

EMILE CLINE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
HUNTINGTON INGALLS,)	DATE ISSUED: 12/23/2013
INCORPORATED (AVONDALE)	
OPERATIONS))	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Employer’s Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

J. Jacob Goehring and Christopher R. Schwartz (Law Office of Christopher R. Schwartz), Metairie, Louisiana, for claimant.

Richard S. Vale, Frank J. Towers, and Pamela Noya Molnar (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order Denying Employer’s Motion for Reconsideration (2012-LHC-00506) of Administrative Law Judge Clement J. Kennington 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).

On April 15, 2011, claimant began to feel short of breath, nauseous, and irritation in his chest while working as a shipfitter for employer. EX 2 at 22-26. He woke the next morning with irritation and a burning sensation from his throat through his chest, and he went to an urgent care facility. *Id.* Thereafter, claimant treated with Dr. McCullough, who diagnosed bronchiolitis obliterans with organizing pneumonia (BOOP). *Id.* at 27. Claimant has been placed on portable oxygen and a number of medications, and the recommendation for his future treatment includes a lung transplant. Tr. at 28; EX 2 at 27-29. Claimant's last day of work was May 28, 2011. EX 2 at 29.

On July 26, 2011, claimant filed a claim under the Act, alleging his respiratory disease was caused by "cutting the scribe and grinding the unit from rust/paint, inadequate ventilation and or no exhaust to remove dust and fumes breathed toxic chemicals, at times was instructed to remove ear plugs and ventilator in order to hear." EX 10 at 6-7. The administrative law judge found that claimant established his prima facie case and that employer did not rebut the Section 20(a) presumption of compensability. 33 U.S.C. §920(a). The administrative law judge further found that claimant was temporarily totally disabled and that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded benefits. Employer moved for reconsideration of the administrative law judge's calculation of benefits, which the administrative law judge denied. On appeal, employer challenges the administrative law judge's finding that claimant's injury is work-related.¹ Claimant responds, urging affirmance. Employer filed a reply brief.

In order to invoke the Section 20(a) presumption, a claimant must show that he sustained a harm and that either an accident occurred at work or working conditions existed which could have caused the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a prima facie case, Section 20(a) applies to relate his injury to his employment, and the burden is on the employer to rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the employer rebuts the presumption, it no longer controls, and the issue of whether there is a causal

¹Employer also submits that claimant's average weekly wage is \$767.53 per its calculations in EX 12. *See* Emp. Br. at 13. The administrative law judge found that claimant's average weekly wage is \$866. Decision and Order at 13-14; Order at 2. Although employer cites to its exhibit, it has not alleged how the administrative law judge's calculation is in error. *See* 20 C.F.R. §802.211(b); Decision and Order at 15; Order at 2. Thus, we will not address this issue. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff'd on recon. en banc* 31 BRBS 13 (1997).

relationship must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012).

In this case, the administrative law judge found that claimant established he suffered a harm in the form of a respiratory condition on April 15, 2011, based on the symptoms claimant testified to experiencing that day at work and the next morning.² The administrative law judge further found claimant established working conditions that could have caused the harm, as claimant testified to working in poorly ventilated areas of the ship where he was exposed to smoke and fumes from the welding process and as Dr. McCullough, claimant's treating physician, stated that exposure to fumes could cause BOOP.³ Tr. at 23; EX 2 at 37-40; EX 3 at 15-16, 51. Employer challenges the administrative law judge's finding, asserting that claimant failed to demonstrate he was actually exposed to toxins and fumes that could cause BOOP. We reject employer's assertion of error as the administrative law judge's finding is supported by substantial evidence. Although Dr. McCullough stated that exposure to toxins may cause BOOP, he also stated that exposure to fumes causes BOOP. EX 3 at 15-16, 51. Therefore, as claimant has shown he suffered a respiratory condition that could have been caused by the fumes he was exposed to at work, the administrative law judge properly invoked the Section 20(a) presumption. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). We affirm this finding as it is supported by substantial evidence.

Employer next contends the administrative law judge erred in failing to find that employer rebutted the Section 20(a) presumption with Dr. Jones's opinion. We agree. Dr. Jones diagnosed idiopathic interstitial pneumonia, and stated that the "evidence does not support occupational causation or aggravation." EX 6 at 3.⁴ The administrative law

²Employer does not dispute claimant has a respiratory condition.

³Dr. Jones, employer's expert, stated that oxides of nitrogens caused by welding may cause BOOP. EX 1 at 12-13.

⁴Specifically, Dr. Jones opined that claimant does not have BOOP because:

- 1.) BOOP has many causes; when caused by an industrial inhalation accident, the symptoms are abrupt in onset and compel immediate medical attention. The symptoms here were of gradual onset and progression.
- 2.) The CT findings are not typical for BOOP.
- 3.) He did not show any CT improvement after six days of high dose steroids, and showed only mild improvement after more than a month of therapy; BOOP is more rapidly steroid-responsive.
- 4.) The histopathology of interstitial pneumonia is highly variable, and the pathologist's description of a BOOP pattern was

judge found that Dr. Jones's opinion does not rebut the Section 20(a) presumption because Dr. Jones admitted that BOOP is difficult to diagnose and stated that the underlying medical data could lead to a diagnosis of BOOP, and because Dr. McCullough's opinion is entitled to greater weight given his status as claimant's treating physician.⁵ Decision and Order at 10. However, employer's burden on rebuttal is one of production, not persuasion. Thus, the Fifth Circuit has held that in order to rebut the Section 20(a) presumption, employer need only offer substantial evidence that "throws factual doubt" on claimant's prima facie case. *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT). Dr. Jones stated that claimant's lung condition is not related to his work exposures, and the administrative law judge thus erred in finding that this opinion does not rebut the Section 20(a) presumption. *Id.*; *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT). Consequently, we reverse the administrative law judge's finding, and hold that employer has produced substantial evidence that claimant's lung condition is not work-related.

As we hold that the Section 20(a) presumption has been rebutted, it no longer controls, and the case must be decided on the record as a whole with claimant bearing the burden of persuasion. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT). The administrative law judge did not conduct this analysis in light of his finding that employer did not rebut the Section 20(a) presumption. Consequently, we vacate the award of benefits, and we remand the case for the administrative law judge to address whether claimant established by a preponderance of evidence on the record as a whole that his condition is work-related. *Id.*, 683 F.3d at 229, 232, 46 BRBS at 27, 29(CRT). Because the record contains conflicting evidence, and the doctors' opinions arguably contain internal conflicts, the administrative law judge must specifically set forth the basis for the weight to be

accompanied by the comment, "The pattern is not specific and difficult to characterize definitively." BOOP was not explicitly asserted as *the diagnosis*.

EX 6 at 2 (emphasis included). Thus, Dr. Jones concluded that claimant has "an idiopathic interstitial pneumonia that has caused lung scarring. The available medical evidence does not support occupational causation or aggravation." *Id.* at 3.

⁵In so finding, the administrative law judge characterized Dr. McCullough's opinion as attributing claimant's condition to work with employer. Decision and Order at 10.

accorded to the evidence.⁶ *See H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

Accordingly, the administrative law judge's Decision and Order and Order Denying Employer's Motion for Reconsideration are vacated and the case is remanded for further consideration in accordance with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁶In this regard, the administrative law judge also should address employer's arguments regarding the absence of evidence of claimant's exposure to BOOP-causing toxins at work.