

BRB No. 93-0515

SHIRLEY HUGHES)
(Widow of ROBERT P. HUGHES))
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: _____
 CONSOLIDATION COAL COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION AND ORDER

Appeal of the Decision and Order of George P. Morin, Administrative Law Judge, United States Department of Labor.

Fred C. Trenor and David F. Ryan (Zimmer, Kunz, Loughren, Hart, Lazaroff, Trenor, Banyas & Conaway, P.C.), Pittsburgh, Pennsylvania, for claimant.

George Stipanovich and Robert W. Eyler (Strassburger McKenna Gutnick & Potter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-LHC-0708) of Administrative Law Judge George P. Morin denying benefits 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).

The employee, Robert P. Hughes (decedent), worked for Consolidation Coal Company as a welder/ironworker from October 4, 1966 to June 13, 1975 and later from January 12, 1976 through August 17, 1988. He suffered a comminuted fracture of the left heel on September 27, 1984, when he jumped off of a company truck while unloading "I" beams. Employer commenced the payment of voluntary temporary total disability compensation for two periods: September 28, 1984 through August 24, 1986, and August 18, 1988 through December 3, 1990, at a weekly rate of \$285.42,

based on an average weekly wage of \$428.10. *See* 33 U.S.C. §908(b). During the interval between these periods, decedent had returned to work at full salary. In February 1989, an subtalar arthrodesis was performed by Dr. Nelson on the injured foot. Mr. Hughes died on December 3, 1990, from a cancer that was not work-related. *See* Decision and Order 1-2.

Claimant filed a claim for survivor's benefits pursuant to Section 8(d)(1) of the Act, 33 U.S.C. §908(d)(1), asserting that decedent had sustained a permanent partial disability of his left foot and seeking compensation under the schedule for a 62 percent loss of the foot.¹ 33 U.S.C. §908(c)(4).

The administrative law judge found that decedent was permanently totally disabled at the time of death. This finding as to the nature and extent of disability precluded an award for permanent partial disability. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 269, 14 BRBS 363 (1980); *see generally Henry v. George Hyman Construction Co.*, 749 F.2d 65, 72, 17 BRBS 39, 44 (CRT) (D.C. Cir. 1984)(finding that decedent was temporarily totally disabled at time of death does not preclude survivor from also recovering under schedule). The administrative law judge therefore denied survivor's benefits under Section 8(d), and this appeal followed. Decision and Order at 8.

On appeal, claimant initially asserts that the administrative law judge's finding of permanent total disability is not supported by substantial evidence. Claimant avers that the administrative law judge refused to resolve factual doubts in her favor,² and improperly failed to recognize the probability that the decedent would have been released to light duty or suitable alternate employment but for his death due to non-work-related cancer, which prevented Mr. Hughes from seeing his treating physician, Dr. Nelson, to obtain a release for work. Claimant contends that the medical evidence demonstrates that the decedent suffered from an underlying partial loss of the use of his foot, *see* 33 U.S.C. § 908(c)(4), despite his total disability, that this evidence is uncontradicted, and implies that the

¹Section 8(d)(1) provides for the payment of scheduled permanent partial disability benefits to statutory survivors where the employee's death is due to non-work-related causes. 33 U.S.C. §908(d)(1).

²We disagree with claimant's assertion that factual doubts should have been resolved by the administrative law judge in her favor. Claimant bears the burden of establishing entitlement under the Act. *Director, OWCP v. Greenwich Collieries*, 114 S. Ct. 2251, 28 BRBS 43 (CRT)(1994).

administrative law judge erred by placing the burden of proving partial disability on claimant.³

The administrative law judge determined that the record did not establish that the decedent's injury resulted in only a permanent partial disability. Mr. Hughes was treated by Dr. Nelson, an orthopaedic surgeon who examined the decedent a number of times and performed arthrodesis surgery (using a bone graft) on his foot. Dr. Nelson offered his opinions in treatment notes and a letter report. Claimant's Exhibit 1; Employer's Exhibit D. In the letter written to claimant's counsel on October 14, 1991, Dr. Nelson rendered a post-mortem opinion assessing that decedent had suffered from a 17 percent whole man disability, a 43 percent lower extremity disability, and a 62 percent loss of the use of the left foot. Claimant's Exhibit 1. In attached treatment notes which reflect the last pre-death opinion on Mr. Hughes' ability to return to work, Dr. Nelson reported on January 24, 1990, that Mr. Hughes

has not been able to return to the office for a follow up check ... because of some other serious medical problems. I have not released the patient to return to work and will not discharge [Mr. Hughes] unless I see him in the office and determine that his foot is well enough to go back to work.

Claimant's Exhibit 1. In a post-surgery report, Dr. Nelson concluded that decedent's post-operative prognosis was "fair." Employer's Exhibit D. Dr. Durning reviewed the medical records in this case, and reported on January 20, 1992, that decedent had reached maximum medical improvement, and that because of this and the surgical fusion, Mr. Hughes was permanently totally disabled from employment as an iron worker.⁴ Employer's Exhibit A.

The administrative law judge recognized that Dr. Nelson's report and notes could support an inference that decedent might have been released for lighter work and was only partially disabled.

³Claimant raises as an issue the question "whether the LHWCA authorizes a posthumous determination of permanent total disability." Claimant's Brief at 4. This issue is not developed, and, in any event, is without merit. An inquiry into the nature and extent of an employee's disability is not precluded by his death. Indeed, Section 8(d)(3) provides that an award for disability may be made after the death of the injured employee. 33 U.S.C. §908(d)(3); *see generally Eckley v. Fibrex and Shipping Company, Inc.*, 21 BRBS 120 (1988); *Acuri v. Cataneo Lines Service Co.*, 8 BRBS 102 (1978); 33 U.S.C. §919(f).

⁴Because the opinion was prepared before Mr. Hughes' subtalar arthrodesis, the administrative law judge discounted the probative value of a report by Dr. Davis, which the administrative law judge felt suggested that decedent may have been able to perform sedentary work. Decision and Order at 7 n.3.

The administrative law judge nevertheless found that Dr. Nelson's conclusions, as a whole, dictated a finding that decedent was still totally disabled; the record contains no evidence that decedent had actually been released to light duty, or was capable of performing suitable alternate employment. Compare *Henry v. George Hyman Construction Co.*, 15 BRBS 475, 478 (1983), *rev'd on other grounds*, 749 F.2d 65, 17 BRBS 39 (CRT)(D.C. Cir. 1984)(administrative law judge's speculation as to permanency not supported by record).

Claimant's contention that the administrative law judge's finding of permanent total disability is in error is without merit. The record provides substantial evidence to support the administrative law judge's interpretation of the record, especially the medical records of Dr. Nelson, and his resulting finding of permanent total disability in this instance. To be sure, Dr. Nelson may well have released the decedent for light duty following another office visit, and there is evidence that the surgery may have improved Mr. Hughes' condition. Nevertheless, the administrative law judge was entitled to infer on the basis of the extant record that Mr. Hughes' disability remained "total" and that he was not yet cleared for suitable alternate employment had such work been offered, primarily because this evidence had not been developed. See *Burns v. Director, OWCP*, 41 F.3d 1555, 1562 & n.10, 1564 n.13, 29 BRBS 28, 38-39 & n.10, 41 n.13 (CRT)(D.C.Cir. 1994)(substantial evidence may be less than weight of evidence; administrative law judge need not rule out other rational interpretations of record). Although claimant asserts the unfairness that evidence of the decedent's ability to perform light duty work was precluded by Mr. Hughes' untimely death, her assertion that the record virtually compels a finding of permanent partial disability represents a request simply that the Board reweigh the evidence on appeal, a task beyond the Board's scope of review. See *Burns*, 41 F.3d at 1263, 29 BRBS at 39 (CRT); *Acuri v. Cantaneo Lines Service Co.*, 8 BRBS 102, 107 (1978).

Thus, the administrative law judge was entitled to find that the record established that decedent was permanently and totally disabled at the time of death.⁵ He duly noted all of the evidence of record, especially Dr. Nelson's disability ratings, see Claimant's Exhibit-1, and within his discretion declined to speculate, as urged by claimant, that Mr. Hughes could return to work or suitable alternate employment or that he therefore was only partially disabled. Because this finding is "neither patently unreasonable nor inherently incredible," see *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), the administrative law judge's finding that claimant has failed to establish entitlement based on this record is affirmed.

Accordingly, we affirm the Decision and Order of the administrative law judge denying survivor's benefits.

SO ORDERED.

⁵The Board's decision in *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982) is inapposite. The administrative law judge there found that that decedent suffered from a permanent partial disability at the time of death. The fact that he suffered a temporary exacerbation prior to death was held not to preclude his survivors from obtaining death benefits pursuant to Section 8(d)(3). 15 BRBS at 22.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge