BRB No. 93-1001

GIE SIMPSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOCKHEED SHIPBUILDING COMPANY	)	
	)	DATE ISSUED:
and	)	
	)	
HELMSMAN MANAGEMENT SERVICES	)	
	)	
Self-Insured Employer/ Administrator- Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Order Denying Employer's Motion to Set Aside Decision and Order and Reopen Record of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

William D. Hochberg (Levinson, Friedman, Vhugen, Duggen & Bland), Seattle, Washington, for claimant.

Russell A. Metz (Metz, Frol & Jorgensen), Seattle, Washington, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Order Denying Employer's Motion to Set Aside Decision and Order and Reopen Record (91-LHC-2753) of Administrative Law Judge Edward C. Burch 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 was employed by Lockheed Shipbuilding Company first as a scaler, from 1952 to 1957, and then as a painter from 1957 until his layoff in 1984. Hearing Transcript 32, 39; Decision and Order at 3. Claimant filed a claim for benefits under the Act on September 12, 1982 for a pulmonary impairment based on his work-related exposures to injurious substances. Claimant's Exhibit 2;[1] Hearing Transcript at 4.

On October 14, 1992, the administrative law judge issued the Decision and Order in this case awarding claimant permanent total disability benefits and interest. The administrative law judge also found that employer is entitled to relief from continued compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).[2] On October 21, 1992, employer moved to set aside the Decision and Order for the acceptance of additional evidence pertaining to claimant's settlements from third-party actions, asserting that this evidence implicated the forfeiture provisions set forth at Section 33(g) of the Act, 33 U.S.C §933(g). The administrative law judge denied this motion, and employer has appealed.[3]

I. Causation

Employer initially challenges the administrative law judge's determination that claimant's pulmonary impairment is causally related to his employment with Lockheed. Employer avers that the administrative law judge failed properly to credit the medical

[1]Claimant has filed three claims for compensation under the Act. OWCP Nos. 14-69256, 14-80056 and 14-78478. The first and third claims were apparently deemed to be identical and were consolidated. *See* Letter, dated March 24, 1992, from District Director Goodwin to Administrative Law Judge Burch. Claimant has also received an award for a work-related hearing loss.

[2]No party contests the administrative law judge's application of Section 8(f).

[3]Employer first appealed the Decision and Order awarding benefits, BRB No. 93-0517, but moved to withdraw this appeal as prematurely filed after the administrative law judge denied its Motion for Order to set aside Decision and Order and Reopen Record. By Order dated February 18, 1993, the Board granted employer's motion and acknowledged employer's appeal after issuance of the administrative law judge's denial of its Motion to Reopen the Record. BRB No. 93-1001. On July 19, 1993, employer appealed the Supplemental Decision and Order awarding attorney's fees, and requested that that appeal be consolidated. These appeals were consolidated by Order dated August 30, 1993. By letter, dated September 29, 1993, employer withdrew its attorney's fee appeal.

opinions of its experts, specifically Drs. Cary, Arcese, Westcott and Stewart, that demonstrate that claimant's pulmonary impairment is due to cigarette smoking and not to asbestosis.

In his Decision and Order, the administrative law judge found that the evidence is sufficient to invoke the presumption of causation accorded by Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer failed to produce sufficient rebuttal evidence. The administrative law judge, in the alternative, determined that, "assuming" employer had produced sufficient rebuttal evidence, the medical opinions of Dr. Rosenstock, who diagnosed both an obstructive and restrictive disease, and Dr. Perkins, who in 1981 had advised claimant to avoid further exposure to industrial irritants, supported claimant's *prima facie* case. Decision and Order at 11-12.[4]

In establishing that an injury arises out of his employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption which applies to the issue of whether an injury is causally related to his employment. *See Perry v. Carolina Shipping Co.*, 20 BRBS 90, 92 (1987). To invoke this presumption, claimant must establish two elements of his *prima facie* case, *i.e.*, that he sustained some harm and that working conditions existed which could have caused or aggravated the harm. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326, 329-31 (1981); *see also Pittman v. Jeffboat, Inc.*, 18 BRBS 212, 214 (1986).

Upon invocation, the burden shifts to employer to rebut the presumption by presenting specific and comprehensive evidence to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1081-82 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976); *Bridier v. Alabama Dry Dock & Shipbuilding Co.*, 29 BRBS 84, 89 (1995). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh the record evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153, 155-56 (1985).

Employer does not dispute the administrative law judge's invocation of the Section 20(a) presumption, but instead challenges the administrative law judge's finding that it failed to produce sufficient evidence on rebuttal. We conclude that the administrative law judge's evaluation of the medical evidence is rational and thus his finding is supported by substantial evidence.

The administrative law judge noted that Dr. Perkins diagnosed claimant as suffering from a chronic obstructive pulmonary disease, and that Dr. Stewart advised claimant to avoid "excessive concentrations of smoke, dust fumes, noxious chemical [and to] wear a respirator." Em. Ex. 3:226-27; Decision and Order at 4. Dr. Barnhart did not diagnose asbestosis, but concluded that further testing was necessary to determine whether claimant

[4]The administrative law judge found that claimant suffered from a permanent total disability as of September 4, 1984. On appeal, employer does not contest this finding.

was afflicted with a "probable restrictive defect." Em. Ex. 3:28. Dr. Rosenstock and Dr. Christie diagnosed asbestosis by x-ray, and the former also supported this diagnosis with pulmonary function and arterial blood gas testing which revealed both restrictive and obstructive airways disease. Cl. Exs. 5, 6, 16, 18. Dr. Westcott also diagnosed asbestosis. Cl. Ex. 11:47. The administrative law judge acknowledged that Dr. Arcese did not diagnose asbestosis or a pulmonary disease, but noted that this physician had opined that claimant's work aggravated claimant's hypertensive heart disease. Cl. Ex. 10; Em. Ex. 2, 3; Decision and Order at 6.

Dr. Cary provided the most thorough opinions on behalf of employer. He concluded that claimant was afflicted with a pulmonary disease which was not due to asbestosis, and cited the lack of interstitial changes on claimant's x-ray and the results of pulmonary function testing. Em. Ex. 4: 11, 14, 16-7. Instead, this physician opined that claimant's pulmonary disease was attributable to cigarette smoking. According to Dr. Cary, the obstructive disease indicated that claimant did not have asbestosis. *Id.* While claimant showed changes compatible with asbestos exposure, *viz.* pleural thickening, claimant was not functionally impaired by that exposure. Em. Ex. 4:15, 17. Dr. Cary acknowledged, however, that part of claimant's obstructive disease could be caused by claimant's industrial exposure to paint and fumes. Em. Ex. 4:19, 32.

The administrative law judge discussed Dr. Cary's diagnosis and conclusions, but found this opinion insufficient to rebut the Section 20(a) presumption. Specifically, the administrative law judge noted that, while Dr. Cary concluded that claimant did not have asbestosis because there was no interstitial lung disease, the physician did find evidence of "mild asbestos related lung disease" in the form of "pleural thickening," and that Dr. Cary diagnosed an "obstructive lung disease." Decision and Order at 11. The administrative law judge also discounted the opinions of Dr. Westcott because that physician diagnosed asbestosis, Dr. Stewart, because he advised against further industrial exposure, and Dr. Arcese, because that expert concluded that claimant's work aggravated his underlying heart disease. *Id*.

A medical opinion that is equivocal is insufficient to rebut the Section 20(a) presumption. *See Dewberry v. Southern Stevedoring Corp.*, 7 BRBS 322, 326 (1977), *aff'd mem.*, 590 F.2d 331, 9 BRBS 436 (4th Cir. 1978). The administrative law judge rationally found that these medical opinions do not rule out asbestos (or industrial exposure to other irritants suffered by claimant as a painter) as being involved in the cause of claimant's pulmonary disease.[5] *Bridier*, 29 BRBS at 89-90. Inasmuch as the administrative law judge properly found that these medical opinions do not rule out claimant's exposure to industrial

[5]Employer allows that the medical evidence "may have helped claimant to establish a prima facie case that conditions existed which could have caused or aggravated the harm ... ." Em. Brief at 15. Employer appears to argue that its medical evidence does not establish that claimant's employment actually aggravated the disease process. This is not the test for rebuttal of the Section 20(a) presumption, which requires employer to rule out any connection between claimant's employment and his pulmonary disease. *See Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 297, 23 BRBS 22, 24 (CRT)(11th Cir. 1990).

irritants as a cause of his respiratory impairment, and substantial evidence supports this finding, we affirm the finding that claimant's pulmonary condition is work-related. *See Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 297, 23 BRBS 22, 24 (CRT)(11th Cir. 1990); *Bridier*, 29 BRBS at 89-90. Because employer does not question the nature and extent of disability, we affirm the Decision and Order awarding benefits in all respects.

II. Section 33(g)

We agree with employer, however, that the administrative law judge erred in denying employer's motion to set aside the Decision and Order. The administrative law judge declined employer's request that he accept additional evidence pertaining to the applicability of the forfeiture provisions set forth at Section 33(g) of the Act, 33 U.S.C §933(g), because employer was deemed to have waived this issue by not pursuing it at the hearing. The administrative law judge also ruled that the Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT)(1992), would not apply retroactively. We note that *Cowart* was decided after the hearing in this case, but prior to the administrative law judge's Decision and Order.

Employer did not waive this issue. Employer's pre-hearing statement lists "Section 33 offsets" as one of the issues. Moreover, claimant, in the first of two hearings where the parties presented their stipulations, "agree[d] that there are third-party settlements and that the net amounts ... may be off-set against any past monies which may ultimately become owing ... ." Hearing Transcript at 6-7 (Feb. 27, 1992). Although these statements seemingly raise the applicability of Section 33(f), employer timely raised Section 33(g) prior to the issuance of the administrative law judge's Decision and Order based on newly decided law. Further, in *Kaye v. California Stevedore & Ballast*, 28 BRBS 240, 245-250 (1994), the Board held that *Cowart* would indeed have retroactive effect. In view of this, the administrative law judge's denial of employer's post-trial motion constitutes an abuse of discretion. We therefore vacate the administrative law judge's Order denying employer's motion to reopen, and remand this case to the administrative law judge for a determination of the application, *vel non*, to this claim by Section 33(g).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed on the present record. The administrative law judge's Order Denying Motion to Set Aside Decision and Order and Reopen Record is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge