BRB No. 00-0532

RUTH S. SHAUGHNESSY (Widow of JOHN SHAUGHNESSY	)	
Claimant-Respondent	)	
v.	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED:
and	)	
COMMERCIAL UNION INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
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 David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

G. William Higbee (McTeague, Higbee, Case, Cohen, Whitney & Toker, PA), Topsham, Maine, for claimant.

Richard F. van Antwerp (Robinson, Kriger & McCallum), Portland, Maine, for employer/carrier.

Stephen Hessert (Norman, Hanson & DeTroy, LLC), Portland, Maine, for Bath Iron Works Corporation in its self-insured capacity.

Jean Shaw Budrow (Latronico & Whitestone), Boston, Massachusetts, for

Liberty Mutual Insurance Company.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (99-LHC-1638) of Administrative Law Judge David W. Di Nardi 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 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).

John Shaughnessy (decedent) worked as a carpenter at employer's shipyard for various periods from 1940 until January 1, 1962, and thereafter as an assistant foreman until January 10, 1977. Decedent was exposed to asbestos during these periods of employment with employer.[1] From 1977 until his retirement on April 30, 1984, decedent worked for employer as an assistant general superintendent, an assistant to the Vice President of Production and an assistant to the Vice President of Operations. Decedent began experiencing breathing problems in 1997 and was diagnosed with bronchoalveolar carcinoma, a form of lung cancer, on June 17, 1998. He died of that disease on August 12, 1998. Decedent's widow (claimant) thereafter filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. §909 (1994).

[1]It is undisputed that Commercial Union Insurance Company (carrier) provided coverage under the Act for employer from January 1, 1963 through February 28, 1981. Liberty Mutual Insurance Company (Liberty Mutual) provided such coverage from March 1, 1981 through August 31, 1986; Birmingham Fire Insurance Company provided such coverage from September 1, 1986 through August 31, 1988. Employer has been a self-insured employer under the Act since September 1, 1988. As it was undisputed that claimant was not exposed to asbestos after the period that carrier provided coverage for employer, at the hearing, the administrative law judge granted motions to dismiss Liberty Mutual and Bath Iron Works in its self-insured capacity from the proceedings. *See* Tr. 42, 44. As this ruling was not reflected in the administrative law judge's decision, both Liberty Mutual and Bath Iron Works in its self-insured capacity respond to employer's appeal, requesting that the Board affirm the administrative law judge's ruling. As the administrative law judge's ruling dismissing Liberty Mutual and Bath Iron Works in its self-insured capacity from the case is unchallenged on appeal, we affirm this ruling.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), that decedent's death was work-related, and then determined that employer failed to establish rebuttal of the presumption. Thus, he awarded claimant death benefits. The administrative law judge denied employer relief under Section 8(f) of the Act, 33 U.S.C. §908(f), as he found that decedent died of lung cancer *per se*.

On appeal, employer contends that the administrative law judge erred in finding that it did not establish rebuttal of the Section 20(a) presumption based on the opinion of Dr. Craighead that decedent's exposure to asbestos played no causative or contributory role in the development of decedent's lung cancer. Employer further challenges the administrative law judge's denial of Section 8(f) relief. Specifically, employer contends that it established a manifest, pre-existing permanent partial disability based on decedent's cigarette smoking and emphysema, which employer contends hastened decedent's death. Claimant responds, urging affirmance of the administrative law judge's decision. The Director has not responded to the instant appeal.

Section 9 of the Act provides for death benefits to certain survivors "if the injury causes death." 33 U.S.C. §909 (1994). Where the immediate cause of death is 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 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 American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000)*; Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). 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, e.g., Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114 (CRT)(8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *see also Director, OWCP v. Greewich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

Employer argues that the administrative law judge erred in concluding that the opinion of Dr. Craighead is insufficient to establish rebuttal of the Section 20(a) presumption. We agree. The United States Court of Appeals for the First Circuit, wherein this case arises, has held that the rebuttal standard under Section 20(a) does not require employer to rule out any possible causal connection between an employee's employment and his condition as such a requirement goes beyond the substantial evidence standard stated in the statute. *See Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998); *Bath Iron Works v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997). Rather, in order to rebut the Section 20(a) presumption, employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. *Id*.

In his September 21, 1999, report, Dr. Craighead opined that decedent's bronchogenic lung cancer was caused by cigarette smoking. He further stated:

> In my opinion with a high degree of medical probability, asbestos played no causative or contributory role in the development of the disease. It is clear from the pathological findings that Mr. Shaughnessy was exposed to asbestos but there was no evidence of the disease process asbestosis. The medical literature in the past indicates that persons who smoke and are exposed to asbestos experience an increased risk of developing lung cancer, but only when the clinical disease process asbestosis exists.

Commercial Union Ex. 1. In his decision, the administrative law judge determined that Dr. Craighead's opinion was insufficient to establish rebuttal of the Section 20(a) presumption as it does not render an unequivocal statement ruling out any connection between the lung cancer and decedent's maritime employment. *See* Decision and Order at 15. Contrary to the administrative law judge's determination, Dr. Craighead was not required to "rule out" any connection between decedent's lung cancer and his employment. *Harford*, 137 F.3d at 675-676, 32 BRBS at 47(CRT). As employer avers, Dr. Craighead's opinion, rendered within a high degree of medical probability, states unequivocally that decedent's work-related asbestos exposure did not cause or contribute to his lung cancer. We therefore hold that employer has produced evidence sufficient to sever the causal relationship between decedent's employment and his harm. *Id.; O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Accordingly, we reverse the administrative law judge's finding that employer has failed to meet its burden on rebuttal, and we remand the case for the administrative law judge to weigh all the evidence regarding causation, with claimant bearing the burden establishing the work-relatedness of decedent's death. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43. On remand, the administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular medical

examiner; rather, the administrative law judge may determine the weight to be accorded to the evidence, and may draw his own inferences and conclusions therefrom.[2] *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

We next consider employer's contention that the administrative law judge erred in denying it relief under Section 8(f) of the Act. Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. In order to establish entitlement to Section 8(f) relief in a death claim, employer has the burden of establishing that the employee's pre-existing permanent partial disability was evident prior to the manifestation of the occupational disease, and that the death was not due solely to the work injury, a standard which can be met if the pre-existing condition hastened the employee's death. *See Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205 (CRT)(4th Cir. 1998); *Bath Iron Works v. Director, OWCP [Reno]*, 136 F.3d 34, 32 BRBS 19 (CRT)(1st Cir. 1998); *Stilley v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 224 (2000).

[2]In discussing the medical opinions of record, the administrative law judge appears to have confused Dr. Craighead with Dr. Pohl and intended to give greater weight to Dr. Pohl's opinion. *See* Decision and Order at 15. Since the Board is not authorized to weigh the evidence, nor substitute its credibility determinations for those of the administrative law judge, *see Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991), on remand, the administrative law judge should clarify the evidence upon which he relies in determining whether decedent's death was related to his employment.

In his decision, the administrative law judge found that since decedent was a voluntary retiree, only decedent's prior pulmonary problems could qualify as a pre-existing permanent partial disability, pursuant to *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989); *see also Director, OWCP v. Bath Iron Works [Johnson]*, 129 F.3d 45, 50, 31 BRBS 155, 158 (1st Cir. 1997).[3] The administrative law judge appears to have found that decedent's emphysema was not a pre-existing permanent partial disability as decedent was in good health at the time of his retirement in 1984, and his breathing problems did not become manifest until June 1998. *See* Decision and Order at 26. He also found that while emphysema was seen on decedent's x-ray on February 9, 1982, decedent's exposure to asbestos ended in the mid-1970's, and thus impliedly found that the manifest element was not satisfied. *Id*. Lastly, the administrative law judge found that as decedent died of lung cancer alone, employer failed to establish entitlement to Section 8(f) relief. *Id*. at 25-26.

In the instant case, employer alleges, and the x-ray record reflects, that decedent was diagnosed with mild pulmonary emphysema on February 9, 1982. *See* Admin. L.J. Ex. 5. Contrary to employer's contention, however, the record contains no evidence that decedent's emphysema had any effect on the treatment or progression of decedent's lung cancer, or hastened his death in any way. Consequently, as there is no evidence that decedent's death was not due solely to his cancer, we affirm the administrative law judge's denial of Section 8(f) relief for failure to establish that a pre-existing condition contributed to or hastened decedent's death.[4] *See generally Sain*, 162 F.3d at 821, 32 BRBS at 211 (CRT); *see, e.g., Stilley*, 33 BRBS at 226-227.

Accordingly, the administrative law judge's denial of relief to employer under Section 8(f) of the Act is affirmed. The administrative law judge's finding that employer failed to establish rebuttal of the Section 20(a) presumption is reversed, and the case is remanded for reconsideration consistent with the decision herein.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[3]The administrative law judge stated that benefits were being awarded under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). *See* Decision and Order at 25. This case, however, concerns only claimant's claim for death benefits under Section 9. *See* Cl. Ex. 1.

[4]Given our holding that employer did not establish the contribution element of Section 8(f) relief, it is not necessary to discuss employer's arguments regarding the manifest and pre-existing permanent partial disability elements.

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge