BRB No. 11-0148

SHERI LECKRONE (Widow of ROBERT E. LECKRONE) Claimant-Respondent v. SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/30/2011 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Jerry R. McKenney and Karen A. Conticello (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-LDA-00441, 00442) of Administrative Law Judge Anne Beytin Torkington 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). 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).

Decedent was hired by employer in March 2004 to work in Afghanistan as a plumber. He subsequently worked there for employer as a heavy truck driver. Decedent sought treatment from a military doctor for chest pain on January 15, 2007. CX 1 at 4. A chest x-ray suggested that decedent had chronic bronchitis. *Id.* at 6. A coronary angiogram showed normal coronary arteries but left ventricular dysfunction with heart failure; Dr. Flayih diagnosed "dilated cardiomyopathy ? post viral" following a chest infection for "the last one month." *Id*. at 7-9. An echocardiograph was "suggestive of congestive cardiomyopathy." *Id*. at 9. Decedent was sent home to the United States in late January 2007 per the recommendation of Dr. Flayih that he rest and that a subsequent review be conducted of decedent's fitness to work. *Id*. Decedent was initially treated in the United States by Dr. Himelman. Dr. Himelman noted that, by history, decedent had had shortness of breath in Afghanistan and a possible viral illness. He diagnosed "probable post-viral myocarditis and cardiomyopathy." *Id*. at 12. He opined on April 26, 2007, that decedent could return to work, but should not leave the country due to his medical problems. *Id*. at 14.

Decedent resumed working in the United Sates at Whitewater Maintenance in October or November 2007 servicing windmills. CX 1 at 27; EX 15 at 30. Decedent contracted a cough and cold in December 2007, which caused a decrease in his heart function. CX 1 at 27; EX 15 at 27. He continued working for Whitewater until February 20, 2008. CX 1 at 27. Decedent began treating with Dr. Bellaci in May 2008, who diagnosed chronic congestive heart failure with cardiomyopathy that was probably due to viral myocarditis. *Id*. at 26. Decedent died on December 19, 2008. The death certificate listed as causes of death: cardiopulmonary arrest, chronic systolic congestive heart failure, and dilated cardiomyopathy; stage III renal failure was identified as a contributing factor. CX 4.

Decedent had filed a claim for disability benefits on March 7, 2007, before he began working for Whitewater, in which he alleged "possible viral illness or infection . . .

affected my heart."[1] EX 1 at 1. Claimant filed a claim for death benefits on January 19, 2009. Pursuant to these claims, claimant sought compensation for temporary total disability, 33 U.S.C. §908(b), from January 16 to April 27, 2007, and from March 16 to December 19, 2008, and for temporary partial disability, 33 U.S.C. §908(e), from April 28, 2007 to March 15, 2008, as well as for death benefits. 33 U.S.C. §909. Employer requested Section 8(f) relief from continuing liability for death benefits. 33 U.S.C. §908(f).

In her decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking decedent's heart condition to his employment with employer and that employer did not establish rebuttal thereof. Alternatively, the administrative law judge found, based on the record as a whole, that decedent's heart condition was related to his employment in Afghanistan. The administrative law judge further rejected employer's contention that decedent's second episode of heart decompensation in December 2007, which arose while he was employed by Whitewater in the United States, was an intervening cause of decedent's subsequent disability and death. The administrative law judge thus awarded claimant temporary total and partial disability compensation for the claimed periods and death benefits. 33 U.S.C. §§908(d)(3), 909. The administrative law judge also determined that employer is entitled to Section 8(f) relief after it pays death benefits for 104 weeks.

On appeal, employer challenges the administrative law judge's finding that decedent's heart condition was related to his employment in Afghanistan and her finding that decedent's subsequent episode of decompensation was not an intervening cause of decedent's disability and death. Claimant responds, urging affirmance of the award of disability and death benefits.

Employer first challenges the administrative law judge's finding that claimant is entitled to invocation of the Section 20(a) presumption because the record contains no evidence that decedent developed a viral infection from an unknown, but work-related, source while employed in Afghanistan, which subsequently progressed to viral myocarditis and dilated cardiomyopathy. Employer avers that claimant, therefore, did not show that working conditions in Afghanistan could have caused, aggravated or accelerated decedent's viral myocarditis, cardiomyopathy, heart failure and death.

[1]Decedent filed an amended claim on November 26, 2007, alleging exposure to "endemic virus" as well as to "mortar attacks, and other war zone exposures, including handling wounded and dead soldiers." EX 1 at 2.

Section 8 of the Act provides compensation for various categories of work-related disability. 33 U.S.C. §908. Section 9 of the Act provides for death benefits to certain survivors "if the injury causes death." 33 U.S.C. §909. In determining whether an injury and/or death is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a *prima facie* case, *i.e.*, the claimant demonstrates that the decedent suffered a harm and that an accident occurred, or conditions existed, at work which could have caused that harm. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). In order to establish her *prima facie* case, and thus entitlement to invocation of the Section 20(a) presumption, claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused, contributed to or accelerated the decedent's disability and death; rather, claimant must show only the existence of working conditions which could have caused or contributed to decedent's disability and death. *See, e.g., Konno v. Young Brothers, Ltd*, 28 BRBS 54 (1994); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has stated that, in order to invoke the presumption, "a claimant must offer 'some evidence' of [an injury and working conditions]." *Albina Engine & Machine v. Director, OWCP [McAllister]*, 627 F.3d 1293, 1298, 44 BRBS 89, 91(CRT) (9th Cir. 2010).

The administrative law judge found the opinion of claimant's treating physician, Dr. Bellaci, establishes that decedent's working conditions could have caused or aggravated his heart condition. Specifically, in his March 16, 2009 report, Dr. Bellaci stated: "[F]rom available information, I consider that this patient's cardiomyopathy was more likely than not the result of a viral myocarditis which the patient contracted in December 2006 when he was working as a driver for [employer] in Afghanistan…" CX 1 at 51. The administrative law judge therefore found this evidence sufficient to invoke the Section 20(a) presumption. Decision and Order at 13.

We reject employer's contention of error. Employer has not established error in the administrative law judge's reliance on Dr. Bellaci's opinion to invoke the Section 20(a) presumption, as the record contains sufficient evidence that decedent contracted a virus in Afghanistan.[2] Decedent began working for employer in Afghanistan in March

[2]Although the administrative law judge did not discuss this evidence in relation to invocation of the Section 20(a) presumption, she relied on some of it in rejecting Dr. Russell's opinion at rebuttal and in her analysis of the evidence of record as a whole. *See* Decision and Order at 13-14. We note that any viral infection decedent contracted in Afghanistan would be compensable pursuant to the "zone of special danger" doctrine.

2004. EX 4 at 9, 15. It is undisputed that decedent's heart condition first became symptomatic on January 15, 2007, in Afghanistan. A chest x-ray administered on January 17, 2007, suggested chronic bronchitis. CX 1 at 6. Dr. Flayih, who examined claimant on January 22, 2007, noted that decedent had an "attack of chest infection for the last month." *Id.* at 9. Dr. Palmer, decedent's family physician, noted that decedent had developed bronchitis and chest pain in Afghanistan, and he referred decedent to Dr. Himelman. *Id.* at 10. Dr. Himelman noted that claimant "possibly had a viral illness in Afghanistan," though tests for microplasma pneumonia, hepatitis B and C, and HIV were negative. CX 1 at 12. Dr. Russell was asked at his deposition whether decedent's working conditions in Afghanistan and the stress of being in a war zone could weaken decedent's immune system and render him more susceptible to contracting a virus. He stated, "[Y]es, it could." EX 15 at 50-51. Dr. Russell also stated that infections can be carried in dust, *id*. at 55, and further noted that decedent had a cough and cold prior to the onset of his congestive heart failure in Afghanistan. EX 15 at 30-31; *see also* CX 1 at 4, 27. The administrative law judge therefore rationally credited Dr. Bellaci's opinion that decedent "more likely than not" contracted viral myocarditis when he was working in Afghanistan, as her finding is supported by substantial evidence.[3] Accordingly, we affirm the administrative law judge's invocation of the Section 20(a) presumption to link decedent's heart condition to his employment in Afghanistan. *See McAllister*, 627 F.3d at 1298, 44 BRBS at 91(CRT); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651, 44 BRBS 47, 50(CRT) (9th Cir. 2010); *see also Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

Employer next challenges the administrative law judge's finding that Dr. Russell's opinion does not rebut the Section 20(a) presumption. Employer maintains that Dr. Russell's opinion that the cause of decedent's heart failure and resultant death cannot be determined and that it is conjecture to state that decedent's dilated cardiomyopathy is

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See O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951); *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir. 2004), *cert. denied*, 543 U.S. 809 (2004); *Ford Aerospace & Communications Corp. v. Boling*, 684 F.2d 640 (9th Cir. 1982); *cf. R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009) (personal use of cosmetic treatment not within the zone of special danger).

[3]Employer is correct that Dr. Bellaci, as well as Drs. Flayih and Himelman, were unaware of decedent's electrocardiogram (ECG) test results recorded in March and June 2004, and November 2005. However, the ECG testing and Dr. Russell's testimony and report do not establish that decedent had viral myocarditis or any subclinical heart-related disability prior to his deployment to Afghanistan. *See* EX 21; EX 15 at 36-39. In addition, pursuant to the aggravation rule, if a pre-existing condition is aggravated or accelerated by a work injury, the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966)

attributable to viral myocarditis contracted in Afghanistan is sufficient to rebut the presumption. EX 15 at 16, 24-28, 32-34, 53-54. Once claimant establishes a *prima facie* case, Section 20(a) applies to relate the disability and death to the employment, and employer can rebut this presumption by producing substantial evidence that the decedent's disability and death were not related to the employment. *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT); *see also Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

We need not address employer's contention. Assuming, *arguendo*, the administrative law judge erred in finding Dr. Russell's opinion insufficient to rebut the Section 20(a) presumption, any error is harmless as the administrative law judge's finding, based on the record as a whole, that decedent's heart condition was related to his employment is supported by substantial evidence. The Ninth Circuit recently reiterated that the "harmless error" analysis is applicable to claims arising under the Act and to rebuttal of the Section 20(a) presumption in particular. *Ogawa*, 608 F.3d at 648-649, 44 BRBS at 48(CRT).

In this case, the administrative law judge stated, assuming, *arguendo*, that rebuttal was established, she credited the opinions of Drs. Bellaci, Himelman and Flayih, discussed above, to conclude that claimant established that decedent's heart condition was caused by a virus contracted in Afghanistan. Decision and Order at 14. The administrative law judge gave less weight to the opinion of Dr. Russell that decedent's condition was idiopathic, that is, from an unknown cause. Dr. Russell stated that the viral causes of cardiomyopathy can be identified, but that no testing for viruses was undertaken in decedent's case. Dr. Russell concluded that it would be "pure conjecture" to suggest that decedent's condition was caused or made symptomatic by his contracting a virus in Afghanistan. The administrative law judge found that Dr. Russell's opinion does not withstand scrutiny because he admitted that decedent did not have ischemia or hypertension, which are the two leading causes of cardiomyopathy. Dr. Russell also admitted that decedent's heart disorder could have been caused by a virus contracted in Afghanistan and that his resistance to a virus could have been lowered due to the working conditions in Afghanistan. The administrative law judge therefore declined to credit Dr. Russell's opinion.[4] The administrative law judge's findings are rational, supported by substantial evidence and in accordance with law. Therefore, we affirm the administrative

[4]Contrary to employer's contention, the administrative law judge acknowledged that Dr. Russell opined that decedent had a pre-existing cardiac disorder. Decision and Order at 13. The administrative law judge rationally found that this testimony "is not helpful to the issue of causality" because Dr. Russell did not specifically address whether the condition was aggravated by decedent's employment and he, in fact noted that the condition became symptomatic in Afghanistan. *See* n.3, *supra*.

law judge's determination that decedent's heart condition, which caused his disability and death, was related to his employment in Afghanistan. *Id.;* 648 F.3d at 652, 44 BRBS at 51(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Employer next challenges the administrative law judge's finding that decedent's second episode of heart decompensation, which occurred when he was working for Whitewater, was not an intervening cause of decedent's disability and death that relieved employer of further liability under the Act. Employer asserts that the administrative law judge misapplied the law and that her finding is not supported by substantial evidence.

We reject employer's contention. If the subsequent progression of a work-related condition is not a natural or unavoidable result of the work injury, but is the result of a supervening cause, employer is relieved of liability for disability attributable to the supervening cause. Employer remains liable for any disability attributable to the work injury and for the natural progression of that injury. *See Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *Plappert v. Marine Corps Exch.*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997). Contrary to employer's contention, the administrative law judge recited the correct standard in her decision.[5] *See* Decision and Order at 15; *Cyr v. Crescent Wharf & Warehouse*, 211 F.2d 454 (9th Cir. 1954); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem.*, 8 F.3d 34 (9th Cir. 1993).

Moreover, the administrative law judge rationally found, based on the opinions of Drs. Bellaci and Russell, that employer did not establish the occurrence of any event constituting an intervening cause of decedent's disability after mid-December 2007 and his subsequent death. Specifically, Dr. Bellaci stated that decedent's viral-like illness in December 2007 was not a recurrence of viral myocarditis but was merely an aggravating condition that triggered decompensated congestive heart failure in a person with pre-existing cardiomyopathy. CX 1 at 51. Similarly, when questioned at deposition, "how do you know that it wasn't that particular [respiratory tract] infection (second episode),

[5]We reject employer's contention that the administrative law judge should have applied the aggravation/responsible employer rule. In this case, employer does not argue, nor is there any evidence indicating, that decedent engaged in maritime employment on a covered situs while working for Whitewater. *See* 33 U.S.C. §§902(3), (4), 903(a); CX 1 at 27; EX 1 at 1. The aggravation/last responsible employer rule extends only to determine liability among maritime employers subject to the coverage provisions of the Act and is therefore inapplicable in this case. *See J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009)*; Plappert v. Marine Corps Exch.*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109, at 110-11 n.2 (1997).

then, that caused his heart failure," Dr. Russell responded, "Well, because you . . . already had established heart failure." Decision and Order at 14, *quoting* EX 15 at 29. The administrative law judge thus concluded that employer did not "sever the causal nexus" between decedent's disability and death and his work in Afghanistan with employer by establishing that decedent's disability and death from cardiomyopathy were due to a supervening event.

It is well-established that the administrative law judge is entitled to weigh the evidence and to draw her own inferences and conclusions from it, *see 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*, 373 U.S. 954 (1963), and that the Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *O'Keeffe*, 380 U.S. 359; *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). In this case, the administrative law judge's finding that employer did not establish that decedent's disability and death were due to a supervening cause is supported by substantial evidence. The credited evidence establishes that there "was simply an onset of complications from the first" injury. *Admiralty Coatings Corp.*, 228 F.3d at 518, 34 BRBS at 95(CRT); *see also Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992); *Vandenberg v. Leicht Material Handling Co.*, 11 BRBS 164 (1979). Therefore, as the administrative law judge's finding that employer is liable for all disability and death benefits is rational, supported by substantial evidence and in accordance with law, the awards are affirmed.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge