

ROLAND A. REYNOLDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS	)	DATE ISSUED: <u>Nov. 13, 2000</u>
	)	
and	)	
	)	
SHAFFER INSURANCE ADJUSTERS	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Compensation and Treatment for a Right Upper Extremity Impairment of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein, & Camden, LLP), Norfolk, Virginia, for claimant.

Robert A. Rapaport and Dana Adler Rosen (Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C.), Norfolk, Virginia, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Compensation and Treatment for a Right Upper Extremity Impairment (97-LHC-2822) of Administrative Law Judge Richard K. Malamphy denying disability and medical benefits 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, a container repairman, injured his left shoulder at work on September 30,

1995. Employer voluntarily paid claimant various periods of temporary total and partial disability benefits for the left shoulder injury. Claimant underwent physical therapy for his left shoulder injury from August 19 through September 9, 1996. On September 30, 1996, claimant complained of right arm pain that started, he alleged, during his physical therapy for the left shoulder injury. Claimant sought disability and medical benefits for his right shoulder condition which he alleges was caused by the physical therapy required to treat his work-related, left shoulder injury. The administrative law judge found invocation and rebuttal of the Section 20(a), 33 U.S.C. §920(a), presumption with respect to the right shoulder injury. Upon a weighing of the evidence, the administrative law judge found that claimant did not establish the work-relatedness of the right shoulder injury. Consequently, the administrative law judge denied claimant disability and medical benefits for the right shoulder injury.

On appeal, claimant challenges the administrative law judge's denial of disability and medical benefits for the right shoulder injury. Employer responds in support of the administrative law judge's denial of benefits.

Claimant initially contends that the administrative law judge erred in finding that Dr. Luciano-Perez's opinion is sufficient to rebut the Section 20(a) presumption because it does not rule out the possibility that the right shoulder injury was caused by the work-related left shoulder injury or that claimant's physical therapy for his work-related left shoulder injury caused his right shoulder injury.¹ Claimant also contends that the administrative law judge erred in crediting the opinion of Dr. Luciano-Perez over that of Dr. Berger in weighing the evidence as a whole. Section 20(a) provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused the harm. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). Once claimant has invoked the presumption, the burden shifts to employer to rebut it with substantial countervailing evidence. *Id.* An unequivocal opinion, given to a reasonable degree of medical certainty, that the employee's injury is not work-related is sufficient to rebut the Section 20(a) presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established with claimant bearing the burden of persuasion. *See Moore*, 126 F.3d at 256, 31 BRBS at 119 (CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

¹On appeal, claimant does not raise any argument that claimant's right shoulder injury is independently related to claimant's heavy work for employer.

The administrative law judge first invoked the Section 20(a) presumption based on the three theories identified by Dr. Berger: 1) that claimant's bilateral degenerative joint disease of the shoulder is due to his heavy work as a container repairman for employer; 2) that claimant's right shoulder injury occurred during physical therapy prescribed for his work-related left shoulder injury; and 3) that claimant overused his right arm to compensate for his work-related left arm injury. The administrative law judge then determined that Dr. Luciano-Perez's opinion is sufficient to rebut the Section 20(a) presumption. In his June 9, 1998, report, Dr. Luciano-Perez stated, to a reasonable degree of medical certainty, that claimant's right arm problems are not related to his work-related left shoulder injury. Emp. Ex. 2f. Dr. Luciano-Perez also stated that it was very unlikely and improbable for someone to have a long term injury from physical therapy and that normal activities of daily living would not have caused claimant to overuse his right arm to compensate for his left shoulder injury. Emp. Ex. 2f-g. Dr. Luciano-Perez reiterated his opinion, in his post-hearing deposition, that claimant's right arm condition was not related to the work-related left shoulder injury, emphasizing that it was unlikely and improbable that the two injuries were related. Dep. at 11-13. With respect to whether the right arm injury occurred in physical therapy as claimant alleges, Dr. Luciano-Perez acknowledged that it was possible but not probable. *Id.* at 7, 14-17.

We affirm the administrative law judge's finding that Dr. Luciano-Perez's opinion is sufficient to rebut the Section 20(a) presumption. Contrary to claimant's contention, Dr. Luciano-Perez was not required to "rule out the possibility" that claimant's right shoulder injury was due to his work-related left shoulder injury or that claimant's physical therapy for his work-related left shoulder injury caused his right shoulder injury. *See Moore*, 126 F.3d at 256, 31 BRBS at 119 (CRT); *Conoco v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997); *American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000); *O'Kelley*, 34 BRBS at 39. Rather, in order to rebut the Section 20(a) presumption, employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. As Dr. Luciano-Perez's opinion that claimant's right arm problems are not related to his work-related left shoulder injury is based on a reasonable degree of medical certainty and is not equivocal, we affirm the administrative law judge's finding that Dr. Luciano-Perez's opinion rebuts the Section 20(a) presumption.

After determining that Dr. Luciano-Perez's opinion was sufficient to establish rebuttal, the administrative law judge weighed the evidence and credited Dr. Luciano-Perez's opinion over that of Dr. Berger, who opined that claimant's right shoulder problems were caused by the three theories used by the administrative law judge to find invocation of the Section 20(a) presumption. The administrative law judge acted within his discretion in

crediting Dr. Luciano-Perez's opinion over that of Dr. Berger after finding that Dr. Luciano-Perez's opinion was better reasoned. *See generally Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999); Decision and Order at 8-9; Emp. Ex. 2f-g; Dr. Luciano-Perez's Deposition at 7, 11-17; Tr. at 15-17; Cl. Ex. 6. Additionally, the administrative law judge noted that Dr. Berger, a Board-certified family physician, acknowledged deference to specialists such as Dr. Luciano-Perez, a Board-certified orthopedic surgeon, regarding orthopedic and neurological problems. Lastly, the administrative law judge found that neither Dr. Luciano-Perez nor Dr. Richardson, a Board-certified neurologist who reported normal electromyography and nerve conduction study results, found an objective basis for relating claimant's complaints of right shoulder pain to his physical therapy for the work-related left shoulder injury. Decision and Order at 9; Emp. Ex. 4a-b; Cl. Ex. 4-1, 4-2; Dr. Luciano-Perez's Deposition at 9-10. As the administrative law judge's weighing of the conflicting evidence is rational, *see Duhagon*, 31 BRBS at 98, we affirm the administrative law judge's finding that claimant's right shoulder injury is not work-related.

Accordingly, the administrative law judge's Decision and Order Denying Compensation and Treatment for a Right Upper Extremity Impairment is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge