BRB No. 05-0104

LORRAINE PORTER (Widow of ARTHUR PORTER) Claimant-Petitioner v. ELECTRIC BOAT CORPORATION Self-Insured Employer-Respondent	)))))))))))	 DATE ISSUED: 09/30/2005 DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Peter A. Clarkin (McKenney, Jeffrey & Quigley), Providence, Rhode Island, for self-insured employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-1394) of Administrative Law Judge Janice K. Bullard 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 administrative law judge's findings of fact and conclusions of law 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).

Claimant's husband, the decedent, worked as a pipe fitter with employer for 26 years. In part as a result of his occupational exposure to fumes and dust, he developed chronic obstructive pulmonary disease and was awarded disability benefits. *See* Cl. Ex. 6. Decedent died on January 25, 2000, due to ventricular fibrillation. *See* Cl. Ex. 1. His widow filed a claim for death benefits under the Act. 33 U.S.C. §909.

In her decision, the administrative law judge found that claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), that decedent's death was due, at least in part, to his work-related respiratory condition. The administrative law judge found that decedent had chronic obstructive pulmonary disease that was at least partially related to his occupational exposures and Dr. Cherniak stated that decedent's death was partially attributable to his chronic obstructive pulmonary disease and chronic bronchitis. The administrative law judge also found that employer established rebuttal of the presumption based on Dr. Bradbury's opinion that decedent's death due to heart disease was not related to his chronic obstructive pulmonary disease. After weighing the evidence as a whole, the administrative law judge concluded that it is clear that decedent suffered from both a pulmonary and a cardiac condition, but that the evidence is too speculative to establish that his pulmonary condition contributed to or hastened his death. Thus, she denied the claim for death benefits.

Claimant contends on appeal that the administrative law judge erred in finding that Dr. Bradbury's opinion is sufficient to establish rebuttal of the Section 20(a) presumption that decedent's death is related to his work-related respiratory condition. Employer responds, urging affirmance of the administrative law judge's decision as it is supported by substantial evidence.

Section 9 of the Act, 33 U.S.C. §909, provides for death benefits to certain survivors if the work-related injury or disease causes death. In establishing entitlement to benefits, claimant is aided by Section 20(a), 33 U.S.C. §920(a), which once the claimant establishes a *prima facie* case, 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,* 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). In addressing the scope of Section 9 where the immediate cause of death is not work-related, the Board has applied the maxim that "to hasten death is to cause it." *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); *see also Shuff v. Cedar Coal Co*., 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

In the present case, the death certificate listed the immediate cause of decedent's death as ventricular fibrillation due to coronary artery disease. Cl. Ex. 1. Dr. Cherniak, who examined decedent twice as a member of a study on work-related respiratory disease, opined that decedent died from "sudden death" due to cardio-pulmonary failure and that both organ systems should be accorded a contributory role. The administrative law judge found that this opinion is sufficient to invoke the Section 20(a) presumption. Decision and Order at 7.

Where claimant has established entitlement to invocation of the Section 20(a) presumption, the burden of production shifts to employer to rebut it with substantial evidence that decedent's death was not caused, contributed to or hastened by his employment injury. *See American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.2d 53, 31 BRBS 19(CRT) (1st Cir. 1997). If employer rebuts the presumption, claimant bears the burden of persuasion of establishing the work-relatedness of decedent's death based on the record as a whole. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see Director, OWCP v. Greenwich Collieries,* 512 U.S. 257, 28 BRBS 43(CRT) (1994).

The administrative law judge found that the opinion of Dr. Bradbury is sufficient to establish rebuttal of the Section 20(a) presumption. Dr. Bradbury opined that decedent died of "progressive coronary disease" and that this disease was accelerated due to "risk factors including hypertension and smoking and not causally-related to his respiratory condition or causally related to his employment at [employer]." Emp. Ex. 5 at 12-13. Thus, Dr. Bradbury's opinion establishes that decedent's heart disease was not directly related to his employment or accelerated by his pulmonary disease. However, in weighing the evidence as a whole, the administrative law judge also stated, "Dr. Bradbury's opinion does not address the issue central to the instant claim: whether the Decedent's pulmonary condition was a causative factor in his death." Decision and Order at 10. Moreover, the administrative law judge found that while Dr. Bradbury offered a well-reasoned opinion regarding the role of decedent's cardiac condition in his death, the doctor did not provide a specific opinion regarding whether decedent's pulmonary disease contributed to or hastened his death. *Id*. These findings are supported by the record.

We cannot affirm the administrative law judge's conclusion that Dr. Bradbury's opinion is sufficient to establish rebuttal of the Section 20(a) presumption that decedent's respiratory condition contributed to his death. Dr. Bradbury clearly opined that decedent's progressive coronary disease was not caused or accelerated by his respiratory condition and that decedent's coronary disease alone was sufficient to cause his death. However, the administrative law judge found that Dr. Bradbury did not offer an opinion as to whether decedent's respiratory condition independently contributed to or hastened his death; rather, the doctor stated only that the two parallel diseases did not necessarily cause the other to accelerate and that the respiratory condition did not accelerate the heart disease. The Section 20(a) presumption is not rebutted where employer does not offer substantial evidence that the death was not contributed to or hastened by the decedent's work-related condition. *Bath Iron Works Corp.,* 109 F.2d at 53, 31 BRBS 19(CRT); *Burley v. Tidewater Temps,* 35 BRBS 185 (2002); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). As the administrative law judge properly found that Dr. Bradbury did not address the central issue of whether decedent's respiratory condition contributed to or hastened his death, this opinion is legally insufficient to rebut

the Section 20(a) presumption. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597 38 BRBS 60(CRT)(1st Cir. 2004); *Gooden,* 135 F.3d 1066, 32 BRBS 59(CRT). As there is no other evidence of record sufficient to rebut the Section 20(a) presumption, we reverse the administrative law judge's finding that the Section 20(a) presumption is rebutted. Therefore, we hold as a matter of law that decedent's death was due, at least in part, to his work-related respiratory condition. *See Preston,* 380 F.3d 597, 38 BRBS 60(CRT); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). Consequently, the case is remanded to the administrative law judge for resolution of any outstanding issues.

Accordingly, the Decision and Order of the administrative law judge denying death benefits is reversed, and the case is remanded for consideration of any outstanding issues.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge