

BESSIE F. RAY)	
(Widow of ALBERT F. RAY))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NORTHROP GRUMMAN SHIPBUILDING, INCORPORATED)	DATE ISSUED: 06/24/2013
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker and Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2011-LHC-00310) of Administrative Law Judge Kenneth A. Krantz 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent worked for employer until April 18, 1996, when he injured his back during the course of his employment as an electrician. Prior to this work injury, decedent had two heart attacks, a failed angioplasty, and diabetes. CX 2 at C. Decedent underwent back surgery for his work injury. CX 13 at J. Thereafter, decedent utilized a walker because of leg weakness. *Id.* at C. He was diagnosed with chronic obstructive

pulmonary disease in 2007. CXs 17 at K-L; 19 at Z-AB. On February 3, 2010, decedent presented at Mary Immaculate Hospital with shortness of breath. CX 21 at A. He sustained a coronary episode there and died; the death certificate lists pneumonia as the immediate cause of death and congestive heart failure as an underlying cause of death. CXs 21 at B; 23 at A. Claimant alleged that decedent's inability to exercise due to the work injury exacerbated his cardiovascular health and obesity and thereby hastened or contributed to his death. Employer controverted the claim.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking decedent's death to his back injury. The administrative law judge found that employer established rebuttal of the presumption based on the opinion of Dr. Durbin. Decision and Order at 11-12; *see* EX 2 at 5. The administrative law judge found that claimant failed to establish, based on the record evidence as a whole, that decedent's death was related to the back injury given the lack of a direct medical opinion addressing this issue, decedent's cardiac history and his poorly controlled risk factors. Decision and Order at 13.

On appeal, claimant challenges the administrative law judge's findings that employer rebutted the Section 20(a) presumption and that she did not establish, based on the record as a whole, that decedent's death in 2010 was related to his 1996 back injury. Employer responds, urging affirmance.

Pursuant to Section 9 of the Act, eligible survivors are entitled to death benefits "if the injury causes death." 33 U.S.C. §909. Once, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that the decedent's death was not caused or hastened by the injury. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 262, 31 BRBS 119, 123(CRT) (4th Cir. 1997); *see Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 225, 43 BRBS 67, 69(CRT) (4th Cir. 2009); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *see also Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998).

The administrative law judge found that Dr. Durbin's April 10, 2011 report rebuts the Section 20(a) presumption. Dr. Durbin listed decedent's risk factors of diabetes, tobacco abuse,¹ hyperlipidemia, and hypertension, and observed that these factors were

¹Claimant asserts that decedent stopped smoking in 1987 and that Dr. Durbin did not discuss how the smoking history contributed to a heart attack 23 years later. While there is evidence to support claimant's assertion that decedent stopped smoking in 1987, CX 10, there is also contradictory evidence that claimant smoked two packs a day in March 1989 and a pack and a half of cigarettes a day in 2008. CX 17 at AH; EX 5 at 6. Therefore, irrespective of decedent's precise smoking history, Dr. Durbin accurately stated that decedent had a history of tobacco abuse.

poorly controlled, as decedent did not comply with his medications regimen and diet. Dr. Durbin also noted that an unsuccessful angioplasty after decedent's heart attack in 1987 left him with residual coronary artery blockage. Dr. Durbin stated that, although decedent's back injury "limited his ability to exercise ... lack of exercise is only a minor cardiac risk factor." EX 2 at 5. The administrative law judge credited Dr. Durbin's opinion that, more likely than not, decedent's death was due to his poorly controlled cardiac risk factors, obesity, and noncompliance with his medical regimen, and not by lack of exercise.² Decision and Order at 10-11; EX 2 at 5. Dr. Durbin also stated that decedent's back injury "in no way" contributed to his death. Decision and Order at 11; EX 2 at 5. The administrative law judge found that, although there is some evidence that decedent had been compliant with his medications regimen and diet and was unable to exercise due to his lower back injury, the record evidence generally corroborates Dr. Durbin's opinion that decedent was not compliant. Decision and Order at 11; *see* CX 7 at H, J-L. The administrative law judge thus concluded that Dr. Durbin's opinion rebuts the Section 20(a) presumption. Decision and Order at 12. We affirm this finding as it is supported by substantial evidence. *See Moore*, 126 F.3d at 263, 31 BRBS at 123-124(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

When the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the relevant evidence in the record, and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In weighing the evidence, the administrative law judge found Dr. Durbin's opinion entitled to greater weight than that of nurse-practitioner Ms. Liebold. Decision and Order at 12; *see* CXs 7 at H, J-L, S-T; 17 at A-H. The administrative law judge found that Ms. Liebold's October 27, 1999 report is claimant's only evidence addressing the correlation between exercise and cardiovascular health. The administrative law judge correctly noted that claimant offered no evidence directly linking decedent's death to the back injury. The administrative law judge found that Ms. Liebold's opinion is not "well-documented or well-reasoned;" that her qualifications are "substantially less clear" than those of Dr. Durbin; and that Dr. Durbin's opinion that decedent's inability to exercise did not contribute to his death is entitled to greater weight. *See Hice v. Director, OWCP*, 48 F.Supp. 501 (D. Md. 1999); *see generally*

²Thus, while Dr. Durbin acknowledged decedent's lack of exercise, he opined that it did not contribute to death. We therefore reject claimant's contention that Dr. Durbin's statement that lack of exercise is a cardiac risk factor, when considered in conjunction with the medical literature recognizing the benefits of regular physical activity on cardiovascular health, renders the physician's report insufficient for rebuttal. *See generally Lynch v. Newport News Shipbuilding & Dry Dock*, 39 BRBS 29 (2005); *Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986).

Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines], 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). The Board must respect the administrative law judge's weighing of the evidence and the inferences and conclusions drawn therefrom. See generally *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). The administrative law judge's finding that claimant failed to establish, based on the record as whole, that decedent's death was related to his work injury is rational, supported by substantial evidence in the form of Dr. Durbin's opinion, and in accordance with law. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001). Therefore, we affirm the administrative law judge's denial of death benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge