BRB No. 92-1582

TOMMIE J. ROBINSON (Widow of LAWRENCE ROBINSON) Claimant-Petitioner v. REINHOLM CRANE & RIGGING and BEAVER INSURANCE COMPANY Employer/Carrier- Respondents	)))))))))))))	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum, San Francisco, California, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-471) of Administrative Law Judge Alexander Karst 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant's husband (the decedent), on February 2, 1980, sustained injuries to his right shoulder and back while in the course of his employment, for which he was awarded compensation for total disability. The decedent died on December 3, 1984; his death certificate lists the cause of death as respiratory failure due to end-stage emphysema. Emp. Ex. 8. Claimant thereafter sought death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909(1988), on the theory that the decedent's physical inactivity resulting from his work-related orthopedic injuries contributed to the progression of the chronic pulmonary disease that caused his death.

A formal hearing was held on April 24, 1991, at which claimant's entitlement to death benefits, claimant's status as a widow, and the effect of the district director's[1] denial of benefits were at issue. Initially, the administrative law judge determined that the district director's decision was null and void and that claimant qualifies as a "widow" as defined by Section 2(16) of the Act, 33 U.S.C. §902(16). The administrative law judge further found claimant entitled to invocation of the presumption at Section 20(a), 33 U.S.C. §920(a), linking the decedent's death to his employment. The administrative law judge concluded, however, that the medical testimony of Dr. Cayton constituted substantial evidence both to rebut the Section 20(a) presumption and to establish that there was no causal link between the decedent's work injury and his death. Accordingly, death benefits were denied.

On appeal, claimant contends that the administrative law judge erred in relying on Dr. Cayton's testimony to find that the presumption was rebutted and that a causal relationship between the decedent's employment and his death did not exist. Employer responds that the administrative law judge's Decision and Order is supported by substantial evidence and should be affirmed.

Section 9 of the Act provides for death benefits to certain survivors "if the injury causes death." 33 U.S.C. §909(1988). Where the immediate cause of death was not work-related, an eligible survivor may qualify for Section 9 death benefits if the employee had a work-related medical condition that hastened his death. *See Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1982)(Ramsey, C.J. dissenting).

Under the Act, once a *prima facie* case is established, claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption linking the decedent's death to his employment. *See Fineman*, 27 BRBS at 104. Upon invocation of the presumption, the burden shifts to the employer to present specific and comprehensive evidence sufficient to sever the causal connection between the death and the employment. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). In this regard, the United States Court of Appeals for the Ninth Circuit, wherein appellate jurisdiction of

[1]Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

this case lies, has stated that even after substantial evidence is produced to rebut the Section 20(a) presumption, employer still bears the ultimate burden of persuasion. *See Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980); *see also Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, No. 92-70045 (9th Cir. Oct. 6, 1993).

Initially, claimant contends that the administrative law judge erred in finding the Section 20(a) presumption rebutted. Specifically, claimant contends that the evidence credited by the administrative law judge was insufficient to rebut the presumption. We disagree. After setting forth the medical evidence of record, the administrative law judge, based upon the testimony of Dr. Cayton, found that employer had rebutted the presumption. Dr. Cayton, a Board-certified specialist in pulmonary medicine, testified at the hearing that there was no relationship between the decedent's orthopedic injury and his subsequent death. *See* Transcript at 85. We hold that this opinion by Dr. Cayton constitutes substantial evidence to support a finding that the decedent's death was neither caused nor hastened by his work-related orthopedic condition; accordingly, we affirm the administrative law judge's finding that the Section 20(a) presumption was rebutted. *See Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

Claimant next contends that the administrative law judge erred in finding, based upon the record as a whole, that employer had established the lack of a causal relationship between the decedent's death and his work-related orthopedic condition. We disagree. Where, as in the instant case, employer has rebutted the Section 20(a) presumption, the administrative law judge must weigh all of the evidence and resolve the causation issue
based on the record as a whole, with employer bearing the ultimate burden of persuasion. *See Parsons*, 619 F.2d at 38, 12 BRBS at 234; *Wright*, 25 BRBS at 161. In the instant case, the administrative law judge credited the testimony of Dr. Cayton that there was no relationship between decedent's orthopedic injury and his pulmonary condition, that decedent's orthopedic problems did not impede medical treatment of his pulmonary disease, and that the physical inactivity resulting from decedent's orthopedic injury did not cause or exacerbate in any way his chronic pulmonary disease or hasten his death from pulmonary disease, over the opinions of Drs. Meyers and Bronshvag, since Dr. Cayton had superior
credentials and experience as a Board-certified specialist in pulmonary medicine.[2] Additionally, the administrative law judge found the written comments of Drs. Meyers and Bronshvag to be "brief and virtually unreasoned" and, as such, less persuasive than the hearing testimony presented by Dr. Cayton. Decision and Order at 4. It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it and that he is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It was, therefore, within the administrative law judge's discretion to credit the opinion of Dr. Cayton over the opinions of Drs. Meyers and Bronshvag, and conclude that the decedent's death was not due to his work-related orthopedic condition. *See Cordero v. Triple A*

[2]Neither Drs. Meyers or Bronshvag are pulmonary physicians; rather, Dr. Meyers is an orthopedist and Dr. Bronshvag is a neurologist.

Machine Shop, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, we affirm the administrative law judge's determination that the decedent's death was not work-related.[3]

[3]We note that the cases cited by claimant in support of her contention that Dr. Cayton's opinion is insufficient to meet employer's burden of disproving causation are inapposite. Claimant first relies on the Board's holding in *Smith v. Sealand Terminal, Inc.*, 14 BRBS 844 (1982), that an employer's evidence that amounts to "mere hypothetical probability" is insufficient to rebut the Section 20(a) presumption. Unlike the employer's physician in *Smith*, who conceded that he did not know the cause of the employee's death and that the possibility that the employee's death was employment-related was at the top of the list of possibilities, in the instant case Dr. Cayton unequivocally testified that there was no causal relationship between the decedent's work injury and his death. Moreover, that portion of Dr. Cayton's testimony cited as support for claimant's contention that Dr. Cayton does not foreclose the possibility that the decedent's inactivity could have contributed to his death is taken out of context. Dr. Cayton's testimony, when read as a whole, supports the administrative law judge's finding that Dr. Cayton's opinion constitutes substantial evidence that no causal link exists between the decedent's employment and his death.

Claimant next cites the holding in *Hensley v. WMATA*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982), that a physician's opinion which was based on an incorrect "visualization" of the claimant's working conditions, and not on actual knowledge, was insufficient to rebut the Section 20(a) presumption. In contrast to *Hensley*, in which the physician's "visualization" was contrary to record evidence based on actual knowledge of the claimant's working conditions, here, claimant identifies no specific errors contained in Dr. Cayton's "visualization," or understanding, of decedent's orthopedic condition.

Finally, claimant's reliance on the Board's holding that rebuttal was not established in *Dixon v. McMullen and Associates, Inc.*, 13 BRBS 707 (1981), is misplaced. In *Dixon*, the employer proffered no direct evidence to rebut the Section 20(a) presumption but, rather, relied on its cross-examination of claimant's physician. In the instant case, employer produced unequivocal testimony by Dr. Cayton to overcome the presumption of the work-relatedness of the employee's death.

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge