BRB No. 02-0671

BENJAMIN M. GOODE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CARGILL, INCORPORATED	)	DATE ISSUED: JUN 13, 2003
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

Dana Adler Rosen (Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (01-LHC-1589) of Administrative Law Judge Daniel A. Sarno, 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). 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).

The facts underlying this case are not in dispute Claimant, an elevator/dryer man, worked primarily on barges and ships loading and unloading grain. His working conditions were dusty, and on December 23, 1998, claimant was exposed to toxic chemicals used to treat the grain. On this day, claimant was a member of a crew attempting to get a grain sample from a tank when alarms went off signaling

the presence of hazardous chemicals and carbon monoxide. HT at 31-33. Upon exiting the tank, claimant, as well as his colleagues, began to experience immediate physical symptoms, including vomiting. HT at 32-33. Subsequent to this exposure, claimant was diagnosed as suffering from sarcoidosis, irritable bowel syndrome, and secondary fibromyalgia. EX 3; HT at 27-30. Claimant stopped working on May 4, 1999, and subsequently filed a claim for total disability benefits under the Act.

In his decision, the administrative law judge found that claimant is entitled to invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), with regard to the causal relationship between all of his conditions and his employment, and that employer failed to rebut the presumption with regard to the sarcoidosis. The administrative law judge, found, however, that employer rebutted the Section 20(a) presumption with regard to claimant's irritable bowel syndrome and fibromyalgia, and that neither condition is work-related. The administrative law judge found that claimant is unable to return to his usual work, that employer established the availability of suitable alternate employment, that claimant did not diligently seek alternate work, and that claimant's condition is still temporary. Accordingly, he awarded claimant compensation for temporary partial disability. 33 U.S.C. §908(e).

Employer appeals, arguing that the administrative law judge erred in finding that claimant's sarcoidosis is work-related.[1] Employer further contends that the administrative law judge erred in finding that claimant cannot return to his usual work because of his sarcoidosis. Claimant responds, urging affirmance.

Based upon the undisputed facts that an incident occurred at work and that claimant is suffering from sarcoidosis, the administrative law judge found claimant entitled to invocation of the Section 20(a) presumption. Employer contends this finding is in error because claimant failed to establish that his sarcoidosis could have been or was caused by the working conditions on December 23, 1998. We reject

[1]On appeal, employer argues that the administrative law judge found claimant's gastrointestinal problems to be work-related. Brief at 5. The administrative law judge specifically found that these problems are unrelated to either claimant's sarcoidosis or to his work environment. Decision and Order at 13. As claimant did not appeal these findings, and they are favorable to employer, this issue will not be further addressed.

this contention.

In establishing that an injury is causally related to his employment, claimant is aided by the Section 20(a) presumption, which provides a presumed causal nexus between the injury and the employment. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and either that a work-related accident occurred or that working conditions existed which could have caused the harm; clamant bears the burden of establishing each element of his *prima facie* case by affirmative proof. *See Bolden v. G.A.T.X. Corp.*, 30 BRBS 71 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Although the Section 20(a) presumption does not aid claimant in establishing either element of a *prima facie* claim, *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988), claimant, contrary to employer's assertion, does not have to introduce affirmative evidence establishing that the accident in fact caused the alleged harm in order to invoke the Section 20(a) presumption. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). In order to invoke the presumption, claimant need only prove that he suffered a harm and that an accident occurred or working conditions existed which could have caused that harm or aggravated a pre-existing condition. *See generally U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982); *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982).

Employer contends that since the cause of sarcoidosis is unknown, claimant cannot establish that his employment exposure caused or could have caused the disease. To the extent that employer contends that claimant must establish that the toxic exposure caused claimant's sarcoidosis, it misperceives the operation of Section 20(a). *See id. See also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 261, 31 BRBS 119, 123(CRT) (4th Cir. 1997) ("an employee seeking to have the benefit of the statutory presumption must first allege (1) an injury or death (2) that arose out of and in the course of (3) his maritime employment. To this claim attaches a presumption of coverage by the Act, shifting the burden of proceeding further to the employer."). With regard to whether claimant's exposures at work could have caused his sarcoidosis, the administrative law judge rationally found that claimant introduced sufficient evidence to invoke the Section 20(a) presumption. Dr. Donlan opined that sarcoidosis can be aggravated by environmental exposures and acknowledged that claimant's symptoms seemed to have their onset on December 23, 1998.

EX 2; Dep. at 13. As the administrative law judge rationally concluded that claimant introduced sufficient evidence to establish that the basis of his claim goes "beyond mere fancy," *see Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968), we affirm the administrative law judge's finding that claimant established a *prima facie* case and his invocation of the Section 20(a) presumption.

Once the Section 20(a) presumption is invoked the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Gooden v. Director,* OWCP, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see also Swinton v. J. Frank Kelly, Inc*., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If claimant's working conditions could have aggravated a pre-existing condition, employer must establish that claimant's work neither directly caused the injury nor aggravated the pre-existing condition. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). In establishing rebuttal of the presumption, proof of another agency of causation is not necessary as long as employer introduces substantial evidence that the injury is not related to the employment. Employer cannot rebut the Section 20(a) presumption merely by demonstrating that the cause of the condition cannot be medically determined. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982)(Kalaris, J., concurring and dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984). Despite the lack of definitive studies demonstrating the cause of a condition, however, employer can rebut the Section 20(a) presumption if it introduces substantial evidence that this claimant's condition was not caused or aggravated by his employment. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT).

The administrative law judge found that employer did not rebut the Section 20(a) presumption because it is insufficient for an employer merely to show that the cause of a disease is unknown. Decision and Order at 13. Employer contends this finding is in error, and that, moreover, the administrative law judge erred in stating that it did not introduce medical evidence sufficient to rebut the Section 20(a) presumption.

Employer first argues that rebuttal is established based upon the medical evidence stating that the cause of sarcoidosis is unknown. *See, e.g.,* EX 3: "Joint

Statement of the American Thoracic Society and the European Respiratory Society," *Am. J. of Respiratory and Critical Care Medicine*, Vol. 150 (1999). However, as the administrative law judge properly stated, the fact that the cause of sarcoidosis is unknown does not establish that claimant's exposure is not a cause of the condition, especially in light of the medical community's emphasis on possible environmental factors as a cause or aggravation of the condition. *Id.; see Stevens,* 14 BRBS at 628. The medical literature acknowledges as possible causes environmental exposures to infectious agents as well as exposure to inorganic agents such as aluminum, zirconium and talc. *Id*., EX 3 at 739. Thus, we affirm the administrative law judge's finding that this evidence does not rebut the Section 20(a) presumption.

Employer also contends that the opinion of Dr. Donlan, who is Board-certified in internal and pulmonary medicine, is sufficient to rebut the Section 20(a) presumption. Dr. Donlan stated that the etiology of sarcoidosis is unknown, but that "I do not think one could relate the sarcoidosis to exposure that occurred at a grain elevator at [claimant's] workplace," CX 6a, and that "I cannot make out a relationship between the exposure and the development of sarcoidosis." EX 2 (examination of Nov. 11, 2001). This opinion constitutes substantial evidence that claimant's sarcoidosis was not caused by claimant's employment. *See Neeley*, 19 BRBS at 140.

We must remand the case, however, for the administrative law judge to discuss whether employer introduced substantial evidence that claimant's sarcoidosis was not aggravated by his employment. *See Conoco, Inc.,* 194 F.3d 684, 33 BRBS 187(CRT). Dr. Donlan stated that sarcoidosis can be aggravated by environmental factors, Dep. at 13, but he also stated that aggravation does not occur in patients like claimant who lack "lung involvement." Dep. at 6, 13-14. On the other hand, Dr. Donlan stated that claimant's condition became symptomatic upon exposure and that he was unaware of the side effects of the chemicals to which claimant was exposed.[2] EX 2. It is not clear to which of claimant's symptoms Dr. Donlan is referring; the administrative law judge found that claimant's gastrointestinal problems are not work-related or related to the sarcoidosis.[3] If claimant's work exposure caused his condition to become

[2]Employer erroneously states that Dr. Donlan concluded that Foxtoxide does not cause sarcoidosis. Brief at 24. Dr. Donlan stated, "I am not aware of the particular side effects from the chemical Foxtoxide, ..." EX 2.

[3]Dr. Donlan stressed that claimant's primary symptoms are gastrointestinal, and not pulmonary, in nature. Dep. at 6, 15-17. On a few occasions, claimant reported to Dr. Donlan that he was intermittently short of breath and had a cough.

symptomatic, or otherwise worsened his symptoms, claimant has sustained a work-related injury.[4] *See Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc*., 18 BRBS 212 (1986); *see also Gooden*, 135 F.3d at 1066, 32 BRBS at 59(CRT). Therefore, since Dr. Donlan's opinion is sufficient to rebut the Section 20(a) presumption with regard to the cause of claimant's sarcoidosis, and as the administrative law judge did not address whether employer presented substantial evidence that claimant's sarcoidosis was not aggravated by his employment, we remand this case for further findings. If the administrative law judge finds that employer rebutted the Section 20(a) presumption, he must weigh the evidence as a whole in order to determine if claimant established that his sarcoidosis is work-related. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

Assuming, *arguendo,* that claimant's condition is work-related, employer also contends that the administrative law judge erred in finding that claimant cannot return to his usual work. The administrative law judge stated that it was undisputed that claimant's usual work was dusty and exposed him to fumes. In finding that claimant cannot return to his usual work, the administrative law judge relied on the opinions of Drs. Donlan, Espada, and Tomlinson, who stated that claimant should not work in such an environment. CXS 1; 5dd; EX 2. Employer relies on the opinions of Drs. Tomlinson and Donlan that claimant is not disabled

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EX 2. In June 1999, however, Dr. Donlan stated that claimant's pulmonary function studies were "essentially normal." *Id.* A pulmonary function test administered in 2000 was interpreted as showing mild restrictive lung disease, CX 4f, although Dr. Patel concluded that claimant did not have "any significant pulmonary symptoms." CX 4b.

[4]Employer argues that the work exposure did not aggravate or render symptomatic claimant's sarcoidosis because his condition had not been previously diagnosed. Employer mistakenly equates the lack of a diagnosis with an absence of a condition.

from working. *See* CX 5dd; Dep. at 7. Dr. Tomlinson, however, was commenting on claimant's physical capacity to work, and the administrative law judge rationally gave less weight to Dr. Donlan's deposition testimony that claimant could return to work in a dusty environment, Dept. at 7, in view of Dr. Donlan's earlier statement that claimant should avoid working in dusty environments, EX 2, and of the opinions of Drs. Espada and Tomlinson. *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, the administrative law judge appropriately took into account the inadvisability of claimant's working in a dusty environment in determining if claimant could return to his usual work. *See Armand v. American Marine Corp.*, 21 BRBS 305 (1988). As the administrative law judge's finding that claimant cannot return to his usual work is rational and supported by substantial evidence, it is affirmed. *See generally Boone v. Newport News Shipbuilding & Dry Dock Co.,* 21 BRBS 1 (1988). Claimant has not appealed the administrative law judge's findings that employer established the availability of suitable alternate employment and that claimant did not seek alternate work in a diligent manner. Therefore, if on remand the administrative law judge finds that claimant's sarcoidosis is work-related, the award of temporary partial disability benefits is affirmed.

Accordingly, we vacate the administrative law judge's finding that employer did not rebut the Section 20(a) presumption with regard to claimant's sarcoidosis, and we remand the case for further findings. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge