BRB No. 04-0171

BETTY HARRIS (Widow of JOSEPH HARRIS, JR.) Claimant-Petitioner v. ELMWOOD DRY DOCK & REPAIR and ELMWOOD MARINE SERVICES, INCORPORATED Employer/Carrier-Respondents	)	DATE ISSUED:Oct. 19, 2004 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

R.A. Osborn, Jr. and R.A. Osborn, III, Gretna, Louisiana, for claimant, and Dominick Savona, Jr., Gretna, Louisiana, for Barbara Bratton.

Mark D. Latham (Liskow & Lewis), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2002-LHC-01052) of Administrative Law Judge Clement J. Kennington 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.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Joseph Harris, the decedent, worked for employer as a dock master and welder. On June 17, 2000, he left work early with flu-like symptoms that had begun the night before. The decedent complained to claimant, his wife, of shortness of breath and gas. The decedent called for an ambulance and was taken to West Jefferson Medical Center, where he was diagnosed with pneumonia and respiratory failure. On June 18, 2000, decedent's blood tested positive for aeromonas hydrophilia. Aeromonas hydrophilia is a bacterium commonly found in fresh water. Aeromonas hydrophilia can enter the bloodstream from a cut or puncture wound and contact with fresh water, by ingestion from drinking water into the gastro-intestinal tract, or by aspiration directly into the lungs. Aeromonas hydrophilia may cause skin and soft tissue infection at the site of the cut or wound, and intestinal tract infection. In rare cases, aeromonas hydrophilia causes pneumonia or sepsis. In this case, decedent's health worsened and he was transferred to Ochsner Foundation Hospital on June 20, 2000, for more extensive respiratory treatment. He was diagnosed there with Adult Respiratory Distress Syndrome and sepsis. On June 23, 2000, decedent expired due to septic shock caused by aeromonas hydrophilia. Claimant filed a claim for death benefits under the Act alleging that decedent contracted the aeromonas hydrophilia bacterium during the course of his employment for employer.[1] 33 U.S.C. §909.

In his decision, the administrative law judge discredited claimant's testimony that the decedent contracted aeromonas hydrophilia after being stung by a catfish while working for employer. However, the administrative law judge credited the testimony of Dr. Dalovisio that the decedent was exposed to the aeromonas hydrophilia bacterium at work and, more likely than not, contracted aeromonas hydrophilia there to find claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a). The administrative law judge credited the testimony of Dr. Lutz that there is no medical evidence linking decedent's contracting aeromonas hydrophilia to his employment to find that employer successfully rebutted the presumption. Finally, the administrative law judge found, based on the record as a whole, that the decedent's contracting of the aeromonas hydrophilia bacterium was not related to his employment. The administrative law judge credited the testimony of Dr. Lutz and the absence of any credible evidence linking decedent's death to his employment. Therefore the administrative law judge denied the claim for death benefits.

On appeal, claimant challenges the administrative law judge's finding that employer rebutted the Section 20(a) presumption, and his finding, based on the record as a whole, that decedent's death due to aeromonas hydrophilia is not related to his employment. Employer responds, urging affirmance.

[1] A second claim for death benefits was filed by Barbara Bratton, mother of Joeryan Bratton, a minor to whom decedent paid court-ordered child support. CXs 1, 3.

Section 9 of the Act provides for death benefits to certain survivors "if the injury causes death." 33 U.S.C. §909. In establishing entitlement to benefits, claimant is aided by Section 20(a) of the Act, which presumes, in the absence of substantial evidence to the contrary, that the claim for death benefits comes within the provisions of the Act, *i.e.*, that the death was work-related. *See, e.g., American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). Once the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that decedent's death was not caused by his employment. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 124 S.Ct. 825 (2003); *see also Louisiana Ins. Guaranty Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); s*ee also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Claimant initially argues that the administrative law judge misstated employer's burden on rebuttal and that the evidence credited by the administrative law judge is insufficient to establish rebuttal. In *Ortco*, the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, held that employer must "affirmatively rebut" the presumption with "*substantial evidence* to the contrary," which the court defined as a minimal standard that is "more than a modicum" but is less demanding than the ordinary civil requirement that a party prove a fact by the preponderance of the evidence. *Ortco*, 332 F.3d at 287, 290, 37 BRBS at 37, 39(CRT) (emphasis in original). Specifically, the court held that employer need not produce evidence: that is "specific and comprehensive;" that "rul[es] out" the employment as a possible cause of the injury; or that "unequivocally or affirmatively states" that the claimant's injury or death is not related to his employment, in order to establish rebuttal of the Section 20(a) presumption. *Id.*, 332 F.3d at 290, 37 BRBS at 39(CRT). In this case, the administrative law judge quoted the *Ortco* statement that substantial evidence is "more than a modicum but less than a preponderance," and he also summarized the court's holding that employer need not rule out the employment as a possible cause of the death or unequivocally or affirmatively state that the injury is not work-related. Decision and Order at 16. Accordingly, we reject claimant's contention that the administrative law judge applied an improper rebuttal standard.

The administrative law judge found that the testimony of Dr. Lutz is substantial evidence to rebut the presumption. The administrative law judge credited his testimony that there is no medical evidence to implicate workplace exposure to bacteria as a cause

of decedent's death. Tr. at 121. The administrative law judge further credited the testimony of Dr. Lutz and the deposition testimony of Dr. Workman that water is aspirated into the lungs when water is swallowed wrongly into the lung, as in a near-drowning experience, and that there is no evidence that decedent nearly drowned or otherwise fell into water. Tr. at 117; CX 28 at 47. The administrative law judge found claimant's testimony that decedent came home with wet clothes on June 16, 2000, explained by the fact it rained heavily that day. Tr. at 53-54. The administrative law judge noted Dr. Lutz's testimony that decedent possibly acquired aeromonas hydrophilia from bottled water, which he drank regularly. Tr. at 59, 122-124. Finally, the administrative law judge credited the testimony of Dr. Lutz that, in most cases, including this one, the cause of aeromonas hydrophilia cannot be determined, which the administrative law judge found supported by the deposition testimony of Dr. Workman that he could not prove how decedent contracted aeromonas hydrophilia. Tr. at 125; CX 28 at 47-48. Inasmuch as the administrative law judge properly determined that employer produced substantial evidence that decedent's death is not related to his employment, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption. *Ortco*, 332 F.3d at 287-290, 37 BRBS at 37-39(CRT).

Claimant next contends that the administrative law judge erred by finding, based on the record as a whole, that decedent's death from aeromonas hydrophilia is not related to his employment. Claimant challenges the administrative law judge's rejection of her testimony that decedent was stung at work and the testimony of Drs. Workman and Dalovisio that a catfish sting would be the most likely means for acquiring aeromonas hydrophilia.

In his weighing of the evidence as a whole, the administrative law judge discredited claimant's testimony that decedent was stung at work as contradictory, unreliable, and uncorroborated hearsay. Decision and Order at 17. The administrative law judge reasoned that claimant did not notify employer of the possible connection between decedent's illness and employment until nine months after his death and after she had retained counsel. Tr. at 54-55, 59, 62. Claimant admitted the decedent never told her he was stung by a catfish. Tr. at 37, 54-55. Claimant did not inform decedent's physicians at West Jefferson Hospital of the alleged sting notwithstanding their indicating to claimant that such an event may have caused decedent's illness.[2] Tr. at 62-68. The administrative law judge also credited the absence of any evidence that decedent worked in standing water or presented to either hospital with a puncture wound. Drs. Workman and Dalovisio testified that they observed what resembled psoriasis on both of decedent's legs. Dr. Workman testified that he was 99.99% certain he did not mistake a puncture

[2] Claimant testified she thinks she told physicians at Ochsner Hospital that something had stung her husband. Tr. at 65.

wound for psoriasis. CX 28 at 23-27, 35-37. Dr. Dalovisio stated that he did not see any indication of a puncture wound. CX 30 at 12-14. The administrative law judge found these statements that decedent did not have a puncture wound supported by Dr. Lutz's testimony that a puncture wound infected by aeromonas hydrophilia would be large, red, and swollen, with necrosis and pus, and that it is highly improbable that physicians with the experience of Drs. Workman and Dalovisio would mistake such a nasty puncture wound for psoriasis. Tr. at 112-116, 132-133.

The administrative law judge also rejected Dr. Dalovisio's testimony that decedent more likely than not contracted aeromonas hydrophilia at work since decedent worked near water and aeromonas hydrophilia is a water-born bacterium. CX 30 at 42. The administrative law judge found that in the absence of any supporting evidence of exposure at work to aeromonas hydrophilia, Dr. Dalovisio's opinion is speculative. Decision and Order at 17. The administrative law judge rejected Dr. Dalovisio's opinion that decedent may have aspirated contaminated water directly into his lungs. The administrative law judge reasoned that Dr. Dalovisio testified that aeromonas hydrophilia could start in the bloodstream and move into the skin or lungs, and Dr. Workman testified that decedent's negative sputum culture indicated that there was no aeromonas hydrophilia in the pneumonia, and likely not in the lung. CXs 28 at 13-16; 30 at 27-28. The administrative law judge also found there is no factual evidence that decedent aspirated *any* water at work. The administrative law judge credited the opinion of Dr. Lutz that there is no medical evidence that suggests workplace exposure to the bacterium as it is better supported by the known facts, and the administrative law judge concluded that claimant failed to establish by a preponderance of the evidence that decedent's death was work-related. Tr. at 121.

The Board is not empowered to reweigh the evidence, *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), and the administrative law judge's credibility determinations must be affirmed unless they are inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Claimant has not demonstrated any error in the administrative law judge's weighing of the evidence as a whole. Because the testimony of Dr. Lutz, and the absence of any corroborating evidence that decedent was stung by a catfish or otherwise contracted aeromonas hydrophilia at work, constitutes substantial evidence in support of the conclusion that decedent's death was not related to his employment, and as the administrative law judge's decision to credit this evidence is within his discretion as the fact-finder, *see generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 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), we affirm the administrative law judge's finding that decedent's death was not work-related.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge