

BRB No. 91-2175

VIRGINIA W. PATRICK)
(Widow of JUNIOR PATRICK))
)
Claimant-Petitioner)
)
v.)
)
NEWPORT NEWS SHIPBUILDING) DATE ISSUED:
AND DRY DOCK COMPANY)
)
Self-Insured)
Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Virginia W. Patrick, Newport News, Virginia, *pro se*.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for the self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant, representing herself, appeals the Decision and Order (89-LHC-3693) of Administrative Law Judge Michael P. Lesniak denying benefits 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). In considering an appeal where claimant is without counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine if they are rational, supported by substantial evidence, and in accordance with law; if so, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant's husband, the decedent, worked for employer as an operating engineer from 1959

until his retirement on July 31, 1985. Decedent initially complained of shortness of breath and chest pains in 1978. Thereafter, he repeatedly sought medical care for these symptoms until the date of his death. Prior to his retirement, decedent filed two claims for disability benefits under the Act. Specifically, in March 1983, decedent filed a claim asserting that his chest pains and dyspnea were due to work-related asbestosis; thereafter, in July 1985, he filed a second claim alleging disabling and chronic lung disease from his exposure to selig in November 1980. On October 15, 1987, decedent died from a self-inflicted gunshot wound to the head. Pathological examination of lung tissue preserved from the autopsy revealed, *inter alia*, mild to moderate plural fibrosis and mild to slight emphysema.

Following decedent's death, claimant filed a claim for death benefits under the Act, alleging that decedent's suicide was due in part to an oxygen deficit caused by his work-related lung disease.

Employer controverted all three claims, which were consolidated and presented for a formal hearing before the administrative law judge on January 25, 1991. At the hearing, claimant appeared *pro se*. She amended decedent's disability claims and her death benefits claim to allege that her husband's disability and death were also due, at least in part, to his exposure to pulmonary irritants over the course of his employment with employer.

In his Decision and Order, the administrative law judge initially determined that there is no evidence of record that decedent suffered from the occupational disease of asbestosis. Next, the administrative law judge, after assuming *arguendo* that claimant had established her *prima facie* case, determined based upon the record as a whole that decedent's lung condition was not work-related. Lastly, the administrative law judge found that there was no connection between decedent's lung symptomatology and his death because there was no evidence supporting claimant's allegations of decreased oxygen to decedent's brain due to any physical condition. Accordingly, the administrative law judge denied the claims for benefits.

On appeal, claimant, without the assistance of counsel, challenges the administrative law judge's denial of the claims for benefits. Employer responds, urging affirmance.

I. Asbestosis

Initially, we affirm the administrative law judge's finding that decedent did not suffer from the occupational disease of asbestosis. Claimant bears the burden of proving that decedent sustained a harm, and that working conditions existed or an accident occurred which could have caused the harm. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). In the instant case, the administrative law judge, after setting forth the voluminous medical evidence of record, found that "there is simply no evidence whatsoever that Decedent suffered from asbestosis." *See* Decision and Order at 21. Our review of the record reveals no affirmative diagnosis of asbestosis. Rather, Drs. Maddox and Craighead, both of whom examined preserved lung tissue from decedent's autopsy, reported that decedent's lung tissue revealed no evidence of asbestosis. Ex 20; Emp. Ex. 78. Similarly, Drs. Ross and Yillar opined that decedent did not have asbestosis. Emp. Exs. 92, 93. Accordingly, we affirm the administrative law judge's finding that decedent did not suffer from

asbestosis, as that determination is rational and supported by the evidence of record. *See O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988).

II. Causation

Next, the administrative law judge determined that, assuming, *arguendo*, that decedent did suffer from a lung condition, the record as a whole indicated that any such condition was not work-related. Once claimant establishes the two elements of her *prima facie* case, *i.e.*, a harm and working conditions which could have caused the harm, the Section 20(a), 33 U.S.C. §920(a), presumption applies to link the harm with decedent's employment. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985). Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that decedent's condition was not caused or aggravated by his employment. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248, 251 (1988).

In the instant case, after setting forth the evidence of record, the administrative law judge determined that "those physicians offering an opinion on whether Decedent's medical problems were work related all indicated that they were not." Decision and Order at 21 (emphasis in original). The administrative law judge concluded by noting that claimant herself stated that not one physician of record reported that decedent's shortness of breath was work related. *Id.*; see Transcript at 24. In rendering this finding, the administrative law judge specifically cited to the unequivocal opinion of Dr. Ross that there is no evidence of a relationship between decedent's employment and his lung or heart conditions. Emp. Ex. 92; Transcript at 60-74. Dr. Craighead opined that there was no evidence of lung disease in decedent's tissue samples. Emp. Ex. 78. We hold that any error committed by the administrative law judge in failing to expressly discuss rebuttal of the Section 20(a) presumption is harmless because the evidence which he cites, specifically the testimony of Dr. Ross, is sufficient to rebut the presumption. *See Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988). Moreover, the administrative law judge's discussion and citation to the medical evidence of record and his ultimate findings establish the absence of causation under the applicable standards. *See Kelaita*, 13 BRBS at 326; *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Specifically, as set forth by the administrative law judge and acknowledged by claimant, none of the physicians of record affirmatively testified as to a relationship between decedent's medical conditions and his employment. Accordingly, we affirm the administrative law judge's determination, based upon the record as a whole, that decedent's medical conditions were not work-related.

III. Death Benefits

Section 9 of the Act provides for death benefits to certain survivors "if the injury causes death." 33 U.S.C. §909(1988). Where the immediate cause of death was not work-related, an eligible survivor may qualify for Section 9 death benefits if the employee had a work-related

medical condition that hastened his death. 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). Under the Act, once a *prima facie* case is established, claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption linking the decedent's death to his employment. See *Fineman*, 27 BRBS at 104. Upon invocation of the presumption, the burden shifts to the employer to present specific and comprehensive evidence sufficient to sever the casual connection between the death and the employment. See *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). It is the employer's burden on rebuttal to present specific and comprehensive evidence to sever the causal connection between the injury and the employment. See *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. See *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

In addressing claimant's claim for death benefits, the administrative law judge, citing to the testimony of Dr. Pile, found that there was no decrease in oxygen to decedent's brain and that, therefore, there is no connection between claimant's lung problems and his death. Dr. Pile, in a report dated January 25, 1990, opined that there was no decrease in oxygen to decedent's brain due to any condition. Emp. Exs. 94, 96. Dr. Pile's opinion is supported by that of Dr. Yillar, who opined that even if decedent had severe lung problems, those problems would not have influenced or contributed to decedent's psychiatric problems and subsequent suicide. Emp. Ex. 93. Similarly, Dr. Ross stated that decedent's employment with employer did not contribute to his death. Emp. Ex. 92; Transcript at 60-74. Although the administrative law judge failed to expressly discuss rebuttal of the Section 20(a) presumption as it applies to claimant's death claim, we hold that any error committed in this regard is harmless. The evidence cited to by the administrative law judge is unequivocal and uncontroverted, and is sufficient to both rebut the presumption and establish the lack of causation under the proper standards. See *Kelaita*, 13 BRBS at 326; *Kier*, 16 BRBS at 128. Accordingly, we affirm the administrative law judge's finding that there is no casual connection between decedent's death and his lung problems.

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge