BRB No. 09-0128

B.L.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 08/31/2009
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

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

Mark P. McKenney (McKenney, Quigley, Izzo & Clarkin, L.L.P.), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (2005-LHC-2253) of Administrative Law Judge Daniel F. Sutton 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).

This case is before the Board for the second time. To recapitulate, claimant worked for employer as a shipfitter from 1961 until he retired on January 29, 1997. During his employment, claimant was exposed to asbestos, cadmium from welding fumes, and solvents. He was diagnosed with kidney cancer and had his right kidney removed in 2003. Claimant filed a claim for benefits, alleging that his cancer is related to his work exposures. The administrative law judge found that claimant established sufficient evidence to invoke the Section 20(a), 33 U.S.C. §920(a), presumption relating

his kidney cancer to his exposure to asbestos and cadmium but not to solvents. The administrative law judge also found that employer rebutted the presumption, and, on the record as a whole, the administrative law judge found that claimant's kidney cancer is not related to his work exposures to cadmium and asbestos. Decision and Order at 7.

Claimant appealed. The Board affirmed the administrative law judge's finding that claimant's cancer is not related to his exposure to solvents. *B.L. v. Electric Boat Corp.*, BRB No. 07-709 (May 14, 2008). With regard to employer's rebuttal evidence on the claim related to asbestos and cadmium exposure, the Board rejected claimant's contention that the administrative law judge erred in relying on the opinion of Dr. Harbison because he is not a medical doctor. Rather, the Board stated that rebuttal evidence need not come from a medical doctor and that Dr. Harbison's extensive credentials in toxicology support the administrative law judge's finding that his opinion is probative. However, because the administrative law judge summarily found that Dr. Harbison's opinion rebutted the presumption without addressing the totality of that opinion, the Board vacated the rebuttal finding and remanded the case for further consideration consistent with the recent decision in *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2^{d} Cir. 2008), which is controlling law, as this case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit. *B.L.*, slip op. at 6. For the sake of judicial efficiency, the Board held that if rebuttal is established on remand, there is substantial evidence to support the administrative law judge's findings on the record as a whole that claimant's kidney cancer is not work-related. *Id.* at 7-8.

On remand, the administrative law judge stated that Dr. Harbison's opinion satisfies the requirements of *Rainey* and is sufficient to establish rebuttal of the Section 20(a) presumption. Specifically, the administrative law judge found there is no causal connection between exposure to cadmium and kidney cancer, as Dr. Harbison explained that the medical evidence and the scientific literature do not support Dr. Brautbar's conclusion that there is a relationship between cadmium exposure and kidney cancer. Additionally, the administrative law judge found that Dr. Harbison's overall opinion is that kidney cancer is not related to asbestos exposure; therefore, the quantity of claimant's asbestos exposure was immaterial to his opinion. As he found Dr. Harbison's opinion rebutted the Section 20(a) presumption and the Board had previously affirmed the finding that causation was not established on the record as a whole, the administrative law judge denied the claim for benefits. Decision and Order on Remand at 3-5, 7. Claimant appeals, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding that employer produced substantial evidence rebutting the presumption that his exposure to workplace asbestos and cadmium caused his kidney cancer. He argues that the administrative law

judge previously discredited Dr. Harbison's methodology and knowledge of the amount of claimant's asbestos exposure and, thus, could not credit Dr. Harbison's opinion on remand.

The administrative law judge found that claimant established a *prima facie* case with regard to his exposures to asbestos and cadmium. Decision and Order at 30. Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the disabling injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). In order to establish rebuttal, the employer is not required to rule out any possible causal connection between the decedent's employment and his condition, but it must produce "substantial evidence" that the work injury is not due, even in part, to the work exposures, not that claimant failed to show that a relationship exists.[1] *Id.*

In *Rainey*, the decedent was exposed to asbestos during the course of his employment. He was diagnosed with lung cancer and COPD. Prior to the administrative law judge's decision on his claim for benefits, decedent died. The administrative law judge found that the decedent established a *prima facie* case relating his lung cancer to his exposure to asbestos. She also found that the employer rebutted the presumption by presenting the opinions of Drs. Teiger and Pulde who stated that lung cancer is not due to asbestos exposure but, rather, was caused by the decedent's many years of tobacco use. On the record as a whole, the administrative law judge found that the decedent did not meet his burden of persuasion. The Board affirmed this decision.

[1]The administrative law judge questioned which standard is the proper standard for employer's rebuttal evidence. He stated that the Board cited both *Rainey*, controlling here, which espouses the "substantial evidence" burden, as well as *Jones v. Aluminum Co. of America*, 35 BRBS 37, 41 (2001), which he said espouses an "affirmative statement" burden. Decision and Order on Remand at 6-7. In *Jones*, a doctor stated that work-related exposure to asbestos "could have" contributed to the claimant's lung cancer and death. The Board held that because the doctor "never affirmatively stated that [the] decedent's cancer was not caused in part by asbestos exposure" his opinion was insufficient to rebut the Section 20(a) presumption under the "substantial evidence" standard as well as the "ruling out" standard of the United States Court of Appeals for the Eleventh Circuit, wherein *Jones* arose. *Jones*, 35 BRBS at 41. As *Rainey* is controlling law here, the substantial evidence standard is applicable. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT).

On appeal, the United States Court of Appeals for the Second Circuit reversed. The court found that Dr. Teiger's report stated that he agreed with the conclusions of the decedent's doctors and that he opined that decedent most likely would have developed lung cancer even if he had never been exposed to asbestos. The court held his opinion did not amount to a statement that decedent's cancer was unrelated to asbestos exposure in view of the aggravation rule and as his statement regarding the likelihood of developing cancer in the absence of asbestos exposure does not foreclose a causal relationship. Also insufficient was Dr. Pulde's opinion that the lung cancer was an exclusive consequence of the decedent's cigarette smoking because that opinion was based on what the administrative law judge found to be an incorrect assessment of the amount of the decedent's asbestos exposure as well as being based on what she found to be a widely discredited theory in the medical community. *Rainey*, 517 F.3d at 635-637, 42 BRBS at 13-14(CRT). Thus, the *Rainey* court held that an administrative law judge cannot rely on a medical opinion derived from a false factual premise or based on discredited medical theories because such is not "substantial evidence."[2] *Rainey*, 517 F.3d at 633, 42 BRBS at 11(CRT). As neither Dr. Teiger's opinion nor Dr. Pulde's opinion constituted reasonable, reliable and probative evidence showing that the decedent's lung cancer was not related to his asbestos exposure, the court held that neither opinion constituted substantial evidence rebutting the Section 20(a) presumption, and the cancer was work-related as a matter of law. *Id.*

In this case, the Board instructed the administrative law judge to address the totality of Dr. Harbison's opinion in accordance with *Rainey*. Specifically, the Board stated that the administrative law judge needed to identify "where in Dr. Harbison's opinions, and on what basis, he stated that claimant's kidney cancer is not due to cadmium exposure." *B.L.*, slip op. at 5. Consistent with *Rainey*, the Board stated that the administrative law judge needed to address any inconsistencies between his own findings and Dr. Harbison's opinions with regard to the degree of claimant's asbestos exposure as well as any inconsistencies between some of Dr. Harbison's own statements.[3] *Id.*

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[2]While the burden is on the employer to produce evidence, it cannot be just "any evidence." To meet its burden, an employer "must introduce 'such relevant evidence as a reasonable mind might accept as adequate' to support a finding that workplace conditions did not cause the accident or injury." *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT); *see American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 817, 33 BRBS 71, 76(CRT) (7th Cir. 1999)(*en banc), cert. denied*, 528 U.S. 1187 (2007)(quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

[3]Contrary to claimant's contentions, the administrative law judge did not discredit Dr. Harbison at any point on remand. Further, in the original Decision and Order, the administrative law judge considered Dr. Harbison's opinion to be "clear and well-

The administrative law judge also found that claimant was exposed to significant amounts of asbestos. Decision and Order at 35. Dr. Harbison originally stated that there was insufficient evidence of claimant's asbestos exposure. Emp. Ex. 2.[4] On remand, the administrative law judge acknowledged and resolved this discrepancy. He explained that, at the hearing, Dr. Harbison agreed that claimant had been exposed to asbestos, as evidenced by pleural plaquing,[5] but that Dr. Harbison stated that the amount of claimant's exposure to asbestos did not alter his opinion that kidney cancer cannot be attributed to exposure to asbestos. Decision and Order on Remand at 5. This reconciliation of any discrepancies is supported by substantial evidence. *See* Emp. Ex. 2; Tr. at 91. Dr. Harbison clearly testified that it "has not been scientifically established to link asbestos with kidney cancer" and that "there is no finding of association between asbestos exposure in the work place and kidney cancer." Tr. at 79-80. With a reasonable degree of certainty, Dr. Harbison stated that there is "no asbestos exposure that led to [claimant's] kidney cancer[,]" because the medical literature does not indicate that kidney cancer is caused by asbestos exposure and the kidney is not a target for asbestos. Tr. at 78, 86, 88.

The administrative law judge also found that claimant was exposed to cadmium in welding fumes. Decision and Order at 30. In invoking the Section 20(a) presumption with regard to cadmium, the administrative law judge relied on Dr. Brautbar's opinion that exposure to cadmium could cause kidney cancer. Cl. Ex. 9. Dr. Harbison's second report critiqued Dr. Brautbar's opinion and stated that his methodology is improper, his reasoning is circular, and his opinion is not supported by studies and scientific literature. Specifically, Dr. Harbison stated that Dr. Brautbar misinterpreted or misunderstood the

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documented." Decision and Order at 31. While the administrative law judge disagreed with Dr. Harbison's assessment of claimant's exposure to asbestos, this difference was addressed on remand and found to be irrelevant. Decision and Order on Rem. at 4-5; *see* discussion *infra*.

[4]In his December 2005 report, Dr. Harbison stated that there was insufficient evidence claimant was exposed to a sufficient amount of asbestos to cause his kidney cancer. This statement conflicted with the administrative law judge's finding. However, in the report, the statement was preceded by: "There is insufficient epidemiological evidence to conclude that workplace exposure to asbestos is a cause of kidney cancer." Emp. Ex. 2.

[5]Dr. Harbison testified that, claimant's asbestos exposure resulting in pleural thickening/plaques, does not mean his exposure resulted in kidney cancer, as there is no relationship between pleural thickening/plaques and kidney cancer. Tr. at 87-88.

results of the various studies and, therefore, drew the wrong conclusion. However, Dr. Harbison also stated:

> No reasonable practitioner, trained in toxicology and occupational medicine, would conclude that sufficient evidence exists for linking unknown exposure to asbestos dust, industrial solvents, *and cadmium* emitted from welding rods, with the kidney cancer of [claimant] based on the facts of this case.

Emp. Ex. 8 at 2 (emphasis added). With regard to cadmium specifically, Dr. Harbison stated that the studies relied upon by Dr. Brautbar show that the link between cadmium exposure and kidney cancer is "less than definitive," that cadmium is not listed as a possible kidney carcinogen, and that "of the three main sources of exposure to cadmium, diet, smoking and occupation, only smoking is an established risk factor for renal cancer." Emp. Ex. 8 at 13-15. The administrative law judge concluded that Dr. Harbison's statements in their entirety indicate that he does not consider cadmium exposure to be associated with kidney cancer.

We affirm the administrative law judge's conclusion that Dr. Harbison's opinion constitutes substantial evidence rebutting the Section 20(a) presumption. The administrative law judge properly determined that Dr. Harbison's opinion is sufficient under *Rainey* and can be accepted as reliable and probative evidence of the absence of a causal relationship between claimant's cancer and his work exposures. Moreover, the administrative law judge rationally concluded that Dr. Harbison discussed all the evidence, cited scientific literature, and explained that exposure to asbestos and cadmium is not related to the development of kidney cancer, and that a reasonable person could accept Dr. Harbison's opinion. Dr. Harbison's reliance on the lack of a general association between the exposures and the disease does not detract from his opinion.[6] *See B.L.*, slip op. at 5. As the administrative law judge addressed the issues set forth by the Board, and his decision is supported by substantial evidence, we reject claimant's contentions of error and affirm the administrative law judge's finding that Dr. Harbison's opinion rebuts the Section 20(a) presumption with regard to claimant's exposures to both cadmium and asbestos. *See Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). In light of the Board's prior decision affirming the administrative law judge's findings based on the record as a whole, we also affirm the conclusion that claimant's condition is not compensable.

[6]Contrary to claimant's assertion, a reasonable person could accept a general epidemiological statement of "no association" as evidence of the specific "no association in this case."

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge