BRB No. 97-1052

SHIRLEY H. MULHERIN (Widow of WILLIAM MULHERIN)	)	
Claimant-Petitioner	)	DATE ISSUED:
v.	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits and Decision on Motion for Reconsideration of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin & Dulin, Ltd.), Gulfport , Mississippi, for claimant.

Ronald T. Russell (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits and Decision on Motion for Reconsideration (96-LHC-329) of Administrative Law Judge David W. DiNardi 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 which 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).

Claimant is the widow of William A. Mulherin (decedent). The decedent worked at employer's shipyard for 24 years in various positions, the last of which was as a maintenance electrician. On December 31, 1993, decedent was in his office when a co-worker came and complained that someone had put blue machinist dye all over his, the co-worker's, white

truck. Later in the evening, decedent was visited by a security guard who told him that he, the security guard, was responsible for the practical joke. Following this incident, decedent reported the security guard to his employer. The guard was placed on temporary suspension while an investigation took place. After the investigation the security guard was allowed to return to work.

Thereafter, decedent began to believe that he was being harassed and threatened on the job by the guard. He believed that someone was spying upon him, and stalking him both at work and at home. On March 17, 1994, decedent stopped working, and sought a pass to go to his doctor. He saw his family doctor that day and related the "trouble" at work, which he had also related a week before. His doctor referred him to a psychiatrist. Cl. Ex. 5 at 17. Days before leaving work, decedent settled a $2,000,000 claim against Ford Motor Company arising out of a 1990 car accident for $20,000, which netted around $9,000. On March 20, 1994, decedent attempted suicide, but was stopped and hospitalized. He tried suicide twice more in the hospital, but was released on July 6, 1994, as the physicians felt that he was free of delusions of persecution and that the depression had lifted. The administrative law judge also found that during the year ending December 1994, decedent lost $100,000 in his stock portfolio, with more losses taken in January 1995.[1] On January 31, 1995, decedent killed himself with a shotgun. Claimant is seeking death benefits, as well as total disability benefits for the period after decedent left work. Decedent had filed a claim for disability benefits in May 1994.

In his Decision and Order, the administrative law judge found that claimant did not establish invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), inasmuch as he found the evidence does not establish working conditions which could have caused decedent's depression and subsequent suicide. The administrative law judge also found, assuming, *arguendo,* that claimant established invocation, that the evidence established rebuttal of the presumption by virtue of Dr. Maggio's opinion, and thus concluded, that there was no work-related connection between decedent's mental

[1]The administrative law judge found decedent had losses of $100,000 because his portfolio was worth $100,000 less at the time of death than it was worth one year earlier. However, decedent sold $46,000 in stock, which does not necessarily represent a loss, and transferred $18,000 from his account to his wife's account. Emp. Exs. 12, 13.

instability and his resultant suicide. In addition, the administrative law judge found that employer established that the claim would be barred by Section 3(c) of the Act, 33 U.S.C. §903(c), inasmuch as decedent intentionally committed suicide. Thus, benefits were denied. The administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant contends that the administrative law judge erred in finding the lack of a causal relationship between the decedent's work and his disability and death. Moreover, claimant contends that the administrative law judge erred in finding that decedent had the willful intent to commit suicide inasmuch as she contends decedent died due to an "irresistible impulse." Employer responds, urging affirmance of the administrative law judge's decision.

Initially, the administrative law judge found that claimant had not established a *prima facie* case for invocation of the Section 20(a) presumption. Claimant has the burden of proving the existence of an injury or harm and that working conditions existed which could have caused the harm, in order to establish a *prima facie* case. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6 (CRT)(5th Cir. 1986). It is claimant's burden to establish each element of her *prima facie* case by affirmative proof. *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). While it is undisputed that decedent suffered from depression and ultimately committed suicide, the administrative law judge found that claimant did not establish working conditions that could have caused this harm. The administrative law judge found that claimant's testimony regarding decedent's mental condition was not credible and based his finding regarding the lack of working conditions on the testimony of decedent's supervisor that he never witnessed any actual harassment at work, and decedent's deposition testimony in the Ford case that he was happy at work.

The administrative law judge rejected the opinions of Drs. Richardson, Vujnovich and Maher, Cl. Exs. 7-9, that work caused decedent's mental condition to deteriorate, because he found them to be "based on incomplete, misleading, inaccurate and/or false history reports." Decision and Order at 14-15. The administrative law judge found it noteworthy that these treating physicians were not told about decedent's settling the Ford case for a much reduced amount, the claimant's and decedent's concern about the physical effect of the injuries from the car accident on decedent's wage-earning capacity, the substantial stock losses, or decedent's family history of mental illness. The administrative law judge as fact-finder is entitled to determine the weight to be given to the evidence of record. *See generally Presley v. Tinsley Maintenance Service,* 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976). As the administrative law judge considered the decedent's history and the treating physicians' reports, and claimant has raised no reversible error on

appeal, we hold that the administrative law judge rationally rejected the reports.

However, in order to invoke the Section 20(a) presumption, claimant is not required to introduce affirmative medical evidence establishing that the working conditions in fact caused the alleged harm. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Rather, claimant's burden is to establish the existence of working conditions which could have caused or aggravated the harm, *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990), in order to satisfy the "minimal requirements of establishing a prima facie case." *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990). The record includes the supervisor's testimony that decedent was afraid the security guard might do something to him after decedent turned him in, that the fear affected decedent drastically and that decedent was very nervous and needed some support after that. Tr. at 98, 103. Thus, this testimony, from a witness the administrative law judge found credible, contradicts the administrative law judge's finding that working conditions did not exist which could have caused the harm,[2] and supports invocation of the Section 20(a) presumption as a matter of law.[3] Thus, it is presumed, in the absence of evidence to the contrary, that decedent's injury and death were caused, aggravated or hastened by his employment. *See generally Wheatley v. Adler,* 407 F.2d 307 (D.C. Cir. 1968).

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[2]Moreover, as will be discussed, Dr. Maggio's credited opinion supports a finding that decedent's working conditions aggravated decedent's condition.

[3]The administrative law judge found that decedent's complaints of harassment at work were not credible given his testimony in deposition for the Ford case given on February 14, 1994. Decedent testified at that deposition that his inability to return to work after the car accident bothered him because "I'm a workaholic...I enjoy working." Emp. Ex. 10 at 92. However, this testimony appears to be related to decedent's ability to return to work following the car accident in 1990, and he did not elaborate on his contemporaneous employment.

The administrative law judge next considered rebuttal of Section 20(a), assuming, *arguendo*, the presumption is invoked. In the instant case, the administrative law judge did not consider the evidence as it applies to the disability and death benefits claims individually; rather, the administrative law judge found that employer introduced evidence severing the connection between decedent's work and his mental instability and his resultant suicide. However, as the case involves both a claim for disability benefits for the period prior to decedent's suicide and a claim for death benefits, we will address the application of the rebuttal evidence to each claim separately.

The administrative law judge relied on the opinion of Dr. Maggio to conclude that rebuttal is established. In discussing the cause of decedent's depression with psychotic features, Dr. Maggio testified at a deposition dated October 4, 1996, that the events described on December 31, 1993, would not cause decedent to have major depression with psychotic features, and that they did not cause his underlying personality disorder. Emp. Ex. 15 at 36. However, on cross-examination, Dr. Maggio testified that "the perception that [decedent] has of [the security guard] or someone being after him could exacerbate and heighten his paranoia," and that "at that time..is where these [conditions] become changed from personality traits to personality disorder." Emp. Ex. 15 at 45. In addition, Dr. Maggio stated that he did not disagree with Dr. Maher's opinions that decedent's perception that his reporting the security guard resulted in possible retaliatory measures evolved into full-blown psychotic depression and that the events at work were a major stressor or precipitant which contributed to the development of the difficulty. Emp. Ex. 15 at 49-50.

Under the "aggravation rule," where an employment-related injury aggravates, accelerates, or combines with an underlying condition, employer is liable for the entire resultant condition. *Strachan Shipping Co. v. Nash,* 782 F.2d 313, 18 BRBS 45 (CRT) (5th Cir. 1986); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). Thus, we hold that Dr. Maggio's opinion that the work incident aggravated claimant's pre-existing personality disorder is insufficient to establish rebuttal of the presumption that decedent's depression was caused at least in part by his employment, *see Bridier v. Alabama Dry Dock & Shipbuilding Co.,* 29 BRBS 84 (1995), and as there is no other rebuttal evidence of record, that causation is established as a matter of law in the claim for temporary total disability benefits. *See Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). The denial of disability benefits therefore is vacated, and the case is remanded to the administrative law judge for consideration of any remaining issues on the disability claim.

However, Dr. Maggio's opinion is sufficient to establish rebuttal of the Section 20(a) presumption in the claim for death benefits, as Dr. Maggio unequivocally testified that the events at work did not trigger decedent's suicide. Dr. Maggio noted the lack of a temporal nexus between the events at work and the suicide, as decedent left work in March and committed suicide in January. Tr. at 38-39. He noted decedent was not suicidal for several months after his release from the hospital, and he concluded that "What happened to him in my experience is not enough to make someone want to kill himself. There has to be something else," and the "suicide was not caused by work-related factors." Emp. Ex. 15 at 51, 53. Decedent's treating physicians opined after the previous suicide attempts and hospitalization that he was no longer suicidal, and Dr. Maggio concurred in this opinion after meeting with decedent and his wife and reviewing the medical records. Dr. Dudley at East Mississippi State Hospital noted at the time of decedent's discharge on July 6, 1994 that decedent was free of the delusions of persecution and that the depression had lifted. Cl. Ex. 5. Moreover, his intake assessment at Gulf Coast Mental Health Center dated June 1994 noted that decedent was depressed and paranoid, but devoid of suicidal ideation. Cl. Ex. 6 at 24. Therefore, as Dr. Maggio's opinion rules out a connection between the suicide and the work environment, we affirm the administrative law judge's finding that this evidence is sufficient to rebut the Section 20(a) presumption that decedent's death was due to his work-related incident. *Duhagon v. Metropolitan Stevedore Co.,* 31 BRBS 98 (1997).

As employer succeeded in establishing rebuttal, the presumption no longer controls and the issue of causation must be resolved based on the record as a whole with claimant bearing the burden of proof. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997)*; Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). As discussed earlier, the administrative law judge rationally discredited decedent's treating physicians' opinions because they were based on an incomplete picture of decedent's history. Therefore, as there is no evidence of record remaining that can support claimant's burden of establishing that decedent's death was work-related, we affirm the administrative law judge's finding that decedent's suicide was not causally related to his employment, and thus affirm the denial of death benefits.[4]

[4]As we affirm the denial of death benefits, we need not address claimant's contentions regarding the administrative law judge's findings under Section 3(c) of the Act, 33 U.S.C. §903(c). We note, however, that the administrative law judge erroneously focused on whether decedent's suicide was an intervening cause of the disability, and that his discussion is tainted by his erroneous finding that decedent's disability was not work-related. He also did not fully consider whether decedent's

Accordingly, the denial of disability benefits is vacated, and the case is remanded for further consideration of any remaining issues on the disability claim. The administrative law judge's denial of death benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

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death was due to an "irresistable impulse" as opposed to a "willful intent" to commit suicide. *See* 33 U.S.C. §920(d); *Konno v. Young Brothers, Ltd.,* 28 BRBS 57 (1994).