BRB No. 11-0104

LADONNA E. SEACHRIS (Widow of CLOYD E. SEACHRIS) Claimant-Petitioner v. BRADY HAMILTON STEVEDORE COMPANY and SAIF CORPORATION Employer/Carrier-Respondents	)	DATE ISSUED: 07/22/2011 DECISION and ORDER

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

Charles Robinowitz, Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway LLP), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-LHC-1747) of Administrative Law Judge Jennifer Gee 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On July 19, 1979, claimant's husband (the decedent) was working for employer as a longshoreman when he slipped and fell on a deck saturated with water and algae. EX 5 at 5. Decedent was asymptomatic after the accident until approximately August 10, 1979, when he reported symptoms of numbness, tingling, and aching in his fingers, as well as weakness and poor control of his legs that made it difficult for him to walk and maintain his balance. JX 5 at 7. He was diagnosed with cervical myelopathy characterized by an ataxic gait and spastic leg muscles. Decedent underwent cervical surgery on October 16, 1979. On February 3, 1983, decedent was awarded temporary total disability benefits from August 10, 1979, and permanent total disability benefits effective March 31, 1980. EX 39 at 51. Decedent died on October 16, 2005, of pneumonia. JX 1. Claimant filed a claim for death benefits, asserting that decedent's death was hastened by the cervical myelopathy that resulted from the July 19, 1979, work accident.[1] 33 U.S.C. §909.

The administrative law judge found claimant entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that decedent's death was work-related based on the opinions of Drs. Rank and Kafrouni and Ms. Lewis-Wyatt, a physician's assistant, that decedent's cervical myelopathy hastened his death due to pneumonia. CX 9 at 20; HT at 11, 85-86. The administrative law judge found that employer rebutted the Section 20(a) presumption through the opinion of Dr. Gerhard that decedent's cervical myelopathy did not cause or hasten his death. EX 186, 189. In weighing the evidence as a whole, the administrative law judge rejected claimant's testimony regarding decedent's physical limitations. Further, the administrative law judge found Dr. Gerhard's opinion to be more persuasive than those of Drs. Rank and Kafrouni and Ms. Lewis-Wyatt because it was better supported by the record. Thus, the administrative law judge found that claimant did not meet her burden of establishing the work-relatedness of decedent's death, and she denied the claim.

On appeal, claimant contends that the administrative law judge erred in finding that Dr. Gerhard's opinion rebuts the Section 20(a) presumption and in crediting his opinion over the opinions of Drs. Rank and Kafrouni and Ms. Lewis-Wyatt. Employer responds, urging affirmance of the denial of benefits.

Section 9 of the Act, 33 U.S.C. §909, provides for death benefits to certain survivors "if the injury causes death." 33 U.S.C. §909; *Close v. Int'l Terminal Operations*, 26 BRBS 21 (1992). In establishing this causal relationship, the claimant is

[1]Specifically, claimant contended that decedent's cervical myelopathy hastened his death due to pneumonia because it worsened over time, limiting his mobility and contributing to his diabetes, thereby making him more susceptible to pneumonia.

aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after she establishes a *prima facie* case. Once the claimant establishes a *prima facie* case, as here, Section 20(a) applies to relate the death to the employment, and the burden is on the employer to rebut this presumption by producing substantial evidence that the death is not related to the employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). In addressing the scope of Section 9 where the immediate cause of death is not work-related, an employer must produce substantial evidence that the death was not hastened or contributed to by the work injury. *See Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). If the employer rebuts the presumption, it no longer controls and the issue of whether there is a causal relationship must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Claimant contends that the administrative law judge erred in relying on the opinion of Dr. Gerhard to find the Section 20(a) presumption rebutted.[2] Specifically, claimant asserts that Dr. Gerhard's opinion is insufficient to establish rebuttal because it does not address whether decedent's work injury hastened his death by contributing to his post-injury weight gain and diabetes. Claimant's Brief at 12. In support of her argument, claimant asserts that "there was no question that the injury contributed to Mr. Seachris' sedentary lifestyle and immobility after he retired," and that Dr. Gerhard "admitted" that decedent's post-injury weight gain was due in part to immobility caused by the work injury. *Id*. at 12. Claimant has mischaracterized Dr. Gerhard's opinion. Dr. Gerhard specifically stated that decedent's work injury did not play any role in his subsequent weight gain or in accelerating his diabetes and death because, although the work injury affected decedent's mobility, EX 189 at 329, it did not result in severe immobilization.[3]

[2]A review of claimant's brief to the administrative law judge reveals that claimant conceded that Dr. Gerhard's opinion rebuts the Section 20(a) presumption. Claimant's Closing Argument at 7. We are not persuaded that the absence of a concession to this point at the formal hearing is of significance. Nonetheless, we will address claimant's contention on the merits.

[3]Specifically, Dr. Gerhard explained that:

> The major after effect of the July 19, 1979 injury seemed to be the gait disturbance. If the gait disturbance had been severe enough to confine the claimant to bed to [*sic*] or to his home, one could then have hypothesized that this decrease in physical activity could have worsened his diabetic control and his preexisting obesity, thereby leading to his stroke and eventual death. However, it does not appear that the claimant was

EX 186 at 298; EX 189 at 372. Further, Dr. Gerhard attributed decedent's post-injury weight gain to a genetic predisposition to obesity and lifestyle choices. EX 186, 189. Moreover, although decedent was completely immobilized at the time of his death, and although Dr. Gerhard opined that diabetes and severe immobility hastened decedent's death due to pneumonia, Dr. Gerhard attributed decedent's diabetes to his preexisting obesity and family history, and the severe immobility to decedent's numerous cardiovascular risk factors[4] which put him in a wheelchair beginning in 1999 and caused a severe stroke in 2001. EX 189 at 339, 341-42, 346, 354, 372. Dr. Gerhard specifically stated that the work injury did not contribute to or lead to claimant's death. EX 186 at 298. Thus, Dr. Gerhard's opinion constitutes substantial evidence that decedent's work injury did not cause, contribute to, or hasten his 2005 death, and we therefore affirm the administrative law judge's finding that Dr. Gerhard's opinion rebuts the Section 20(a) presumption. *See Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Rochester v. George Washington University*, 30 BRBS 233 (1997).

Claimant also challenges the administrative law judge's finding that Dr. Gerhard's opinion is more credible than the opinions of Drs. Rank and Kafrouni and Ms. Lewis-Wyatt as the administrative law judge overlooked relevant evidence in weighing these opinions. It is well established that, in evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and draw her own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In weighing the evidence as a whole in this case, the administrative law judge found the opinions of Drs. Kafrouni and Rank and Ms. Lewis-Wyatt less persuasive than that of Dr. Gerhard because, unlike Dr. Gerhard, their opinions were not corroborated by the medical evidence of record.

The administrative law judge found Dr. Gerhard's opinion that cervical myelopathy did not contribute to decedent's death because it never completely immobilized him to be supported by Dr. Brown's 1989 medical report stating that

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> completely immobilized after the 1979 work injury. This was just not the case. In fact, I quote a 1989 chart note by Dr. Richard Brown that the claimant was "ambulating without difficulty, seemed to be in good physical condition, and was traveling extensively." The work injury, therefore, did not, in my opinion, contribute to or lead to the claimant's decline or death.

EX 186 at 298.

[4]Dr. Gerhard cited the following as decedent's cardiovascular risk factors: a hundred-pack-year smoking history, diabetes, uncontrolled hypertension, high cholesterol, and family history of diabetes, stroke, and heart disease. EX 189 at 349-351.

decedent was traveling extensively and appeared to be in good physical condition and able to walk without difficulty.[5] Decision and Order at 13-14, 22. Further, the administrative law judge found Dr. Gerhard's testimony linking decedent's death to his diabetes and severe immobility caused by his numerous cardiovascular risk factors and resulting cardiovascular diseases to be consistent with the documented evidence in the medical records. *Id*. at 23. In declining to rely on Dr. Kafrouni's opinion that decedent's cervical myelopathy worsened over time, causing chronic pain and depression, limiting mobility, and hastening death, CX 9, the administrative law judge accurately observed that none of decedent's medical records noted complaints, diagnoses, or treatments for worsening cervical myelopathy, chronic pain, or depression.[6] Decision and Order at 19. Additionally, in declining to rely on the opinions of Dr. Rank and Ms. Lewis-Wyatt that cervical myelopathy hastened decedent's death by immobilizing him, HT at 85, 11, the administrative law judge observed that their opinions overlooked decedent's other medical conditions that were relevant to his mobility, such as his claudication and stroke. Decision and Order at 23. Thus, it was rational for the administrative law judge to give greater weight to the opinion of employer's expert. *See Donovan*, 300 F.2d 741; *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Consequently, we affirm the administrative law judge's finding that claimant failed to establish by a preponderance of evidence that decedent's death was work-related as that finding is supported by

[5]Claimant asserts that Dr. Brown's report is not consistent with the record as a whole, and that the administrative law judge could not rationally base a finding on his statement that decedent was in good physical condition. Cl. Br. at 22. The administrative law judge did not address the credibility of Dr. Brown's report. However, in crediting Dr. Gerhard's opinion, the administrative law judge did not find that decedent was "in good condition" in 1989. Rather, the administrative law judge credited Dr. Brown's report as supportive of Dr. Gerhard's opinion that the work injury did not render decedent completely immobilized, a finding that claimant does not challenge.

[6]Although claimant asserts she testified to decedent's worsening condition and to his needing a walker in 1994 before the claudication in his legs put him in a wheelchair, the administrative law judge found that claimant was not a credible witness, a finding that claimant does not challenge. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Further, although claimant argues that decedent's report to Social Security on April 30, 1990, stated that he thought his cervical myelopathy was worsening, this report is not a medical record and its existence does not undermine the administrative law judge's finding that there are no medical records documenting worsening cervical myelopathy.

substantial evidence.[7] *See Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991). Consequently, we affirm the denial of death benefits. *Close*, 26 BRBS 21.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[7]Dr. Foster expressed no opinion on whether decedent's cervical myelopathy contributed to his death and stated that he could not tell from decedent's medical records whether his cervical myelopathy worsened. JX 15. Thus, his opinion does not support claimant's position.