**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0059

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| JIMMIE D. WILSON | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| FLUOR CORPORATION | ) | |
| | ) | |
| and | ) | DATE ISSUED: 02/22/2023 |
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| INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA | ) | |
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| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand Denying Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), Sausalito, California, and Howard S. Grossman and Scott Thaler (Grossman Attorneys at Law), Boca Raton, Florida, for Claimant.

Monica F. Markovich and Krystal L. Layher (Brown Sims), Houston, Texas, for Employer/Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order on Remand Denying Benefits (2016-LDA-00099) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as

amended, 33 U.S.C. §901 *et seq*. (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). This case is before the Benefits Review Board for a second time.[1]

Claimant served for 21 years in the United States military where he worked in fuel distribution and handling. HT at 53, 55. From 2009 to 2012, Claimant worked for Employer as a fuel distribution systems manager in Afghanistan. *Id* at 70; CX 21 at 1. His work involved transferring a specific type of jet fuel propellant, JP8, from tanker trucks to fuel bladders. HT at 75-76. During his employment, Claimant stated he was regularly exposed to JP8 jet fuel as well as its chemical additives and corresponding fuels. *Id.* Claimant was responsible for cleaning up spills and transferring fuel when bladders became defective or unusable. *Id.* at 78.

During a routine primary care appointment while Claimant was stateside in 2011, his doctor, Dr. Paul Skinner, noticed Claimant had elevated protein levels. CX 10. Dr. Skinner referred Claimant to Dr. Saeeda Zaman Chowdhury, who diagnosed him with multiple myeloma (bone marrow cancer) in June 2012. *Id*. Claimant began chemotherapy in September 2012 and underwent another round after a stem cell transplant in February 2013. Bone marrow biopsies in August and December 2013 were negative for residual disease, but Claimant's February 2014 biopsy showed slightly hyper cellular marrow. *See Wilson,* slip op. at 4.

Claimant filed a claim under the Act on December 10, 2012, alleging his multiple myeloma was caused by his work exposure to jet fuel.[2] CX 2; EX 3. Further, Claimant asserted he developed Post-Traumatic Stress Disorder as a result of contracting multiple myeloma. *See* HT at 30, 99-102. He relied on the opinions of Drs. Harvey Checkoway and Gary Spitzer and asserted that benzene, a carcinogen and component of jet fuel, either caused or contributed to his multiple myeloma. CX 31 at 5; CX 13 at 1, 4. Employer

[1] For a full discussion of the facts, *see Wilson v. Fluor Fed'l Global Products Inc.*, BRB No. 18-0254 (June 18, 2019), slip op. at 2-4.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because the district director who filed the ALJ's decision is in the Jacksonville District Office of the Office of Workers' Compensation Programs (OWCP), which is in Florida. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

challenged his claim, asserting Claimant did not establish benzene could cause multiple myeloma.

On February 7, 2018, the ALJ issued his Decision and Order Denying Benefits. He determined Claimant failed to establish a prima facie case to invoke the Section 20(a) presumption by not proving he was exposed to benzene during the course of his work with Employer or that benzene could have caused his multiple myeloma. The ALJ also denied Claimant's secondary psychological injury claim because Claimant failed to invoke the presumption that his initial injury was work related.

Claimant appealed to the Board, contending the ALJ erred in failing to invoke the Section 20(a) presumption. The Board agreed with Claimant's position and reversed the ALJ's decision, holding Claimant met his prima facie case by producing sufficient evidence from Drs. Chowdhury, Checkoway, and Spitzer that benzene exposure from jet fuel could have caused his multiple myeloma. *Wilson*, slip op. at 9. Thus, the Board remanded the case to the ALJ to address whether Employer rebutted the presumed causal connection and, if Employer successfully rebutted the presumption, to then subsequently resolve the issue of causation on the record as a whole. *Id.* At 10. The Board also instructed the ALJ to address Claimant's argument that his elevated protein levels and myeloma may have been pre-existing before his work with Employer and were aggravated by his work exposures. *Id.*

On remand, the ALJ determined Employer produced substantial evidence sufficient to rebut the Section 20(a) presumption, 33 U.S.C. §920(a). Decision and Order (D&O) at 2. Specifically, the ALJ found Dr. Suzanne Sergile's medical opinion that Claimant's multiple myeloma was not causally related to his employment with Employer or his exposure to benzene met the burden of production necessary to rebut Claimant's prima facie case. *Id.* After next weighing the evidence, the ALJ concluded Claimant did not establish a causal relationship between his exposure to benzene and his multiple myeloma. *Id* at 3.

The ALJ gave greater weight to Dr. Sergile's medical testimony than to Claimant's doctors, finding her opinion well-documented and well-reasoned, as she also contemplated studies Dr. Checkoway had not considered. *Id.* at 13-14. In addition, the ALJ found the record did not establish Claimant's elevated protein levels or multiple myeloma were pre-existing before his work with Employer or were aggravated by his work exposures with Employer.[3] *Id*. at 20. Finally, because the ALJ determined the evidence did not establish

[3] The ALJ, in response to the Board's instructions, reiterated his belief that Claimant did not raise an aggravation theory prior to his appeal. Nevertheless, because of the

Claimant's multiple myeloma was work related, he found Claimant's subsequent psychological injury was not compensable either. *Id.* at 21.

On appeal, Claimant contends the ALJ erred in his rebuttal analysis. He claims Employer's reliance on Dr. Sergile's medical opinion identifying a "possible" association between benzene exposure and myeloma demonstrates a likelihood of causation and falls short of the substantial evidence standard necessary to disprove causation. Cl. Brief at 21. Alternatively, Claimant maintains that even if the Board affirms the ALJ's finding that Employer rebutted the Section 20(a) presumption, Claimant should still prevail because the ALJ improperly weighed Dr. Sergile's medical opinion and substituted his own opinion for the medical experts. *Id.* at 28, 33-34. In the event the Board affirms the ALJ's weighing of the evidence, Claimant argues his myeloma should be treated as a pre-existing condition aggravated by his jet fuel exposures. *Id.* at 23, 26-27. Claimant further states his psychiatric injury should be found compensable as secondary to his work-related multiple myeloma. *Id.* at 42. Thus, he requests the Board reverse the ALJ's finding that Employer rebutted the Section 20(a) presumption, remand the case, and direct the ALJ to enter an order awarding benefits. Employer responds, urging affirmance of the ALJ's decision denying benefits. Claimant filed a reply brief reiterating his contentions.

**Employer produced substantial evidence to rebut the Section 20(a) presumption[4]**

Claimant asserts the ALJ erred in finding Employer presented substantial evidence to rebut the Section 20(a) presumption that benzene exposure could have caused or aggravated his multiple myeloma. To be entitled to the Section 20(a) presumption linking his injuries to his employment, a claimant must sufficiently allege: 1) he has sustained a

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Board's instruction, the ALJ considered aggravation, and this decision will address both causation and aggravation.

[4] As a preliminary matter, Employer posits Claimant is asking the Board for a *de novo* review to assess the credibility and weight of the evidence. Emp. Br. At 15. Employer argues Claimant uses identical caselaw and verbatim recitations of fact on appeal as he did before the ALJ on remand. *Id.* at 12-14. Accordingly, Employer requests the Board find the issues Claimant raises on appeal are without merit. *Id.* at 15. However, Claimant contends his recitation of facts and arguments are to support his assertion that there is no substantial evidence in the record to support rebuttal. Cl. Reply Br. at 2. The Board is not permitted to reweigh the evidence but must look to whether substantial evidence supports the ALJ's decision; thus, we will proceed to consider the arguments raised before us and apply the appropriate standard of review in so doing. *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 1219, 43 BRBS 21(CRT) (11th Cir. 2009).

harm; and 2) an accident occurred or working conditions existed which could have caused or aggravated the harm. *Rose v. Vectrus Systems Corporation*, 56 BRBS 27(CRT) (Decision on Recon. en banc); *see, e.g.*, *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010)*; Brown v. I.T.T/Cont'l Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000). The claimant bears an initial burden of production to invoke the Section 20(a) presumption.[5] *Rose,* 56 BRBS at 36.

Once the Section 20(a) presumption is invoked, as is the case here, the burden shifts to the employer to rebut it with substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Newport News Shipbuilding & Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67 (CRT) (4th Cir. 2009); *Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Kelley,* 34 BRBS 39. Substantial evidence is the amount of evidence which a reasonable mind could accept as adequate to support a conclusion. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986); *see Travelers Insurance Co. v. Belair*, 412 F.2d 297 (1st Cir. 1969). If the employer successfully rebuts the presumption, the claimant is no longer entitled to it, and the issue of causation must be resolved on the evidence of the record as a whole, with the claimant bearing the burden of persuasion by a preponderance of the evidence. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 262, 31 BRBS 119, 124(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp*., 30 BRBS 71 (1996).

Claimant contends the ALJ erred in accepting Dr. Sergile's medical opinion as constituting substantial evidence to rebut the Section 20(a) presumption because he asserts her testimony demonstrated a likelihood of causation rather than a lack of causation. Cl. Brief at 19. Specifically, Claimant argues Dr. Sergile's opinion describes a possible association between exposure to petroleum products and myeloma, and this association does not rule out causation. *Id.* at 20. Claimant asserts this testimony is "hedged and speculative," and falls below the legal standard that Employer must disprove a causal link. *Id.* at 21.

We disagree with Claimant's interpretation of Dr. Sergile's testimony as well as his contention about Employer's burden to disprove causation. Dr. Sergile repeatedly opined Claimant's multiple myeloma is not related to his benzene exposure. In her initial November 28, 2012 report, Dr. Sergile stated:

[5] "The burden of production or 'some evidence' standard which we have set forth here is a light burden – being no greater than an employer's burden on rebuttal – meant to give the claimant the benefit of the statutory framework." *Rose*, 56 BRBS at 36-37.

> Multiple myeloma is more likely than (sic) NOT CAUSALLY related to work for [Employer]. Plausibility of jet fuel exposure with current employer and multiple myeloma is not established. The [Material Safety Data Sheet (MSDS)] for jet fuel with which he was working does not identify risk of multiple myeloma development as a result of exposure to the jet fuel…

EX 12 at 2. In her deposition, Dr. Sergile outlined the nine Bradford-Hill criteria she used to support her conclusion that Claimant's multiple myeloma was not caused by his work exposures with Employer.[6] EX 14 at 17. She applied these criteria, and reviewed textbooks in occupational and environmental medicine, to conclude there is no causal relationship between Claimant's multiple myeloma and his employment. EX 14 at 24. In her supplemental report, Dr. Sergile once again stated that, based on her methodology and research, "review of the submitted documents support[s] that Mr. Wilson's multiple myeloma did not result from exposure to jet fuel during his employment at [Employer]." EX 31 at 6.

Claimant likens his case to the decision of the United States Court of Appeals for the Eleventh Circuit in *Brown*, 893 F.2d 294, 23 BRBS 22(CRT), where the court held "an employer must rebut the §20(a) presumption with 'direct concrete evidence' 'ruling out the possibility that there was a causal connection' between the accident and the disability." *Brown*, 893 F.2d at 297, 23 BRBS at 24; *see* Cl. Brief at 13-14. However, the court in *Brown* specifically found there was no concrete evidence sufficient to rebut the presumption because none of the physicians on record expressed an opinion ruling out a causal connection. *Id.*, 893 F.2d at 297, 22 BRBS at 24. Subsequent Board decisions have interpreted *Brown* to indicate an employer may, but is not required to, show proof of another agency of causation to rebut. *O'Kelley*, 34 BRBS 39; *see Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1984). Rather, the testimony of a physician that a relationship does not exist between a claimant's injury and employment is sufficient to cast doubt on the link and rebut the presumption. *Id.*; *see Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1994).

[6] The Bradford Hill criteria for causality is a methodology that epidemiologists and other doctors use to determine an association or causation between workplace exposure and an injury or illness. The Bradford Hill factors include: (1) temporal relationship; (2) strength of association; (3) dose-response relationship; (4) replication of findings; (5) biological plausibility; (6) consideration of alternative factors; (7) cessation of exposure; (8) specificity of association; and (9) consistency with other information and knowledge. The ALJ's D&O provides an extensive and well-documented discussion of these nine factors that need not be reproduced here. *See* D&O at 13-20.

Dr. Sergile's opinion constitutes substantial evidence and is sufficient to rebut the Section 20(a) presumption. *O'Kelley*, 34 BRBS 39. As Employer asserts, a review of Dr. Sergile's reports and deposition reveals she repeatedly stated Claimant's myeloma was not related to his exposure to benzene. *See* EX 12 at 2 (*see* quote *supra*); EX 14 at 24;[7] EX 31 at 6.[8] In fact, she specifically states in her deposition testimony, "I did not see a causal relationship between the two." EX 14 at 24. When taken as a whole, instead of taking one remark out of context, her opinion is specific, comprehensive, and sufficient to rebut the presumed connection. Accordingly, we affirm the ALJ's determination that Employer produced substantial evidence to rebut Claimant's Section 20(a) presumption.

**The ALJ permissibly found a preponderance of evidence does not establish a causal relationship**

Claimant argues the ALJ erred in weighing the evidence as a whole, even if Employer presented substantial evidence to rebut the Section 20(a) presumption. Specifically, Claimant contends Employer's reliance on Dr. Sergile's testimony, admitting a "possible" association between benzene exposures and myeloma, does not disprove causation. Claimant also alleges the ALJ failed to properly weigh the evidence that Drs. Chowdhury, Checkoway, and Spitzer submitted. Further, Claimant asserts the ALJ improperly weighed Dr. Sergile's testimony because she only conducted one hour of

[7] Dr. Sergile stated in her deposition: "I did not see a causal relationship between the two" as, from the study provided to her, "there was no mention of [aviation fuel] causing multiple myeloma." It was her opinion there is no causal relationship "to a reasonable degree of medical probability." EX 14 at 24. Dr. Sergile opined many of the studies she reviewed did not mention jet fuel or benzene exposure or multiple myeloma and those that did had too few test cases for the results to render a strong enough association; "there is no science that shows that any chemical, in particular benzene or whatever other portion of jet fuel, causes multiple myeloma." EX 14 at 34-36, 65.

[8] In her conclusion in her supplemental report, Dr. Sergile stated: "Based on the additional information provided in the reviewed documents and references listed, my original opinion remains unchanged that [Claimant's] occupational exposures to jet fuel, additives or benzene during his employment at Fluor Daniels was not a significant contributing factor and was not the most likely cause of his development of multiple myeloma." EX 31 at 6-7.

research for her determination and was Employer's "in-house, non-practicing physician." Cl. Brief at 37.[9]

We disagree with Claimant's position. Once the ALJ found Employer rebutted the presumption, it dropped out of the case, and the ALJ weighed all the evidence to determine if a causal relationship was established, with Claimant bearing the ultimate burden of persuasion. As the factfinder, the ALJ is entitled to evaluate the credibility of all witnesses, including doctors, weigh the medical evidence, and draw his own inferences and conclusions from the record. *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999). It is solely within the ALJ's discretion to accept or reject all or any part of anyone's testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir.1988); *see also John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, it is impermissible for the Board to reweigh the evidence or to substitute its own views for those of the administrative law judge. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981) (table).

Contrary to Claimant's contentions, the ALJ reasonably weighed the evidence in reaching his conclusions. He provided a comprehensive review of the doctors' opinions and, in doing so, determined Dr. Chowdhury's testimony deserved limited weight because he based his findings on a one-page blog post entitled "Broad Concerns About Toxic Exposure and Myeloma" and did not address any of the more academic medical literature. D&O at 3; CX 24. Moreover, the ALJ gave little weight to Dr. Spitzer's testimony based on his uncertain and equivocal language, his failure to address the medical literature, and his confusing statement about a potential connection between jet fuel exposure and a "young person." *Id.* at 3-5; CX 13.[10]

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[9] Claimant alleges a conflict of interest in light of Dr. Sergile's employment as an in-house doctor for a subsidiary of Employer's insurance carrier. Claimant apparently questions Dr. Sergile's credibility as an expert in this case based on her background and work association. The ALJ's D&O does not address this argument. However, as Claimant does not make this a material argument, and the ALJ is entitled to evaluate the credibility of all witnesses and found Dr. Sergile's credentials credible, any error the ALJ may have made in failing to specifically address this argument is harmless.

[10] Dr. Spitzer stated benzene and jet fuel exposure might be "possibly contributing to an etiology of myeloma in a young person," but he did not define "young person," indicate whether Claimant, a 52-year-old male, would fit that definition in the context of multiple myeloma diagnoses, or state why it would affect a "young" person but not an older

The ALJ then determined Drs. Checkoway and Sergile's medical opinions were well-documented and well-reasoned, and so it came down to a "battle of the experts." D&O at 13. Ultimately, he determined Dr. Sergile's medical research and analysis of the nine Bradford Hill factors warranted giving her opinion greater weight. The ALJ concluded Dr. Sergile relied on more medical cross studies to opine that any association between benzene in fuel and myeloma is viewed as weak or non-existent within the medical community.[11] Consequently, he gave greater weight to her opinion and found Claimant's argument fails based on the preponderance of the evidence. *Id.* at 20.

Nothing in the record indicates the ALJ erred in weighing the evidence. The ALJ's review was well cited and well supported by the doctor's reports, deposition testimony, and medical literature in the record. As the Board is not permitted to impute its own judgment in the place of the ALJ's well-reasoned inferences and conclusions, we are in no position to negate the ALJ's conclusions. Accordingly, we affirm the ALJ's conclusion that Claimant did not prove by a preponderance of the evidence that his work exposures caused his myeloma. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994) (the Board may not disregard the ALJ's findings, if they are supported by substantial evidence, on the basis that other inferences are more reasonable); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (the choice among reasonable inferences is left to the ALJ; the Board may not engage in *de novo* review or substitute its credibility determinations); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

**The ALJ permissibly found the work exposure did not aggravate a preexisting condition.**

Alternatively, Claimant alleges his multiple myeloma was a pre-existing condition aggravated by his work exposure to benzene when working for Employer. Based on the Board's prior remand order, the ALJ addressed whether Claimant's aggravation theory could succeed. He found the record unclear on whether Claimant suffered from multiple myeloma prior to working for Employer, as the record indicates Claimant was not

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person (especially when the ALJ found other articles indicated myeloma is a disease of old age). D&O at 4-5.

[11] Taken out of context, Dr. Sergile's statement that there may be a possible association seems to support Claimant's position. However, while she agreed some medical studies leaned that way, she remained steadfast in her opinion that those studies have weaknesses, and others in the medical community, including her, are not convinced of the connection Claimant is asserting.

diagnosed with it until sometime after his work with Employer. CX 11 at 3. Although Dr. Sergile noted Claimant's elevated protein levels existed since 2007, which were ultimately the driving factor for testing Claimant for myeloma, as the ALJ found the record is decidedly silent of any evidence Claimant's conditions were aggravated by exposures to benzene from his work with Employer. This is particularly so in light of Dr. Sergile's credited opinion that there is no established and accepted relationship between exposure to jet fuel and multiple myeloma. Thus, we affirm the ALJ's determination that Claimant's condition was not aggravated by his work-related exposure to benzene. *See Sea-Land Services, Inc., v. Director, OWCP* [*Ceasar*], 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020).

**Claimant's consequential psychological injury is not compensable.**

Finally, Claimant alleges his psychiatric condition is compensable, either as an independent injury or as a consequence of his multiple myeloma. Nothing in the record indicates Claimant raised an independent claim relating his alleged psychiatric conditions directly to his employment. Therefore, his psychiatric condition is only compensable as a consequence of his multiple myeloma if his cancer is work-related. As we have affirmed the ALJ's determination that Claimant's multiple myeloma is not work-related, we likewise affirm his determination that Claimant's psychological injuries also are not compensable. *R.F. [Fear] v. CSA, Ltd*., 43 BRBS 139 (2009) (a secondary injury is not compensable when the primary injury is found not compensable); *see also Metro Mach. Corp. v. Director, OWCP*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017).

Accordingly, we affirm the ALJ's Decision and Order on Remand Denying Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge