

JEFFREY HAYNES)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
VINNELL CORPORATION)	DATE ISSUED: <u>June 17, 2002</u>
)	
and)	
)	
INSURANCE COMPANY OF THE)	
STATE OF PENNSYLVANIA)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of James W. Kerr, Jr.,
Administrative Law Judge, United States Department of Labor.

Gary B. Pitts, Houston, Texas, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi LLP), San Francisco,
California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2000-LHC-301) of
Administrative Law Judge James W. Kerr, Jr., 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), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the
DBA). We must affirm the findings of fact and conclusions of law of the administrative law
judge if they 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).

From November 1989 to December 1990, and from February 28, 1991 to December

21, 1991, claimant worked for employer in Saudi Arabia where he assisted in the medical training of the Saudi Arabian National Guard. While in Saudi Arabia, claimant lived in a base camp located near the capital city of Riyadh. Claimant testified that, during the later period of his deployment in Saudi Arabia, it was his belief that he was exposed to various unknown toxic chemicals and pesticides, sand flies, and the effects of Kuwaiti oil well fires while at employer's base camp and during visits to the Saudi Arabian-Kuwaiti border area. Upon his return to the United States in December 1991 after his contract with employer was not renewed, claimant alleges that he began to suffer from a variety of health problems.¹ Claimant additionally asserts that although he worked for a variety of employers upon his return to the United States in 1991, he has not been employed since 1997. As a result of his ongoing medical complaints, claimant sought treatment with a number of physicians, and he was a participant in a government funded study on Gulf War Illness conducted by the State University of New York Health Sciences Center in 1998. Claimant sought disability benefits under the Act, arguing that his numerous health problems are related to the various exposures which he experienced while he was employed in Saudi Arabia.

In his Decision and Order, the administrative law judge initially determined that claimant established the existence of various harms, specifically chronic headaches, irritable bowel syndrome, and a psychological disorder, and that claimant reported numerous other symptoms which, although insufficiently documented, would be compensable if claimant established working conditions which caused or aggravated his conditions. Next, the administrative law judge found that claimant failed to establish the existence of working conditions which could have caused, aggravated, or accelerated his symptoms. Specifically, the administrative law judge determined that claimant did not establish that he was within the zone of special danger with regard to claimant's assertions that he was exposed to toxic chemicals, smoke from Kuwaiti-based oil well fires, or the residue plume occasioned by the explosions at Khamisiyah.² The administrative law judge next found that claimant did not establish a sufficient exposure history to either sand flies or pesticides to invoke the

¹Claimant avers that since his return from Saudi Arabia he has experienced, *inter alia*, psychological problems, irritable bowel syndrome, headaches, cold hands and feet, insomnia, rashes, shortness of breath, muscle atrophy, bleeding gums, and hand tremors.

²On March 10, 1991, allied forces demolished an Iraqi munitions storage facility at Khamisiyah.

presumption in Public Law 105-277. Lastly, the administrative law judge determined that the medical evidence did not support a finding of a causal relationship between claimant's medical conditions and his employment with employer. Accordingly, the administrative law judge denied claimant's claim for benefits under the Act.

On appeal, claimant challenges the administrative law judge's finding that he failed to establish the existence of working conditions which could have caused his present medical conditions. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant has the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish a *prima facie* case.³ See *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. See *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Claimant is not required to prove that working conditions in fact caused his harm; rather, claimant must show the existence of working conditions which could have potentially caused the harm alleged. See

³As no party challenges the administrative law judge's finding that claimant established that he suffers from chronic headaches, irritable bowel syndrome and a psychological disorder, the finding that he established the harm element of his *prima facie* case is affirmed. The administrative law judge also stated that claimant reported various other symptoms which, although insufficiently documented, would be compensable if claimant established working conditions which caused or aggravated his conditions. Any credible symptoms reported by claimant can constitute a harm, see, e.g., *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981), and Section 20(a) is invoked with regard to such symptoms so long as claimant shows he was exposed to substances which could potentially cause them.

Stevens, 23 BRBS 191. Thus, the “working conditions” prong of a claimant’s *prima facie* case requires that the administrative law judge determine whether employment events which could have caused the harm sustained by claimant in fact occurred. See *Sewell v. Noncommissioned Officers’ Open Mess, McCord Air Force Base*, 32 BRBS 127 (1997)(McGranery, J., dissenting), *aff’d on recon. en banc*, 32 BRBS 134 (1998)(Brown and McGranery, JJ., dissenting). Once claimant establishes his *prima facie* case, Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his condition is causally related to his employment. See *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff’d*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989).

With these principles in mind, we now turn to the facts of the instant case as determined by the administrative law judge. Initially, the parties agree that the case comes within the purview of the DBA. The DBA provides workers’ compensation coverage for workers engaged in employment under contracts with the United States, or an agency thereof, for public work to be performed outside of the continental United States. 42 U.S.C. §1651. In this regard, the United States Supreme Court has held that an injury may occur in the course of employment under the DBA where the injury did not occur within the space and time boundaries of work, but the employee was in a “zone of special danger.” In *O’Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), the employee, while spending the afternoon in the employer’s recreational facility near the shoreline in Guam, drowned while attempting to rescue two men in a dangerous channel. The Court stated that “[a]ll that is required [for compensability] is that the ‘obligations or conditions’ of employment create the ‘zone of special danger out’ of which the injury arose.” *O’Leary*, 340 U.S. at 505; see *Gondeck v. Pan-American Airways, Inc.*, 382 U.S. 25 (1965); *O’Keefe*, 380 U.S. 359.

In the instant case, employer acknowledges in its response brief that the administrative law judge referred to the zone of special danger in a context different from the doctrine endorsed by the Supreme Court, and that the administrative law judge’s use of this term may be confusing. See Emp’s brief at 31. We agree with this statement, since the administrative law judge’s decision in this regard appears to require evidence that claimant was in a specific area of special danger in order to be in the “special zone of danger,” and thus have his alleged injuries be compensable under the DBA. See Decision and Order at 28-33. Contrary to the administrative law judge’s statements, however, the “zone of special danger” doctrine espoused by the United States Supreme Court expands DBA coverage to include employees in off-duty hours engaged in leisure or other activities. Although the court recognized that there may be a case where the employee becomes “so thoroughly disconnected from the service of his employer” that he is no longer in the course of employment, *O’Leary*, 340 U.S. at 507; see *Gillespie v. General Electric Co.*, 21 BRBS 56 (1988), *aff’d mem.*, 873 F.2d 1433 (1st Cir. 1989), there is no argument here that claimant was such an employee. Therefore, he was in the zone of special danger and covered under the DBA for any injurious

conditions and exposures that he experienced while on or off duty in Saudi Arabia, including exposures in or near the city of Riyadh. *See Harris v. England Air Force Base*, 23 BRBS 175 (1990). Because the record contains evidence that claimant may have been exposed to injurious substances during his time in Saudi Arabia, and the administrative law judge did not apply the proper standard in evaluating these exposures, this case must be remanded for reconsideration pursuant to Section 20(a).

Initially, we reject claimant's assertion of error in the administrative law judge's finding that he did not establish that he traveled to the Saudi Arabian-Kuwaiti border area where was exposed to toxic fumes. The administrative law judge, after discussing claimant's testimony regarding these alleged trips, concluded that claimant had failed to establish that the asserted trips had in fact occurred. *See U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631. In rendering this determination, the administrative law judge found that claimant's employment attendance records did not indicate that he made the trips alleged, that claimant failed to submit any evidence supportive of the alleged trips, and that claimant was able to identify only the general locations that he is purported to have visited. The administrative law judge also found that claimant received only Fridays off; thus, the testimony of Mr. Wright, employer's present Director of Business Operations, and the maps of the area in question indicate that the distance between employer's base camp outside of Riyadh and the northern border area with Kuwait made it unlikely that claimant could make the round trip in time to return to work the following day.⁴

The administrative law judge's decision not to credit the testimony of claimant regarding his alleged visits to the Saudi Arabian-Kuwaiti border area following his return to Saudi Arabia in February 1991 must be affirmed, as it is within his province as fact-finder. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). The administrative law judge specifically considered claimant's testimony, the contrary testimony of Mr. Wright, and the evidence of record in concluding that claimant did not prove he took the trips alleged. As there is no error in administrative law judge's weighing of this evidence, his determination that claimant, subsequent to his return to Saudi Arabia on February 28, 1991, did not visit the northern border areas of that country is affirmed.

⁴Regarding the issue of the distances involved between employer's base camp and the Kuwaiti border area, Mr. Wright testified that it would take approximately one-half of a day to travel to the border area. *See Tr.* at 140-145.

We cannot affirm, however, the administrative law judge's conclusion that claimant was not exposed to working conditions which could have caused his present medical conditions in the area where he lived and worked subsequent to his return to Saudi Arabia on February 28, 1991. Specifically, uncontradicted evidence establishes that claimant was exposed to smoke and particles resulting from the Kuwaiti oil well fires and to pesticides used in employer's base camp. Regarding claimant's alleged exposure to oil well fire smoke, the administrative law judge, after acknowledging that both claimant and Mr. Wright testified as to the presence of a visible haze with a fine particulate in the air during various periods of time following the decision by Iraqi forces to ignite oil wells in Kuwait, concluded that claimant was "outside the zone of special danger with respect to the Kuwait oil well fires" since those fires were located 300 miles from employer's camp and the resulting conditions occurred on only one or two occasions.⁵ *See* Decision and Order at 30. As accurately set forth by the administrative law judge, both claimant and Mr. Wright described a haze in the sky that they attributed to the oil well fires burning in Kuwait. *See* Tr. at 46, 149. In this regard, Mr. Wright testified that he recalled a two to three-day period of time where there was a low-lying cloud-like material of very fine particulate floating through the air.⁶ *See id.* at 149. Thus, all parties agree that claimant, subsequent to his return to Saudi Arabia on February 28, 1991, was in a position to be exposed to the effects of the oil well fires burning in Kuwait at that time.

⁵Claimant submitted into evidence documents indicating that more than 600 Kuwaiti oil wells and refineries were set on fire during February 1991, *see* CX 35 at 17, and that the prevailing winds in the area generally blow from Kuwait southward toward Saudi Arabia. *See* CX 26 at 20.

⁶In its response brief, employer concedes that the Kuwaiti oil well fires resulted in smoke and particulate matter, and that the testimony of claimant and Mr. Wright indicates that such conditions were experienced in the Riyadh area. Employer avers, however, that such conditions were extremely rare, and that the usual wind patterns would have dispersed any particulate matter "southwest into the Persian Gulf or northeast to Iran." *See* Employer's brief at 24-25.

The administrative law judge similarly declined to find that claimant established the existence of working conditions which could have caused his present medical conditions based upon his alleged exposure to toxic chemicals in pesticides used to fumigate employer's camp. Specifically, the administrative law judge found that claimant failed to present sufficient evidence of pesticide use exposure in order for the presumption contained in Public Law 105-277 to be persuasive.⁷ See Decision and Order at 30. The administrative law judge found that although claimant stated he used DEET, which is listed in this statute, the articles cited by the parties state that detrimental effects resulting from pesticide exposure depend on the frequency and level of exposure and whether symptoms manifest immediately. See CX 11, RX 26. The administrative law judge then summarily concluded that the evidence was not sufficient to invoke the public law presumption. The issue, however, is whether Section 20(a) of the Act is invoked, and the pertinent inquiry is whether claimant established exposure which could potentially cause the harm alleged. *Stevens*, 23 BRBS 191. If so, then the Section 20(a) presumption is invoked, and whether the exposure was sufficient to in fact cause claimant's harm is an issue which is addressed on rebuttal. *Louisiana Ins. Guaranty Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). In this case, it is undisputed that claimant had some pesticide exposure, since employer agreed that its base camp was

⁷The administrative law judge referenced the Persian Gulf War Veterans' Act of 1998, 38 U.S.C. §1117 *et seq.*, which provides a legal presumption for veterans of the United States military that they were exposed to various toxic substances. As the administrative law judge acknowledged, this statute is not applicable to claimant, who was a civilian employee, but the administrative law judge found it could be considered persuasive in establishing claimant's *prima facie* case.

fumigated on a regular and routine basis.⁸ See Employer's brief at 28. In fact, both claimant and Mr. Wright testified that employer had its base camp fogged twice a week, and that the employees' rooms were sprayed once every two or three months. See Tr. at 43, 146. Thus, the parties are in agreement that claimant, subsequent to his return to Saudi Arabia on February 28, 1991, was in a position to be exposed to various pesticides sprayed by employer in its base camp.

⁸Employer's reliance on the decision of the United States Court of Appeals for the Ninth Circuit in *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) 9th Cir. 1990), is misplaced. Contrary to employer's characterization of *Picinich* as a rebuttal of causation case, the issue addressed by the Ninth Circuit in *Picinich* concerned the sufficiency of the claimant's exposure to injurious stimuli for purposes of determining the employer to be held responsible for the injured employee's benefits. Moreover, in *Picinich*, employer produced evidence that exposure at its facility was minimal and thus lacked the potential to cause claimant's disease.

As previously set forth, invocation of Section 20(a) involves determining whether the events alleged by claimant to be the cause of his injuries in fact occurred. *See generally Sewell*, 32 BRBS 127. In this case, claimant and employer are in agreement that claimant was employed by employer during the period of time that employer's base camp experienced both the effects of the oil well fires which burned in Kuwait and the application of pesticides throughout that camp. Moreover, after addressing the testimony of these two witnesses, the administrative law judge did not find that these events did not occur. Accordingly, this case must be remanded in order for the administrative law judge to reconsider whether these admitted exposures, and any other conditions to which claimant was exposed within the proper scope of his employment in Saudi Arabia, could have potentially caused any of the physical conditions or symptoms sustained by claimant.⁹ *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990) (court holds that claimant is entitled to the benefit of the Section 20(a) presumption once the "minimal requirements" of establishing his *prima facie* case have been met); *Stevens*, 23 BRBS 191 (Board holds that while claimant is not required to introduce affirmative evidence establishing that working conditions in fact caused the alleged harm, her theory must go beyond "mere fancy"); *Sinclair v. United Fund & Commercial Workers*, 23 BRBS 148 (1989) (claimant need only show the existence of working conditions which could conceivably cause the harm alleged).

If, on remand, the administrative law judge finds that the presumption is invoked with regard to any exposure or condition of claimant's employment, the medical evidence must be reconsidered, placing the burden on employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment conditions. *Conoco v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999)(*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). If the presumption is rebutted by employer, it drops from the case, *see Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997), and the administrative law judge must then weigh all the evidence and resolve the causation issue on

⁹Contrary to the administrative law judge's statement that the city of Riyadh was "out of the range of the fighting," *see* Decision and Order at 29, the record reflects, and employer agrees, that approximately ten Iraqi SCUD missiles were fired at that city during the Gulf War, with two of these attacks occurring on February 24, 1991, four days before claimant's return to the area. *See* Employer's brief at 22; RX 22. Moreover, the administrative law judge specifically noted claimant's testimony that he visited a site near employer's base camp where a SCUD missile landed and that he acquired at that time a piece of metal from that missile. *See* Decision and Order at 4.

the record as a whole with claimant bearing the burden of persuasion.¹⁰ *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). If the administrative law judge finds a causal relationship between any of claimant's conditions and his employment with employer in Saudi Arabia, he must then consider the nature and extent of any disability resulting therefrom.

¹⁰Although the administrative law judge ultimately placed determinative weight on the opinions of Drs. Friedman and Perez, who opined that claimant's physical conditions were unrelated to his alleged work-related exposures, when addressing the issue of causation, both of these physicians diagnosed claimant with a psychological or psychiatric disorder. *See* RXS 25, 26. Moreover, although the administrative law judge found that the articles, reports and testimony submitted by claimant in support of his claim were "highly persuasive," he gave this evidence little weight based upon his finding that claimant was not an individual within the zone of special danger. *See* Decision and Order at 31. Should on remand the administrative law judge find invocation of the Section 20(a) presumption, he must explicitly weigh all of the medical evidence of record regarding claimant's multitude of physical and psychological conditions when addressing the issue of causation. *See Ballesteros v. Williamette W. Corp.*, 20 BRBS 184 (1988).

Accordingly, the administrative law judge's finding that claimant failed to establish the existence of working conditions which could have caused his present medical conditions is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge