BRB Nos. 96-0475
and 96-0475A

LARRY HICE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ELECTROSPACE SYSTEMS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
HOME INSURANCE	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order of Joel R. Williams, Administrative Law Judge, United States Department of Labor.

Benjamin T. Boscolo and Lancey M. Boros (Chasen & Boscolo), Greenbelt, Maryland, for claimant.

Roy D. Axelrod (Littler, Mendelson, Fastiff, Tichy & Mathiason), San Diego, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (94-LHC-3261) of Administrative Law Judge Joel R. Williams denying 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge 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 October 7, 1991, claimant, an electrical engineer employed by employer to perform very low frequency transmission system assessments under a contract with the United States Navy, experienced chest pains while climbing steps at his work station in Australia. Prior to this incident, claimant had worked for 11 or 12 days in Japan at least 8 hours per day performing work which he characterized as physically demanding; he indicated he was required to carry his lap-top computer, brief case and camera, weighing approximately 25 pounds, up and down stairs. Claimant received medical treatment for his chest pains in three different hospitals in Exmouth and Perth, Australia, where testing revealed that he had suffered a myocardial infarction. After his condition stabilized, claimant commenced a return trip to the United States. This trip required that he stay overnight in Sydney, where, on October 19, 1991, he sustained a right hemispheric embolic cerebrovascular accident due to cardiac thrombosis. As a result, claimant was admitted to St. Vincent's Hospital. Claimant was discharged to return to the United States on November 5, 1991, where he came under the care of Dr. Akbari at Fairfax Hospital in Virginia. On December 2, 1991, Dr. Akbari released claimant to resume his employment on a part-time basis, and claimant worked a total of 25 hours between December 2 and 12, 1991. Following a neurological examination by Dr. Grass on December 27, 1991, however, Dr. Akbari withdrew her release, and claimant has not returned to work since that time. Claimant filed a claim seeking permanent total disability compensation and medical benefits under the Defense Base Act, alleging that unusual stress and physical exertion during his back-to-back job assignments in Japan and Australia caused or contributed to his myocardial infarction and resultant stroke.

In a Decision and Order issued on November 8, 1995, the administrative law judge denied benefits, finding that although the parties stipulated that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, substantial evidence in the record established rebuttal, and the record as a whole did not support a finding that claimant's myocardial infarction and resultant stroke were causally related to his employment.

On appeal, claimant contends that, in denying his claim for compensation, the administrative law judge erred in relying on the opinions of employer's medical experts rather than on the opinion of claimant's treating physician, Dr. Akbari, and in failing to recognize that the claim was compensable under the "aggravation rule." Employer responds, urging affirmance of the denial of benefits. Employer also filed a protective cross-appeal, contending that the administrative law judge erred in failing to apply *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786 (1993), *on remand*, 43 F.3d 1311 (9th Cir. 1995), to exclude Dr. Akbari's opinion from the record.

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 if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *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). Under the "aggravation rule," where an employment-related injury aggravates, accelerates or combines with a non work-related pre-existing disease or underlying

condition, the entire resultant disability is compensable. *See Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). Once claimant has invoked the presumption, the burden of proof shifts to employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935).

After review of the administrative law judge's Decision and Order in light of the evidence of record, we affirm his denial of benefits because his determination that claimant's myocardial infarction and resultant stroke are not work-related is rational, supported by substantial evidence, and in accordance with applicable law. *See O'Keeffe*, 380 U.S. at 359. In the present case, employer conceded that claimant was entitled to the Section 20(a) presumption. The administrative law judge, however, properly determined that employer introduced evidence sufficient to rebut the presumption based on the medical opinions of employer's experts, Drs. Shugoll, Jenkins, and Hughson, that there was no causal relationship between claimant's employment and his myocardial infarction and stroke. *See generally Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). These doctors opined that claimant's myocardial infarction was not caused by stress in his employment but rather by the natural progression of his pre-existing, non work-related coronary artery disease, which in turn was caused by claimant's multiple risk factors, including a prior myocardial infarction in 1989, hypertension, hypercholesterolemia, smoking, diabetes, and peripheral vascular disease. *See* Emp. Exs. 66, 8, 38.[1]

Having found rebuttal established, the administrative law judge proceeded to consider the causation issue based on the evidence as a whole. The administrative law judge discredited Dr. Akbari's opinion relating claimant's heart attack and resultant stroke to his employment, finding it unreasoned because it was based at least in part on the unsupported assumption that claimant's myocardial infarction was preceded by attacks of angina and that claimant's work situation in Australia was unusually stressful.[2] Crediting the opinions of Drs. Shugoll, Jenkins, and Hughson, the administrative law judge concluded that claimant failed to establish that his myocardial

[1]The credited physicians explained that while acute physical or mental stress could immediately precipitate a myocardial infarction, the stresses that claimant described undergoing in Australia did not place him at risk. Moreover, Dr. Hughson stated that as the effect of stress on the heart is temporary, lasting at most a few hours, any stress which claimant perceived himself as having while he was in Japan could not have contributed to his myocardial infarction one week later. Tr. at 128-129.

[2]Claimant testified that he experienced no chest pains between the time of his first myocardial infarction in 1989 and the morning of October 7, 1991. Tr. at 48-50. Although claimant argues that he testified to several instances of work stress in Australia, including the minimal amount of travel time allotted between Japan and Australia, his inability to rest between work assignments and the physical requirements of his job in Australia, Tr. at 42-49, the administrative law judge's finding that claimant did not relate any particularly stressful situations in Australia, Decision and Order at 9, is supported by the testimony of Dr. Hughson, Tr. at 122, 123.

infarction and subsequent stroke are work-related. As the administrative law judge is not bound to accept the opinion or theory of any particular medical examiner but is free to accept or reject all or any part of any testimony as he sees fit, *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), his decision to credit the medical opinions of Drs. Shugoll, Jenkins, and Hughson was a proper exercise of his discretionary authority. *See generally Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT)(9th Cir. 1990), *cert. denied*, 111 S.Ct. 1589 (1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

Claimant correctly asserts that the administrative law judge did not specifically address his argument that work-related physical and mental stress aggravated his pre-existing coronary artery disease. We conclude, however, that any error the administrative law judge may have made in this regard is harmless because, as previously discussed, after weighing the evidence relevant to causation, the administrative law judge rationally rejected Dr. Akbari's medical opinion, the only evidence of record sufficient to support a finding of causation under an aggravation theory. Moreover, he credited the opinion of Dr. Hughson, who unequivocally stated that "there was no acceleration of the natural progression of his coronary artery disease due to his claimed industrial stress."[3] Ex. 38 at 17; *see Whitmore v. AFIA Worldwide Insurance*, 837 F.2d 513, 20 BRBS 84 (CRT)(D.C. Cir. 1988).

The medical opinions of Drs. Shugoll, Jenkins, and Hughson provide substantial evidence to support the administrative law judge's finding that claimant's myocardial infarction and stroke are not work-related. As claimant has failed to raise any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, his denial of benefits based on claimant's failure to establish that his myocardial infarction and stroke are work-related is affirmed.[4] *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir.

[3]We reject claimant's assertion that Dr. Hughson's opinion is insufficient to establish rebuttal because he conceded that the stress that claimant was experiencing could have caused or contributed to his heart attack. Although Dr. Hughson acknowledged that it was theoretically possible for stress to contribute to claimant's myocardial infarction, he went on to explain that virtually anything is possible, but on the facts of this case it was not "reasonably medically probable that the alleged industrial stress caused, accelerated, or contributed to the coronary artery disease, or caused the second myocardial infarction earlier than would have occurred simply from the natural progression of the pre-existing, non-industrial coronary artery disease." Emp. Ex. 38 at 17; *see also* Tr. at 122-123. An opinion based on a reasonable degree of medical *probability* is sufficient, and it is not undermined by the doctor's acknowledging that other outcomes are *possible*.

[4]In light of our affirmance of the denial of benefits, employer's argument that the administrative law judge erred in failing to exclude Dr. Akbari's opinion from the record pursuant to the criteria enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786 (1993), *on remand*, 43 F.3d 1311 (9th Cir. 1995), which it raised in its protective cross-appeal, has been rendered moot. We note, however, that the administrative law judge's finding that *Daubert* is not applicable because the administrative law judge is not bound by formal rules of evidence in proceedings under the Act comports with applicable law. *See* 20 C.F.R. §702.339; *see also generally*

1978), *cert. denied*, 440 U.S. 911 (1979); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

Powell v. Nacirema Operating Company, Inc., 19 BRBS 124, 127 (1986).