

NADA GREEN)	
(Widow of LARRY B. GREEN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ELECTRIC BOAT CORPORATION)	DATE ISSUED: 06/24/2013
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

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

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Edward W. Murphy (Morrison Mahony LLP), Boston, Massachusetts, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-LHC-00951, 00952, 00953) 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent injured his back on October 16, 1981 and July 2, 1983, during the course of his employment for employer as a painter. In a March 1985 decision, Judge Glennon awarded claimant compensation for permanent total disability from July 3, 1983. CX 8. Employer was found entitled to Section 8(f) relief. 33 U.S.C. §908(f). Nonetheless, decedent returned to work for 11 months until he sustained a third work-related back injury on June 5, 1989. Tr. at 78; CX 1 at 2. Decedent received treatment from the Veteran's Administration Hospital (the VA) in August 2000 after a slip and fall at a grocery store resulted in low back pain. Decedent subsequently was treated at the VA for morbid obesity, diabetes, hypertension, obstructive sleep apnea, depression, hypercholesterolemia, kidney disease, and low back pain. CX 19. Decedent died on February 10, 2010; the death certificate states the cause of death as coronary artery disease and hypertension. CXs 3, 20 at 9, 11. Claimant asserted that: decedent's back injuries caused chronic pain and depression; these conditions caused an inability to exercise, binge eating and adrenal hypertension; and decedent's inability to exercise affected his cardiovascular fitness and weight gain, which in turn worsened his cardiovascular status resulting in death.

In her decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that decedent's back injuries contributed to his morbid obesity and coronary artery disease, which in turn caused or hastened his death. Decision and Order at 17. The administrative law judge found the opinions of Drs. Morgan and Tousignant, that decedent's back injuries did not hasten his death, rebut the Section 20(a) presumption. The administrative law judge concluded that claimant failed to establish by a preponderance of the evidence that decedent's back injuries caused, contributed, or hastened his death. *Id.* at 20. Therefore, the administrative law judge denied the claim for death benefits.

On appeal, claimant challenges the denial of death benefits. Employer responds, urging affirmance.

Claimant first contends the administrative law judge erred by relying on evidence submitted by the Director, Office of Workers' Compensation Programs (the Director), with his post-hearing brief that claimant returned to work beginning in 1988. Claimant asserts she objected to the admission of this evidence, the administrative law judge did not rule on her objection, and the administrative law judge considered this evidence in her decision when she found that decedent's return to work for 11 months in 1988 and 1989 "undermines Mrs. Green's testimony that from 1984 to the mid-1990s the decedent could not sleep, walk, or exercise because those activities bothered his back." Decision and Order at 19 n.27.

The Director submitted with his post-hearing brief opposing employer's request for Section 8(f) relief a letter from employer to OWCP dated February 22, 2011, which stated that decedent had returned to work from July 10, 1988 to June 5, 1989, when he

again stopped working due to an injury. Director's Post-Hearing Br. at Ex. 6. The administrative law judge did not rule on the admissibility of this evidence. Nonetheless, we reject claimant's contention that the administrative law judge relied on this evidence to claimant's prejudice. The record also contains properly admitted evidence of the June 1989 work injury. Dr. Baker's January 7, 2011 report states that decedent had a work-related back injury on June 5, 1989. CX 1 at 2. Dr. Selden's July 6, 1998 office note states that decedent reinjured his back in 1989. CX 11 at 8. Dr. Tousignant addressed decedent's having sustained three work injuries. EX 8 at 22-23. Dr. Morgan testified that decedent returned to work in 1989 for 11 months, and he stopped working due to an injury to his back. Tr. at 66, 73-74. The administrative law judge cited Dr. Morgan's testimony and Dr. Selden's note. Decision and Order at 6, 8. As there is evidence of record supporting the administrative law judge's statement that decedent returned to work for 11 months in 1988 and 1989, claimant has not established that the administrative law judge relied on the Director's post-hearing exhibit to find that decedent returned to work in 1988. *See generally Collins v. Electric Boat Corp.*, 45 BRBS 79 (2011). The administrative law judge's failure to address claimant's motion to exclude the Director's evidence, therefore, is harmless.¹ Moreover, the administrative law judge's reliance on decedent's return to work to impeach claimant's testimony concerning decedent's alleged immobility is within her discretion. *See generally Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2^d Cir. 1993).

Claimant next asserts that the administrative law judge's denial of death benefits is not supported by substantial evidence. Pursuant to Section 9 of the Act, eligible survivors are entitled to death benefits "if the injury causes death." 33 U.S.C. §909. In determining whether a death is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a prima facie case, *i.e.*, the claimant demonstrates that the decedent suffered a harm and that an accident occurred, or conditions existed, at work which could have caused that harm. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2^d Cir. 2008); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Where, as here, claimant establishes a prima facie case, Section 20(a) applies to relate the death to the employment, and the employer can rebut this presumption by producing substantial evidence that the decedent's death was not caused,

¹As claimant has not shown that the Director's post-hearing exhibits were admitted into the record, we need not address claimant's contention that the Director's evidence was not relevant to the death benefits claim and that she did not have an opportunity to impeach this evidence of a third work-related injury. *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd*, 202 F.3d 259 (4th Cir. 1999) (table).

contributed to or hastened by his employment. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT); see *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); see also *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998). If employer rebuts the presumption, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

Claimant contends that in addressing rebuttal, the administrative law judge did not consider the role chronic pain played in causing decedent's depression and eating disorders. We reject this contention. The administrative law judge found the opinions of Drs. Morgan and Tousignant rebut the Section 20(a) presumption. Dr. Morgan opined that decedent's morbid obesity was caused by neuroendocrine and neurobehavioral factors, including eating disorders, diabetes, and enlarged adrenal glands. Tr. at 69-73. He opined that decedent's work injuries did not cause chronic back pain; decedent's chronic back pain was a result of his obesity and non-work-related degenerative disc disease. *Id.* at 73-75, 77, 102, 105. Dr. Morgan concluded that decedent's back injuries did not cause, contribute to or worsen decedent's metabolic syndrome or cardiovascular disease. *Id.* at 69-71, 73-75. Dr. Tousignant opined that decedent's fatal heart attack was due to obesity, obstructive sleep apnea, poorly controlled diabetes, coronary artery disease, and hypertension, and that his death was not hastened by the work-related back injuries. EX 8 at 24-25. In his deposition testimony, Dr. Tousignant opined that decedent's obesity was not related to the work injuries and that the back pain was caused by obesity and degenerative joint disease. *Id.* 8 at 27-28, 32, 60. The administrative law judge's finding that the opinions of Drs. Morgan and Tousignant rebut the Section 20(a) presumption is supported by substantial evidence. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Moreover, as the administrative law judge relied on Dr. Morgan's testimony that decedent's chronic back pain was not due to the work injuries, she was not required to address the contribution of chronic pain to decedent's depression and eating disorders to find the presumption rebutted. Therefore, we affirm the finding that employer rebutted the Section 20(a) presumption. See *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 89 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Rochester v. George Washington University*, 30 BRBS 233 (1997). Thus, the issue of whether decedent's death was related to his work injuries was properly addressed based on the record as a whole, requiring claimant to prove her claim by a preponderance of the evidence. See *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996).

Claimant asserts the administrative law judge improperly injected fault into her weighing of the evidence by finding that decedent could have lost weight had he controlled his eating, rather than focusing on the contribution of chronic pain to his obesity. In weighing the evidence as a whole, the administrative law judge found that all

the experts agree that coronary artery disease was the direct cause of death, and that decedent's morbid obesity contributed to his coronary artery disease as well as to his diabetes, hypertension, and obstructive sleep apnea. Decision and Order at 19. The administrative law judge stated that the key difference is that Drs. Morgan and Tousignant, unlike claimant's expert, Dr. Baker, do not link claimant's work injuries to his chronic back pain.

The administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences and conclusions from the evidence. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961); *see also Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, the administrative law judge rationally found less persuasive the opinion of Dr. Baker linking decedent's death to the work injuries. Dr. Baker opined that the injuries caused chronic pain, limited decedent's physical activities, and contributed to depression and over-eating. In turn, these contributed to obesity, which worsened decedent's underlying conditions and hastened his death. CX 21. The administrative law judge found more persuasive the opinions of Drs. Morgan and Tousignant as they are more consistent with decedent's contemporaneous medical records. The administrative law judge rationally relied on decedent's ability to return to work for 11 months in 1988-1989, the absence of medical records documenting back pain complaints from 1984 to 2000, and the exercise recommendations by the VA physicians after the 2000 non-work-related back injury to reject claimant's assertion that decedent's back condition precluded physical activity. Moreover, the administrative law judge rationally rejected claimant's assertion that decedent's eating disorders and weight gain could be attributed to depression related to chronic back pain as unsupported by the VA records, which attributed decedent's depression to non-work-related causes. In her weighing of the evidence as a whole, the administrative law judge clearly addressed and rejected claimant's assertion of work-related chronic back pain leading to morbid obesity, and, rather than injecting fault into her analysis, she discussed the cause of decedent's weight gain only in so far as it was necessary to address claimant's assertion that it was due, in part, to work-related depression. Consequently, as the administrative law judge's weighing of the evidence is rational and her conclusion that claimant did not establish that decedent's back injuries caused or contributed to his death is supported by substantial evidence, we affirm the finding that claimant is not entitled to death benefits. *See Sistrunk*, 35 BRBS 171; *Coffey*, 34 BRBS 85.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge