U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0510

KATHLEEN GODFREY (Widow of SHAWN GODFREY) Claimant-Respondent v. TAPPAN ZEE CONSTRUCTORS, LLC and ACE AMERICAN INSURANCE COMPANY Employer/Carrier-Petitioners	)	DATE ISSUED: 03/13/2019 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra Harris, Administrative Law Judge, United States Department of Labor.

Timothy F. Schweitzer (Hofmann & Schweitzer), New York, New York, for claimant.

Keith L. Flicker and Brendan E. McKeon (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-LHC-00544) of Administrative Law Judge Lystra Harris 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 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).

Decedent worked for employer as a general foreman overseeing ironworkers. On April 30, 2016, decedent was working at the top of the new Tappan Zee Bridge, "installing the splices, the girder sections." CX 9 at 6-7. One of decedent's coworkers testified he saw decedent climbing steep gangways between the crane barge and the material barges, and at least twice climbing and descending a staircase of 100 feet, while carrying around 20 pounds. *Id.* at 12, 13, 15.

After about 10 hours of work, decedent collapsed and became unconscious while sitting on a bench completing a work-related report in the ironworkers' shanty, which was located on a barge. CX 9 at 19-20, 26-27. After receiving emergency medical treatment, he was hospitalized at Phelps Memorial Hospital and then transferred to the Westchester County Medical Center where he underwent treatment including cardiac catheterization and cardiac angiography with stent treatment but remained unconscious. He died on May 7, 2016. JX 1 at 8. His death certificate identified the immediate cause of death as "acute myocardial infarction" due to "stenosing coronary arteriosclerosis." CX 1.

Claimant, decedent's widow, filed a claim for death benefits under the Act. Section 9 of the Act provides for payment of death benefits to certain survivors if a work-related injury "causes death." 33 U.S.C. §909. In determining whether a death is work-related, a claimant is aided by the Section 20(a) presumption which applies to relate the death to decedent's employment. 33 U.S.C. §920(a); *see, e.g., Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). A claimant invokes the Section 20(a) presumption if she establishes that an accident occurred or conditions existed at work which could have caused, contributed to or hastened decedent's death. *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption by producing substantial evidence that the death was not related to decedent's employment. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). If the presumption is rebutted, it falls from the case and the issue of causation must be resolved on the evidence of record as a whole. *Id.*, 517 F.3d at 634, 42 BRBS at 12(CRT).

The administrative law judge found that claimant established a prima facie case that decedent's death was work-related, based on the testimony of decedent's co-worker as to decedent's work activities and the opinion of Dr. Friedlander that those work activities contributed to decedent's cardiac arrest, but that employer rebutted the Section 20(a) presumption based on Dr. Breall's opinion that decedent's work did not cause or contribute

to his death. Decision and Order at 11. In weighing the evidence as a whole, the administrative law judge gave less weight to Dr. Breall's opinion than to that of Dr. Friedlander. She found that Dr. Breall's opinion was based on a mischaracterization of the objective laboratory test results in evidence and that Dr. Breall offered inconsistent statements as to the type and size of the myocardial infarction.[1] *See id.* at 13. She also found that Dr. Breall's understanding of decedent's work activity on April 30 was flawed because he asserted that it was "not arduous, nor was it intensely physical in nature." *See id.* at 14 (citing EX 1 at 2). Dr. Breall also admitted that he did not know what decedent actually did at work. EX 3 at 7. The administrative law judge therefore discounted Dr. Breall's opinion, relying instead on Dr. Friedlander's opinion to conclude that claimant established that decedent's work contributed to his death. *See* Decision and Order at 15-16. Dr. Friedlander testified that decedent's work activities on April 30, 2016 increased the oxygen demands on his heart and contributed to the ventricular arrhythmia that precipitated decedent's collapse. CX 5 at 2. The administrative law judge found that Dr. Friedlander's opinion was better supported than that of Dr. Breall's because it was based on decedent's laboratory tests. Thus, she concluded that decedent's death was related to his work and awarded death benefits.

Employer appeals the award of death benefits. Claimant responds, urging affirmance of the award. Employer filed a reply brief in support of its position.

Employer first challenges the weight given to Dr. Friedlander's opinion, arguing that Dr. Friedlander's theory as to the mechanics of cardiac arrest do not support his ultimate conclusion that decedent's work activities contributed to his death. Employer contends that Dr. Friedlander's description of the effect decedent's vigorous physical activities had on his heart did not explain why decedent did not collapse earlier when his physical exertion was actually occurring. Employer's argument is without merit as it is well settled that the administrative law judge has the discretion to evaluate and weigh the evidence of record. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge found that Dr. Friedlander's opinion was supported by decedent's laboratory tests as well as the evidence indicating that decedent was still engaged in work

[1] Specifically, Dr. Breall stated that there were only two laboratory tests measuring decedent's troponin enzyme levels, but the record shows that decedent's troponin levels were measured at least five different times. In addition, the administrative law judge noted that Dr. Breall's written report described decedent's myocardial infarction as being "massive" and "acute," but later in his deposition, Dr. Breall retracted the characterization of the myocardial infarction as being "massive," stating that it could have been a small but severe one. Decision and Order at 13 (citing EX 1 and EX 3).

activity, albeit while seated, when he collapsed. In addition, Dr. Friedlander testified that fatigue was one of the symptoms of a silent myocardial infarction, which could also be affected by stress, and this is supported by claimant's credible testimony that decedent reported to her that he was tired and often spoke of the stress of work. The administrative law judge's finding that Dr. Friedlander's opinion was entitled to greater weight is rational and supported by substantial evidence in the record and will not be disturbed.

Employer assigns error to the administrative law judge for substituting her own views for those of the medical expert, taking issue with the administrative law judge's statement that Dr. Breall's opinion "defies [her] common sense." We reject employer's argument. Employer has not established that the administrative law judge abused her discretion in weighing the evidence. The administrative law judge permissibly gave less weight to Dr. Breall's opinion in light of his mischaracterization of the objective laboratory testing relating to decedent's troponin levels, his inconsistent statements as to the type or size of decedent's myocardial infarction, his admission that he was not familiar with what decedent's work actually entailed, his equivocation as to the amount of time which would have to elapse for strenuous work activity not to have had a relationship with decedent's collapse,[2] and his assumption that decedent was resting when he collapsed.[3] Decision and Order at 14-15. The administrative law judge's determination is within the scope of her prerogative to independently weigh the evidence in the record. *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). The administrative law judge's finding regarding the weight accorded to Dr. Breall's opinion is therefore affirmed.

Employer next challenges the determinative weight given to Dr. Friedlander's opinion because Dr. Friedlander stated that the Addendum to his report was drafted by claimant's counsel and that he based his opinion on facts provided by counsel. Tr. at 64-65. The administrative law judge acknowledged Dr. Friedlander's statement regarding the authorship of the Addendum but found that "it does not warrant that Dr. Friedlander's opinion be discredited in its entirety." Decision and Order at 15. Dr. Friedlander testified that he reviewed and fully approved the content of the Addendum. Tr. at 64-65. The administrative law judge noted that the Addendum recited the decedent's work activities as discussed in the co-worker's deposition and were not based on the attorney's opinion regarding the work activities. Decision and Order at 15. In addition, the administrative

[2] Dr. Breall testified that if decedent were engaged in strenuous physical activity 11 minutes before his collapse, he "would have to evaluate what he was doing precisely at 11 minutes." EX 3.

[3] Decedent's fellow worker, Keith Eisgruber, testified that decedent was preparing a work report at the time of his collapse. CX 9.

law judge found that Dr. Friedlander's understanding of the facts is consistent with the evidence in the record and supported by the credible testimony of decedent's co-worker. *See id.* Employer has not established that the factual circumstances relied upon by Dr. Friedlander in formulating his opinion are erroneous or otherwise not supported by the record.

In addition, Dr. Friedlander wrote two other reports on decedent's death and the opinions in those reports are consistent with the Addendum. Dr. Friedlander wrote a medical review dated November 6, 2016, in which he stated that decedent experienced a small myocardial infarction in the early hours of April 30 and that decedent's subsequent collapse was "presumably due to a sudden ventricular arrhythmia," that was precipitated "as a result of electrical instability and worsening ischemia as demands on the heart proceeded throughout the day." CX 5. On December 20, 2016, in his second report, he reiterated his opinion that decedent's collapse was due to work-related activity. CX 5. Moreover, Dr. Friedlander testified that if decedent had not been at work, it was very unlikely that he would have sustained the lethal arrhythmia and that decedent's work activities increased decedent's ischemia and created increased electrical instability leading to the arrhythmia which caused his death. Tr. at 45, 57-58. The administrative law judge's finding that the Addendum accurately represented Dr. Friedlander's opinion regarding the cause of decedent's death is rational and supported by substantial evidence and we will not disturb it.

Similarly, we reject employer's contention that the administrative law judge erred in relying on Dr. Friedlander's opinion because he did not mention decedent's history of smoking as a possible cause of his heart condition. The administrative law judge has the prerogative to evaluate the evidence and to determine the sufficiency of that evidence to establish an element of the claim. *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982). The Board is not permitted to reweigh the evidence or substitute its views for those of the administrative law judge. *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993). The administrative law judge noted that Dr. Friedlander did not reference decedent's smoking history in his reports, although he testified that he was aware that decedent was a heavy smoker and that decedent's smoking was "a risk factor for the development of the disease." Decision and Order at 15 (citing Tr. at 64). In addition, Dr. Friedlander testified that he took decedent's heart disease as a given and would have known as of his October 25, 2017 report that decedent was likely smoking on the day of his collapse, and approved of the content of the addendum "as it relates to the activity level of the patient during that day." Tr. at 64-65. The administrative law judge permissibly determined that this was not sufficient to discount Dr. Friedlander's opinion because decedent's death would be compensable as long as it was hastened or contributed to by his work activities. Decision and Order at 15; *see Fineman*, 27 BRBS 104. She concluded that while decedent may have had multiple risk factors, including

smoking, the evidence supports a finding that decedent's work aggravated his underlying heart condition and contributed to his death. Decision and Order at 15-16.

The administrative law judge discussed and weighed all the relevant evidence and acted within her discretion in crediting Dr. Friedlander's opinion with persuasive weight. Therefore, as it is supported by substantial evidence of record, we affirm the administrative law judge's finding that claimant established that decedent's work activities contributed to his death and the consequent award of death benefits. *See Fineman*, 27 BRBS 104.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge