

LYNDA WEBB)
(Widow of DENNIS L. WEBB))
)
 Claimant-Respondent)

v.)

JONES STEVEDORING COMPANY)
)
 Self-Insured)
 Employer-Petitioner)

DATE ISSUED: July 21, 2004

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of John M. Vittone,
Chief Administrative Law Judge, United States Department of Labor.

Peter W. Preston and Meagan A. Flynn (Preston Bunnell & Stone, LLP),
Portland, Oregon for claimant.

Jay W. Beattie (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for
self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2001-LHC-1070,
2001-LHC-2959) of Chief Administrative Law Judge John M. Vittone 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).

On February 14, 2000, decedent sustained an injury to his neck and upper back while in the course of his employment as a walking boss with employer. Employer voluntarily paid decedent temporary total disability benefits from February 22, 2000 to September 4, 2000, and thereafter controverted the claim; decedent filed a claim for further disability benefits on September 5, 2000. On the morning of January 26, 2001, decedent underwent an anterior cervical microdiscectomy and fusion at the C6-7 level. On the afternoon of his surgery, decedent suffered a basilar artery thrombosis with brain stem infarction (stroke), which resulted in his death on January 28, 2001. Thereafter, claimant, decedent's widow, filed a claim for death benefits and funeral expenses under the Act. *See* 33 U.S.C. §909.

The separate claims for disability and death benefits were joined in the proceedings before the administrative law judge. In considering the claim for disability benefits, the administrative law judge determined that decedent's cervical condition and his January 26, 2001, surgery were causally related to his work injury, and that decedent remained unable to perform his regular employment duties with employer; accordingly, the administrative law judge awarded temporary total disability benefits from September 4, 2000 to January 28, 2001. With respect to the claim for death benefits, the administrative law judge found that employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption that decedent's fatal stroke was at least in part caused by his work-related surgery. Additionally, the administrative law judge found that, even had the presumption been rebutted, the evidence weighed as a whole establishes that decedent's surgery contributed to his death. Accordingly, the administrative law judge awarded claimant death benefits and funeral expenses.¹

On appeal, employer challenges only the administrative law judge's award of death benefits, assigning error to the administrative law judge's determination that decedent's fatal stroke was causally related to his surgery.² Specifically, employer avers that the administrative law judge's analysis does not comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), that the administrative law judge erroneously found that employer did not rebut the Section 20(a) presumption, and that

¹ The administrative law judge further found that employer is entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

² As employer does not contest the administrative law judge's award of temporary total disability benefits from September 4, 2000 to January 28, 2001, it is affirmed. Moreover, employer, on appeal, does not challenge the administrative law judge's determination that the surgery performed on January 26, 2001 was causally related to decedent's February 14, 2000 work injury; thus, that finding also is affirmed.

the administrative law judge's causation determination based on the record as a whole was not based on substantial evidence. Accordingly, employer avers that the administrative law judge's decision must be vacated and the case remanded for further consideration. Claimant responds, urging affirmance of the administrative law judge's decision.

Claimant is entitled to death benefits if a work-related injury caused or hastened decedent's death. 33 U.S.C. §909; *see Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *see also Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Any medical conditions or complications resulting at least in part from surgery or other medical treatment for a work-related injury are considered to be work-related. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). Where, as in the instant case, it is uncontroverted that claimant is entitled to invocation of the Section 20(a) presumption linking the decedent's death to his employment, the burden shifts to employer to produce substantial evidence that the decedent's death was not caused by, contributed to or hastened by that employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), *aff'g* 31 BRBS 98 (1997); *American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *see also Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Manship v. Norfolk & W. Railway Co.*, 30 BRBS 175 (1994). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

With regard to employer's contention that the administrative law judge erred in finding it did not produce evidence sufficient to rebut the Section 20(a) presumption, any error is harmless, as the administrative law judge went on to weigh the relevant evidence and his finding that claimant established a causal relationship between the decedent's death and his employment based on the record as a whole is rational and supported by substantial evidence. *See Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). In the instant case, after considering all of the medical evidence of record, the administrative law judge accorded determinative weight to the opinions of Drs. Tiley and Melgard that decedent's work-related surgery was a contributing factor in his death. In this regard, the administrative law judge specifically credited the testimony of Drs. Tiley and Melgard that a known risk of an anterior cervical microdiscectomy and fusion is vertebral artery compression during surgery; this compression can cause a thrombosis of the vertebral arteries which can then ascend to the basilar artery at the base of the skull causing a stroke. The administrative law judge further credited the testimony of these two physicians that hyperextension of the neck is a known cause of compression of the vertebral arteries, and that performance of decedent's surgery

would have required an unusual amount of hyperextension of the neck.³ Thus, the administrative law judge credited “the thorough and well-articulated explanation” provided by Drs. Tiley and Melgard, that decedent’s thrombosis occurred in his vertebral arteries and migrated upward to his basilar artery, resulting in his fatal stroke, over the contrary opinion of Dr. Seres that the surgery did not cause decedent’s thrombosis. Decision and Order at 8-13, 19.

It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom; he has the prerogative to credit one medical opinion over that of another and is not bound to accept the opinion or theory of any particular medical examiner. *See Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Moreover, it is impermissible for the Board to substitute its views for those of the administrative law judge; thus, the administrative law judge’s findings may not be disregarded merely on the basis that other inferences might appear to be more reasonable. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003); *Duhagon*, 169 F.3d at 618, 33 BRBS at 2-3(CRT).

In the instant case, we hold that the administrative law judge provided a rational basis for relying on the explanation of the sequence of events leading to decedent’s death that was provided by Drs. Tiley and Melgard over the explanations of the other physicians of record.⁴

³ Both Drs. Tiley and Melgard explained that the risk of vertebral artery compression inherent in a cervical microdiscectomy and fusion was heightened in decedent’s case because Dr. Hacker, who performed the surgery, chose to reopen a previous incision at the C5-6 level rather than to make a new incision at the C6-7 level, thus requiring him to use a lot of traction and hyperextension of decedent’s neck to operate on the C6-7 level from the higher incision. *See* Decision and Order at 10-13; Tr. at 36-40, 43-46, 73, 75-76, 93-94; CXS 24, 26.

⁴ Employer assigns error to the administrative law judge’s reliance on Dr. Melgard’s opinion, asserting that the assumptions underlying Dr. Melgard’s opinion are erroneous and that therefore the administrative law judge should have discredited his opinion as conjectural. We hold that the opinion of Dr. Melgard, properly credited by the administrative law judge, constitutes substantial evidence to support a finding that decedent’s fatal stroke was causally related to his surgery. Although we need not address in detail employer’s specific contentions regarding the assumptions underlying Dr. Melgard’s opinion, a review of the administrative law judge’s decision establishes that he gave sufficient consideration to the evidence cited by employer, including the autopsy and Doppler findings and evidence that decedent had various risk factors for stroke, and that the administrative law judge’s findings regarding this evidence are reasonable and supported by substantial evidence. *See* Decision

See Parks v. Newport News Shipbuilding & Dry Dock Co., 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). Moreover, we reject employer's contentions that the administrative law judge failed to properly consider and analyze the contrary opinions of Drs. Hacker, Tearse and Seres, and that this failure constitutes a violation of the APA. The administrative law judge thoroughly set forth all of the evidence of record, including the opinions of these three physicians. *See* Decision and Order at 7-10, 13. While he did not explicitly accept or reject each and every piece of medical evidence, a review of the administrative law judge's Decision and Order, considered in its entirety, makes it clear that the administrative law judge fully considered and weighed all of the evidence and ultimately credited the opinions of Drs. Tiley and Melgard. In this regard, the administrative law judge expressly determined that "Dr. Seres' cursory opinion does not match up to the thorough and well-articulated explanation of claimant's experts that the surgery contributed to the stroke," observing that Drs. Tiley and Melgard addressed decedent's clinical findings and also explained the risks associated with the surgery performed on the decedent. Decision and Order at 19. As employer has not established reversible error in the administrative law judge's weighing of the conflicting evidence,⁵ we reject employer's assertion that the administrative law judge's decision does not comport with the requirements of the APA. *See Siminski v. Ceres Marine Terminals*, 35 BRBS 136, 139 n.4 (2001); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54 (2^d Cir. 2001). Furthermore, we hold that the administrative law judge acted within his discretion in crediting the opinions of Drs. Tiley and Melgard over the contrary medical opinions, and we therefore affirm the administrative law judge's determination that decedent's fatal stroke was causally related to his employment and his consequent award of death benefits to claimant. *See Parks*, 32 BRBS 90.

and Order at 19-20; *see also* Decision and Order at 4-13.

⁵ Contrary to employer's contention, the absence of an explicit statement by the administrative law judge that he was not crediting Dr. Hacker's deposition testimony does not represent reversible legal error. The administrative law judge addressed at length the evidence regarding the change in Dr. Hacker's position regarding the causal relationship between decedent's surgery and his stroke. *See* Decision and Order at 2, 6, 8, 13. Moreover, the administrative law judge expressly stated that Dr. Hacker's deposition testimony that decedent's surgery did not contribute to his death was based on the fact that he had no professional knowledge of a relationship between basilar artery thrombosis and cervical spine surgery. *See* Decision and Order at 13. In light of the administrative law judge's explicit crediting of the testimony of Drs. Tiley and Melgard that the existence of this relationship is well-accepted in the medical profession, *see* Decision and Order at 19, the Decision and Order provides a sufficient explanation for the administrative law judge's rejection of Dr. Hacker's deposition testimony.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge