BRB No. 00-0628

DENNIS ROWSEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: MAR 7, 2003
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Paul A. Weykamp (Law Offices of Paul A. Weykamp), Baltimore, Maryland, for claimant.

James M. Mesnard (Seyfarth Shaw), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (98-LHC-1510, 1511, 1512) of Administrative Law Judge Fletcher E. Campbell, 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 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).

Claimant began working for employer on June 28, 1966, and was subsequently exposed to sand, dust and asbestos. *See* Tr. at 39, 42. In 1972, claimant was transferred to employer's paint department, where he spray-painted using various products. After

experiencing breathing difficulties, claimant filed a claim for benefits under the Act on February 11, 1983. EXs 1-2. He subsequently developed congestive heart failure, or cardiomyopathy, in 1995. On May 29, 1996, claimant filed a second claim for benefits based upon an alleged occupationally-induced lung disease. EXs 5, 6.[1] Claimant last worked for employer on November 7, 1997.

In his Decision and Order, the administrative law judge, after initially finding that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption of causation, found that employer produced substantial evidence to rebut the presumption. Next, after considering the totality of the evidence, the administrative law judge concluded that claimant's present respiratory impairment is not causally related to his employment with employer. Accordingly, the administrative law judge denied claimant benefits under the Act. On appeal, claimant challenges the denial of benefits. Employer responds, urging affirmance.

In the instant case, the administrative law judge properly invoked the Section 20(a) presumption as he found that claimant suffered a harm and that working conditions existed which could have caused that harm. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997)*; see generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Once claimant has invoked the presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Moore*, 126 F.3d at 262, 31 BRBS at 123 (CRT); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). The opinion of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). *See generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

[1]Claimant also filed claims for a bilateral knee injury sustained on September 7, 1995, and a right ankle injury sustained on September 16, 1995, in addition to his claim for the respiratory condition. EXs 8, 9, 13. Only the claim for the lung impairment is before the Board.

In finding that employer rebutted the invoked presumption, the administrative law judge relied upon, *inter alia*, the opinion of Dr. Shaw. Dr. Shaw stated, to a reasonable degree of medical certainty, that claimant does not have asbestosis; that he does not feel that claimant's current pulmonary problems are caused by his employment; and that while claimant's mild bronchial asthma may have been aggravated by his employment in employer's paint department, the source of the aggravation was removed when claimant left the paint department in 1983.[2] *See* EX 57. Contrary to claimant's contention that Dr. Shaw's most recent medical report is dated March 9, 1994, and is therefore an inaccurate reflection of claimant's current condition, Dr. Shaw stated that he last saw claimant on March 8, 1996. *See* EX 57. Moreover, the administrative law judge, when addressing the medical evidence of record, specifically referred to Employer's Exhibit 57, a January 27, 1999, report authored by Dr. Shaw, wherein that physician reviewed both his own and the other physicians' medical records. As Dr. Shaw's opinion severs the causal link between claimant's employment and his present medical condition, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See generally Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Claimant also challenges the administrative law judge's finding that causation was not established based on the record as a whole. Specifically, claimant assigns error to the administrative law judge's decision not to rely on what he asserts is the recent, thorough and complete medical report of Dr. Baker, which is based on a physical examination conducted one month prior to the hearing, and Dr. Freeman's report, which claimant argues is well-reasoned and complete. After considering all of the medical evidence of record, the administrative law judge determined that Dr. Baker's opinion that claimant's restrictive lung disease is related to his work at the shipyard was not entitled to determinative weight because Dr. Baker had not reviewed the reports of Dr. Fairman or Dr. Splan, and his report was based on only selected reports with which claimant supplied him. CX 21 at 14, 16-18, 20, 39. The administrative law judge also found Dr. Freeman's report to be poorly reasoned in that it was conclusory on the question of work-related causation. Accordingly, the administrative law judge found that claimant did not meet his burden of showing that his current condition is related to his work injury.

[2]Similarly, Dr. Mitchell opined that claimant's chest x-ray does not show signs of either asbestos exposure or asbestos-related disease. *See* EX 37.

In this case, the administrative law judge fully evaluated the relevant evidence, and his findings regarding the medical opinions are supported by the record. In making this determination, the administrative law judge found that of the eight physicians who rendered opinions on this issue, the opinions of Drs. Fairman, Foreman, Mitchell, Splan and Shaw support employer's position that claimant's lung impairment is not work-related. The administrative law judge specifically found that Dr. Splan, claimant's current treating physician, and Dr. Shaw, who had treated claimant for seven years, are most familiar with claimant's condition, and are well-qualified pulmonary specialists. Decision and Order at 20. Moreover, the administrative law judge stated that Drs. Fairman, Foreman and Mitchell, who also are of the opinion that claimant's respiratory problems are not work-related, had the most complete records available for their review. In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, the administrative law judge's decision rationally discounted the opinions of Drs. Baker and Freeman in determining that claimant failed to meet his burden in this case. *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT). We therefore affirm the administrative law judge's determination, based on the record as a whole, that claimant did not meet his burden of establishing that his present respiratory condition is related to his employment with employer. *See, e.g., Rochester v. George Washington University*, 30 BRBS 233 (1997).[3]

[3]Employer has filed a motion to dismiss claimant's appeal on the ground that the administrative law judge's February 15, 2000, decision denying benefits was automatically affirmed on March 15, 2001, after claimant's appeal had been pending for one year. Under the Consolidated Appropriations Act, 2002, Pub. L. No. 107-116, 115 Stat. 2177, appeals before the Board must be addressed within one year of the date of appeal or be considered administratively affirmed. *See Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Donaldson v. Coastal Marine Contracting Corp.*, 116 F.3d 1449, 31 BRBS 70(CRT) (11th Cir. 1997); *Shell Offshore, Inc. v. Director, OWCP*, 112 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 251 (1998). Contrary to employer's argument, claimant's appeal had not been "pending" for the one-year period on March 15, 2001. The Board dismissed claimant's initial appeal for lack of prosecution on June 27, 2000, within one year of its filing. The Board granted claimant's motion and reinstated this appeal on August 7, 2000. The one year period for review commenced on the date of reinstatement. *Trice v. Va. Int'l Terminals*, 30 BRBS 165, 167 n.2 (1996). However, as the record was not forwarded to the Board, the Board again dismissed the appeal and remanded the case to the

district director with instructions to reconstruct the record. As this action occurred within one year of the reinstatement, the Board's July 23, 2001, remand order was timely. *See Trice*, 30 BRBS 165; *see generally McKnight*, 32 BRBS 251. The reconstructed record was forwarded to the Board on August 15, 2002, the appeal was again reinstated on August 23, 2002, and this decision has been issued within one year of that date. Accordingly, employer's motion to dismiss is denied.

Accordingly, 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

REGINA C. McGRANERY
Administrative Appeals Judge