

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40460
Summary Calendar

VELMA MUNDY (Claiming as
Widow of DANNY L. MUNDY, Deceased),

Petitioner-Appellant,

v.

PORT STEVEDORING COMPANY, INC. and
GRAY & COMPANY, INC., and

Respondent-Appellee,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition for Review of an Order of the Benefits Review Board
(85-LCH-1546)

(July 10, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM*:

Petitioner-Appellant Velma Mundy (Mrs. Mundy) appeals an order of the Benefits Review Board (BRB) vacating its prior holding,

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

which reversed the initial order of the administrative law judge (ALJ) denying Mrs. Mundy death benefits under the Longshore & Harbor Workers' Compensation Act (the LHWCA or the Act),¹ and reinstating and affirming the ALJ's initial order. As we conclude that the decision of the BRB is supported by substantial evidence and in accordance with the law, we affirm the BRB's order.

I

FACTS AND PROCEEDINGS

In January 1984, while employed as a longshoreman for Port Stevedoring Company (PSC), Mrs. Mundy's husband, Danny (Mundy), fell off a pipe, sustaining injuries to his ankle, leg, arm, shoulder, and back. Mundy filed a claim for compensation under the LHWCA, and PSC paid him compensation for temporary total disability from the time of his injury until the time of his death on November 7, 1984. Following the January accident, Dr. Bruce Craig, a family practitioner, and Dr. L. Donovan Perdue, an orthopedic surgeon, treated Mundy for his injuries, which were diagnosed as a bulging disc and radiculopathy. As a part of Mundy's treatment, Dr. Craig prescribed anti-inflammatories, which were to be taken on a regular basis, and the narcotic, Percodan, which was to be taken as needed for acute pain. Mundy's treatment under Dr. Craig's care continued from the time of his accident until his death.

Relevant to Mundy's death and Mrs. Mundy's claim for benefits--and the ALJ's denial of those benefits--is the fact that Mundy was a smoker. At the formal hearing on her benefits claim, Mrs. Mundy

¹33 U.S.C. § 901 *et seq.*

testified that, for as long as she had known Mundy (about sixteen years) he had smoked approximately one and one-half packages of cigarettes a day. Dr. Craig testified at his deposition that when he first examined Mundy he observed that Mundy was a heavy smoker. Dr. Craig noted that when Mundy first visited the doctor's office, he coughed twenty to thirty times a minute due to lung disease and temporarily left the medical examination a couple of times to smoke. Dr. Craig urged Mundy on several occasions to stop smoking and informed him that he could not even be around others who smoked without further jeopardizing his health. Despite Dr. Craig's advice, however, Mundy continued to smoke until the time of his death.

On November 7, 1984, while engaged in sexual activities with his girlfriend, Mundy had chest pains, passed out, and died shortly thereafter. The cause of death listed on Mundy's death certificate and autopsy report was probable cardiac arrhythmia.

Mrs. Mundy, who was separated from Mundy at the time of his death, filed a claim under the LHWCA asserting her entitlement to death benefits as Mundy's widow.² PSC challenged Mrs. Mundy's claim, arguing that she was not entitled to death benefits under the LHWCA because Mundy's work-related injury did not cause his death. A formal hearing was held before the ALJ, who denied benefits to Mrs. Mundy on the ground that Mundy's work-related

²Mrs. Mundy had been married to Mundy for almost fourteen years when they separated in February 1983. They were in the process of obtaining their final judgment of divorce at the time of Mundy's death.

injury did not cause or hasten his death by cardiac arrhythmia. The ALJ's order denying benefits to Mrs. Mundy was appealed to the BRB. Mrs. Mundy argued that, as PSC had not rebutted the LHWCA's presumption of causation, the ALJ erred in denying her benefits.

The BRB reversed the ALJ's decision and remanded the case to that judge to resolve the remaining issues necessary to award benefits to Mrs. Mundy.³ On remand the ALJ held that, pursuant to the BRB's ruling, Mrs. Mundy was entitled to death benefits under Section 9(b) of the LHWCA. PSC's motion to the ALJ to reconsider his decision awarding benefits was denied. PSC filed a Petition for Review with the BRB. After reviewing its prior decision and the ALJ's decision on remand, the BRB determined that its original decision was erroneous. Accordingly, the BRB vacated its initial decision, reinstated and affirmed the ALJ's original order denying death benefits under the LHWCA to Mrs. Mundy, who now appeals that decision of the BRB.

II

ANALYSIS

We review the decisions of the BRB for errors of law, applying the same substantial evidence standard that governs the BRB's review of the ALJ's factual findings.⁴ We must affirm the BRB's decision if it correctly concluded that the ALJ's factual findings

³PSC filed a Petition for Review with this court. That petition was denied.

⁴Mendoza v. Marine Personnel Co., Inc., 46 F.3d 498, 500 (5th Cir. 1995) (citing P & M Crane Co. v. Hayes, 930 F.2d 424, 428 (5th Cir. 1991); Boland Marine & Mfg. Co. v. Rihner, 41 F.3d 997, 1002 (5th Cir. 1995) (citations omitted).

are supported by substantial evidence and are in accordance with the law.⁵

The LHWCA provides in pertinent part that, if an injury causes death, a widow or other beneficiaries of a deceased longshoreman may receive death benefits as permitted by the Act.⁶ Pursuant to Section 920 of the Act, once a claimant establishes a prima facie compensation claim,⁷ then in any proceeding seeking to enforce that claim, it is presumed in the absence of substantial evidence to the contrary that the claim comes within the provisions of the Act.⁸ Thus, under Section 920(a), when a claimant presents a prima facie compensation claim, the Act in essence creates a rebuttable presumption that the employee's injury is causally connected with his employment.⁹ To rebut this presumption the employer must present substantial evidence that there is no relationship between the employee's injury and his employment.¹⁰ If the presumption is

⁵Mendoza, 46 F.3d at 500.

⁶See 33 U.S.C. § 909 (1994) (stating that, if injury causes death, compensation in form of death benefits are payable according to format prescribed by Act).

⁷See, e.g., Noble Drilling Co. v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (claimant has dual burden of establishing that he has suffered harm and that alleged accident in fact occurred or alleged working conditions existed) (citing Kelaita v. Triple A Machine Shop, 13 B.R.B.S. 326 (1977)), reh. denied, 798 F.2d 1412 (1986).

⁸33 U.S.C. § 920(a) (1994).

⁹Noble Drilling Co., 795 F.2d at 481.

¹⁰Id. (citing Matter of District of Columbia Workmen's Compensation Act, 554 F.2d 1075 (D.C. Cir. 1976), cert. denied sub nom J. Frank Kelly, Inc. v Swinton, 429 U.S. 820 (1976)). "Substantial evidence" refers to the kind of evidence that a

thus rebutted it no longer affects the outcome of the case, so an administrative law judge then must weigh all of the evidence in the record to resolve the facts at issue.¹¹ In resolving the facts at issue, the judge has the broad prerogatives of a factfinder to accept or reject the particular medical opinions given in the case, and may accept or reject an expert's testimony in whole or in part.¹²

Mrs. Mundy grounded her claim for LHWCA death benefits on the contention that Mundy's work-related injury caused his death. Mrs. Mundy asserted the following: Mundy sustained a work-related injury that caused him considerable pain and rendered him unable to work; as Mundy was unable work, he had idle time on his hands whereby he could smoke more than his usual pack-and-a-half of cigarettes each day; as a result of Mundy's doctor's prescribing pain-killing narcotics for Mundy, his mind became "numb" to the extent that he was no longer concerned about how his smoking was affecting his pre-existing lung and heart problems; consequently, as Mundy's work-related injury caused him to smoke more and care less, this same work-related injury caused his fatal heart attack.

In addressing Mrs. Mundy's claim, the ALJ identified the contested issues as whether the presumption under Section 920(a) of

reasonable mind might accept as adequate to support a conclusion.
Id.

¹¹See Del Vecchio v. Bowers, 296 U.S. 280, 286 (1935); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 90 (5th Cir. 1990).

¹²Avondale Shipyards, Inc., 914 F.2d at 91 (citing Eller and Co. v. Golden, 620 F.2d 71, 74 (5th Cir. 1980); Noble Drilling Co., 795 F.2d at 481.

the Act was applicable to the claim and whether Mundy's injury aggravated his pre-existing condition so as to hasten his death. The ALJ first determined that Mrs. Mundy had established a prima facie claim sufficient to trigger the presumption that her claim was within the scope of the LHWCA. The judge based this determination on Dr. Craig's testimony that showed a tenuous connection between Mundy's original injury and his death: specifically, Dr. Craig's testimony that there may have been an indirect connection between Mundy's back injury and his death. Dr. Craig testified that the fact that Mundy was not working and had more time on his hands may have enabled him to smoke more, perhaps killing him sooner than would be expected. In light of this testimony, the ALJ concluded that Mrs. Mundy had established her prima facie case of a compensable claim.

After determining that Mrs. Mundy's claim fell within the scope of the Act, thereby establishing the presumption of causation between Mundy's employment (his work-related injury) and his injury (death), the ALJ concluded that the record did not support Mrs. Mundy's contention that Mundy's on-the-job injury produced a condition that caused his death. Accordingly, the ALJ held that the evidence in the record not only rebutted the presumption of causation, but supported a conclusion that Mundy's work-related back injury did not cause or hasten his death by cardiac arrhythmia. The judge noted specifically Dr. Craig's testimony that, at the time he first examined Mundy, he observed that Mundy was suffering from lung disease due to his smoking--an observation

that the ALJ noted was corroborated by Mundy's autopsy report--and that Dr. Craig had no knowledge whether Mundy decreased or increased his smoking after his injury. The judge also noted Dr. Craig's testimony that, even if Mundy had increased his smoking after his injury, it would be impossible to determine whether such increase caused his death.

As for Mrs. Mundy's contention that Mundy's stress (distress) over his injury contributed to his heart attack, the ALJ observed that the record reveals that, (1) although Mundy was initially depressed about his injuries, his emotional state improved, and (2) there was no medical testimony that Mundy's emotional stress led to his heart attack. In a related vein, the ALJ observed that, despite Dr. Craig's testimony that Percodan could produce apathy, there was no record evidence other than Mrs. Mundy's pure conjecture that Mundy was worried about his smoking habit before his injury or that he stopped worrying about it once he began taking Percodan. The ALJ also took note of Dr. Craig's opinions that none of the medications prescribed for Mundy listed cardiac arrhythmia as a possible side effect and that an increase in "idle time" could not have caused Mundy's fatal arrhythmia.

In light of Dr. Craig's medical opinions, plus the evidence indicating that Mundy had an extensive smoking habit for nearly half of his life, the ALJ determined that the preponderance of the evidence established that neither Mundy's back condition nor the medical treatment therefor caused or hastened his fatal arrhythmia. The judge concluded, therefore, that the presumption of causation

was rebutted by substantial evidence that Mundy's death was not casually connected to his work-related injury. Finding no causal nexus between Mundy's injury and his death, the ALJ ordered that Mrs. Mundy's claim for death benefits under the LHWCA be denied.

In the BRB's order appealed from herein, i.e., the one reinstating and affirming the ALJ's findings and conclusions, the BRB first determined that, as its initial decision reversing the ALJ's original decision was clearly erroneous, it had the power to reconsider its first decision addressing Mrs. Mundy's claim.¹³ Accordingly, the BRB then vacated its initial decision, i.e., the one in which it had (1) found--erroneously--that the record contained no medical evidence ruling out the possibility of a causal nexus between Mundy's injury and his death, and (2) held that the ALJ had therefore erred in finding that the presumption of causation had been rebutted. Next, in reliance on Dr. Craig's opinion that Mundy's work-related injury did not cause his death and that Mundy's death was due to the heart and lung disease that existed prior to his work-related accident, the BRB held that a physician's unequivocal testimony that no relationship exists

¹³See, e.g., United States v. United States Smelting, Refining & Mining Co., et al., 339 U.S. 186 (1950) (law of the case doctrine is discretionary rule used to promote finality in judicial process); Messenger v. Anderson, 225 U.S. 436, 444 (1912). See also White v. Murtha, 377 F.2d 428, 432 (5th Cir. 1967) (appellate tribunal will adhere to initial decision unless change in underlying factual situation, intervening controlling authority renders original decision erroneous, or first decision was clearly erroneous and would result in manifest injustice); accord Young v. Herring, 938 F.2d 543, 547 (5th Cir. 1991) (same), cert. denied, 503 U.S. 940 (1992). Clearly, the BRB's decision to vacate that opinion fell within these exceptions to the law of the case doctrine.

between the employee's injury and the employee's employment is sufficient to rebut the presumption under Section 920(a).¹⁴ Finally, the BRB concluded, that here the ALJ's initial determination of no causation indeed was rational by virtue of the fact that the only evidence addressing causation was Dr. Craig's deposition testimony, in which Dr. Craig concluded that a causal relationship between Mundy's employment and his death did not exist.

Our review of the record supports that decision of the BRB, which affirmed and reinstated the ALJ's original decision that had denied Mrs. Mundy LHWCA benefits for Mundy's death. As the BRB correctly noted, the only evidence in the record addressing the causal nexus between Mundy's employment (his work-related injury) and his injury (his death) is Dr. Craig's deposition testimony. Throughout that testimony, Dr. Craig refers to Mundy's excessive smoking habit and lung disease, both of which pre-dated his fall. Despite Dr. Craig's conjectural testimony about the possibility that Mundy might have smoked more cigarettes due to his increased free-time, however, there is no record evidence that Mundy did in fact increase the number of cigarettes he smoked daily after his injury. Similarly, despite Dr. Craig's general testimony regarding the "mind-numbing" effects of Percodan, no evidence was offered to

¹⁴The BRB observed that, despite Dr. Craig's testimony that there was a possibility that Mundy smoked more as a result of his injury (the basis on which it rested its first opinion), Dr. Craig testified that Mundy was an excessive smoker before his injury, and that there was no evidence that Mundy did in fact smoke more as a result of his injury.

support Mrs. Mundy's conclusional theory that Mundy's use of Percodan caused him to worry less about his smoking, ergo his smoking increased, ergo his imminent heart failure and subsequent death occurred sooner than might otherwise have been expected. Dr. Craig testified at least twice in his deposition that, based on a reasonable medical probability, Mundy's pre-existing lung and heart disease was the cause of his death, not his work-related back injury. In the absence of any record evidence contradicting Dr. Craig's opinion as to the cause of Mundy's death--which is corroborated by the autopsy report--we are satisfied that the evidence in the record is substantial; that is, that a reasonable mind might accept as adequate the ALJ's conclusion that Mundy's work-related injury did not cause his fatal arrhythmia. Accordingly, we affirm the BRB's order vacating its initial decision, and affirming and reinstating the ALJ's initial decision, which denied LHWCA benefits to Mrs. Mundy for the death of her husband.

AFFIRMED.¹⁵

¹⁵As we affirm the decision of the BRB affirming the ALJ's denial of benefits, we do not reach PSC's alternative argument that Mrs. Mundy failed to prove her status as a "widow" for purposes of the LHWCA.