BRB No. 01-0216

MARIE G. KANESHIRO (Widow of CALVIN T. KANESHIRO) Claimant-Petitioner v. HOLMES & NARVER, INCORPORATED and WAUSAU INSURANCE COMPANIES Employer/Carrier-Respondents	)	DATE ISSUED: Sept. 28, 2001 DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Marie G. Kaneshiro, Laupahoehoe, Hawaii, *pro se*.

Robert C. Kessner and James N. Duca (Kessner Duca Umebayashi Bain & Matsunaga), Honolulu, Hawaii, and B. James Finnegan, San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant, without legal representation, appeals the Decision and Order (91-LHC-2518) of Administrative Law Judge Donald W. Mosser 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). In reviewing an appeal where claimant is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine whether they are rational, supported by substantial evidence, and in accordance with law; if they are,

they must be affirmed. 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 that this case has been before the Board. To briefly recapitulate, claimant's husband, the decedent, was employed as a waiter/cook from January 20, 1954 to January 19, 1955, from February 16, 1955 to November 15, 1955, and from December 16, 1955 to June 11, 1956, on the Enewetok and Bikini Atolls, during which time those atolls were utilized by the Atomic Energy Commission for atomic weapons testing programs. In January 1989, the decedent was diagnosed with chronic granulocyctic leukemia (CGL). The decedent filed a claim seeking total disability benefits under the Act, alleging that his exposure to radiation during the course of his employment with employer resulted in his CGL.

In the initial Decision and Order, Administrative Law Judge Bober found, *inter alia*, that decedent established his *prima facie* case based upon his exposure to radiation and the diagnosis of CGL, that decedent was thus entitled to the presumption of causation at 33 U.S.C. §920(a), and that employer failed to establish rebuttal of that presumption. Accordingly, Judge Bober awarded decedent temporary total disability compensation commencing January 17, 1989, and continuing, and medical benefits. On appeal, the Board affirmed the administrative law judge's invocation of the Section 20(a) presumption, vacated the administrative law judge's finding that employer failed to establish rebuttal thereof, and remanded the case for the administrative law judge to address the relevant medical evidence of record to determine if employer established rebuttal of the Section 20(a) presumption. *Kaneshiro v. Holmes & Narver, Inc.*, BRB No. 93-1370 (March 14, 1996)(unpublished).

On remand, the case was transferred to Administrative Law Judge Di Nardi. In his decision on remand, Judge Di Nardi found that employer established rebuttal of the Section 20(a) presumption. Judge Di Nardi subsequently weighed all the evidence of record and found that decedent failed to establish that his condition arose out of his employment. Accordingly, the claim for benefits was denied. On appeal, decedent challenged Judge Di Nardi's finding that employer rebutted the Section 20(a) presumption. The Board affirmed this finding, as well as the unchallenged finding, based on the record as a whole, that decedent's CGL is not related to his employment. *Kaneshiro v. Holmes & Narver, Inc.*, BRB No. 97-0596 (November 17, 1997)(unpublished).[1]

[1]Claimant's appeal of the Board's November 1997 decision to the United States

In June 1997, decedent's CGL resulted in his death. On August 14, 1998, claimant filed a petition for modification alleging a mistake in fact. *See* 33 U.S.C. §922. In his Order Granting Motion for Modification, Judge Di Nardi found claimant's petition timely and that claimant is entitled to a new hearing as she proposed offering additional expert testimony on the cause of decedent's CGL. Subsequently, Judge Di Nardi notified the parties that he would be unable to preside at the hearing; the case thus was assigned to Administrative Law Judge Mosser (the administrative law judge). The administrative law judge admitted the parties' new evidence into the record. He found that the weight of this new evidence does not establish a mistake in the ultimate determination that decedent's CGL was not caused by his work-related exposure to ionizing radiation.

Court of Appeals for the Ninth Circuit was dismissed for lack of jurisdiction. *See* 33 U.S.C. §921(c).

The administrative law judge also addressed claimant's contentions that Judge Di Nardi erred in discrediting the testimony of Philip Manly, claimant's radiation expert witness. The administrative law judge found that any error Judge Di Nardi may have made would be harmless, because claimant's specific allegations of error are irrelevant to the underlying basis of Judge Di Nardi's conclusion that decedent's CGL is not work-related. The administrative law judge found Mr. Manly's testimony less credible than the expert opinion of Dr. Auxier, and that claimant failed to meet her burden of proof because the greater weight of the evidence establishes that decedent's CGL was not related to his employment.[2]

On appeal, claimant, without the assistance of counsel, challenges the denial of her petition for modification. Employer responds, urging affirmance.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *see Banks v. Chicago Grain Trimmers Ass'n,* 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo,* 515 U.S. 291, 30 BRBS 1(CRT)(1995). Where, as in the instant case, the claimant has been found entitled to the Section 20(a) presumption linking decedent's CGL to his employment, and that employer has rebutted that presumption, the administrative law judge is required to weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See, e.g., Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); *see generally Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43(CRT)(1994). These standards for determining the cause of decedent's CGL on modification are the same as in the initial adjudicatory process. *See generally Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993).

[2]For example, the administrative law judge agreed that Mr. Manly was qualified to make retrospective radiation calculations, contrary to Judge Di Nardi's finding, but that his opinion is not entitled to dispositive weight. *See* Decision and Order at 14-16.

The administrative law judge found that the overwhelming weight of the evidence does not prove that decedent's CGL was caused by his exposure to ionizing radiation while working for employer. In this regard, the record before Judge Di Nardi included the medical opinions of Drs. Fry, Goldman, Fabrikant, Moloney, and Auxier that decedent's radiation exposure during the course of his employment with employer from January 1954 to June 1956 was not a cause of decedent's CGL, which was initially diagnosed in January 1989. *See Kaneshiro*, BRB No. 97-0596, slip op. at 3. The administrative law judge explicitly considered the totality of the medical evidence of record, including the medical report and testimony of Dr. Upton that claimant submitted on modification, and an additional medical report from Dr. Fry and the deposition testimony of Dr. Mettler, submitted by employer on modification. The administrative law judge specifically credited the dosage calculation by Dr. Auxier that decedent's work-related radiation exposure measured between 2 and 3 rem, as opposed to Mr. Manly's opinion that decedent's exposure measured no less than 6.3 rem, with a possible upper range exposure estimate of 15.6 rem.[3] *Compare* May 12, 1992, Hearing Tr. at 288 *with* May 8, 1992, Hearing Tr. at 239-241, CXS 11, 13. The administrative law judge credited Dr. Auxier's superior qualifications and the information upon which he relied in forming his dosage calculation.[4] The administrative law judge also found that the more credible medical evidence supports a longer latency period between decedent's exposure to radiation and the onset of his CGL than Mr. Manly used in his dosage calculation.[5] The

[3]Ionizing radiation exposure is measured in "rem," which is an acronym for roentgen equivalent man. *See generally* EX 62.

[4]Dr. Auxier, who has a master's degree in health physics and a doctorate degree in nuclear engineering, is director of Health Physics at Oak Ridge National Laboratory. EX 22, Appendix 1.5. Mr. Manly is a certified health physicist. CX 2-M. Dr. Auxier derived his dosage calculation from the radiation badges decedent wore during the course of his employment for employer, which measured a total exposure of 1.13 rem, EX 103, his own experience with radiation safety procedures at decedent's place of employment, claimant's testimony, and the testimony of Robert Taft and Colonel Jacks, who supervised radiological safety at the employment sites between 1954 and 1956, November 16, 1999, Hearing Tr. at 76-77, 83-84, 94-96. Mr. Manly's dosage calculation additionally relied upon decedent's history alleging unbadged radiation exposure, and Defense Nuclear Agency reports. November 16, 1999, Hearing Tr. at 40-43, 53, 65-66.

[5]Mr. Manly opined that decedent's CGL was initially manifest in April 1986, when decedent recorded an elevated white blood cell count. CXS 11, 13; *see also* May 8, 1992, Hearing Tr. at 304-308. Drs. Fry, Fabrikant and Mettler opined that decedent's CGL was not manifest until January 1989, when claimant's treating physician, Dr. Rajdev, diagnosed CGL. May 13, 1992, Hearing Tr. at 111-112; EX 1-M at 5; EX 2-M at 12-13.

administrative law judge concluded that any error alleged by claimant on modification in Judge Di Nardi's discrediting of Mr. Manly's dosage calculations and causation opinion is therefore harmless. Moreover, the administrative law judge specifically found the opinion of Dr. Upton to be equivocal and predicated upon inaccurate levels of radiation exposure of from 3 to 15 rem.[6]

In adjudicating a claim, it is well-established that an administrative law judge is entitled to determine the weight to be accorded to the evidence of record, and is not bound to accept the opinion or theory of any particular medical examiner. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 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 (2d Cir. 1961). In the instant case, the administrative law judge rationally credited the medical opinions of record that conclude that decedent's CGL was not related to radiation exposure during the course of decedent's employment with employer, and the administrative law judge's decision is thus supported by substantial evidence. Moreover, the administrative law judge rationally afforded less weight to the opinions of Dr. Upton and Mr. Manly, which are the only opinions of record relating decedent's CGL to his work-related radiation exposure, based on their misconception as to length of the latency period before decedent's CGL was manifest and the extent of decedent's rem exposure. Contrary to claimant's contention, the administrative law judge was not required to give determinative weight to Mr. Manly's opinion merely because he found Mr. Manly qualified to render an expert opinion on the degree of radiation exposure. We therefore affirm the administrative law judge's determination on modification, based on the record as a whole, that decedent's CGL was not related to his employment. *See, e.g., Rochester v. George Washington University*, 30 BRBS 233 (1997).

[6]Dr. Upton stated that the probability that decedent's CGL is related to his employment is dependent on the extent of decedent's work exposure to radiation. At an exposure level of 15 rem, Dr. Upton opined it was more likely than not that decedent's CGL was work-related, while at an exposure level of 3 rem it was less likely than not that decedent's CGL was related to his employment. CX 7-M at 65.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge