge, United States Department of Labor.

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

John T. Marin (Laughlin, Falbo, Levy & Moresi, LLP), Sacramento, California, for Employers and Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS, and JONES, Administrative Appeals Judges

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Susan Hoffman's Decision and Order Denying Benefits (2018-LHC-01558) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Juan R. Salcedo (Decedent) worked as a pipefitter for various companies between 1968 and 1999,[1] including three maritime employers: 1) Aero Conveying Systems (ACS) during parts of 1968-1974, 1979, 1983-1984 and 1986-1987; 2) Automatic Tube Company/American Sterilizer (ATC/AS) (Employer)[2] from 1974 through 1978; and 3) Roger Swartz d/b/a Telecom Systems (RSTS) from 1979 through 1985.[3] CX 3 at 4-7. Claimant, Decedent's widow, maintains Decedent, while working for Employer, was assigned to the Alameda Naval Air Station (ANAS) where he worked on board the Naval vessels *USS Enterprise* and *USS Hornet*. She alleges this work exposed him to asbestos which eventually caused or contributed to a malignant mesothelioma tumor resulting in his death on October 22, 2007. Claimant and Decedent's son, Roger Salcedo,[4] both represented by the law firm of Brayton Purcell LLP (BP), filed a wrongful death lawsuit in San Francisco Superior Court on July 1, 2008, against various third-party manufacturers, distributors, and purchasers of asbestos products.

On October 14, 2009, Claimant, through BP, signed two disclaimers which purported to renounce her interest in the third-party actions and in Decedent's estate in favor of her pursuit of a claim for death benefits under the Longshore Act. CX 24. On October 21, 2009, Claimant, still represented by BP, filed a claim for death benefits under

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Decedent sustained his alleged injury in California. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[2] These entities entered into a merger agreement whereby, effective December 29, 1974, American Sterilizer became the surviving corporation and Automatic Tube Company ceased to exist.

[3] Decedent also worked for Diebold in 1978 and 1979, and Pneumatic Tube Products Company in 1983, 1998 and 1999. CX 3 at 4-7.

[4] Roger Salcedo died on February 20, 2010. CX 28.

the Act originally against ACS, Employer, and RSTS. CX 1. BP also filed a Request for Dismissal of Claimant, without prejudice, in the wrongful death action which the Superior Court apparently granted on December 3, 2009. CX 28. The Longshore case was originally referred to the Office of Administrative Law Judges (OALJ) in December 2013 (OALJ No. 2014-LHC-00402), was remanded back to the Office of Workers' Compensation Programs (OWCP) for "further proceedings" in April 2016, and then was referred to the OALJ for a second time in October 2018 (OALJ No. 2018-LHC-01558), when it was assigned to the ALJ.

Between October 2018 and September 2021, the ALJ issued a series of procedural orders ultimately resulting in Employer and its carrier being joined to the claim and identified as the sole potential responsible employer and carrier. A video hearing addressing the merits was held on October 7 and 13, 2021.[5] At the hearing, the parties' stipulated Decedent had mesothelioma that was "the predominant cause in his death" and submitted "on the evidence, testimony and trial transcript from the July 9, 2019 bifurcated trial on the issue of Section 33(g) forfeiture." Jt. Stip. #s 1, 2, and 10; *see* 33 U.S.C. §933(g). The parties also agreed the primary issues before the ALJ were whether: Decedent's work for Employer occurred on a covered situs;[6] his death was due to asbestos exposure during his covered work with Employer; and/or Section 33(g) barred the claim for benefits under the Act. HT at 25-36.

In her decision, the ALJ found Claimant did not satisfy the situs requirement of Section 3(a), 33 U.S.C. §903(a), because she could not establish whether Decedent performed any work at a covered situs while working for Employer from 1974 through 1978. She further found Claimant did not satisfy the status requirement of Section 2(3), 33 U.S.C. §902(3), because she found there is no credible evidence establishing Decedent's

[5] The ALJ's procedural actions included: a February 1, 2019 order scheduling a formal hearing for July 9, 2019; a June 24, 2019 order bifurcating the proceedings into two phases (Phase I to address Section 33(g), 33 U.S.C. §933(g), and Phase II, if necessary, to address all remaining issues), with the first phase to be addressed at the July 9, 2019 hearing; a November 12, 2020 order vacating the previous order of bifurcation; and an April 29, 2021 order scheduling the October 2021 video hearing on the merits.

[6] Employer maintained it never engaged in any maritime work following the December 29, 1974 ATC/AS merger. HT at 26. It further noted that although ATC "may have been" engaged in maritime work prior to the merger, there is not "any information about that history." *Id.* at 26-27.

work for Employer involved the regular performance of maritime operations. Alternatively, the ALJ found Claimant invoked the Section 20(a) presumption that Decedent's death was work-related, 33 U.S.C. §920(a), but Employer established rebuttal of the presumption. Considering the record as a whole, the ALJ found Claimant did not establish, by a preponderance of the evidence, that Decedent suffered an injury arising out of and in the course of his work for Employer.[7] Consequently, based on her findings of fact and conclusions of law, the ALJ denied Claimant's claim for death benefits.

On appeal, Claimant challenges the ALJ's findings that she did not satisfy the Act's situs and status elements and her alternative finding that Employer rebutted the Section 20(a) presumption. Employer responds, urging affirmance of the ALJ's denial of benefits. Claimant has filed a reply brief. We shall address the ALJ's alternate finding on causation first.

Claimant contends Employer did not rebut the Section 20(a) presumption. She asserts the ALJ misstated and misapplied the law by recognizing Employer's burden on rebuttal, as articulated in *Albina Engine & Mach. v. Director, OWCP*, 627 F.3d 1293 (9th Cir. 2010), is one of production but by failing to require it to produce "substantial evidence" to satisfy that burden. In this regard, Claimant maintains the rebuttal evidence consists of Industrial Hygienist Joel Cohen's speculative, non-opinions and arguments which cannot, as a matter of law, constitute "substantial evidence" to rebut the Section 20(a) presumption in this case. Claimant next asserts a "fair reading" of the qualifications of each of her witnesses, and a review of their opinions as contained in the record as a whole, establishes there is no rational basis to give any weight to Mr. Cohen's testimony.[8] Consequently, she

[7] Because Decedent's injury is neither covered nor compensable under the Act, the ALJ determined she need not address any "other issues," e.g., whether Section 33(g) barred the claim, whether Employer is entitled to a Section 3(e) credit, 33 U.S.C. §903(e), for benefits paid under the state workers' compensation act, and whether Claimant is entitled to Employer-paid attorney's fees. D&O at 36.

[8] As part of her challenge to the ALJ's rebuttal finding, Claimant alleges the ALJ incorrectly found Decedent's medical records have no persuasive value, improperly accorded "little weight" to Dr. Richard Cohen on the issue of causation, and erroneously accorded no weight to the testimony of Decedent's son, Roger Salcedo, the declaration of steamfitter/pipefitter Andre Wright, and the reports and statements of Asbestos Consultant Charles Ay and Industrial Hygienist, Kenneth Cohen, PhD. Cl's Br. at 62-73. In essence, she asserts this evidence on "the record as a whole is quite clear" in directly refuting and, therefore, establishing Mr. Cohen's opinion is not substantial rebuttal evidence. *Id.* at 77-78, 80.

asserts the ALJ's rebuttal finding is neither rational nor based upon substantial evidence, and she requests the Board reverse it and hold Decedent's death is work-related as a matter of law.[9] Employer asserts the ALJ correctly found it rebutted the working conditions element of the prima facie case by establishing the unlikelihood of Decedent being exposed to harmful amounts of asbestos while working for it in a maritime capacity between 1974 and 1978.

Where, as here, the Section 20(a) presumption is invoked,[10] the burden shifts to the employer to rebut it by producing substantial evidence that the employee's death was not caused, aggravated, or accelerated by the conditions of his employment. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642 (9th Cir. 2010); *Ramey v. Stevedoring Services of America*, 134 F.3d 954 (9th Cir. 1998). The United States Court of Appeals for the Ninth Circuit has held an employer's burden on rebuttal is to produce "evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Ramey*, 134 F.3d at 959 (internal citation omitted). In this regard, an employer is required to cast doubt on the relationship between the decedent's death and any injurious work exposure or working conditions for which it may be responsible. It need not cast doubt on all the decedent's work. *See Albina Engine*, 627 F.3d at 1302-1303 (in a multi-employer case, each employer may rebut the presumption with substantial evidence that it is not the last responsible employer; once an employer rebuts the presumption, it may only be held liable if the claimant shows it is responsible by a preponderance of the evidence);[11] *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000)

[9] Claimant also contends the overall humanitarian purpose of the Act requires all doubtful questions of fact be resolved in her favor. Claimant's position, however, represents an incorrect statement of the law. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994) (the "true doubt" rule violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d)). Instead, the ALJ is entitled to weigh conflicting evidence, and Claimant, as the proponent of the claim, bears the overall burden of establishing her claim by a preponderance of the evidence. *Greenwich Collieries*, 512 U.S. at 272, 281; *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171, 174-175 (1996).

[10] We affirm the ALJ's finding that Claimant invoked the Section 20(a) presumption relating Decedent's death to asbestos exposure during his work for Employer as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

[11] The court in *Albina Engine* further held that the Section 20(a) "presumption may be rebutted not only with substantial evidence that [the decedent] was not harmed by injurious stimuli at that employer, but also with substantial evidence that [he] was exposed

(the employer meets its burden with evidence demonstrating the absence of a causal relationship and need not prove another agency of causation to rebut the presumption); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 (1982) (an employer need not rebut every conceivable theory of recovery). The inquiry at rebuttal, therefore, concerns "whether the employer submitted evidence that could satisfy a reasonable fact finder that the [decedent's death] was not work-related." *Ogawa*, 608 F.3d at 651. Consequently, the employer's burden on rebuttal is one of production only. The weighing of conflicting evidence or of the credibility of evidence "has no proper place in determining whether [employer] met its burden of production."[12] *Id.*

Addressing rebuttal, the ALJ set out the appropriate standard[13] and acknowledged Employer's evidence consisted of the reports and testimony of an industrial hygienist, Mr. Cohen, whom she found "to be well qualified to offer expert opinions on the industrial

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to injurious stimuli at a subsequent covered employer." *Albina Engine*, 627 F.3d at 1302 n.3.

[12] In light of this standard, we reject Claimant's contentions that the ALJ's decision to accord diminished weight to her evidence adversely impacted the ALJ's Section 20(a) rebuttal analysis. The weight given to Claimant's supporting evidence does not affect Employer's burden of production on rebuttal – as credibility of evidence is not a consideration at the presumption or rebuttal stages of the causation analysis. *Ogawa*, 608 F.3d at 651; *Rose v. Vectrus Systems Corp*., 56 BRBS 27, 35 (2022) (en banc), *appeal dismissed*, (M.D. Fla. Aug. 24, 2023).

[13] Contrary to Claimant's contention, the ALJ not only properly stated the "burden on the employer imposed by Section 20(a)" is one of production, not persuasion, but she also explicitly articulated that an employer must "rebut the presumption of causation with '*substantial evidence to the contrary*'" which, she further correctly stated, "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," D&O at 23 (quoting 33 U.S.C. §920 (emphasis added) and *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also Ogawa*, 608 F.3d at 651; *Ramey*, 134 F.3d at 959. Moreover, the ALJ's decision reflects she found Mr. Cohen's "reports and testimony *to be substantial evidence* that is specific and comprehensive enough to rebut the Section 20(a) presumption." D&O at 28 (emphasis added). Therefore, we reject Claimant's contention that the ALJ's rebuttal analysis is flawed because it involved a misstatement of the law. *Id.*

issues in controversy in this case."[14] D&O at 23, 24-25. She thereafter extensively reviewed Mr. Cohen's reports and testimony and the evidence on which he relied, *id.* at 24-28, before determining:

> Mr. Cohen opined that "one cannot conclude Decedent's working conditions and employment with [Employer] caused or contributed to his death." His credentials and expertise in the field of industrial exposure are established and his reports are thorough and detailed. The undersigned finds his reports and testimony to be substantial evidence that is specific and comprehensive enough to rebut the Section 20(a) presumption as to the second element of Claimant's prima facie case.

Id. at 28.

In his report dated January 31, 2012, Mr. Cohen opined, "with reasonable scientific certainty" and based on his review of "the case-specific materials" he was provided,[15] Decedent's "most likely potential sources of asbestos exposure would have been fireproofing materials he disturbed on structural beams in buildings and taping mud used on drywall" which "would have occurred during his employment with [ACS]." RX 2 at 5, 6. For that reason, he opined Decedent "more likely than not was exposed to airborne asbestos in the years prior to 1973" and also "may have been exposed to asbestos if and when he disturbed structural fireproofing materials during his installation work prior to 1974."[16] *Id.* at 6.[17] When asked at the 2021 hearing whether he believed Decedent

[14] During his cross-examination of Mr. Cohen, Claimant's counsel conceded he did not have any objection regarding Mr. Cohen's qualifications to give testimony as an industrial hygienist and as an expert in this case. HT at 219.

[15] Mr. Cohen reviewed Decedent's Social Security earnings records; a general listing of his various employers from 1968 through 1993; depositions taken between 2009 and 2011 of Claimant, a former co-worker at ACS (Joe Chisum), Industrial Hygienist Dr. Kenneth Cohen, Decedent's son, Decedent's daughter-in-law; and an industrial report prepared by Kyle Dotson. RX 2 at 1. He also had some general information on Decedent's work activities "based solely" on Mr. Chisum's testimony. *Id.* at 2-5.

[16] Mr. Cohen cautioned "there is insufficient information in the materials reviewed to conclude where or when [Decedent's] work with any asbestos-containing fireproofing may have taken place, and there is insufficient information to determine his level of exposure." RX 2 at 6.

[17] In his February 10, 2012 supplemental report, Mr. Cohen was asked to specifically address testimony from Decedent's son and Dr. Kenneth Cohen regarding Decedent's

sustained any type of industrial injury due to asbestos exposure from 1974 to 1978, the period during which he worked for Employer, Mr. Cohen answered "no." HT at 189. More specifically, he stated he relied, in part, on various Naval regulations and protocol beginning in 1968 "for minimizing [asbestos] exposure" on ships,[18] but he also relied on "[o]ther elements" including "where [Decedent] worked, what work he performed, what work others performed in his proximity," while noting "[w]e have no information, whatsoever" on which date such work was done. *Id.* at 222. More specifically, Mr. Cohen conceded that while a 1979 report indicated "instances" of exposure to asbestos from handling insulation material or gasketing material "could still be found," in this case "[w]e don't have any information regarding that occurring in [Decedent's work] environment." *Id.*

The record in this case establishes the companies that employed Decedent and the general type of work he performed, but as Mr. Cohen repeatedly stated, there is no evidence indicating Decedent performed any work potentially exposing him to asbestos during the

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potential asbestos exposure while working for ACS aboard Navy vessels in the 1980s (i.e., alleging Decedent worked aboard the *USS Hornet* and *USS Enterprise* installing tube systems sometime between 1980-1985). Mr. Cohen deemed these statements too speculative to conclude Decedent was exposed to injurious levels of asbestos while aboard either ship and declined to change his opinions from his January 2012 report. EX 3.

[18] In his 2012 supplemental report, and referencing a memo from NAVSEC 6100, 9 Dec. 1968, Mr. Cohen opined "[t]here is clear evidence that the Navy issued warnings about the hazards of asbestos associated with ship construction and repair as early as 1968 and began addressing precautions to minimize, if not completely eliminate the possibility of exposures to asbestos at naval shipyards." RX 3 at 9. He further stated that as "early as January 1971, the Department of the Navy was issuing instructions on the handling and control of asbestos material" and that "[i]t is also clear that the Navy was eliminating the use of asbestos" at that time. *Id.* At the hearing, he reiterated "the Navy established protocol and specifications for handling existing asbestos-containing materials onboard their ships, and what is to be installed for new materials" which began in the late 1960s and spanned "through the 1970s." HT at 179. For this reason, Mr. Cohen opined "[i]t is unlikely [Decedent] personally handled asbestos-containing materials when he worked aboard the two naval vessels." RX 3 at 2. Nevertheless, Mr. Cohen conceded that "an exposure to low level of asbestos could exist onboard the ship" but, most importantly, "[t]he question remains, there is no information that – assuming [Decedent] was onboard the ship – that work was being performed and that he was in proximity to that work," so "in that case his exposure would be the same as our exposure in the ambient environment." *Id.* at 236.

pertinent time frame, i.e., 1974-1978 when he worked for Employer. In this regard, although the record contains Decedent's contractor badge for access to ANAS between October 5, 1976, and September 14, 1977, CX 20, and evidence that the *USS Enterprise* was at that facility during some of that time,[19] there is no evidence Decedent performed any work onboard the *USS Enterprise* or that he experienced any asbestos exposure in the course of his work with Employer while at ANAS. Instead, the record contains testimony from Decedent's son, Roger, in which he recalled Decedent working on the *USS Enterprise* and the *USS Hornet* at ANAS during the "range from 1980 to '85" for "either [ACS or RSTS]."[20] CX 19 at 20. Similarly, Claimant testified she was not aware whether Decedent ever worked on any ship after his military service ended in 1960,[21] CX 56 at 12, RX 12 at 355-356, and Decedent's daughter-in-law's testimony is limited to her knowledge that he worked as a pipefitter in various places such as hospitals, including one she thought was located in New York, EX 11 at 331-332, 334-335, 337.

Mr. Cohen's reports and hearing testimony set forth his conclusion that Decedent did not sustain any type of industrial injury due to asbestos exposure while working for Employer from 1974 to 1978. Instead, Mr. Cohen opined Decedent's exposure to asbestos most likely occurred before 1974, prior to his working with Employer, and that any potential work exposure, thereafter, was most likely not harmful. This specific evidence, in conjunction with the lack of any evidence delineating Decedent's work for Employer, constitutes substantial evidence that Employer did not expose Decedent to injurious

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[19] The military history of the *USS Enterprise* Claimant submitted revealed the vessel was at ANAS from March 28, 1977, until April 27, 1977, from August 6 to 14, 1977, and from around August 19, 1977, to October 25, 1977. CX 49 at 5-6. In contrast, the *USS Hornet* was decommissioned on June 26, 1970, leaving Claimant to concede "the relevant shipboard work would have to have been on the *USS Enterprise*." D&O at 14 (citing Cl's Reply Br. at 7.).

[20] Mr. Salcedo, however, also stated he did not know any details of his father's job duties, other than installing tube systems, while working with ACS onboard those ships. CX 19 at 21. Moreover, as the ALJ noted, although Mr. Salcedo produced Decedent's ANAS access badge, he provided no testimony as to Decedent's work at ANAS during the period shown on that badge, or that he knew any details on his father's employment with Employer beyond him working as an installer. D&O at 10 (citing CX 19 at 22-23).

[21] The ALJ found that although Claimant's interrogatory response indicated Decedent worked on the *USS Enterprise* and *USS Hornet* at ANAS, CX 56 at 15, she provided no timeframe for that purported work and referred to those ships in connection with Decedent's employment with ACS, EX 5 at 23; CX 1 at 44.

stimuli, any possible asbestos exposure during that employment was not harmful, or both. *Albina Engine*, 627 F.3d at 1302 n.3; *see also generally Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1083-1085 (D.C. Cir.) *cert. denied*, 429 U.S.820 (1976) (Section 20(a) presumption may be rebutted by negative evidence specifically tailored to the facts that gave rise to the presumption in the first place); *Holmes v. Noble Drilling Corp.*, 29 BRBS 18, 21-22 (1995) (Negative evidence may rebut the Section 20(a) presumption where it is sufficiently specific to sever the potential connection between the alleged injury and working conditions). We therefore affirm the ALJ's finding that Employer rebutted the Section 20(a) presumption that Decedent's death is work-related. *Ogawa*, 608 F.3d at 651; *Ramey*, 134 F.3d at 959.[22] Consequently, we affirm the ALJ's denial of death benefits. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171, 174 (2001).[23]

[22] To the extent Claimant raises the issue, we affirm the ALJ's finding that Claimant has not met her burden of persuasion by a preponderance of the evidence on the record as a whole to establish Decedent sustained any work-related injury. As previously noted, although Claimant asserts the ALJ's weighing of her evidence is suspect, she raises this issue entirely in the context of her challenge to the ALJ's rebuttal finding. This reading is exemplified by Claimant's argument "C" in her brief that asserts the Section 20(a) presumption was not "REBUTTED BY SUBSTANTIAL EVIDENCE AND SHOULD RESULT IN A DECISION FOR THE CLAIMANT ON THE MERITS." Cl's Br. at i, 59; *see also* Cl's Br. at 70, 80. Nowhere does Claimant directly challenge the ALJ's finding based on her weighing of the evidence as a whole.

[23] As causation is a required element for any award of death benefits, 33 U.S.C. §909; *Sistrunk*, 35 BRBS at 174; *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104, 107 (1993), the lack of a work-related injury here obviates the Board's need to address Claimant's remaining arguments regarding the situs and status issues. *See generally Scalio*, 41 BRBS at 58.

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge