U.S. Department of Labor

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

BRB No. 18-0014

BARBARA DILL (Widow of WADE DILL) Claimant-Respondent v. SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Employer/Carrier-Petitioners	)	DATE ISSUED: 10/11/2018 DECISION and ORDER

Appeal of the Decision and Order on Second Remand of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Scott J. Bloch and Connor Wilkinson (The Law Offices of Scott J. Bloch, PA), Washington, D.C., and Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., for claimant.

Michael W. Thomas and Edwin B. Barnes (Thomas Quinn, LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (2008-LDA-00259) of Administrative Law Judge Steven B. Berlin 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

This is the third time this case has come before the Board. Although the underlying facts have been set forth in detail in the Board's prior decisions, they may be summarized as follows. Decedent, claimant's husband, began working for employer in Iraq in December 2004 as a pest control specialist. He returned home to visit claimant and their daughter in March/April 2005, in the fall of 2005, in December 2005, and in June 2006. Claimant reported that decedent became more aggressive, mean, and angry after each visit. Upon his return home in June 2006, decedent discovered, inter alia, that his wife was having an affair and seeking divorce, and that his daughter was using illegal drugs. On July 16, 2006, decedent shot and killed himself at a hotel. Claimant filed a claim for death benefits contending decedent's suicide was related to stressors associated with his employment in Iraq. 33 U.S.C. §909.

In his first decision, the administrative law judge found that claimant established a prima facie case relating decedent's death to his employment, as she established a harm (suicide) and "evidence of conditions" in "the zone of special danger that could have been a cause of [decedent's] suicide, including the separation from his family and the exposure to traumatic wartime dangers." The administrative law judge further found that employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption, and that the suicide was not a willful act, making Section 3(c), 33 U.S.C. §903(c),[1] inapplicable. Accordingly, the administrative law judge awarded claimant death benefits and funeral expenses. Employer appealed this decision.

The Board affirmed the administrative law judge's application of the Section 20(a) presumption, vacated the finding that employer did not rebut the presumption, and remanded the case for him to address whether employer presented substantial evidence to rebut the Section 20(a) presumption and, if so, to weigh the record as a whole on the cause of decedent's death. *Dill v. Serv. Employees Int'l, Inc.*, BRB 11-0395 (Feb. 28, 2012), slip op. at 5 *[Dill I]*.

[1] Section 3(c) states: "No compensation shall be payable if the injury was occasioned . . . by the willful intention of the employee to injure or kill himself or another."

On remand, the administrative law judge found that employer rebutted the Section 20(a) presumption with Dr. Whyman's opinion. On weighing the evidence as a whole, the administrative law judge credited claimant's expert, Dr. Seaman, concluding that his opinion was more congruent with the circumstances of decedent's employment and home life and supported by a United States Army study addressing suicides by Army personnel. Relying on Dr. Seaman's opinion that decedent's "work-related separation from his family significantly intensified the dysfunction in his marriage" and contributed to his suicide, the administrative law judge found decedent's death work-related and the claim not barred by Section 3(c). He once again awarded death benefits and funeral expenses. Employer appealed this award.

While the appeal was pending before the Board, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, issued *Kealoha v. Director, OWCP*, 713 F.3d 521, 47 BRBS 1(CRT) (9th Cir. 2013), a case addressing the compensability of disability due to an attempted suicide. In *Kealoha*, a claimant's pre-existing psychological problems were aggravated as a result of his 2001 work-related injuries. In 2003, he shot himself in the head and sustained additional injuries. The administrative law judge found that the claimant's attempted suicide was "intentional" under Section 3(c), was not the result of an irresistible impulse, and thus was not compensable; the Board affirmed the decision. The Ninth Circuit rejected the analysis used by the administrative law judge and the Board in view of what it called a more recent understanding of mental illness. Specifically, the court held that the appropriate issue is whether the claimant's work injury caused his suicide attempt rather than whether the suicide attempt was the result of an irresistible impulse, stating:

> Suicide or injuries from a suicide attempt are compensable under the Longshore Act when there is a direct and unbroken chain of causation between a compensable work-related injury and the suicide attempt. The claimant need not demonstrate that the suicide or attempt stemmed from an irresistible suicidal impulse. The chain of causation rule accords with our modern understanding of psychiatry. It also better reflects the Longshore Act's focus on causation, rather than fault.

Kealoha, 713 F.3d at 524-525, 47 BRBS at 3(CRT). The court explained that compensability is determined by whether there is an "unbroken chain of causation from the injury to the suicide." *Id.*, 713 F.3d at 524, 47 BRBS at 3(CRT). In this regard, the court quoted this statement: "The 'chain-of-causation rule,' succinctly stated, is that where the injury and its consequences directly result in the workman's loss of normal judgment and domination by a disturbance of the mind, causing the suicide, his suicide is compensable."

Id. (internal quotations omitted).[2]

In addressing employer's appeal, the Board stated that the Ninth Circuit's decision in *Kealoha* constituted intervening controlling authority which demonstrated that the Board's decision in *Dill I* and the administrative law judge's decision on remand may be erroneous, as they did not address the compensability of the decedent's death under the standard set forth by the Ninth Circuit. Thus, the Board vacated the administrative law judge's decision on remand and remanded the case for him to address employer's contention that the "chain" was broken – effectively, that there was a non-work-related cause of decedent's death. *Dill v. Serv. Employees Int'l, Inc.*, 48 BRBS 31 (2014) *[Dill II]*.

On remand, the parties relied on the evidence previously submitted in support of their respective positions. The administrative law judge accepted claimant's testimony regarding the deterioration of decedent's mental condition during and after his employment in Iraq and again credited Dr. Seaman's opinion. The administrative law judge concluded that claimant established an unbroken chain of causation between decedent's employment in Iraq and his suicide. Thus, the administrative law judge awarded claimant death benefits and funeral expenses.

On appeal, employer challenges the administrative law judge's finding that there was an unbroken chain of causation between decedent's employment in Iraq and his July 2006 suicide. Claimant responds, urging affirmance.

Referencing claimant's prima facie case, employer asserts there is no evidence of record that decedent sustained an injury due to his employment or that his alleged workplace stressors in fact occurred. The issue of invocation of the Section 20(a) presumption was addressed in the Board's prior two decisions.[3] In *Dill I*, slip op. at 4, the

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[2] The court in *Kealoha* did not explain the roles of Section 3(c) or Section 20(d), 33 U.S.C. §920(d), which provides the presumption that "the injury was not occasioned by the willful intention of the injured employee to injure or kill himself" in relationship to its holding.

On remand in *Kealoha*, the administrative law judge awarded benefits, and the Board affirmed. *Kealoha v. Leeward Marine, Inc.*, BRB No. 15-0276 (May 4, 2016). The Ninth Circuit affirmed the award in a non-precedential decision. *Leeward Marine, Inc. v. Director, OWCP*, 694 F. App'x 627 (9th Cir. 2017).

[3] In order to be entitled to the Section 20(a) presumption, claimant must establish a prima facie case by proving the existence of an injury or harm and that a work-related

Board stated that employer did not dispute that decedent's suicide constituted an "injury" sufficient to satisfy the first prong of claimant's prima facie case. Additionally, the Board noted that employer conceded the existence of "war zone stressors" and held that substantial evidence supported the administrative law judge's finding that claimant established the existence of working conditions sufficient to invoke the Section 20(a) presumption. *Id.*, slip op. at 5 and n.5; *see also Dill II*, 48 BRBS at 34 n.13. Accordingly, as the administrative law judge properly invoked the Section 20(a) presumption and as employer rebutted it, *Dill II*, 48 BRBS at 34, the administrative law judge correctly proceeded to weigh the evidence as a whole under the *Kealoha* standard.[4] *See Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013).

Employer next contends that substantial evidence does not support the administrative law judge's finding that there was an unbroken chain of causation between decedent's employment in Iraq and his 2006 suicide.[5] Employer challenges the administrative law judge's crediting the opinion of Dr. Seaman, contending he was not apprised of all the events transpiring between decedent and his family and that his opinion was based on a "fictional scenario presented to him by Claimant." *See* Emp. Br. at 28-44.

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accident occurred or that working conditions existed which could have caused the harm. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *see also U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). If these two elements are established, the Section 20(a) presumption applies to link the employee's injury or harm to the employment accident or conditions. *Hawaii Stevedores, Inc., v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

[4] Unlike *Kealoha*, the employee in this case did not sustain a work-related physical injury prior to his suicide. We do not view this as invalidating the *Kealoha* analysis. As the Board discussed in *Dill II*, the issue is whether there is an unbroken chain of causation between decedent's employment in Iraq and his suicide, or whether an intervening "event" resulted in the suicide. *Dill II*, 48 BRBS at 34-35; *see* n.9, *infra*.

[5] Employer acknowledges that, as this case arises within the jurisdiction of the Ninth Circuit, the administrative law judge was bound to follow that court's decision in *Kealoha*. Employer has, however, expressed its disagreement with the court's holding in that case so that it may preserve its subsequent right to appeal. *See* Emp. Br. at 51-54.

Employer's essential contention is that Dr. Seaman's opinion is not sufficient to meet claimant's burden of proving that decedent's death is compensable.[6]

On remand, the administrative law judge discussed at length the parties' contentions regarding the events in decedent's life between the commencement of his employment in Iraq in 2004 and his suicide in 2006. *See* Decision on Second Remand at 3-34. The administrative law judge specifically addressed employer's contentions regarding claimant's veracity, finding that some of claimant's statements were false, misleading and inconsistent. *Id.* at 19-22. The administrative law judge nevertheless concluded that both Dr. Seaman and Dr. Whyman had adequate facts before them from which to draw conclusions and that their opinions are not undermined by claimant's limited reliability.[7] *Id.* at 21. The administrative law judge found Dr. Seaman's opinion to be the more persuasive one, as his analysis is more consistent with the full factual record.[8] *Id.* at 33, 38-39. The administrative law judge additionally found Dr. Seaman's opinion supported by a United States Army study which discussed the relationship between failed marital or other intimate relationships and suicides of Army personnel. *Id.* at 23, 33-34, 38-39. Thus,

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[6] We note that employer does not contend that the opinion of its expert, Dr. Whyman, should have been credited over that of Dr. Seaman.

[7] Neither Dr. Seaman nor Dr. Whyman, both of whom are Board-certified psychiatrists, evaluated decedent during his lifetime. Rather, each assessed decedent's psychological condition by way of a "psychological autopsy." *See* n.10, *infra*.

Dr. Seaman opined that decedent had a pre-existing adjustment disorder with "mixed disturbance of emotions and conduct" and that decedent's work-related separation from his family significantly intensified the dysfunction in his marriage. Dr. Seaman concluded that the combination of decedent's stress from working in Iraq and his marital separation resulted in decedent's suicide. CX 34; ALJX 11.

Dr. Whyman opined that decedent had pre-existing psychological conditions and that his suicide was solely the result of his developmental problems and non work-related marital stress, and that decedent's employment in Iraq did not affect his underlying psychological condition. Dr. Whyman concluded that decedent's suicide was the culmination of all of the things that had gone wrong in decedent's life. EX 44.

[8] In this respect, the administrative law judge found that Dr. Seaman was aware of decedent's suicide notes blaming claimant for his action. Decision on Second Remand at 41. Dr. Seaman stated that it is not unusual for a person under stress to focus blame on one person. *See* CX 34.

giving most weight to Dr. Seaman's opinion, the administrative law judge concluded that claimant established a direct, natural and unbroken chain of causation between decedent's employment in Iraq and his suicide.[9] *Id.* at 39–45.

We reject employer's contention that the administrative law judge erred in concluding that claimant met her burden of proof on this issue. The administrative law judge is entitled to weigh the evidence and to draw reasonable inferences therefrom, *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010), and to determine the credibility of witnesses. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988). The Board may not reweigh the evidence on the ground that other findings and inferences could have been drawn from the evidence, *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990), or disturb the administrative law judge's credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We are unable to conclude that the administrative law judge's decision is not supported by substantial evidence. *See Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010). The administrative law judge was aware of the limitations of the evidence relied upon by the parties,[10] but was well within his discretion to credit Dr.

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[9] The administrative law judge addressed the contention that the behavior of decedent's family was itself the sole cause of decedent's suicide. He stated:

> There is no indication that the behavior of either [decedent or claimant] was independent of the chain of events that followed from their job-related physical separation.
>
> The marital problems and the particular situation that [decedent] returned to in June 2006 were in part a product of his employment, indeed a direct and foreseeable consequence of that employment given the pre-existing condition of [decedent] and his family. The experts agreed that [decedent's suicide] was driven by the devolution of his marriage and family. The disagreement isn't about causation – it's about whether that devolution was independent in a way that could break the causal chain. I find that it was not.

Decision on Second Remand at 41.

[10] The administrative law judge noted that the parties "relied on what amounts to a psychiatric post-mortem" of the decedent. Decision on Second Remand at 19. Because the decedent had not been examined by a mental health expert during his lifetime, the parties "retained experts to gather what information they could" about him. *Id.* As the

Seaman's opinion, as supported by the U.S. Army survey, to conclude that claimant met her burden of establishing an unbroken chain of causation from decedent's employment in Iraq to his suicide. *See King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85(CRT) (9th Cir. 1990); *see also* Decision on Second Remand at 34-46. Therefore, as the administrative law judge's award of benefits is rational, supported by substantial evidence, and in accordance with law, *see Kealoha*, 713 F.3d at 524-525, 47 BRBS at 3(CRT), we affirm the award of death benefits and funeral expenses.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
=Administrative Appeals Judge

administrative law judge found, "Dr. Whyman termed the process a psychiatric 'autopsy' – an effort to reconstruct the life of the deceased; determine whether he had a psychological disorder and, if so, whether it was job-related; and in this case decide whether [he] was 'responsible for his suicide.'" *Id*. at 20 (citing Tr. at 326-27).