BRB No. 13-0471

BARBARA DODGE (Widow of DONALD D. DODGE)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: Apr. 2, 2014
BAE SYSTEMS NORFOLK SHIP REPAIR, c/o FARA SERVICES	)	
Self-Insured Employer/ Administrator-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter Mills, LLP), Norfolk, Virginia, for claimant.

Gerard E.W. Voyer and Audrey Marcello (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer/administrator.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order on Reconsideration (2012-LHC-00528) of Administrative Law Judge Daniel A. Sarno, 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).

Claimant's husband, the decedent, was diagnosed with Myelodysplastic Syndrome (MDS) in July of 2008, which progressed to a diagnosis of acute myeloid leukemia (AML) in May 2009; this disease caused decedent's death on January 27, 2010. CX 5.

Claimant testified that decedent regularly used Varsol, a benzene-containing product, to wash his hands and clean tools when he worked in employer's shipyard tool room from 1977 to 1987. Tr. at 14-20. Claimant filed a claim for death benefits, 33 U.S.C. §909, alleging that decedent's death was due to benzene exposure during the course of his employment for employer.

In his decision, the administrative law judge found that claimant submitted sufficient evidence that decedent was exposed to benzene during the course of his employment. The administrative law judge found that, since the physicians of record agree that benzene is a known causative factor for AML, claimant is entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), linking decedent's AML and death to his employment. Decision and Order at 8. The administrative law judge found that employer's evidence in the opinions of Drs. William George (W. George) and Edward George (E. George) is not sufficient to rebut the presumption. The administrative law judge found that Dr. W. George's opinion does not rebut the presumption because it is based on an inaccurate history regarding the extent of decedent's work-related benzene exposure. *Id*. at 9. The administrative law judge found that the opinion of Dr. E. George does not rebut the Section 20(a) presumption because he opined that scientific information in most specific cases is insufficient to attribute or not attribute AML to benzene exposure. *Id*. Accordingly, as employer did not rebut the Section 20(a) presumption, the administrative law judge concluded that decedent's AML and death are related to his employment with employer. He awarded death benefits to claimant.[1] 33 U.S.C. §909.

Employer challenges the administrative law judge's finding that claimant is entitled to invocation of the Section 20(a) presumption. Claimant bears the initial burden of establishing the occurrence of a work-related accident or that working conditions existed which could have caused or hastened the decedent's death.[2] *See, e.g., Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). If claimant establishes her prima facie case, the Section 20(a) presumption

[1] The administrative law judge initially awarded decedent temporary total disability compensation, 33 U.S.C. §908(b), from August 1, 2008 to January 27, 2010. Decision and Order at 10-12. On reconsideration, the administrative law judge vacated the compensation award to decedent since the claim was solely for death benefits and funeral expenses. Decision and Order on Recon. at 1-2.

[2] Section 9 of the Act, 33 U.S.C. §909, provides for death benefits to certain survivors "if the injury causes death."

applies to link the decedent's death to his employment with employer. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

Employer contends that claimant did not establish the existence of working conditions that could have caused decedent's AML because claimant did not establish when or by what means decedent was exposed to benzene at work, and no scientific proof was submitted to demonstrate that any of the chemicals alleged to have been used by decedent contained benzene. Moreover, employer submits that claimant did not present evidence that the amount and duration of decedent's exposure was sufficient to cause injury.

In order to establish her prima facie case, claimant is not required to introduce medical evidence establishing that decedent's employment in fact caused his MDS and AML, which led to his death; rather, she must show only the existence of working conditions that could have caused these diseases. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Richardson v. Newport News Shipbuilding & Dry Dock Co*., 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock v. Director, OWCP*, 245 F.App'x 249 (4th Cir. 2007); *Everett v. Newport News Shipbuilding & Dry Dock*, 23 BRBS 316 (1989). Thus, claimant was not required to submit evidence of the precise amount and duration of decedent's benzene exposure. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191, 193-194 (1990) (doctor opined that claimant's degenerative brain disease could possibly have been caused by work exposure to Tributylten). In his decision, the administrative law judge credited the hearing testimony of Dalton Shannon, a co-worker of the decedent, that he and decedent were exposed to Varsol fumes and liquid during their daily work cleaning tools in employer's tool room, beginning in late 1977 or early 1978; Dr. Butler's statement that the Material Safety Data Sheet for Varsol provides that it contains benzene; and the opinion of four physicians who stated that benzene is a known causative factor in the development of AML.[3] Decision and Order at 8; *see* Tr. at 25-30; CXs 2 at 11; 4 at 8; 12; EXs 6; 8 at 3. As this constitutes substantial evidence to establish the working conditions element of claimant's prima facie case, we affirm the administrative law judge's finding that claimant is entitled to invocation of the Section 20(a) presumption. *See Moore*, 126 F.3d 256, 31 BRBS

[3] Two of these physicians additionally opined that decedent's AML and death were related to his work exposure to benzene. Decedent's treating physician, Dr. Nagabhirava, opined that decedent's AML was "most likely" caused by benzene exposure even without his exact knowledge of decedent's exposure in terms of parts per million. CX 2 at 13-18. Dr. Butler opined that decedent's AML was the "direct result" of excessive benzene exposure. CX 4 at 1. She stated that the only significant risk factor for AML in decedent's history was excessive and long-term benzene exposure. *Id*. at 12.

119(CRT); *see also Albina Engine & Machine v. Director, OWCP* [*McAllister*], 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010); *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *aff'd in pert. part, rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

Once, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that the decedent's death was not caused or hastened by the injury. *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT); *see Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Fineman*, 27 BRBS 104; *see also Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998). Employer contends the administrative law judge erred in finding that the opinions of Drs. E. George and W. George do not rebut the Section 20(a) presumption.

In his decision, the administrative law judge found that Dr. E. George opined that the available information was insufficient for him to attribute decedent's AML and death to benzene exposure or to rule it out. In his report, Dr. E. George stated:

> the majority of patients diagnosed with AML do not have any significant exposure history. This raises a question in any specific case, as to whether a specific agent can be identified as the main etiologic factor; but unfortunately the science at this time is not developed enough for us to able (sic) to ascribe a specific etiologic factor to a de novo case of MDS and AML. In view of this, it cannot be stated with certainty that benzene or other toxic chemicals are the etiologic factor producing this patient's condition. Similarly, one cannot fully rule out a contributing etiology, either.

EX 6. Employer's burden on rebuttal is to produce substantial evidence of the lack of a connection between the work exposure and the harm. *Holiday*, 591 F.3d at 226, 43 BRBS 69-70(CRT); *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT). The administrative law judge rationally found Dr. E. George did not state that decedent's AML was not related to his employment exposures and therefore was insufficient to rebut the Section 20(a) presumption.[4] *Holiday*, 591 F.3d at 226, 43 BRBS 69-70(CRT); *Bridier v.*

[4] In contrast, Dr. Butler stated that risk factors for MDS include genetics, increased age, male sex, smoking, drinking alcohol, excessive radiation exposure and long-term benzene exposure. CX 4 at 10. Dr. Butler also stated that decedent's presentation with MDS at age 50 is unusual. *Id*. Claimant testified and decedent stated in an employment questionnaire that he never smoked or drank. Tr. at 21; EX 4 at 238. There is no evidence of excessive radiation exposure.

Alabama Dry Dock & Shipbuilding Corp., 29 BRBS 84 (1995) (doctor specifically acknowledged that workplace noise could have been factor in hearing loss); *see also Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

The administrative law judge also found that Dr. W. George's opinion that decedent's AML and death was not due to benzene exposure does not rebut the Section 20(a) presumption because it is based on facts inconsistent with Mr. Shannon's testimony that decedent was exposed to benzene-containing Varsol liquid and fumes in employer's tool room for approximately ten years. Decision and Order at 9. In his report, Dr. W. George stated that he based his opinion on testimony obtained in connection with claimant's state compensation claim: claimant had testified that she had never seen decedent work with benzene and Mr. Shannon had testified that rubber gloves and Tyvek suits were worn to clean chemical spills at the Brambleton facility.[5] *Id*. at 3-4. Dr. W. George also relied on the testimony of Linda Holley, a shipping and receiving supervisor, that decedent was not exposed to chemicals from 2002 to 2008.[6] *Id*. at 3. As Dr. W. George's opinion did not account for decedent's benzene exposure from 1978-1987 in employer's shipyard tool room, the administrative law judge rationally concluded that his opinion does not constitute substantial evidence to rebut the Section 20(a) presumption. *See Compton v. Pennsylvania Avenue Gulf Service Center*, 14 BRBS 472, 479-480 (1981) (opinion does not rebut since there is no evidence supporting the level of benzene

[5] The administrative law judge found that decedent's benzene exposure occurred while he worked in employer's shipyard tool room over a period of 10 years until 1987, when he transferred to the Brambleton facility. Decision and Order at 8.

[6] Employer asserts that Dr. W. George's opinion is further buttressed by Ms. Holley's testimony that: employer's work rules prohibited decedent from performing manual labor after he became a supervisor in 1985; she never observed anyone working with chemicals in the tool room; she did not observe decedent working with chemicals; and employer utilized safety equipment when exposure was possible. We reject employer's reliance on Ms. Holley's testimony, since the administrative law judge had the discretion to credit Mr. Shannon's testimony over her testimony. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Employer also relies on a health questionnaire decedent completed prior to being hired by employer in 2002 on which he did not expressly deny benzene exposure. Rather, he was asked to check a box next to 24 listed chemicals or conditions if he had ever used or been exposed to the chemical or condition. EX 4 at 239. Decedent did not check the box next to benzene. Employer, however, provided no evidence decedent was aware in 2002 that Varsol contained benzene.

exposure the doctor assumed); *see also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). As it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that employer did not produce substantial evidence to rebut the Section 20(a) presumption. *Holiday*, 591 F.3d at 226, 43 BRBS 69-70(CRT). Therefore, we affirm the finding that, as a matter of law, decedent's death is work-related and the resultant award of death benefits to claimant. 33 U.S.C. §909.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge