BRB No. 14-0163

LILLIAN HEPTING (Widow of IRVIN HEPTING) Claimant-Petitioner v. BP AMERICA, INCORPORATED and ACE AMERICAN INSURANCE COMPANY Employer/Carrier-Respondents	)	DATE ISSUED: Nov. 25, 2014 DECISION and ORDER

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

Ted Williams, Baton Rouge, Louisiana, for claimant.

John J. Rabalais, Janice B. Unland and Gabriel E. F. Thompson (Rabalais, Unland & Lorio), Covington, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, the widow of Irvin Hepting (decedent), appeals the Decision and Order (2012-LHC-01555) of Administrative Law Judge Larry W. Price 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which 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).

Decedent worked seven-day shifts as an electrician on a fixed oil production platform located on the Outer Continental Shelf from June 30, 1983 to January 1, 1998. Decedent, who had never been diagnosed with any type of lung or pulmonary disease, was diagnosed with lung scarring on August 11, 1992, and cryptococcal meningitis in September 1993.[1] Decedent's meningitis went into remission, but his health thereafter declined, culminating in his inability to perform his usual job as of January 1, 1998. Decedent received treatment for his pulmonary conditions from his general practitioner, Dr. McSween, and a pulmonologist, Dr. Malloy, and treatment for his cryptococcal meningitis from a Board-certified neurologist, Dr. Borresen. Decedent died on July 8, 2002. Dr. Malloy completed the death certificate listing respiratory failure, pulmonary hemorrhage and granulomatous lung disease as the causes of death.

Claimant filed a claim seeking benefits, alleging that decedent's work-related exposure to seagull droppings on the oil platform caused the cryptococcal meningitis, which, in turn, caused or contributed to his permanent total disability in 1998 and death in 2002. Employer controverted the claim. In his decision, the administrative law judge found that claimant did not establish a prima facie case and, thus, is not entitled to the Section 20(a) presumption. 33 U.S.C. §920(a). Specifically, the administrative law judge found that there is no scientific evidence relating cryptococcal meningitis to seagull droppings or otherwise supporting Dr. Borresen's opinion that decedent's exposure to seagull droppings could have caused this condition. Nevertheless, the administrative law judge also found that the combined testimony of Drs. Lutz and Jones is sufficient to rebut the Section 20(a) presumption and that claimant did not establish, by a preponderance of the evidence, a causal connection between decedent's cryptococcal meningitis, his work for employer, and his disability and death. Accordingly, he denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant contends that, contrary to the administrative law judge's finding, the record contains sufficient evidence to establish the working conditions element of, and thus her entitlement to, the Section 20(a) presumption. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after she establishes a prima facie case. *See Noble Drilling Co. v. Drake,* 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986). We need not address claimant's contention that the administrative law judge erred in not invoking the Section 20(a)

[1]Meningitis is an infection and inflammation of the membranes that cover the spinal cord and brain. *Dorland's Illustrated* Medical Dictionary 933 (25th ed. 1974). Cryptococcal meningitis is caused by fungi, and is more likely to occur in persons with compromised immune systems. CX 3 at 11-14. The disease is treatable, and goes into remission, with life-long anti-fungal medication. *Id.*

presumption, as the administrative law judge assumed, in the alternative, that the presumption applied and he proceeded to address whether employer rebutted it. *See* Decision and Order at 12.

It is employer's burden to rebut the Section 20(a) presumption by introducing substantial evidence to throw factual doubt on claimant's prima facie case. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The employer's burden is one of production, not persuasion.[2] *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT). Claimant contends the administrative law judge erred in finding the employer rebutted the Section 20(a) presumption. The administrative law judge determined that the combined testimony of Drs. Lutz and Jones is sufficient to rebut the Section 20(a) presumption. The record reflects that Dr. Lutz opined, on a more probably than not basis and with a reasonable degree of medical certainty, that decedent did not contract the cryptococcal neoformans, which led to his cryptococcal meningitis, while working for employer on an oil platform in the Gulf of Mexico. EXs 2, 5. Similarly, Dr. Jones stated that decedent's cryptococcal meningitis was "definitely not" related to his work for employer. EX at 23-24; *see also* EX 3. Moreover, Drs. Lutz and Jones agreed that, even assuming that decedent's cryptococcal meningitis was work-related, there is no evidence to show that this condition played any role in the sarcoidosis/lung disease which both physicians believed caused decedent's disability and death.[3] EXs 2, 3; EX 5 at 23, 26, 69-70; EX 8 at 44, 45. The administrative law judge rationally found that the

[2]Claimant contends that the administrative law judge erred in relying on the opinions of Drs. Lutz and Jones to find the Section 20(a) presumption rebutted because neither physician has the qualifications necessary to opine on the causal connection between decedent's cryptococcal meningitis and his work-related exposure to seagull droppings. In view of employer's limited burden to produce "substantial evidence to the contrary" on rebuttal, we reject the contention that the administrative law judge should have weighed the relative qualifications of Drs. Borresen, Lutz and Jones at this stage of his analysis. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT).

[3]Claimant did not allege, either before the administrative law judge or now on appeal, that decedent's chronic obstructive pulmonary disease and granulomatous lung disease, which caused his total disability, and/or his respiratory failure, pulmonary hemorrhage, granulomatous lung disease, and possible sarcoidosis, which were noted as causes of death, were related to his work for employer. Rather, as noted by the administrative law judge, claimant contended that decedent contracted cryptococcal meningitis as a result of his work for employer which either alone, or acting in conjunction with his non-work-related lung disease, contributed to or caused his disability and/or death.

opinions of Drs. Lutz and Jones constitute substantial evidence sufficient to rebut the Section 20(a) presumption. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT). Therefore, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption.

Claimant next avers that the administrative law judge erred by crediting the opinions of Drs. Lutz and Jones over the contrary opinion of Dr. Borresen to find that claimant did not establish, based on the record as a whole, a causal connection between decedent's cryptococcal meningitis and his work for employer.[4] Claimant submits that the administrative law judge's finding that seagull droppings do not cultivate cryptococcus is incorrect in view of scientific evidence and the opinions of all three physicians that decedent's exposure to seagull droppings while working offshore could be a source of cryptococcal meningitis. In this regard, claimant asserts that the record contains two medical publications, i.e., Dr. Borresen's case study published by the American Society of Neuroimaging and a report entitled "Chronic and Subacute Meningitis" published by the American Academy of Neurology in December 2012, supporting a causal link between exposure to water fowls and cryptococcal meningitis.

The record establishes that decedent was diagnosed with cryptococcal meningitis in September 1993, that he was diagnosed with totally disabling chronic obstructive pulmonary disease and granulomatous lung disease in January 1998, and that he died on July 8, 2002, as a result of respiratory failure, pulmonary hemorrhage and granulomatous lung disease. CXs 1, 3, 12 and 29. In terms of a causal relationship between cryptococcal meningitis and decedent's disability and fatal lung conditions, the record contains the testimony of Dr. Borresen, who opined that decedent's cryptococcal meningitis was due to his work-related exposure to seagull droppings but who also conceded that he was not aware of any link between this condition and decedent's death or disability; CX 4; and the opinions of Drs. Lutz and Jones, who each opined that there is no causal connection between decedent's work for employer and his cryptococcal meningitis or his disability and death,[5] EXs 5, 8. In weighing this evidence, the

[4]Contrary to claimant's contention that, pursuant to *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986), the administrative law judge was required to resolve all doubtful question in his favor, the "true doubt rule" was held by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), to violate the Administrative Procedure Act. In any event, the administrative law judge did not find the evidence in this case to be in equipoise.

[5]While, as claimant contends, Drs. Lutz and Jones agreed that decedent's exposure to seagull droppings offshore could be a source of his cryptococcal meningitis, EX 5 at 58; EX 8 at 29, both physicians opined, on a more probable than not basis, that decedent

administrative law judge found that the opinions of Drs. Lutz and Jones are better explained in light of the underlying scientific evidence.[6] He thus credited the opinions of Drs. Lutz and Jones over that of Dr. Borresen to conclude that claimant did not establish, by a preponderance of the evidence, a causal connection between decedent's cryptococcal meningitis, his disability and/or his death, and his work for employer.

The administrative law judge is entitled to draw his own inferences from the evidence, and his selection from among competing inferences must be affirmed where it is supported by substantial evidence, which in this case is represented by the opinions of Drs. Lutz and Jones. *See Mendoza v. Marine Pers. Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Specifically, Dr. Lutz stated, on a more probable than not basis, that decedent did not contract the cryptococcal neoformans which led to his cryptococcal meningitis while working for employer and that moreover, decedent's disability and death were not related to his work for employer. EXs 2, 5. Dr. Lutz indicated that his conclusions were based on the complete lack of any clinical or epidemiological evidence to the contrary. *Id.* Dr. Jones likewise stated that decedent's cryptococcal meningitis was "definitely not" related to his work for employer, EX 8 at 23-24, and that in any event there is inadequate evidence that decedent's work caused or contributed to his respiratory illnesses or his death, EXs 2, 8. Both Dr. Lutz and Dr. Jones opined that there is no scientific literature or research to support the existence of any definitive link between exposure to seagull droppings and cryptococcal meningitis.[7] The Board is not

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did not contract the cryptococcal neoformans which led to his cryptococcal meningitis while working for employer, EX 5 at 22; EX 8 at 23-24.

[6]The administrative law judge acknowledged the published reports upon which Dr. Borresen relied, i.e., the physician's own case study of decedent and the report entitled "Chronic and Subacute Meningitis," but found that each was flawed, as explained by Dr. Lutz, on the narrow issue of whether cryptococcal meningitis can be contracted from exposure to seagull excrement on oil platforms, because the fungus (cryptococcal neoformans) which causes the disease is typically found in soil that contains bird droppings and "nobody" believes that seagull excrement is a source of that fungus. Decision and Order at 5, 11; *see also* EX 5 at 7, 9, 53, 68-69. The administrative law judge instead relied on the only known scientific study directly addressing whether any such relationship exists, i.e., a 1971 British scientific study which "definitively found that cryptococcal neoformans were not present in either fresh or dry seagull droppings." Decision and Order at 11.

[7]Dr. Lutz stated "there is no medically accepted or peer reviewed medical research showing any definitive link between exposure to seagull excrement and cryptococcus." EX 2. Specifically, Dr. Lutz stated "[t]here has never been a report in the 22 million articles of the medical literature that I searched through the computer, reporting

empowered to reweigh this medical evidence to obtain the result urged by claimant. *See Mendoza*, 46 F.3d 498, 29 BRBS 79(CRT); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Accordingly, as it is rational, the administrative law judge's decision to credit the opinions of Drs. Lutz and Jones over the contrary opinion of Dr. Borresen is affirmed.[8] As the credited opinions constitute substantial evidence of the lack of a causal nexus between decedent's work for employer, his cryptococcal meningitis, and his disability and death due to his lung disease, we affirm the administrative law judge's denial of benefits. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

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cryptococcus in seagull excrement." EX 5 at 9. Dr. Jones stated that "I haven't seen credible scientific evidence that the droppings of seagulls are dangerous," EX 8 at 17-18, and that to say that decedent "got sick because he was exposed to bird droppings on his offshore job doesn't pass the test of ordinary logic," *id.* at 22-23. Dr. Jones also stated that "I did a lot of research looking for evidence of – of colonization or the carrier state of birds for cryptococcus and came up empty." *Id.* at 42.

[8]Although an administrative law judge may give special weight to a treating physician's opinion, *see Amos v. Director, OWCP*, 153 F.3d 1051, *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999), he is not required to credit such an opinion where there is contrary probative evidence in the record. In this case, the administrative law judge found Dr. Borresen's causation opinion less credible in light of the contrary opinions of Drs. Lutz and Jones, which the administrative law judge found were better supported by the underlying evidence of record. Decision and Order at 13-14. Claimant has not demonstrated any error in this determination. *See Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005); *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge