BRB No. 94-2810

MARY J. HAWKINS (widow of GILBERT W. HAWKINS)	)	
Claimant-Respondent	)	
v.	)	
HARBERT/JONES	)	DATE ISSUED:_____
and	)	
CIGNA INSURANCE COMPANY	)	
Employer/Carrier-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Randall E. Roach, Lake Charles, Louisiana, for claimant.

Patrick E. O'Keefe, New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (91-LHC-1649) of Administrative Law Judge Edward Terhune Miller 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).[1] We must affirm the administrative law judge's findings of fact and conclusions of law

[1]This case was administratively affirmed by the Board on September 12, 1996,

pursuant to Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996). Employer appealed the case to the United States District Court for the Eastern District of Louisiana, and the district court determined that Public Law 104-134 does not apply to cases arising under the Defense Base Act. The appropriations law requires the Board to decide appeals of cases arising under the Longshore Act within one year of the date of appeal, and it provides that if the Board does not do so, the administrative law judge's decision is deemed affirmed "for purposes of obtaining a review in the United States courts of appeals[.]" Public Law 104-134. Inasmuch as the United States Courts of Appeals for the Fifth Circuit has held that the initial appeal of a Board decision in a Defense Base Act case is to a district court pursuant to 42 U.S.C. §1653(b), and not to a court of appeals, *AFIA/CIGNA Worldwide v. Felkner,* 930 F.2d 1111, 24 BRBS 154 (CRT)(5th Cir. 1991), *cert. denied*, 502 U.S. 906 (1991); *contra Pearce v. Director, OWCP,* 603 F.2d 763 (9th Cir. 1979), and as Public Law 104-134 did not amend 42 U.S.C. §1653(b), the district court held that the administrative law judge's decision in this case could not be deemed final, and it remanded the case to the Board for appropriate review. *Harbert/Jones v. Hawkins*, No. MC 96-3128 N (E.D. La. April 25, 1997). On September 25, 1997, the United States Court of Appeals for the Fifth Circuit granted employer's motion to dismiss its appeal without prejudice while permitting it to retain the right to proceed before the Board. *Harbert/Jones v. Hawkins*, No. 97-30499 (5th Cir. Sept. 25, 1997). Accordingly, the case is now before the Board for review of the administrative law judge's decision.

if they are supported by substantial evidence, are rational, and are 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 as a pipeline supervisor on a public works project in Cairo, Egypt. On December 20, 1989, after his normal work day, he returned to the work site just before midnight, presumably to check on the dewatering pumps.[2] Between the work site and the site office, decedent's truck collided with a telephone pole. After midnight, he was found on the floor of his truck by two night-shift co-workers. They called the company doctor, and he pronounced decedent dead on arrival at the hospital. In accordance with Egyptian custom, no autopsy was performed, but the doctor who examined the body, Dr. Amin, listed acute failure of the heart and circulatory system as the cause of death. Emp. Ex. 7. Thereafter, decedent's body was returned to the United States for burial, and claimant, decedent's widow, filed a claim for death benefits under the Act.

The administrative law judge recited the parties' stipulations as to the facts and discussed the medical records and witness testimony of record. He found that claimant established a *prima facie* case for invocation of the Section 20(a), 33 U.S.C. §920(a), presumption linking decedent's death to his employment. Based on the medical reports of employer's experts, the administrative law judge then found that employer presented sufficient evidence to rebut the presumption. However, on the record as a whole, he determined that decedent's death was work-related, giving credit to the report of claimant's expert, Dr. White. Decision and Order at 10-12. On alternate grounds, the administrative law judge found that decedent's death occurred within the "zone of special danger" which was created by the conditions of decedent's work and the fact that this employment was in Egypt. Decision and Order at 13. Consequently, the administrative law judge awarded claimant and her minor children death benefits and $3,000 for funeral expenses. 33 U.S.C. §909; Decision and Order at 13. However, he denied employer's request for Section 8(f), 33 U.S.C. §908(f), relief because, although he found that the evidence establishes a mild case of pre-existing hypertension, he concluded decedent had no recognizable physical impairment from such hypertension which was manifest prior to his death. Decision and Order at 14. Employer appeals the administrative law judge's decision, and claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not filed a brief in this case.

Initially, employer contends the administrative law judge erred in awarding death

[2]There were no witnesses to decedent's activities or accident, and the parties agree this must have been decedent's purpose for being on the premises at that time. Decision and Order at 3-4.

benefits. Employer argues there is not substantial evidence of record to support such an award, as there is no evidence decedent suffered from any work stress, and argues that reliance on Dr. White's opinion was irrational, as Dr. White's credentials are not a matter of record and his opinion is purely speculative and unsupported by any record evidence. Additionally, employer asserts that the administrative law judge misplaced his reliance on the "zone of special danger" doctrine. Claimant maintains substantial evidence exists which supports the administrative law judge's award of benefits.

In determining whether a death is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after the claimant establishes a *prima facie* case. *Bell Helicopter International, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13 (CRT) (8th Cir. 1984), *aff'g Darnell v. Bell Helicopter International, Inc.*, 16 BRBS 98 (1984); *see generally Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). To establish a *prima facie* case, a claimant must show that decedent suffered a harm and that conditions existed or an accident occurred at the employer's facility which could have caused that harm. *Id.* Once the presumption is invoked, an employer may rebut it by producing facts to show that the employment did not cause or contribute to the death. *See generally Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). If the employer submits substantial countervailing evidence to sever the causal connection, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. *Universal Maritime Corp. v. Moore*, 126 F.3d 256 (4th Cir. 1997); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

Initially, we conclude that the administrative law judge properly invoked the Section 20(a) presumption, as the parties agreed decedent died while performing a work-related duty, thereby establishing claimant's *prima facie* case.[3] *Bell Helicopter*, 746 F.2d at 1342, 17 BRBS at 13 (CRT). Additionally, we hold that the administrative law judge properly found the presumption rebutted by the opinions of Drs. Matis and Phillips who opined that decedent's death was due to a pre-existing heart condition and not caused by employment-related conditions or events. Emp. Exs. 1-4. Therefore, he correctly determined that the case must be evaluated on the record as a whole. *See Stevens*, 23 BRBS at 191.

In this case, the administrative law judge credited a portion of the opinions of Drs. Matis and Phillips, in conjunction with the opinion of Dr. Amin, to conclude that decedent

[3]In this regard, we need not address employer's contention that the administrative law judge misapplied the "zone of special danger" doctrine. The doctrine aids in establishing that an injury or death occurred in the "course of employment" in Defense Base Act cases. *See O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951). No party challenges the administrative law judge's finding that decedent died while he was on the job.

suffered a sudden cardiac death.[4] Decision and Order at 12; Emp. Exs. 1-4, 7. However, he found "implausible" their opinions that there was no causal relationship between decedent's death and his work. Decision and Order at 12. He credited Dr. White's opinion that it is more likely than not that decedent suffered some stresses (*i.e.*, long work hours, working in Egypt, supervising Egyptian nationals, and being away from home at Christmas time), which contributed to his death.[5] *Id.*; Cl. Ex. 15.

It is within the discretionary powers of the administrative law judge to determine the credibility of witnesses and to evaluate and draw inferences from the medical evidence of record. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30 (CRT) (9th Cir. 1988); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Here, in assessing the record as a whole, the administrative law judge rationally

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[4]Dr. Matis concluded that decedent suffered an acute myocardial infarction or a fatal disturbance in his cardiac rhythm. He believed pre-existing hypertension in addition to decedent's history of smoking caused the death. Emp. Ex. 4. Dr. Phillips reached the same conclusion, stating that the death was caused primarily by chronic occlusive coronary artery disease and decedent's risk factors (age, gender, weight, smoking and hypertension). As there was no evidence of unusual stress at work, Dr. Phillips opined that there was a temporal association and not a causal one between decedent's work and his death. Emp. Exs. 1-2.

[5]Because there was no autopsy and no solid evidence of pre-existing heart disease, Dr. White questioned the conclusion that decedent had a pre-existing heart condition and stated that the heart attack could have been precipitated by any number of occurrences. He stated that a high blood pressure reading on one occasion does not equate to a diagnosis of hypertension just as a one-time finding of albumin in the urine does not mean there is heart disease. Cl. Ex. 15.

found that decedent's death was associated with his work. The administrative law judge's conclusion in this case is supported by the opinion of Dr. White. Therefore, we affirm both the administrative law judge's finding that decedent's death was work-related and his award of death benefits to claimant and her children.

Additionally, employer challenges the administrative law judge's denial of Section 8(f) relief from continuing liability for benefits. Contrary to employer's assertions, the evidence of record supports the finding that there was no permanent partial disability manifest prior to decedent's death. Decision and Order at 14; *Compare* Cl. Exs. 15-19 *and* Emp. Ex. 7 *with Director, OWCP v. General Dynamics Corp. [Fantucchio]*, 787 F.2d 723, 18 BRBS 88 (CRT) (1st Cir. 1986) (pre-existing hypertension was documented for years and affected employment). As these elements are necessary for relief from the Special Fund, *Perry v. Bath Iron Works Corp.*, 29 BRBS 57 (1995), and as employer has failed to establish their existence, we affirm the administrative law judge's denial of Section 8(f) relief. *See Kubin*, 29 BRBS at 117; *Vlasic v. American President Lines*, 20 BRBS 188 (1987).

Accordingly, the administrative law judge's Decision and Order is affirmed.[6]

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
NANCY S. DOLDER
Administrative Appeals Judge

[6]We deny counsel's Motion for Payment of Expenses by claimant filed in March 1995. Because claimant was successful in defending her award on appeal, counsel is entitled to an attorney's fee for work performed before the Board, payable by employer. 33 U.S.C. §928; 20 C.F.R. §802.203. Consequently, counsel should include the request for expenses in his fee petition.