BRB No. 92-0620

VELMA MUNDY (Widow of DANNY L. MUNDY) Claimant-Respondent v. PORT STEVEDORING COMPANY and GRAY & COMPANY Employer/Carrier- Petitioners	)	DATE ISSUED DECISION and ORDER

Appeal of the Decision and Order on Remand and Decision on Employer/Carrier's Motion for Reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Atreus M. Clay, Houston, Texas, for claimant.

Polly A. Kinnibrugh (Brown, Sims, Wise & White), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand and Decision on Employer/Carrier's Motion for Reconsideration (85-LHC-1546) of Administrative Law Judge Alfred Lindeman 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).

This is the second time that this case has been appealed to the Board. On January 18, 1984, claimant's husband (decedent) fell while at work and injured his back; on November 7, 1984, while recuperating from this injury, decedent died of a "probable cardiac arrhythmia." Claimant filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. §909. The administrative law judge denied compensation, finding that although claimant was entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that decedent's death was related to his employment, the weight of the medical

evidence rebutted the presumption. Claimant appealed to the Board. *See Mundy v. Port Stevedoring Co.*, BRB No. 96-1284 (February 28, 1989)(unpublished). The Board held that the administrative law judge erred in finding the presumption rebutted, as the record contained no medical evidence which ruled out the possibility of a causal nexus between decedent's back injury and his death; the Board, therefore, remanded the case to the administrative law judge to resolve any remaining issues necessary to an award of benefits. *See* slip op. at 2. Employer's subsequent motion for reconsideration was denied by the Board in an Order dated June 30, 1989.

On remand, the administrative law judge, after declining to address employer's contention that claimant was not in fact the widow of decedent, awarded claimant death benefits from November 7, 1984, and continuing. 33 U.S.C. §909. Employer thereafter sought reconsideration before the administrative law judge. In a Decision on Employer/Carrier's Motion for Reconsideration, the administrative law judge denied the relief sought by employer, concluding that as employer failed to raise the issue of claimant's widow status at the formal hearing or on appeal to the Board, that issue was no longer viable.

On appeal, employer urges that the Board reconsider its prior holding that it failed to carry its burden of establishing rebuttal of the Section 20(a) presumption. Additionally, employer challenges the administrative law judge's decision not to address the issue of claimant's status. Claimant responds, urging affirmance.

Initially, employer requests reconsideration of the Board's holding in its first decision that it failed to establish rebuttal of the Section 20(a) presumption. In response, claimant argues that the issue of causation was previously addressed in the Board's initial decision and is now moot.

The Board's prior decision regarding the issue of causation is the law of the case. *See generally Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986). The law of the case doctrine, however, is not a rule of law but a discretionary rule used to promote finality in the judicial process. *See United States v. United States Smelting, Refining & Mining Co., et al.*, 339 U.S. 186 (1950). Under the law of the case doctrine, an appellate tribunal generally will adhere to its initial decision when a case is on appeal for the second time unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first decision was clearly erroneous and allowing it to stand would result in manifest injustice. *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting). Thus, the Board has the power to reconsider its first decision, *Messenger v. Anderson*, 225 U.S. 436, 444 (1912), should one of the generally accepted reasons for doing so be found to be present in this case.

A review of the Board's initial decision in the instant case reveals that our decision was erroneous with regard to the evidence submitted by employer in attempting to establish rebuttal of the presumption of causation; to let that decision stand would produce a manifest injustice. *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967). Specifically, once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition is not caused or aggravated by his employment. *Sam v. Loffland & Bros.*, 19 BRBS 288 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury 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). The unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all the evidence and resolve the causation issue based on the record as a whole. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

In the instant case, claimant sought death benefits on the theory that decedent's back injury rendered him unable to cease smoking, and that his subsequent increased post-injury smoking led to his death. In its initial decision, the Board reversed the administrative law judge's finding of rebuttal, and his consequent finding of no causation, after determining that the testimony of Dr. Craig, the only reporting physician of record to address causation, was insufficient to rebut the presumption of causation, since that physician did not rule out the possibility of a nexus between decedent's back injury, smoking, and his death. In his deposition testimony, however, Dr. Craig opined that, within a reasonable medical probability, decedent's low back injury of January 18, 1984, did not cause his death and that, again within a reasonable medical probability, his death was due to the heart and lung disease which preceded his 1984 work-accident. *See* Craig depo. at 53-55, 70-71. Although Dr. Craig thereafter acknowledged that there was a possibility that decedent smoked more as a result of his work-related injury which could have hastened his death, Dr. Craig went on to state that decedent was an excessive smoker prior to his injury, *id.* at 70-71, and that he had no evidence that decedent did, in fact, smoke more as a result of his injury. *See id.* at 68. We hold that Dr. Craig's uncontroverted opinion, offered within a reasonable degree of medical probability, that there is no relationship between claimant's death due to his heart and lung conditions and his work-related back injury is sufficient to establish rebuttal of the Section 20(a) presumption. Employer is not required to rebut every conceivable theory of recovery. *U.S Industries/Federal Sheet Metal Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In this case, claimant's theory of recovery rested on a relationship between decedent's back injury, his alleged increased post-injury cigarette smoking and his death; Dr. Craig's testimony *in toto* reveals that that physician opined that no casual connection existed between decedent's back injury and his subsequent death. Accordingly, we vacate our prior decision holding that Dr. Craig's testimony is insufficient to establish rebuttal, and we reinstate and affirm the administrative law judge's determination that employer has established rebuttal of the Section 20(a) presumption.

Lastly, we hold that the administrative law judge's determination in his initial decision that the record does not support a finding of causation is rational. Specifically, the administrative law judge found that there is no evidence in the record which would support claimant's theory of causation. As only Dr. Craig addressed the issue of causation, and that physician clearly opined that a causal relationship between decedent's employment and his death did not exist, we affirm the administrative law judge's finding of no causation. *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

Accordingly, our Decision and Order and Decision and Order on Reconsideration are

vacated, and the administrative law judge's Decision and Order Denying Benefits is reinstated and affirmed.[1]

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[1]Because of our disposition of this case, we need not address employer's arguments regarding claimant's status as the decedent's widow.