BRB No. 96-244

PASQUALINA SANTORO (Widow of MICHAEL SANTORO)	)	
Claimant-Petitioner	)	DATE ISSUED:_____
v.	)	
MAHER TERMINALS, INCORPORATED	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Joseph T. Stearns (Kenny & Stearns), New York, New York, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (87-LHC-833) of Administrative Law Judge Edward J. Murty, Jr., 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has come before the Board. It follows remand after the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994). The facts are not in dispute. On July 23, 1985, while driving a car off of a ship, decedent sustained a cervical strain when he swerved to avoid a shackle headed for the windshield of the car. He turned abruptly to the right and ducked as the shackle crashed through the glass. Cl. Ex. 32; Tr. at 215. Decedent returned to work on August 1 (four hours) and again on August 2 (eight hours) and then went on a long-planned vacation. Emp. Ex. A; Tr. at 220. While on vacation, decedent developed numbness and then paralysis on his left side. Tr. at 221-229. He

underwent surgery on August 19 which revealed a well-established astrocytoma predominantly at the C3-4 level in the spinal cord.[1] Within months, decedent became quadriplegic and he died on March 11, 1986, due to cardiac arrest and the astrocytoma.[2] Cl. Exs. 4, 7. Decedent filed a claim for disability benefits after August 2, 1985, and claimant, decedent's widow, later filed a claim for death benefits.

[1] An astrocytoma is an incurable malignant tumor, which, in decedent's case, extended deep into the spinal cord, totally destroying the normal anatomical structure of the cord. Cl. Ex. 7; Tr. at 260-263.

[2]No autopsy was performed. Tr. at 328.

Administrative Law Judge Silverman conducted a two-day hearing, discussed all evidence of record, and concluded that "[t]he issue of causality is still deemed to be debatable, but the doubt is resolved in favor of the Claimant." Decision and Order (I) at 16. The Board affirmed Judge Silverman's decision, stating that Judge Silverman did not err in relying on Dr. Yazdan's opinion and in applying the "true doubt" rule, which provided that where the evidence submitted by the parties is in equipoise, doubt should be resolved in favor of the injured employee. *Santoro v. Maher Terminals, Inc.*, BRB No. 89-443 (March 27, 1992) (unpublished). Employer appealed the Board's decision to the United States Court of Appeals for the Third Circuit, which held that the true doubt rule violates the Administrative Procedure Act (APA), 5 U.S.C. §501 *et seq.* (1988), and thus cannot apply to cases arising under the Act. *Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d 1277, 27 BRBS 1 (CRT) (3d Cir. 1993), *aff'd sub nom. Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994). The Director, Office of Workers' Compensation Programs (the Director), appealed the case to the Supreme Court of the United States, and the Court affirmed the Third Circuit's decision. It held that the true doubt rule improperly shifts the burden of persuasion to the employer; therefore, it conflicts with Section 7(c) of the APA, 5 U.S.C. §556(d), which requires the proponent of a rule or order, in this case the claimant, to bear the burden of persuasion.[3] Because the true doubt rule "runs afoul" of the APA, it cannot apply to cases arising under the Act. *Greenwich Collieries*, 114 S.Ct. at 2259, 28 BRBS at 47 (CRT).

On remand, Administrative Law Judge Murty[4] set forth the opinions of two of the doctors of record. He stated that Dr. Derby's credentials entitle his opinion to "great respect[,]" and he determined that "Dr. Derby has a better understanding of the medical problems than does Dr. Yazdan." Judge Murty then noted that, "[i]n the most favorable view for claimant[], the evidence is in equipoise." Although he empathized with claimant's suffering, he held that she failed to prove her claim by a preponderance of the evidence, and he denied benefits. Decision and Order (II) at 2. Claimant appeals this decision, and employer responds, urging affirmance.

Claimant contends Judge Murty erred in denying benefits because he violated the APA by not thoroughly discussing this complex record and he improperly credited Dr. Derby's opinion over that of Dr. Yazdan. Further, claimant urges the Board to define "preponderance of the evidence" for cases arising under the Act. Employer responds, arguing that Judge Murty's opinion is supported by substantial evidence.

The APA requires an administrative law judge to adequately detail the rationale behind his decision, analyze and discuss the relevant evidence of record, and explicitly set forth the reasons for

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[3]Section 7(c) of the APA, 5 U.S.C. §556(d), provides in pertinent part:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proofs. * * * A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

[4]Judge Silverman had retired. Decision and Order (II) at 1.

his acceptance or rejection of such evidence. 5 U.S.C. §557(c)(3)(A); *see, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Cairns v. Matson Terminals, Inc.* 21 BRBS 252 (1988). In this case, Judge Murty discussed the opinions of only two of the many doctors who examined or treated decedent during the course of his illness; however, their opinions on causation are the only ones expressed *after* the diagnosis of the tumor.[5] Specifically, the administrative law judge noted there are two conflicting theories on the cause of decedent's condition and demise. Dr. Yazdan, decedent's Board-certified treating neurosurgeon, testified that decedent's disability and death were work-related. According to him, the work injury aggravated an already-compromised spinal cord by causing swelling in a tumor-filled cord. Ordinary movement of the head put pressure on the edema (swelling) which then put pressure on the cord and triggered the neurological breakdown. Cl. Exs. 5-6; Tr. 142-169.

Dr. Derby, a Board-certified neurologist who reviewed decedent's records but did not examine him, testified on behalf of employer. He agreed with Dr. Yazdan's diagnosis, but he disagreed with Dr. Yazdan's theory on causation.[6] Dr. Derby concluded that the astrocytoma was a naturally occurring tumor which had been present but asymptomatic for a long time, and that it erupted spontaneously, without reference to an external event. Tr. at 304. According to Dr. Derby, decedent's spinal cord was so poor that a true "whiplash"-type injury[7] would have had severe and immediate (or within a few minutes) repercussions, *i.e.*, the neurological breakdown would not have been delayed by a few weeks.[8] *Id.* at 287-288. Therefore, he concluded decedent's condition and death were caused totally by the spontaneous escalation of the astrocytoma and had no connection with the July 23, 1985 accident.[9] *Id.* at 350-351.

Although Judge Murty discussed the testimony of only two of the doctors of record, we reject claimant's APA argument. Judge Murty succinctly stated the facts and issue herein and gave a

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[5]Although there are many medical records which pre-date decedent's surgery, Judge Murty specifically stated that decedent's pathology (diagnosis of the astrocytoma) was not established before his August 19 surgery; therefore, Judge Murty rationally concluded that opinions regarding causation which were espoused prior to surgery "are of no significance." Decision and Order (II) at 2.

[6]He stated that Dr. Yazdan's theory is "medically impossible." Tr. at 286.

[7]According to the witnesses' testimony, decedent described his accident as resulting in whiplash-type action. Tr. at 30, 215.

[8]In addition to the tumor, Dr. Derby testified that decedent's spinal cord also had two osteophytes pressuring it. Tr. at 287-288.

[9]*See also* Cl. Ex. 33 (Dr. Greifinger examined decedent on August 9, 1985, and noted significant degenerative changes and osteophyte formations in the cervical spine, as well as full range of motion with no complaints of neck pain).

brief but accurate description of the contrasting theories on causation. He eliminated from consideration all the opinions of doctors who were unaware of the malignant tumor in decedent's spine which played a major role in his demise, and he focused only on the relevant medical evidence. Judge Murty's brevity detracts nothing from his well-reasoned conclusion which is supported by evidence of record. *See O'Keeffe*, 380 U.S. at 359.

Next, claimant contends Judge Murty erred in determining that Dr. Derby espoused the more credible opinion. Such a determination is within his discretion as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, it is solely within his discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Judge Murty based his credibility determination on Dr. Derby's credentials and on his better understanding of the medical problems herein. As the Board may not reweigh the evidence or interfere with an administrative law judge's credibility determinations unless they are inherently incredible or patently unreasonable, we reject claimant's argument on this point. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981).

Claimant also contends Judge Murty did not properly apply the "preponderance of the evidence" standard to this case. She argues that, as the Supreme Court did not define "preponderance" in association with cases under the Act in its decision in *Greenwich Collieries*, the Board must state a definition, so as to prevent administrative law judges from using a purely quantitative measure of the evidence. Although the Supreme Court did not define "preponderance" in its *Greenwich Collieries* decision, *per se*, use of the term and its general meaning were not questioned therein.[10] Moreover, the standard is that which is used in most civil cases, and it is far from undefined.

Black's Law Dictionary defines the preponderance of the evidence standard as "the greater weight of evidence, or evidence which is more credible and convincing to the mind." It continues:

> The word "preponderance" means something more than "weight"; it denotes a superiority of weight, or outweighing. The words are not synonymous, but substantially different. There is generally a "weight" of evidence on each side in [a] case of contested facts. But juries cannot properly act upon the weight of evidence, in favor of one having the *onus*, unless it overbear, in some degree, the weight upon the other side.
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> * * *

[10] *See also Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 161 n.35, 11 BLR 2-1, 2-14 n.35 (1987), *reh'g denied*, 484 U.S. 1047 (1988), wherein the Supreme Court noted, without deciding, that the standard for proving an invocation fact under the regulations to the Black Lung Act, 30 U.S.C. §901 *et seq.*, at 20 C.F.R. Part 727 is by a preponderance of the evidence.

> Preponderance of evidence may not be determined by the number of witnesses, but by the greater weight of all evidence, which does not necessarily mean the greater number of witnesses, but opportunity for knowledge, information possessed, and manner of testifying determines the weight of testimony.

Black's Law Dictionary (5th ed. 1979) (emphasis in original). Similarly, Barron's Law Dictionary defines the burden as "more convincing to the trier of fact than opposing evidence" and the existence of a fact "is more probable than not." Barron's Law Dictionary (1984).

Although the Supreme Court did not expressly define "preponderance" or state that cases arising under the Act must meet that burden, it did state that claimants are not entitled to the true doubt rule but instead carry the burden of proof, which means the burden of persuasion.[11] *Greenwich Collieries*, 114 S.Ct. at 2257-2259, 28 BRBS at 46-48 (CRT). Further, the Court has stated that the preponderance of the evidence standard is presumed applicable to civil actions between private litigants unless "particularly important individual interests or rights are at stake." *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-390 (1983)). More recently, the Court defined the standard, remarking:

> The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, "simply requires the trier of fact `to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'"

Concrete Pipe & Products of Calif., Inc. v. Construction Laborers Pension Trust for Southern Calif., ___ U.S. ___, 113 S.Ct. 2264, 2279 (1993) (citations omitted). The Court continued:

> Before any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty.

Id.

Further, to support its conclusion that the true doubt rule violates the APA by easing the burden on the proponent of an order, the Third Circuit, citing the Supreme Court's decision in *Steadman v. Securities Exchange Commission*, 450 U.S. 91 (1981),[12] stated:

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[11]The Supreme Court defined the "burden of proof" as the "burden of persuasion" which is "the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." The Court distinguished this burden from the "burden of production" which is "a party's obligation to come forward with evidence to support its claim." *Greenwich Collieries*, 114 S.Ct. at 2255, 28 BRBS at 45 (CRT).

[12]The Supreme Court addressed Section 7(c) of the APA, stating that its language "implies the

The *Steadman* Court's analysis of the [APA] and its legislative history directly links the statutory requirement that no order shall issue unless "supported by and in accordance with . . . substantial evidence" with the preponderance standard.

> If no order shall issue except supported by and in accordance with a preponderance of the evidence, the inevitable conclusion is that the proponent of that order must bear the burden of persuasion by a preponderance of the evidence.

Maher Terminals, 992 F.2d at 1283, 27 BRBS at 9 (CRT). The Board, however, previously has discussed the preponderance of the evidence standard only briefly. Although the Board did not define the standard *per se*, in a recent decision under the Black Lung Act, it disagreed with the employer's interpretation of the standard and clarified:

[A] finding of evidentiary equipoise under the discredited true doubt principle does not automatically require a finding of insufficient evidence under the preponderance of the evidence standard. Rather, the administrative law judge as fact-finder must determine whether, under this standard, claimant has met his burden of proof pursuant to Section 7(c) of the Administrative Procedure Act. . . .

Cole v. East Kentucky Collieries, 20 BLR 1-50, 1-54 (1996).

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enactment of a standard of proof" and that standard is "the traditional preponderance-of-the-evidence standard." *Steadman*, 450 U.S. at 98, 102.

In the case at bar, claimant urges the Board to define the preponderance of the evidence standard so as to prevent a purely quantitative review of the evidence by the fact-finder. Because the standard is well-defined, we need not specifically delineate it for use in cases arising under the Act: its general meaning serves us well. Further, examination of the above definitions leaves no doubt that the standard is not quantitative in nature; therefore, claimant incorrectly supposes that administrative law judges will interpret it as such. Additionally, in light of our evaluation of the preponderance of the evidence standard, we conclude claimant is mistaken in describing Judge Murty's weighing of the evidence as "quantitative." In pure numbers, more doctors than not believed decedent sustained a work-related aggravation of a pre-existing condition.[13] Judge Murty, however, rationally felt that only two of the doctors were in a position to discuss causation and that Dr. Derby's opinion was the more reasonable of the two theories and was the more likely explanation for decedent's situation. Moreover, after fully considering the evidence, he stated that, at best, the evidence is in equipoise, and the determination that the opposing evidence warrants equal weight is enough to defeat claimant's claim in this case. *Greenwich Collieries*, 114 S.Ct. at 2259, 28 BRBS at 48 (CRT); *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995) (Decision on Recon.).

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

[13] *But see* n.5, *supra*.