

BRB No. 01-0184

BETTY H. JEFFERY)
(Widow of FRANKLIN C. JEFFERY))
)
)
 Claimant-Respondent)
)
 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: 10/23/01)
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge,
United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order (99-LHC-0673) of Administrative Law Judge Daniel A. Sarno, Jr., 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 if they 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).

Claimant's husband (the decedent) was employed as a machinist by employer for approximately thirty-nine years, during which time he was exposed to airborne asbestos dust and fibers. In 1987, the decedent retired and, on January 8, 1998, he died. Claimant thereafter sought death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909, contending that decedent's exposure to asbestos contributed to his demise.

In his Decision and Order, the administrative law judge found that decedent suffered from asbestosis as a result of his exposure to asbestos while working for employer, and that decedent's asbestosis was a significant contributing factor and cause of his death. Accordingly, the administrative law judge awarded claimant death benefits.

Employer now appeals, contending that the administrative law judge erred in determining that decedent's death was causally related to his employment with employer. Claimant has not responded to this appeal.

Section 9 of the Act provides for death benefits to certain survivors "if the injury causes death." 33 U.S.C. §909. In addressing the scope of Section 9 where the immediate cause of death is not work-related, the Board has applied the maxim that "to hasten death is to cause it." See *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *Woodside v Bethlehem Steel Corp.*, 14 BRBS 601 (1982)(Ramsey, C.J., dissenting); see also *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992) (in a Black Lung case, court holds that if a medical condition hastens death in any way, it contributes to that death).

Following the decedent's death, Dr. Legier, a board-certified pathologist, performed an autopsy and, in his subsequent report, noted that he had found evidence of occupational exposure to asbestos, emphysema due to smoking, folded lung syndrome and multiple hyaline pleural plaques with focally calcified parietal and diaphragmatic pleura asbestos bodies. Emp. Ex. 11. Based upon these findings, Dr. Legier concluded that the decedent suffered from mild asbestosis, grade 1A, which set the stage for and made the decedent vulnerable to pneumonia, thus contributing to his death. Clt. Exs. 4, 5; Emp. Ex. 11. Dr. Gluckman, the decedent's long standing treating physician, testified that his records note that the decedent experienced minor respiratory problems in 1995, that he may have suffered from lung cancer in 1997, but that the decedent's neurologic condition prevented testing and treatment of any respiratory condition he may have had. Following the decedent's demise, Dr. Gluckman signed the Death Certificate listing only advanced dementia due to Parkinson's Disease, with a terminal illness of pneumonia, as the cause of death. See Clt. Ex. 1; Emp. Ex. 12. Thereafter, he opined that there was no reason to associate the decedent's death with any lung disease, Clt. Ex. 7; however, after reviewing Dr. Legier's autopsy report, Dr. Gluckman accepted Dr. Legier's diagnosis of asbestosis and concluded that the terminal event which ultimately led to the decedent's death, *i.e.*, pneumonia, was assisted by his asbestosis which made that terminal event more assured. Emp. Ex. 17 at 12-13. Specifically, despite the fact that the decedent was terminally ill with his neurological condition, Dr. Gluckman concluded that the death was hastened albeit by only a matter of days or weeks.¹ *Id.* In contrast to the opinions of Drs. Legier and Gluckman, Dr. Cagle, a board-certified pathologist, reviewed the decedent's autopsy records and, while agreeing that the decedent had emphysema, pneumonia, pleural plaques, fibrosis of lung tissue

¹Thus, Dr. Gluckman concluded that

...this kind of dementia patient that dies at home, in general they die a respiratory death of some infection and that his chronic lung disease, whatever the nature of that lung disease, made him more susceptible to that, so he would die more rapidly from that or actually or might get an event earlier.

Emp. Ex. 17 at 10.

and numerous asbestos bodies, concluded that the decedent did not have asbestosis and, therefore, had no asbestos-related impairment that would have affected his death. Emp. Ex. 16.

In his Decision and Order, after considering all of the medical evidence of record, the administrative law judge credited and relied upon the opinions of Dr. Legier and Dr. Gluckman over contrary opinion of Dr. Cagle. Specifically, the administrative law judge found Dr. Legier's opinion to be well-reasoned, fully explained and credible, and Dr. Gluckman's testimony to be reliable and credible. The administrative law judge found Dr. Cagle's testimony to be unreliable in part because that physician appeared reluctant to answer questions, frequently did not elaborate, and was often unresponsive.² See Decision and Order at 8.

It is well-established that an administrative law judge is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge has the authority to address questions of witness credibility and to weigh the evidence, including medical evidence. See *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). In the instant case, the administrative law judge set forth and considered each of employer's concerns regarding the medical evidence of record and concluded that the presence of work-related asbestosis was a contributing factor to the decedent's death. In rendering these determinations, the administrative law judge specifically acknowledged that Dr. Gluckman, after reviewing and accepting Dr. Legier's autopsy finding of asbestosis, changed his opinion regarding the relationship between the decedent's terminal event and his underlying lung condition. Thus, contrary to employer's contention of error, the administrative law judge did not misinterpret Dr. Gluckman's opinion, as that physician ultimately opined that the onset of the decedent's pneumonia was assisted by his lung condition. The administrative law judge's decision to rely upon the opinion of Dr. Legier, as supported by the opinion of Dr. Gluckman, that a causal relationship exists between the decedent's work-related asbestosis and his death is rational and within his authority as fact-finder. We therefore affirm the administrative law judge's decision that the decedent's asbestosis was a contributing factor to his death, as it is supported by substantial evidence and is in accordance with law. Based on this finding, his award of death benefits to claimant pursuant to Section 9 of the Act is also affirmed. See *Fineman*, 27 BRBS 104.

²Additionally, while Dr. Legier performed the autopsy on the decedent, the administrative law judge noted that Dr. Cagle relied upon tissue slides, was unfamiliar with folded lung syndrome, found no asbestosis despite identifying both fibrosis and asbestos bodies along with other potential asbestosis indicators, and used stricter standards in making his diagnosis than those provided by the CAP/NOSH guidelines.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge