

BRB Nos. 08-0213
and 08-0213A

M.M. (widow of N.M.))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
UNIVERSAL MARITIME APM)	DATE ISSUED: 09/30/2008
TERMINALS)	
)	
and)	
)	
SIGNAL MUTUAL)	
INDEMNITY ASSOCIATION,)	
LIMITED)	
)	
Employer/Carrier-)	
Respondents)	
Cross-Petitioner)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Larry W. Price,
Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for
employer/carrier.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant, the deceased employee's widow,¹ appeals the Decision and Order on Remand (2003-LHC-02387) of Administrative Law Judge Larry W. Price 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 which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. To briefly recapitulate, decedent, a groundman for employer, slipped and fell, striking his buttocks, back and head on the asphalt, during the first hour of his eight-hour shift on February 26, 2003. Decedent reported no pain due to this incident, and completed his regular shift that day.² The following day, February 27, 2003, decedent worked a normal shift for employer.³ The next morning, February 28, 2003, decedent awoke at his normal time and went outside to brush snow from his automobile around 6:00 a.m. Upon returning inside, decedent complained to his wife of a severe headache. Decedent's condition deteriorated, with the development of additional neurological symptoms. He was subsequently taken by an ambulance to Northwestern General Hospital where a CT scan revealed a very large acute right subdural hematoma. Decedent was immediately transferred to Sinai Hospital, where he underwent emergency surgery. Dr. Naff, who performed this surgery, removed an acute, traumatic right subdural hematoma and additionally identified and coagulated a single subdural bleeding point. Decedent, who was in a coma for approximately one week following his surgery, was confined to a wheelchair and was capable of walking only short distances with a cane at the time of the formal hearing in this case, which was held on February 25, 2004.

In a Decision and Order issued on September 28, 2004, Administrative Law Judge Tureck found decedent entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), linking his subdural hematoma to his February 26, 2003, work accident. Judge

¹ The employee (decedent) died on October 26, 2007. By Order dated June 27, 2008, the Board granted decedent's widow's motion to substitute her as "claimant" on behalf of decedent's estate.

² That evening, decedent asked his wife to check the back of his head because he felt as if it were bleeding. His wife found no evidence of bleeding, but indicated that the back of decedent's head felt soft to the touch.

³ Decedent's wife stated that decedent seemed tired on both February 26 and 27.

Tureck further found, however, that employer produced substantial evidence sufficient to rebut the presumption; in this regard, the administrative law judge relied upon the opinion of Dr. Lancelotta, who opined that decedent's acute subdural hematoma was not caused by his February 26, 2003, fall at work. Weighing the evidence as a whole, Judge Tureck concluded that decedent's condition did not arise out of his employment, and he therefore denied the benefits sought by decedent.

Decedent thereafter appealed the denial of his claim to the Board. The Board rejected decedent's contentions on appeal and accordingly affirmed Judge Tureck's Decision and Order. *[N.M.] v. Universal Mar. Services*, BRB No. 05-0114 (Sept. 22, 2005)(unpub.). Decedent appealed the Board's decision to the United States Court of Appeals for the Fourth Circuit. In an unpublished opinion, the court held that Judge Tureck failed to properly analyze the testimony of Dr. Lancelotta, upon whose opinion he relied to find the Section 20(a) presumption rebutted.⁴ The court therefore vacated the denial of benefits and remanded the case for further proceedings, directing that the case be assigned to a different administrative law judge on remand. *McKenzie v. Universal Mar. Services*, 220 Fed. Appx. 233 (4th Cir. 2007).

On remand, the case was reassigned to Administrative Law Judge Price (the administrative law judge).⁵ In his Decision and Order on Remand issued on October 22, 2007, the administrative law judge found decedent entitled to invocation of the Section 20(a) presumption. Next, after specifically addressing each of the points of error identified by the Fourth Circuit with respect to Judge Tureck's analysis of Dr. Lancelotta's testimony, the administrative law judge found that Dr. Lancelotta's opinion constitutes substantial evidence sufficient to rebut the presumption. Thereafter, the administrative law judge weighed the evidence as a whole and concluded that decedent failed to establish a causal relationship between his subdural hematoma and his February 26, 2003, work accident. Accordingly, the administrative law judge denied the claim for benefits.

⁴ The court noted references to a possible fall by claimant on February 28 in the medical testimony, and stated that there was no evidence in the record that such a fall occurred. The court also addressed Dr. Lancelotta's theories as to how the hematoma may have occurred, stating that hypothetical theories or speculation is insufficient to rebut the presumption.

⁵ In an Order Denying Request for Hearing issued on August 7, 2007, the administrative law judge denied employer's request for a hearing in this matter. In an Order Closing Record issued on August 22, 2007, the administrative law judge stated that his decision on remand would be based on the evidence and arguments in the current record.

On appeal, claimant challenges the administrative law judge's finding that a causal relationship was not established between decedent's subdural hematoma and his fall at work on February 26, 2003. Employer responds, urging affirmance. Employer has filed a protective cross-appeal, assigning error to the administrative law judge's failure to admit into evidence the medical report and curriculum vitae of Dr. Austin and the August 31, 2007 supplemental report of Dr. Lancelotta; claimant has not responded to employer's cross-appeal.

Once, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that there is no causal relationship between the employee's disabling condition and his employment. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 262, 31 BRBS 119, 123(CRT) (4th Cir. 1997); *see Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.2d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). A doctor's opinion, given to a reasonable degree of medical certainty, that a condition is not work-related is sufficient to rebut the Section 20(a) presumption. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Employer is not required to establish another agency of causation in order to rebut the Section 20(a) presumption. *Id.* If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence in the record, and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

We reject claimant's contentions of error and affirm the administrative law judge's determination that decedent did not establish the existence of a causal relationship between decedent's February 26, 2003, work accident and his subdural hematoma. The administrative law judge specifically addressed each of the points of concern identified by the Fourth Circuit in its opinion in this case. Decision and Order on Remand at 4-6. He rationally found that Dr. Lancelotta's opinion was not based on a belief that a fall occurred on February 28 and that any speculation in his opinion related to possible causes of the hematoma.⁶ In concluding that the Section 20(a) presumption was rebutted, the

⁶ As the administrative law judge stated, employer is not required to prove the actual cause of an injury but must only establish that the work event was not a cause in order to rebut Section 20(a). Decision and Order at 6, *citing Stevens v. Todd Pacific Shipyards*, 14 BRBS 626, 628 (1982).

administrative law judge relied on Dr. Lancelotta's consistent opinion that it was not possible for decedent's fall at work on February 26, 2003, to have caused the acute subdural hematoma diagnosed two days later. *Id.* at 6. In this regard, the administrative law judge referenced Dr. Lancelotta's testimony that if decedent's February 26, 2003, fall had caused his acute subdural hematoma, he could not have continued to function until February 28, 2003, and would have displayed the specific symptoms indicative of an acute subdural hematoma, including a progressively severe headache and increasing neurological symptoms such as confusion and disorientation on February 26 and February 27. *Id.* at 5-6, 9; *see* EXs 22, 27; Hearing Tr. at 119-125, 142-145, 147, 152. As the credited opinion of Dr. Lancelotta constitutes substantial evidence severing the presumed causal link between decedent's acute subdural hematoma and his employment with employer, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See Moore*, 126 F.3d at 263, 31 BRBS at 123(CRT); *O'Kelley*, 34 BRBS 39.

After finding the Section 20(a) presumption rebutted by Dr. Lancelotta's opinion, the administrative law judge considered the evidence as a whole and concluded that decedent failed to establish that his condition was causally related to his employment. *See* Decision and Order on Remand at 6-9. The administrative law judge accorded greater weight to Dr. Lancelotta's opinion that decedent's acute subdural hematoma was not related to his February 26, 2003 work accident than to the opinions of Drs. Slaughter and Naff. The Board is not empowered to reweigh the evidence, but must accept the rational inferences and factual findings of the administrative law judge which are supported by substantial evidence. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 438, 37 BRBS 17, 19-20(CRT) (4th Cir. 2003); *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 380-81, 34 BRBS 71, 72 (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001). In this case, the administrative law judge fully evaluated the medical opinions and examined the logic of the physicians' conclusions and the evidence on which their conclusions were based. *See Faulk*, 228 F.3d at 381, 34 BRBS at 72(CRT); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 140, 32 BRBS 48, 52(CRT) (4th Cir. 1998). As claimant has not raised any reversible error in the administrative law judge's weighing of the evidence as a whole, we affirm the administrative law judge's finding that decedent's acute subdural hematoma was not work related, as it is supported by substantial evidence. *See O'Keefe*, 380 U.S. 359; *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT). We thus affirm the administrative law judge's denial of benefits.⁷

⁷ In view of our affirmance of the denial of benefits, we need not address employer's challenge on cross-appeal to the administrative law judge's exclusion from the record of the medical evidence which employer sought to have admitted on remand.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination to affirm the administrative law judge's Decision and Order on Remand denying benefits.

The majority affirms the administrative law judge's decision for the same reason that the Board affirmed the prior decision in this case by Administrative Law Judge Tureck: Dr. Lancelotta testified that the decedent's fall at work, striking his head on asphalt, could not have caused the hematoma which was diagnosed two days later, because the hematoma would have become symptomatic sooner, and one cannot bleed inside the head for two days and live. The United States Court of Appeals for the Fourth Circuit vacated both the Board's decision and the administrative law judge's decision, and directed that the case be assigned on remand to a different administrative law judge.

The court determined that the administrative law judge had properly invoked the Section 20(a) presumption, 33 U.S.C. §920(a), that the decedent's hematoma was related to his fall at work. The court observed that Judge Tureck had accurately stated the applicable law: "[h]ypothetical theories, inferences or speculation are insufficient to rebut the presumption' that the hematoma was job-related." (citation omitted). *McKenzie v. Universal Mar. Services*, 220 Fed. Appx. 233, 235 (4th Cir. 2007). The court held, however, that Judge Tureck had "improperly analyzed the testimony." *Id.*

The court summarized the relevant portions of Dr. Lancelotta's testimony: he had acknowledged that the majority of hematomas are caused by trauma and indicated that the decedent's hematoma could have been caused by a fall two days after the fall at work; if not caused by this second fall, the doctor opined that the hematoma resulted from decedent's use of blood thinners or it was spontaneous. The court discredited the doctor's first two theories, pointing out that there was no evidence in the record of a second fall and that the decedent's clotting factors were normal at the time of his acute hematoma. The court did not explicitly counter the doctor's suggestion that the hematoma could have been spontaneous; that is obviously a hypothetical theory and the court had made clear that a hypothetical theory is insufficient to rebut the presumption. Furthermore, reliance upon this theory is undermined by the doctor's acknowledgement that most hematomas result from trauma.

The court also explicitly discredited one of the reasons Dr. Lancelotta gave for excluding the fall at work as a cause of the hematoma, *i.e.*, it would not have been asymptomatic for two days. The court pointedly observed that "Dr. Lancelotta did not account for [decedent's] abnormal behavior on February 26 and 27." *McKenzie*, 220 Fed. Appx. at 235 n.2. That unusual behavior included the decedent's asking his wife to check the back of his head because he thought it was bleeding. The doctor had no explanation for this question, but was confident it was not indicative of a subdural hematoma. Hearing Tr. at 132-134. The administrative law judge on remand determined that the doctor had not addressed the decedent's abnormal behavior because he considered it irrelevant. Decision and Order on Remand at 5. Obviously, the court disagreed.

The administrative law judge acknowledged that Dr. Lancelotta's opinion was speculative as to the identification of the cause of the hematoma, but the administrative law judge considered the doctor's opinion was "definite and consistent" in excluding the work accident as the cause of the hematoma. The administrative law judge concluded:

Dr. Lancelotta stated, numerous times, that if the fall on February 26 caused the acute hematoma, Claimant would not have survived, until February 28, or at least Claimant would have displayed severe symptoms prior to that date.^[8] Based upon this statement, it would be impossible for

⁸ In his written reports, Dr. Lancelotta did not express his opinion in such absolute terms, *e.g.*, in his second report he wrote:

As I noted in my initial report, if the fall was in fact the cause of the subdural hematoma, it is still almost impossible for me to explain how [the decedent] could have continued working the day of the incident and also

the fall on February 26 to cause Claimant's injury, thereby negating "the potential relationship between the injury and Claimant's employment."

Decision and Order on Remand at 6. The crux of the case is whether the administrative law judge properly credited the doctor's opinion as substantial evidence severing the connection between the work accident and injury, or whether that opinion is merely a hypothetical theory, inference or speculation insufficient to rebut the presumption.

The evidence which the administrative law judge credited to establish rebuttal of the Section 20(a) presumption is essentially the same as the evidence employer relied upon in *Jones v. Director, OWCP*, 915 F.2d 1557, 1990 WL 152356 (1st Cir. 1990). The First Circuit observed that employer relied upon evidence that claimant returned to work after the fall and that disabling symptoms did not occur until five months after claimant's work accident. The court summarized the remainder of employer's evidence as follows:

The employer introduced no evidence that [claimant] experienced any back trauma other than the fall in April 1978. In addition, the employer offered no evidence to suggest any non-traumatic cause of the back pain other than some theoretically possible disease origins discussed in medical texts. . . . "Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by the Act.... What the Act calls for is facts, not speculation, to overcome the presumption of compensability." *Swinton* [v. *J. Frank Kelly, Inc.*, 554 F.2d 1075, 1085 (D.C. Cir.), cert. denied, 429 U.S. 820 (1976)] (quoting *Steele v. Adler*, 269 F.Supp. 376, 379 (D.D.C. 1967)). The employer's textbook "evidence" is therefore inadequate to rebut the presumption.

Jones, 915 F.2d 1557, 1990 WL 152356. In the instant case, employer seeks to sever the decedent's injury from the work accident with evidence of the hypothetical improbability that the decedent would be headache free for two days following a fall which caused an acute subdural hematoma. Employer also relies upon textbook "evidence" that it is possible for hematomas to develop spontaneously. In other words, the doctor's opinion is nothing more than a combination of theoretical probability and possibility; such evidence is clearly inadequate to rebut the presumption. See *Jones*, 915 F.2d 1557, 1990 WL 152356.

how he worked the day afterwards without having any significant headache.

EX 27 at 2.

Furthermore, it is surprising that the administrative law judge would find such an opinion adequate to establish rebuttal since the administrative law judge recognized that “[l]ogic would first lead the Court to the conclusion that the hematoma was caused by the fall at work just two days previous.” Decision and Order on Remand at 6. The administrative law judge permitted logic to be overcome, perhaps because he believed that he “must rely on the medical professionals in this case to determine the validity of such a conclusion.” *Id.* It is unclear whether the administrative law judge recognized that the connection between the work accident and the injury in this case exists in law as well as logic unless employer provides substantial, credible evidence to prove otherwise. *See Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935). Only if the medical professional’s opinion constitutes substantial, credible evidence can the administrative law judge rely upon it to rebut the statutory presumption. As discussed *supra*, an opinion built on probability and possibility does not constitute substantial evidence to rebut the statutory presumption. *Jones*, 915 F.2d 1557, 1990 WL 152356. And it is noteworthy that the administrative law judge properly determined that the doctor’s credibility was undermined by the unexplained change in his opinion, from excluding Cumadin as a possible cause of the decedent’s hematoma, to including it as a possible cause. Decision and Order on Remand at 9. The administrative law judge should have explained his determination to credit the doctor’s opinion notwithstanding finding its credibility undermined, since the Administrative Procedure Act requires that LHWCA orders be supported by “reliable, probative, and substantial evidence.” 5 U.S.C. §556(d). *See generally Rainey v. Director, OWCP*, 517 F.3d 632, 637, 42 BRBS 11, 14(CRT) (2^d Cir. 2008).

In sum, I respectfully dissent from the majority’s determination to affirm the administrative law judge’s decision denying benefits because Dr. Lancelotta’s opinion is built on probability and possibility; it does not constitute substantial, reliable evidence, sufficient to rebut the statutory presumption that the decedent’s hematoma was related to his work accident. *See Jones*, 915 F.2d 1557, 1990 WL 152356. The administrative law judge’s decision should be reversed because it is based entirely on Dr. Lancelotta’s opinion which the Fourth Circuit has already determined does not constitute substantial evidence to support rebuttal. The court stated its analysis of Dr. Lancelotta’s testimony:

Leaving aside Dr. Lancelotta’s opinion based on the assertion of a fall on February 28, which is not supported by the record, his testimony merely asserts that McKenzie’s hematoma was either spontaneous or resulted from McKenzie’s use of blood thinners. However, as the ALJ noted, “[h]ypothetical theories, inferences or speculation are insufficient to rebut the presumption” that the hematoma was job-related. J.A. 14. (footnote omitted).

McKenzie, 220 Fed. Appx. at 235. The court vacated Judge Tureck’s decision because he

had improperly analyzed the testimony and, in the hope of obtaining a different analysis, the court directed that the case be assigned on remand to a different administrative law judge. *Id.* Because the administrative law judge on remand credited Dr. Lancelotta's opinion and provided essentially the same analysis of the testimony as that previously rejected by the court, I believe the majority errs in affirming his decision that employer rebutted the presumption that decedent's hematoma was related to his fall at work. The only action which the Board could take consistent with the court's decision in this case would be to vacate the administrative law judge's decision and remand the case for entry of an award of benefits. Accordingly, I respectfully dissent from the majority's determination to affirm the administrative law judge's Decision and Order on Remand.

REGINA C. McGRANERY
Administrative Appeals Judge