

## **SECTION 20 – PRESUMPTIONS**

### **Introduction**

Section 20 provides

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary--

- (a) That the claim comes within the provisions of this Act.
- (b) That sufficient notice of such claim has been given.
- (c) That the injury was not occasioned solely by the intoxication of the injured employee.
- (d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

This section thus provides claimant with a presumption in the areas covered which shifts the burden to employer to rebut it with substantial evidence. Section 20 of this Deskbook will cover Section 20(a), which primarily aids claimant in establishing causation under Section 2(2), and Section 20(b), which aids claimant in establishing the timeliness of his claim under Sections 12 and 13. Sections 20(c) and (d) are discussed in Section 3(c) of the Deskbook.

## Section 20(a) - Where Applicable

The plain language of Section 20(a) of the Act states that it presumes that a claim comes within the provisions of the Act. It is most frequently applied to aid a claimant in proving that his injury arises out of and in the course of his employment under Section 2(2) of the Act. This presumption of compensability is grounded in the humanitarian purpose of the Act, favoring awards in arguable cases. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (en banc); *Leyden v. Capitol Reclamation Corp.*, 2 BRBS 24 (1975), *aff'd mem.*, 547 F.2d 706 (D.C. Cir. 1977).

The presumption applies to the issue of whether an injury is causally related to employment, *see, e.g., Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082, 4 BRBS 466, 475 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Wheatley v. Adler*, 407 F.2d 307; *Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981), and its application to this issue is discussed in detail in this section of the deskbook. Where claimant has a pre-existing condition and aggravation is raised, Section 20(a) applies to whether the injury is caused directly by the employment or is the result of the aggravation of the prior condition. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1<sup>st</sup> Cir. 2004); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5<sup>th</sup> Cir. 1999); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11<sup>th</sup> Cir. 1990); *Rajotte v. Gen. Dynamics Corp.*, 18 BRBS 85 (1986); *LaPlante v. Gen. Dynamics Corp./Elec. Boat Div.*, 15 BRBS 83 (1982) (Kalaris, concurring and dissenting); *Seaman v. Jacksonville Shipyards, Inc.*, 14 BRBS 148.9 (1981). It thus applies in determining whether the claimant's disabling condition is work-related. *See Swinton*, 554 F.2d 1075, 4 BRBS 466; *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

The Section 20(a) presumption is applicable in psychological injury cases. *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989) (decision on remand); *Marino v. Navy Exch.*, 20 BRBS 166 (1988).

Section 20(a) similarly applies to whether death arises out of employment. *Bell Helicopter Int'l, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984), *aff'g Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984) (court states presumption "clearly applies" where death occurs in the course of employment); *Smith v. Sealand Terminal, Inc.*, 14 BRBS 844 (1982). *See Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1982) (Ramsey, dissenting) (administrative law judge erred in not applying Section 20(a) to link decedent's chronic obstructive pulmonary disease to his employment; moreover, if the chronic obstructive pulmonary disease hastened death due to renal cancer, the death is work-related). *Accord Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

Section 20(a) cannot apply to a claim not made by claimant; claimant must at least allege an injury arising out of and in the course of his employment. *U. S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In order for Section 20(a) to apply to causation, claimant must establish a *prima facie* case by proving that he suffered some harm or pain, *Murphy v. SCA/Shayne Bros.*, 7 BRBS 309 (1977) (Miller, dissenting), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that working conditions existed or an accident occurred which could have caused the harm or pain. *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). Section 20(a) does not aid claimant in proving the two elements of his *prima facie* case. *Id.*; see *Kooley v. Marine Indus. Nw.*, 22 BRBS 142 (1989).

In *Devine v. Atl. Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., concurring and dissenting), the Board rejected employer's invitation to re-examine the purpose and scope of Section 20(a), which employer asserted was to more readily bring injured workers within the fundamental coverage of the Act and not to provide a presumption of compensability and injury. The Board held that its construction of Section 20(a) does not provide a presumption of compensability and injury, as claimant must establish the existence of an injury before the presumption is invoked, and claimant does not have a compensable claim until the other requirements for entitlement, *e.g.*, the existence of a disability, are proven.

Once claimant establishes his *prima facie* case, the Section 20(a) presumption applies to link the harm or pain with claimant's employment. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985); *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336 (1981); *Kelaita*, 13 BRBS at 331.

The Section 20(a) presumption also applies to the issue of whether an injury arises in the course of employment. *Durrah v. Washington Metro. Area Transit Auth.*, 760 F.2d 322, 17 BRBS 95(CRT) (D.C. Cir. 1985); *Travelers Ins. Co. v. Donovan*, 221 F.2d 886 (D.C. Cir. 1955); *Vitola v. Navy Resale & Services Support Office*, 26 BRBS 88 (1992); *Willis v. Titan Contractors, Inc.*, 20 BRBS 11 (1987); *Oliver v. Murry's Steaks*, 17 BRBS 105 (1985); *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593 (1981). Moreover, where an injury or death occurs in the course of employment, the presumption that the injury also arises out of the employment is strengthened. *Wheatley*, 407 F.2d 307; *Butler v. Dist. Parking Mgmt. Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Twyman v. Colorado Sec.*, 14 BRBS 829 (1981).

While the Section 20(a) presumption applies to the issue of whether the claimant's disability is work-related, see *Kubin*, 29 BRBS 117; *Mackey*, 21 BRBS 129, it does not aid claimant in establishing the nature and extent of disability. *Jones v. Genco, Inc.*, 21 BRBS 12 (1988); *Holton v. Indep. Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979). Claimant must therefore establish the nature, *i.e.*, temporary or permanent, and extent, *i.e.*, total or partial, of his disability under Section 8

of the Act without benefit of the presumption. The Board has stated that a claimant is fully able to muster evidence on this point. *See Brocato v. Universal Mar. Serv. Corp.*, 9 BRBS 1073 (1978) (Miller, dissenting); *Davis v. George Hyman Constr. Co.*, 9 BRBS 127 (1978), *aff'd in part, part sub nom. Davis v. United States Dep't. of Labor*, 646 F.2d 609 (D.C. Cir. 1980); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). In *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7<sup>th</sup> Cir. 2000), the Board rejected employer's argument that the administrative law judge erred in invoking the Section 20(a) presumption that the injury was work-related on the basis that claimant sought only partial disability benefits yet was awarded total disability. The Board explained that whether claimant is seeking total or partial disability benefits is not relevant to Section 20(a) or causation and the presumption does not apply to the nature and extent of claimant's disability.

Where medical benefits are claimed for a condition, the presumption applies to whether the condition for which treatment is sought is work-related, but it does not apply in determining whether claimant has established entitlement under Section 7. Claimant must establish that treatment is reasonable and necessary for his work-related condition and that he has met the other requirements for employer to pay medical benefits. In this regard, the Fourth Circuit held that the presumption does not relieve the claimant of his burden of proving the elements of his claim for medical benefits and reversed the Board's decision that employer prove with substantial evidence that claimant's private physician did not file a report pursuant to Section 7(d). *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4<sup>th</sup> Cir. 1979), *rev'g* 6 BRBS 550 (1977). *See Shahady v. Atlas Tile & Marble Co.*, 13 BRBS 1007 (1981) (Miller, dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983) (Section 20(a) does not apply to Section 7).

The Section 20(a) presumption aids a claimant in establishing the compensability of his claim, *i.e.*, whether he has a work-related injury. The Board and the Seventh Circuit have held that it does not apply in determining the identity of the responsible employer. *See, e.g., Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7<sup>th</sup> Cir. 2005); *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005) and 41 BRBS 28 (2007); *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64 (2005), *modified in part on recon.*, 40 BRBS 1 (2005), *aff'd sub nom. Dillingham Ship Repair v. U.S. Dep't of Labor*, 320 F. App'x 585 (9<sup>th</sup> Cir. 2009); *Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997), and 33 BRBS 32 (1999), *aff'd sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 F. App'x 547 (9<sup>th</sup> Cir. 2001); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992). The Ninth Circuit, however, in reversing the *McAllister* decisions, held that claimant must make out a *prima facie* case with respect to each employer against whom he has filed a claim, even if the issue presented concerns only the issue of which employer is liable. *Albina Engine & Mach. v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9<sup>th</sup> Cir. 2010). An employer can rebut the Section 20(a) presumption by producing substantial evidence that it did not expose claimant to injurious stimuli or that the exposure was not

harmful. The Ninth Circuit agreed with the decision in *Lins*, 26 BRBS 62 that the Section 20(a) presumption cannot be used by one employer against another.

The Section 20 presumption also does not aid a claimant in a survivor's claim in establishing her status as a beneficiary under Section 9. *Meister v. Ranch Rest.*, 8 BRBS 185 (1978), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979).

The Board has held that the Section 20(a) presumption does not apply to the existence of an employer-employee relationship. *Holmes v. Seafood Specialist Boat Works*, 14 BRBS 141 (1981) (Miller, J., dissenting). It is for the administrative law judge as the trier-of-fact to evaluate the evidence and apply the relevant legal test in order to determine whether an employment relationship is demonstrated. *Id.*

While the question of whether the presumption applies in establishing that the coverage requirements of Sections 2(3) and 3(a) of the Act are met has been raised in many cases, Section 20(a) has not been determinative, as the issues raised generally are legal and not factual. In *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 4 BRBS 156 (2d Cir. 1976), *aff'd sub nom. Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), and *Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977), the courts rejected the Director's argument that the presumption applied to the coverage issues raised, holding that it does not apply to the legal interpretation of these provisions. In *Dellaventura*, 544 F.2d at 49, 4 BRBS at 174, the Second Circuit reviewed previous coverage decisions of the Supreme Court, finding that they would "be searched in vain for any mention of the presumption." The court also discussed its prior decisions, *e.g.*, *Overseas African Constr. Corp. v. McMullen*, 500 F.2d 1291, 1296, (2d Cir. 1974), which involved the coverage provisions of the Defense Base Act extension, stating that the presumption was treated merely as an embodiment of the "rule...that so long as any reasonable inference from the facts supports jurisdiction under the statutory presumption that jurisdiction may be found." *Id.* The court concluded that the issue before it was not one of whether claimant could fit within a line that had been drawn but defining where the line was to be placed and only in the former case might the presumption apply. *See also O'Leary v. Puget Sound Bridge & Dry Dock Co.*, 349 F.2d 571 (9th Cir. 1965) (Section 20(a) cannot bring an injury within the pre-1972 coverage of the Act on the facts presented, involving an employee injured on land in the performance of a non-maritime contract and on a building way used in new ship construction).

Following *Dellaventura* and *Stockman*, the Board held that Section 20(a) does not apply to the status and situs inquiries. *See, e.g., Hagenzeiker v. Norton Lilly & Co.*, 22 BRBS 313 (1989); *Davis v. Doran Co. of California*, 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989); *Sheridon v. Petro Drive, Inc.*, 18 BRBS 57 (1986); *Wynn v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 31 (1983); *Boughman v. Boise Cascade Corp.*, 14 BRBS 173 (1981); *Sedmak v. Perini North River Associates*, 9 BRBS 378 (1978)

(Miller, dissenting), *aff'd sub nom. Fusco v. Perini North River Associates*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981).

The Director continued to raise applicability of the presumption in coverage cases, and the Board continued to reject the argument, as the issues raised involved the legal interpretation of the statute, to which Section 20(a) does not apply. *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Coyne v. Refined Sugars, Inc.*, 28 BRBS 372 (1994); *George v. Lucas Marine Constr.*, 28 BRBS 230 (1994), *aff'd mem. sub nom. George v. Director, OWCP*, 86 F.3d 1162 (9th Cir. 1996) (table); *Palma v. California Cartage Co.*, 18 BRBS 119 (1986).

While court decisions have similarly found the presumption not dispositive, they have acknowledged it may apply to questions of fact. In *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (en banc), *cert. denied*, 452 U.S. 905 (1981), the Fifth Circuit stated that in determining whether an area falls within Section 3(a), the administrative law judge is guided in this factual determination by Section 20(a). In *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998), the Second Circuit stated its agreement with claimant that the administrative law judge erred in not applying the Section 20(a) presumption to questions of fact involving the coverage issues raised and in placing the burden of producing evidence on claimant. The court held that this error was harmless, as its ruling that claimant was a covered employee was based on undisputed facts of record, with the court addressing only legal issues, and thus the same conclusion would be reached even if the presumption did not apply. Similarly, citing *Stockman*, 539 F.2d 264, 4 BRBS 304, the First Circuit rejected the argument that Section 20(a) provides a bias in favor of coverage, holding that the presumption does not apply to the situs inquiry where legal judgments are being made about undisputed facts. *Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1<sup>st</sup> Cir. 2004), *aff'g Cunningham v. Bath Iron Works Corp.*, 37 BRBS 76 (2003) (Hall, J., concurring and dissenting).

In *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002), the Board reversed an administrative law judge's denial of coverage based on a lack of specific evidence regarding the point at which a maintenance worker's failure to remove debris would impede shipbuilding. Despite the administrative law judge's reliance on a lack of evidence, the Board found it unnecessary to address the scope of Section 20(a), as there was no dispute regarding claimant's job duties. The disputed issue involves the legal import of those duties, and only one conclusion was possible based on the evidence and law.

The D.C. Circuit, however, has held that the presumption does apply to the issue of jurisdiction under the 1928 D.C. Act extension of the Longshore Act. *Director, OWCP v. Nat'l Van Lines, Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), *aff'g* 1 BRBS 449 (1975) (Hartman, dissenting). In *Nat'l Van Lines*, 613 F.2d at 981, 11 BRBS at 306 the

court quoted Section 20(a), held it was bound by this “presumption of jurisdiction” and stated that it “applies with equal force to proceedings under the District of Columbia Act” citing *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947). The Board followed this pronouncement in cases arising under the 1928 D.C. Act. See *MacRae v. MacMyer Investments, Ltd.*, 21 BRBS 332 (1988); *Norfleet v. Holladay-Tyler Printing Corp.*, 20 BRBS 87 (1987).

### Digests

The Fifth Circuit stated, pursuant to *U.S. Indus.*, that the Section 20(a) presumption attaches only to the claim made, which here is only the formal claim that claimant injured his back and groin at work. Thus, the administrative law judge and Board erred in applying the Section 20(a) presumption to the allegation that claimant’s heart condition was due to steroids taken for the back injury because this allegation was based on claimant’s hearing testimony as to what he was told by a doctor. Claimant must establish that the heart condition “naturally or unavoidably” resulted from his back injury without reference to the Section 20(a) presumption. *Amerada Hess Corp. v. Director*, OWCP, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008).

The Fifth Circuit reversed the Board’s/district court’s affirmance of the administrative law judge’s award of benefits. Following *U.S. Indus.*, 455 U.S. 608, 14 BRBS 631, and *Amerada Hess Corp.*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008), the court held that the Section 20(a) presumption does not apply to claimant’s claim for benefits for his CIPD, as that disease was not an injury for which a “claim” was made. Specifically, the court held that claimant’s CIPD was a “secondary” injury, allegedly related to claimant’s work-related arm injury, surgeries and gastritis, and that claimant’s request for benefits for “other . . . problems associated with [his arm] injury and working conditions in Iraq” was insufficient to convert the secondary condition into a primary claim. As CIPD was not a primary claim, the Section 20(a) presumption did not apply to it, and the compensability of claimant’s CIPD must be assessed by determining whether it was the natural or unavoidable result of his arm injury pursuant to Section 2(2). Thus, the court remanded the case for the administrative law judge to reconsider the issue under the proper standard. *Ins. Co. of the State of Pennsylvania v. Director*, OWCP [Vickers], 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013).

Section 20(a), which makes no reference to “injury,” does not distinguish between “primary” and “secondary” injuries. Therefore, the Section 20(a) presumption “unambiguously” applies to claims involving both types of injuries, provided the injuries have been included in the claim. In a case where claimant filed a claim for compensation form that included only his lung injury, but asserted both work-related lung and vertebra injuries before the district director and the administrative law judge, a claim had been made for the vertebra injury, and the Section 20(a) presumption was properly applied by the

administrative law judge. *Metro Mach. Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017).

In a case where claimant filed a claim for compensation form that included only his lung injury, but asserted a claim for both his lung (primary) and vertebra (secondary) injuries before the district director and the administrative law judge, the Fourth Circuit concluded that a claim had been made for the vertebra injury and that the Section 20(a) presumption applied. In so holding, the Fourth Circuit rejected the holdings in *Ins. Co. of the State of Pennsylvania v. Director, OWCP [Vickers]*, 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013), and *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008), wherein the Fifth Circuit concluded that the Section 20(a) presumption does not apply to secondary injuries. The Fourth Circuit noted that the Fifth Circuit's split decisions appeared to have been based on the fact that the secondary injuries were not included in the claimants' claims, and, to the extent there were other reasons, the Fourth Circuit was unclear on what those reasons might be. Thus, relying on the Supreme Court's decision in *U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), which stands for the two propositions that the Section 20(a) presumption applies only to claims actually made and that a claim must include a primary injury which occurred at work, the court held that the administrative law judge properly found that claimant claimed a work-related primary injury and that a claim was made for the work-related secondary injury; thus, the Section 20(a) presumption applies to both. *Metro Mach. Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 688, 50 BRBS 81(CRT) (4th Cir. 2017).

The Board rejected employer's assertion that the Section 20(a) presumption did not attach to all of claimant's gastric ailments but, rather, was limited to the asserted claim of a stomach infection. The Board held that employer did not raise this issue before the administrative law judge and also that employer stipulated prior to the hearing that claimant's injury was "gastrointestinal." Thus, the administrative law judge properly applied the Section 20(a) presumption to claimant's GI condition in its entirety. *Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016).

The Second Circuit rejected the first employer's argument that it was not liable for benefits because claimant's second injury with another employer aggravated the first injury. The court held that the aggravation rule is not a defense to be used by first or earlier employers as a shield from liability. In this case, where claimant and the second employer settled the claim for benefits due to the second injury, precluding recovery from that employer, the court stated that claimant bears the burden of showing that his current disability can be attributed to the first injury so that the first employer is still liable. As there is less proximity between the current condition and the first injury, the Section 20(a) presumption does not apply. Thus, the court remanded the case for the administrative law judge to ascertain the extent to which the first injury contributed to the second. *New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 37 BRBS 73(CRT) (2d Cir. 2003).

Decedent worked in the shipyards for three companies between 1956 and 1960, and he was exposed to asbestos which caused mesothelioma and his death. There is no dispute that Lockheed was, chronologically, his last maritime employer. In this case, however, all parties conflated the issues of responsible employer and causation, so the Board thoroughly discussed the law for both issues, specifying how that law should be applied. The Board stated that Section 20(a) is invoked on a claimant's behalf if she establishes that decedent suffered a harm and was exposed to injurious stimuli, here asbestos, during the course of his shipyard employment. In a multiple employer case, any employer may rebut the presumption by producing substantial evidence that decedent's death was not related to or hastened by his work-related exposure. If any of the employers rebuts the presumption, it no longer applies and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. Once causation is found, then the employers must establish which of them is liable for benefits. The responsible employer is the last covered employer to expose the employee to injurious stimuli prior to the date he becomes aware of his occupational disease. Each employer bears the burden of showing that it is not the responsible employer and may do so by demonstrating either that the employee was not exposed at its facility in sufficient quantities to cause his disease or that the employee was exposed while working for a subsequent covered employer. In this case, the Board vacated the administrative law judge's decision and remanded the case for further consideration of these issues, using the appropriate law. *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005); *see also K.M. [McAllister] v. Lockheed Shipbuilding*, 42 BRBS 105 (2008); *McAllister v. Lockheed Shipbuilding*, 41 BRBS 28 (2007); *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64 (2005), *modified in part on recon.*, 40 BRBS 1 (2005), *aff'd sub nom. Dillingham Ship Repair v. U.S. Dep't of Labor*, 320 F. App'x 585 (9th Cir. 2009). The Board's decisions in *McAllister* were subsequently reversed. *Albina Engine & Mach. v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010).

In reversing the Board's decisions, the Ninth Circuit held that the Board erred in stating that the Section 20(a) presumption applies to "the claim" instead of against each individual employer or to the responsible employer issue. The court held that the proper application of the Section 20(a) presumption in a multi-employer, occupational disease case is: 1) the presumption must be invoked (by "some" evidence) against each employer and if not invoked against a particular employer, that employer may not be held liable; 2) each employer may rebut the presumption with substantial evidence that it is not the last employer to expose the employee to injurious stimuli; 3) once the employer rebuts the presumption, it may only be held liable if the claimant has shown that the employer is responsible by a preponderance of the evidence. This analysis is to occur sequentially beginning with the most recent employer and working backwards. If a more recent employer is found to be responsible, then the administrative law judge need not address the liability of earlier employers. The court stated that this analysis complies with the APA, 5 U.S.C. §556(d), and the "rational connection rule." In this case, under the court's analysis, Lockheed, the last employer, and not Albina, is liable for compensation to

claimant. *Albina Engine & Mach. v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010).

The claimant in this case was injured by another employee while on a rest break aboard an oil rig. The Board held that the administrative law judge erred in placing the burden on claimant to establish that he was on an authorized break, as Section 20(a) places the burden on employer to establish that the break was unauthorized and subjected claimant to risks unrelated to his employment. Moreover, the fact that claimant's break may have been unauthorized does not alone rebut the Section 20(a) presumption. The incident occurred in a place where the claimant would reasonably expect to be in the course of his work and not in an "unanticipated path of new risks not inherent in his employment situation." The administrative law judge also erred in finding that claimant was not injured in the course of his employment due to his characterization of the assault as horseplay. Injuries caused by fights between co-workers are compensable where employer presents no evidence that the injured employee had any personal or social contacts with the assailant outside of work. In this case there is no evidence that this incident was horseplay and it occurred based on contacts the two men had at work. *Phillips v. PMB Safety & Regulatory, Inc.*, 44 BRBS 1 (2010).

In this case, which involved the legal question of whether the Coalition Provisional Authority was an agency of the United States within the meaning of the Defense Base Act, the Board rejected claimant's argument that Section 20(a) applies as the facts were established and the question was a legal issue only. *Tisdale v. Am. Logistics Services*, 44 BRBS 29 (2010).

The Board affirmed the administrative law judge's finding that claimant contracted histoplasmosis during his employment on a bridge and not during his three days of employment on a barge. Although the Section 20(a) presumption does not apply to legal questions of concerning the Act's coverage provisions, the Board addressed claimant's contention that the administrative law judge failed to give him the benefit of the Section 20(a) presumption. To the extent that the presumption applies to factual issues related to coverage, the Board held that employer presented substantial evidence to rebut the Section 20(a) presumption with evidence that claimant's injury occurred on the bridge. In weighing the evidence as a whole, the administrative law judge rationally credited evidence that claimant's disease was not contracted on the barge. *Hough v. Vimas Painting Co., Inc.*, 45 BRBS 9 (2011).

In this case involving an employee of a fish processing company, the Board reiterated that the Section 20(a) presumption does not apply to the legal issues of coverage when the facts are undisputed. *Stork v. Clark Seafood, Inc.*, 46 BRBS 45 (2012), *aff'd on recon.*, 47 BRBS 5 (2013).

Assuming, arguendo, the Section 20(a) presumption applies to the issue of “navigability,” any error in the administrative law judge’s failure to apply the presumption is harmless because employer presented substantial evidence that the Passaic River at the point of injury is not navigable in fact. *Wilson v. Creamer-Sanzari Joint Venture*, 53 BRBS 19 (2019), *aff’d in part and rev’d on other grounds sub nom. Wilson v. Director, OWCP*, 984 F.3d 265, 54 BRBS 91(CRT) (3d Cir. 2020).

The Third Circuit affirmed the Board’s holding that the Section 20(a) presumption does not apply to situs under Section 3(a). The court held “situs is a threshold issue that must be resolved before § 920(a) can be applied” and is an issue on which claimant bears the burden of proof. *Wilson v. Director, OWCP*, 984 F.3d 265, 54 BRBS 91(CRT) (3d Cir. 2020).

While the Section 20(a) presumption may apply to facts underlying coverage issues, it does not apply to the legal interpretation of those facts. In this case the presumption is not applicable because the facts concerning the situs issue are undisputed. *Long v. Tappan Zee Constructors, LLC*, 53 BRBS 27 (2019).

## Application of Section 20(a)

### *Prima Facie* Case

#### In General

The Section 20(a) presumption does not apply to aid claimant in establishing his *prima facie* case. In order to do so, claimant must establish that he suffered an injury, *i.e.*, harm or pain, and that an accident occurred or working conditions existed which could have caused the harm. *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). See Section 2(2) of the Deskbook.

The Board has held that *Kelaita* is consistent with the Supreme Court's decision in *U. S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), *rev'd* 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980). *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984), *aff'd sub nom. Bell Helicopter Int'l, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984).

In *U.S. Indus.*, claimant alleged that an incident occurred at work on November 19, 1975. On the early morning thereafter, claimant awoke at home in severe pain. The Board affirmed the administrative law judge's decision denying the claim on the basis that the stated accident did not occur and Section 20(a) therefore was inapplicable. *Riley v. U. S. Indus./Fed. Sheet Metal*, 9 BRBS 936 (1979) (Miller, dissenting), *rev'd*, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980). In reversing on appeal, the United States Court of Appeals for the D.C. Circuit held that as claimant clearly suffered an injury, *i.e.*, the pain in the early morning hours of November 20, 1975, the Section 20(a) presumption applied, requiring employer to come forth with evidence that the injury was not "employment-bred."

The Supreme Court reversed this decision. The Court declined to address the specific scope of the Section 20(a) presumption but stated that a *prima facie* claim must at least allege an injury that arises out of and in the course of employment. The Court stated further that the "mere existence of a physical impairment is plainly insufficient to shift the burden of proof to employer." *U.S. Indus.*, 455 U.S. at 616, 14 BRBS at 633. Moreover, in considering whether the injury at home was work-related, the court held that the D.C. Circuit invoked Section 20(a) in support of a claim not made by claimant. Noting that the claim was for an accident at work, the Court held that the presumption does not require rebuttal of every theory of recovery. Holding that the presumption attaches only to the claim filed by claimant, the Court noted the informal nature of workers' compensation proceedings and that "considerable liberality" is allowed in amending claims, but claimant did not avail himself of these liberal pleading rules. 455 U.S. at 613 n.7, 14 BRBS at 633 n.7.

Following a discussion of the various interpretations of this provision, the Board's majority put forth the following standard required for invocation: To be entitled to the Section 20(a) presumption linking her injuries to her employment, a claimant must sufficiently allege: 1) she has sustained a harm; and 2) an accident occurred or working conditions existed which could have caused or aggravated the harm. The claimant bears an initial burden of production in order to invoke the Section 20(a) presumption; a burden which is no greater than an employer's burden on rebuttal. The Section 20(a) invocation analysis "does not require examination of the entire record, an independent assessment of witness' credibility, or weighing of the evidence" at the first step. As such, credibility plays no role in addressing whether a claimant has established a *prima facie* case. Instead, the claimant need only "present some evidence or allegation that if true would state a claim under the Act." The Board will follow this interpretation in cases arising within all but the Fifth Circuit. *Rose v. Vectrus Systems Corp.*, 56 BRBS 27 (2022) (Decision on Recon. en banc), *appeal pending with Middle Dist of FL*.

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The Fifth Circuit approved the standard for invocation of the presumption set forth in *Kelaita*, 13 BRBS 326 (1981) - claimant must establish that he has suffered a harm and that the alleged accident in fact occurred or the alleged working conditions existed. The presumption then operates to link the harm with the employment. In this case, the medical evidence that claimant suffered an aneurysm and that claimant was under stress at work is sufficient to invoke Section 20(a). *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986).

Claimant's chest pains are sufficient to satisfy the "harm" element of his *prima facie* case; the underlying disease need not be caused by the employment under the aggravation rule, and it is sufficient if employment results in an aggravation of claimant's symptoms. Thus, as it is uncontroverted that claimant sustained chest pain in the form of angina attacks while at work and that he was exposed to job-related stress which could have cause this harm, the Section 20(a) presumption was invoked. As the medical experts agree claimant's chest pains were at least in part related to stress in his work, the presumption is not rebutted and claimant's injury is work-related. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988).

Addressing *U.S. Indus.*, 455 U.S. 608, 14 BRBS 631, the Board stated that the Court did not say that pain is not a compensable injury or that claimant must prove an injury arising out of and in the course of employment without benefit of the Section 20(a) presumption; under *U.S. Indus.*, an administrative law judge cannot consider a claim not made by claimant and cannot apply the presumption where claimant alleges only an injury and not, in addition, an accident or circumstances at work which could have led to that injury. Claimant's chest pains establish the harm element of his *prima facie* claim. As to the

second element, the administrative law judge erred in requiring claimant to show unusually stressful working conditions. Since claimant's ordinary working conditions could have caused his chest pains, he established a *prima facie* case. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *Accord Devine v. Atl. Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting) (presumption invoked to link claimant's cancer to workplace chemical exposures; majority vacates finding it was not rebutted, holds employer presented sufficient evidence to rebut and remands for weighing on record as a whole).

The Section 20(a) presumption does not aid claimant in establishing either element of a *prima facie* claim. *Kooley v. Marine Indus. Nw.*, 22 BRBS 142 (1989) (affirming finding claimant established injury); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988) (affirming finding claimant was not credible and did not establish alleged head, neck and back injuries).

In a death benefits case, the Board held that the administrative law judge erred in applying the Section 20(a) presumption to aid claimant in establishing that decedent was exposed to asbestos. Error was held harmless, as the administrative law judge also relied on evidence of exposure which the administrative law judge found was credible and uncontradicted. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only).

Pre-hearing statements and stipulations which indicate that causation issue has been raised are sufficient for invocation of the presumption to link claimant's back condition to his work accident. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).

The Board rejected employer's contention that claimant never made a claim for a low back injury and that the administrative law judge's consideration of this injury violates *U.S. Indus.* by applying the presumption to a claim never alleged. The Board held that although claimant did not allege a low back injury in her initial injury report, she did later claim that this injury is work-related, thus satisfying the requirements of *U.S. Indus.* *Dangerfield v. Todd Pac. Shipyards Corp.*, 22 BRBS 104 (1989).

In order to invoke Section 20(a), claimant is not required to introduce affirmative medical evidence establishing that the working conditions in fact caused the alleged harm. Claimant's theory must be go on beyond "mere fancy" - she need only show the existence of working conditions which could conceivably cause the harm alleged. In this case, the relevant medical opinions indicate a possible connection between claimant's symptoms and her employment-related exposure to chemicals; claimant thus is entitled to the presumption. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

The Board rejected the notion that *U.S. Indus.* stands for the propositions that pain alone is not an injury and that claimant must establish, without benefit of the Section 20(a) presumption, an injury arising out of and in the course of employment. Section 20(a) thus invoked as administrative law judge found claimant had chest pains while moving 55

gallon drums at work and two doctors related his chest pains to exertion. *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990).

In order to invoke the Section 20(a) presumption, claimant must prove the existence of a harm and working conditions which could have caused it; claimant is not required to prove that the working conditions in fact caused the alleged harm. In establishing that the proven working conditions could have caused the harm, claimant's theory as to how the injury occurred must go beyond "mere fancy." In this case, claimant established that decedent was exposed to toxins which medical experts testified could have caused his disease. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

The District of Columbia Circuit held that in analyzing causation, the administrative law judge erred by placing the burden of proof on claimant. Claimant is entitled to the benefit of the Section 20(a) presumption of causation once the "minimal requirements" of establishing a *prima facie* case have been met. *Brown v. I.T.T./Cont'l Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990).

The Board rejected the Director's argument that the case should be remanded in order for the administrative law judge to determine whether claimant suffered an aggravation injury due to his usual work activities, holding that claimant's LS-18, statements to his physicians, post-hearing brief and Petition for Review did not indicate that claimant had asserted such a claim. The Section 20(a) presumption attaches only to claims made. *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990), *vacated in part on recon.*, 24 BRBS 63 (1990). The determination that claimant did not assert an aggravation claim was vacated on reconsideration, and the Board remanded the case for the administrative law judge to consider whether claimant made a claim for an aggravation injury due to his usual work activities as there is some evidence in the record that could support this conclusion. *Hartman v. Avondale Shipyard, Inc.*, 24 BRBS 63 (1990), *vacating in part on recon.* 23 BRBS 201 (1990).

The Eighth Circuit rejected employer's argument that claimant asserted a claim only for a specific trauma accident and affirmed the administrative law judge's finding that claimant made a sufficient claim for a degenerative condition or cumulative trauma. Claimant was entitled to invocation of the Section 20(a) presumption on these theories. *Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

The First Circuit held that claimant's testimony that the shipyard was noisy, that he noticed a loss of hearing during the period he worked at the shipyard and the medical evidence consisting of three audiograms were sufficient to establish a *prima facie* case under the Act. In this case, carriers had appealed the administrative law judges' decisions as the second administrative law judge had found no hearing loss during the covered period at the shipyard but the first administrative law judge had found such hearing loss. The First

Circuit upheld claimant's award as the issue of compensability was decided in claimant's favor by the first administrative law judge, whose decision was affirmed by the Board. The second administrative law judge did not have the issue of compensability before him but was merely to determine the extent of claimant's work-related hearing loss until claimant transferred to the non-covered facility. *Bath Iron Works v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999).

The court holds that claimant's testimony of exposure to injurious noise is sufficient to invoke the Section 20(a) presumption that working conditions existed at the last employer that could have caused his hearing loss. As employers failed to present rebuttal evidence, the presumption controls and the last employer is liable for claimant's work-related hearing loss. *Ramey v. Stevedoring Services of Am.*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

In this case where decedent worked in the shipyards for 3 companies between 1956 and 1960, and he was exposed to asbestos which caused mesothelioma and his death, there are statements from decedent to his doctor concerning his exposure to asbestos at the shipyards. As the Board held that the administrative law judge should consider all the evidence of record in addressing claimant's *prima facie* case, including decedent's statements, the Board advised the administrative law judge concerning the applicability of Section 23(a). Specifically, the Board held that Section 23(a) assists in proving both the "working conditions" and the "harm" elements of Section 20(a), noting that *Martin*, 24 BRBS 112, is incorrect in stating Section 23(a) applies only to the "harm" element. If the decedent's statements are corroborated, then they shall be sufficient to establish the "injury," that is, the elements for invoking the Section 20(a) presumption. If they are not corroborated, then Section 23(a) does not apply, and the statements may be sufficient to establish the injury only if they are otherwise credible and probative. The Board remanded the case for the administrative law judge to reconsider decedent's statements in light of Section 23(a). *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005), *rev'd on other grounds sub nom. Albina Engine & Mach. v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9<sup>th</sup> Cir. 2010).

The Fifth Circuit stated, pursuant to *U.S. Indus.*, that the Section 20(a) presumption attaches only to the claim made, which here is only the formal claim that claimant injured his back and groin at work. Thus, the administrative law judge and Board erred in applying the Section 20(a) presumption to the allegation that claimant's heart condition was due to steroids taken for the back injury because this allegation was based on claimant's hearing testimony as to what he was told by a doctor. Claimant must establish that the heart condition "naturally or unavoidably" resulted from his back injury without reference to the Section 20(a) presumption. *Amerada Hess Corp. v. Director, OWCP*, 543 F. 3d 755, 42 BRBS 41(CRT) (5th Cir. 2008).

The Fifth Circuit reversed the Board's/district court's affirmance of the administrative law judge's award of benefits. Following *U.S. Indus.*, 455 U.S. 608, 14 BRBS 631 (1982), and *Amerada Hess Corp.*, 543 F.3d 755, 42 BRBS 41(CRT) (5<sup>th</sup> Cir. 2008), the court held that the Section 20(a) presumption does not apply to claimant's claim for benefits for his CIPD, as that disease was not an injury for which a "claim" was made. Specifically, the court held that claimant's CIPD was a "secondary" injury, allegedly related to claimant's work-related arm injury, surgeries and gastritis, and that claimant's request for benefits for "other . . . problems associated with [his arm] injury and working conditions in Iraq" was insufficient to convert the secondary condition into a primary claim. As CIPD was not a primary claim, the Section 20(a) presumption did not apply to it, and the compensability of claimant's CIPD must be assessed by determining whether it was the natural or unavoidable result of his arm injury pursuant to Section 2(2). Thus, the court remanded the case for the administrative law judge to reconsider the issue under the proper standard. *Ins. Co. of the State of Pennsylvania v. Director, OWCP [Vickers]*, 713 F.3d 779, 47 BRBS 19(CRT) (5<sup>th</sup> Cir. 2013).

In a case where claimant asserted a primary injury to his lungs and a secondary injury to his vertebra, a fracture due to coughing and the use of steroid medication, the court concluded that, although the Section 20(a) presumption applies to both injuries, the presumption must be applied slightly differently to the secondary injury. That is, for a secondary injury, a claimant must show that he sustained a primary work-related injury and that the primary injury could have "naturally or unavoidably caused, aggravated, or accelerated," the secondary injury in order to invoke the Section 20(a) presumption on the secondary injury claim. In this case, the court held that the administrative law judge's failure to apply the "naturally or unavoidably" standard for the vertebra injury was harmless. Specifically, as there is substantial evidence to support the administrative law judge's finding that the vertebra fracture "could have resulted" from the primary injury, the court concluded the same evidence would support a finding that the fracture "could have unavoidably resulted" from the lung condition. Accordingly, the Fourth Circuit stated it was unnecessary to remand this case for the administrative law judge to apply the proper standard. *Metro Mach. Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680, 50 BRBS 81(CRT) (4<sup>th</sup> Cir. 2017).

In this psychological injury case, employer argued that recovery was precluded by the "zone of danger" test, which limits recovery to those plaintiffs who sustain an actual physical injury or are placed in immediate risk of physical injury as a result of a defendant's negligent conduct. The Board affirmed the administrative law judge's rejection of employer's contention that the "zone of danger" test precludes an award of compensation under the Act, holding that the test is a tort concept which does not apply to the workers' compensation provisions of the Longshore Act. Similarly, the Board held that employer's reliance on the holdings in the Section 5(b) cases was misplaced, as the fault and negligence concepts that may be applicable to negligence actions brought under Section 5(b) have no application to workers' compensation claims under the Act, absent the applicability of

Section 3(c). The Board stated in this regard that it is well established that a work-related psychological impairment, with or without an underlying physical harm, may be compensable under the Act. *Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014), *aff'd sub nom. Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016).

In affirming the Board's decision, the Fourth Circuit rejected employer's contention that claimant can recover for a psychological injury only if he also sustains a physical injury or was placed in immediate risk of physical harm. The court held that such a limitation is inconsistent with the express terms of Section 2(2), which does not distinguish between physical and psychological injuries, as well with case precedent interpreting Section 2(2). Moreover, the "zone of danger" test is a tort concept which is not applicable in a workers' compensation claim. As substantial evidence supported the administrative law judge's conclusion that claimant has PTSD related to the work accident, in which claimant ran over and killed a co-worker with a forklift, the court affirmed the award of benefits. *Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016).

In 1999, claimant settled a claim under the Act for scheduled permanent partial disability benefits for injuries to his hands sustained in the course of his employment with a previous employer. In his subsequent employment with another longshore employer, claimant sustained further injuries to his right hand in 2011, for which he underwent surgery. The administrative law judge denied the claim for scheduled benefits for right carpal tunnel syndrome, having found that claimant did not make out his prima facie case under Section 20(a). The Board held, as a matter of law, that claimant satisfied both elements of his prima facie case, and stated that, contrary to the administrative law judge's reasoning, the fact that claimant may have a lower impairment rating after his recovery from carpal tunnel surgery in 2012 than the rating assigned by a physician in 1999 does not establish the absence of a work injury occurring in 2011. The Board remanded the case for the administrative law judge to address, consistent with the Section 20(a) presumption and the aggravation rule, whether claimant has a disabling right hand condition that is causally related to his employment with employer. *Myshka v. Elec. Boat Corp.*, 48 BRBS 79 (2015).

In this case, claimant alleged injuries to his neck, back, and mouth as a result of being bumped and jolted when the personnel basket he was on collided with the vessel. The Fifth Circuit reversed the Board's reversal of the denial of benefits. The court reiterated that an administrative law judge may make credibility determinations and choose between inferences in ascertaining whether a claimant has established his prima facie case. While the court agreed this was a difficult case, it held that substantial evidence supported the administrative law judge's finding that claimant failed to establish a prima facie case because the administrative law judge found claimant lacked credibility and doctors relied on his statements as to how his injuries occurred from jostling of the personnel basket.

Moreover, the results of allegedly objective medical tests were compromised by claimant's "faked pain." Therefore, the court reinstated the administrative law judge's denial of benefits for claimant's neck and back injuries. Because claimant had complained of a loose tooth immediately after the incident, and a tooth had fallen out by the time he saw a dentist, the court affirmed the Board's determination that a prima facie case was established and that, absent any rebuttal, employer is liable for costs associated with the missing tooth. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016).

Because the ALJ improperly considered Claimant's credibility and weighed the conflicting evidence at the initial invocation stage in this case arising under the Eleventh Circuit, effectively applying a burden of persuasion standard, the Board reversed her conclusion that Claimant did not establish a prima facie case invoking the Section 20(a) presumption. The claimant bears an initial burden of production in order to invoke the Section 20(a) presumption; a burden which is no greater than an employer's burden on rebuttal. The claimant need only "present some evidence or allegation that if true would state a claim under the Act." The Board will follow this interpretation in cases arising within all but the Fifth Circuit. *Rose v. Vectrus Systems Corp.*, 56 BRBS 27 (2022) (Decision on Recon. en banc), *appeal pending with Middle Dist of FL*.

## Establishing Injury

It is well established that the Section 20(a) presumption does not apply to the issue of whether claimant sustained a physical or psychological harm or injury. *Carter v. Gen. Elevator Co.*, 14 BRBS 90 (1981); *Volpe v. Ne. Marine Terminals*, 14 BRBS 1 (1981) (Miller, dissenting), *rev'd on other grounds*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); *Murphy v. SCA/Shayne Bros.*, 7 BRBS 309 (1977), *citing Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969). The D.C. Circuit, in an unpublished decision, affirmed the determination in *Murphy* that there was no “injury.” The court, however, stated that its affirmance was based on the assumption that Section 20 applies not only to the fact of causation but also to the “fact of injury” and that the presumption was rebutted by substantial evidence. *Murphy v. SCA/Shayne Bros.*, 600 F.2d 280 (D.C. Cir. 1979) (table). However, in *Riley v. U. S. Indus./Fed. Sheet Metal*, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980), *rev'd sub nom. U. S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), the court determined that claimant had established an “injury” before it reached its holding regard the scope of Section 20(a) which was later reversed.

Claimant has sustained an “injury” where he has some harm or pain, or if “something unexpectedly goes wrong within the human frame.” *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968) (en banc). *See Kelaita*, 13 BRBS at 329; *Schoener v. Sun Shipbuilding & Dry Dock*, 8 BRBS 630 (1978); *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513 (1977).

In *Volpe v. Ne. Marine Terminal Corp.*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982), *rev'g* 14 BRBS 1 (1981) (Miller, dissenting), the court held that the administrative law judge erred in failing to shift the burden of proof to employer where claimant clearly sustained an injury in the form of chest pain at work. Instead, the administrative law judge improperly focused on whether claimant proved he suffered a myocardial infarction on the day in question. The court further noted that in affirming the administrative law judge, the Board exceeded its scope of review by supplementing an inadequate decision.

An injury need not be traceable to a definite time, but can occur gradually, over a period of time. *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Claimant’s burden does not include establishing “injury” as defined in Section 2(2) of the Act. In *Kelaita*, the Board stated that to place such a burden on claimant would be contrary to the well-established rule that the Section 20(a) presumption applies to the issue of whether an injury arises out of and in the course of employment. *Kelaita*, 13 BRBS at 329.

Additional cases regarding the fact of injury are discussed in Section 2(2) of this deskbook.

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A harm has been defined as something that has unexpectedly gone wrong with the human frame. Claimant sustained injuries to his head and hands when he suffered a seizure at work. Thus, the harm prong of claimant's *prima facie* case is met. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987).

The administrative law judge rationally found that claimant's testimony was not credible, and as this testimony is the only evidence that claimant sustained a harm, the administrative law judge's conclusion that the evidence failed to establish the occurrence of an injury is affirmed. *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

A claimant's subjective complaints of pain alone may be sufficient to establish the injury element of the *prima facie* case. The Board affirmed the finding of an injury even though there were no objective findings that claimant was harmed. *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988).

Where claimant established that he had pleural plaques, the Board reversed the administrative law judge's finding that claimant did not suffer an injury under the Act. The administrative law judge erred in requiring that claimant not only establish that he suffered from "the wound or physical harm" but also from a measurable impairment. Claimant need not show that he has a specific illness or disease in order to establish an injury, but need only establish some physical harm. As claimant established that something had gone wrong within his body, the Section 20(a) presumption was invoked. As it was not rebutted, claimant is entitled to the medical monitoring he sought. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

Although the administrative law judge erred by using the Section 20(a) presumption to establish that claimant sustained bodily harm, this error is harmless, as the administrative law judge's finding that claimant was injured in May 1983 is supported by substantial evidence. *Kooley v. Marine Indus. Nw.*, 22 BRBS 142 (1989).

Claimant's credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case for Section 20(a) invocation. The Board affirmed the finding of invocation on this basis, as is it uncontested that an accident occurred at work. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

The Board affirmed the finding that claimant met the "harm" element, as decedent committed suicide. It is not relevant that decedent's depression was not diagnosed or treated prior to his death, or that the medical reports relied on were generated after the death. *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994).

The Board rejected employer's argument that claimant failed to establish a psychological injury because his doctors did not analyze his condition using the *Diagnostic & Statistical Manual of Mental Disorders*. The Board stated that the Act does not require the use of this manual in assessing whether a claimant has a particular psychological injury either in establishing a *prima facie* case or in proving the work-relatedness of an injury based on the record as a whole. As all the doctors, including employer's expert, reported that claimant suffers from some psychological injury, the Board affirmed the administrative law judge's determination that claimant established the "harm" element of his *prima facie* case. *S.K. [Kamal] v. ITT Indus., Inc.*, 43 BRBS 78 (2009), *aff'd in part and rev'd in part mem.*, No. 4:09-MC-348, 2011 WL 798464 (S.D. Tex. Mar. 1, 2011).

In this DBA case, where claimant alleged that a physical harm to his face caused a psychological injury, and the administrative law judge found there was no physical harm, the Board reversed the administrative law judge's determination that there was no injury/harm in this case, as the doctor's reports are uncontradicted that claimant suffered a psychological injury. The administrative law judge was incorrect in requiring claimant to initially establish a physical harm, as a psychological injury can constitute harm under the Act with or without an underlying physical harm. Although the Board reversed the administrative law judge's finding, it affirmed her denial of benefits, as the Board held that the zone of special danger did not apply and that claimant failed to establish the working conditions element of his *prima facie* case. *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009).

Because the ALJ improperly considered Claimant's credibility and weighed the conflicting evidence at the initial invocation stage in this case arising under the Eleventh Circuit, effectively applying a burden of persuasion standard, the Board reversed her conclusion that Claimant did not establish a *prima facie* case invoking the Section 20(a) presumption. The claimant bears an initial burden of production in order to invoke the Section 20(a) presumption; a burden which is no greater than an employer's burden on rebuttal. The claimant need only "present some evidence or allegation that if true would state a claim under the Act." The Board will follow this interpretation in cases arising within all but the Fifth Circuit. In this case, Claimant's testimony and submission of doctors' and therapists' statements regarding psychological symptoms and diagnoses constitutes "some evidence" to support her allegation that she sustained a harm; the Board reversed the ALJ's finding to the contrary and remanded for further proceedings. *Rose v. Vectrus Systems Corp.*, 56 BRBS 27 (2022) (Decision on Recon. en banc), *appeal pending with Middle Dist of FL*.

## Accident or Working Conditions

The Section 20(a) presumption also does not aid a claimant in establishing the occurrence of an accident or the existence of working conditions which could have caused the harm alleged. *Mock v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 275 (1981); *Jones v. J. F. Shea Co.*, 14 BRBS 207 (1981); *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336 (1981); *Sharp v. Marine Corps Exch.*, 11 BRBS 197 (1979). In *Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981) (Miller, dissenting), *aff'd*, 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982), the Board affirmed an administrative law judge's finding that an alleged fall did not occur where the administrative law judge discredited claimant's testimony. *Accord Jones*, 14 BRBS 207. See *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985) (remand to determine whether claimant met her burden of establishing exposure to potentially toxic chemicals which could have caused the harm).

An injury need not involve an unusual strain or stress; it makes no difference that the injury might have occurred wherever the employee might have been. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (en banc). See *S. Stevedoring Co. v. Henderson*, 175 F.2d 863 (5<sup>th</sup> Cir. 1949). An external, unforeseen incident is also not necessary for claimant to have an accidental injury. *Id.*

Additional cases regarding this element are discussed in Section 2(2) of this deskbook.

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An "accident" has been defined as an exposure, event or episode. Claimant's fall from a seizure is such an event. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987).

Claimant established exposure to asbestos, as there is evidence that asbestos was delivered at the pier where decedent worked and medical records indicating he was covered with asbestos dust when the bags broke. Claimant is thus entitled to the Section 20(a) presumption that decedent's disability and death are work-related. *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

The Board held that a psychological injury resulting from a legitimate personnel action, as the reduction-in-force in this case, is not compensable under the Act inasmuch as such an event is not a "working condition" which can form the basis for a compensable injury; to hold otherwise would hinder employer in conducting its business. The case is remanded for the administrative law judge to consider whether claimant's psychological injury was the product of cumulative stress from the job. *Marino v. Navy Exch.*, 20 BRBS 166 (1988).

Claimant is not required to show that his working conditions were unusually stressful in order to satisfy the "working conditions" element for invocation of Section 20(a). *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

The administrative law judge rationally found that discrepancies in claimant's accounts of the manner in which the accident occurred were "within the expected range" and insignificant. The Board affirmed the administrative law judge's conclusion that claimant sustained an industrial injury to his back on December 27, 1982 is supported by the medical histories and claimant's testimony. *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988).

The Board affirmed the administrative law judge's finding that claimant was not exposed to asbestos while he was employed by employer, where 99 percent of the asbestos had been removed from the ship prior to the date claimant began work on the ship and claimant's work was far removed from the site where the remaining 1 percent was removed. The administrative law judge's conclusion that the material which claimant and his co-worker assumed to be asbestos was most likely the newly-installed asbestos-free insulation is reasonable and also supported by substantial evidence. *Brown v. Pac. Dry Dock*, 22 BRBS 284 (1989).

The Board affirmed the administrative law judge's finding that claimant did not establish the "working conditions" element as he rejected claimant's testimony about the allegedly stressful working conditions, finding it non-specific, uncorroborated and contradicted by the testimony of co-workers. The Board thus affirmed the finding that claimant's psychological condition is not work-related. *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989) (decision on remand).

The Board affirmed the administrative law judge's finding that the Section 20(a) presumption is invoked as he credited claimant's and her son's testimony that decedent worked with asbestos in the shipyards and the evidence that decedent told his physicians he was exposed to asbestos. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

The Board held that the administrative law judge's failure to require claimant to prove the existence of working conditions that could have caused carpal tunnel syndrome prior to invoking the presumption is harmless error. It is undisputed that claimant's job as a commercial artist required repeated use of a scalpel-type knife and a paper cutter. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

The Board held that the administrative law judge correctly determined that decedent's Jakob-Creutzfeldt disease, which caused his death, may have been related to his employment as a ship painter based on a physician's testimony that decedent's exposure to a paint chemical could have conceivably lowered decedent's resistance to the disease, thereby making him more susceptible to acquire the disease, or making him vulnerable to the rapid progression of the disease. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

The Board affirmed the administrative law judge's finding that claimant failed to establish that a work accident occurred on February 8, 1984, when he allegedly fell from a scaffold. Claimant's testimony is uncorroborated by witnesses and written reports. *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990), *vacated on other grounds on recon.*, 24 BRBS 63 (1990).

The Board affirmed the administrative law judge's finding that claimant established he was exposed to hazardous chemicals which could have caused his cancer during the course of his employment, therefore invoking the Section 20(a) presumption. Claimant and a co-worker testified that there were toxic chemicals in the shipyard, and a doctor's testimony and report establish that claimant's allegation that his cancer is work-related goes beyond "mere fancy." *Devine v. Atl. Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds).

Claimant, diagnosed earlier as having asbestosis, suffered from chest wall pain after undergoing a lung resection for removal of a nodule which was benign and had no asbestos fibers in it (although adjacent lung tissue did show pulmonary fibrosis). The Board reversed the finding that claimant was not entitled to the Section 20(a) presumption because he failed to show that harmful working conditions caused the nodule. Claimant need only show the presence of working conditions which could have caused the harm alleged; he does not have to prove the causal nexus. Claimant invoked the presumption by proving that he has chest wall pain and that he was exposed to asbestos which could potentially cause the pain. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989).

The administrative law judge erred in his application of Section 20(a) by relying on the presumption to find that working conditions existed at decedent's job that could have caused his injury. This error is harmless, however, as the administrative law judge also relied on credible, uncontradicted evidence in the record which was sufficient to establish that decedent was exposed to asbestos in the course of his covered employment. These documents consist of decedent's written statements to his attorney and on his claim form, and statements to a doctor that he was exposed to asbestos. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only).

The Board affirmed the administrative law judge's crediting of claimant's testimony and his finding that a work accident occurred. Claimant's testimony was supported by her instructor, and the fact that her supervisor did not witness the accident does not establish that it did not occur, nor does the fact that she did not report the accident to her initial treating physicians. Claimant reported the accident to subsequent physicians. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

The Board affirmed the administrative law judge's finding that the "working conditions" element is satisfied. The administrative law judge properly noted that while some of the

work-related stress may seem relatively mild, the issue is the effect of the incidents on decedent. As a doctor linked the depression to some of the work incidents, it is irrelevant that other actions which may not be compensable (*e.g.*, grand jury investigation) also may have contributed to the depression. It does not matter that the medical evidence relied upon was generated after the death. *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994).

The Ninth Circuit affirmed the Board's decision affirming an administrative law judge's finding that claimant failed to establish the alleged accident occurred. The administrative law judge found claimant's testimony incredible due to inconsistencies in his reports to physicians and his testimony. The court rejected claimant's arguments that his diagnosed low mental capacity, psychological problems and other factors explained the inconsistencies and affirmed the administrative law judge's decision as supported by substantial evidence. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9<sup>th</sup> Cir. 1988).

The Board affirmed the administrative law judge's finding that claimant failed to establish the existence of a work-related accident on January 17, 1989, as alleged by claimant, which could have caused his present back condition. The administrative law judge noted inconsistencies in claimant's testimony regarding the date of the alleged work accident, and claimant's failure to report the incident to Dr. Grimes on January 19, 1989. As claimant failed to establish an essential element of his *prima facie* case, the Board affirmed the administrative law judge's denial of the claim. *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996).

The Board affirmed the administrative law judge's finding that claimant established the "working conditions" element of his *prima facie* case as he rationally credited claimant's testimony that he engaged in lifting and moving heavy materials. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5<sup>th</sup> Cir. 2000).

In a case where it is undisputed that claimant has a work-related hearing loss involving two potentially responsible employers, the Ninth Circuit held that the administrative law judge erred in denying benefits because claimant did not establish injurious stimuli at the last employer. The court holds that claimant's testimony of exposure to injurious noise is sufficient to invoke the Section 20(a) presumption that working conditions existed at the last employer that could have caused his hearing loss. As employers failed to present rebuttal evidence, the presumption controls and the last employer is liable for claimant's work-related hearing loss. *Ramey v. Stevedoring Services of Am.*, 134 F.3d 954, 31 BRBS 206(CRT) (9<sup>th</sup> Cir. 1998).

In this psychological injury case, the Board held that the administrative law judge erred in holding that claimant was not entitled to the Section 20(a) presumption. In his analysis, the administrative law judge erred in considering whether employer's interactions with

claimant, including claimant's treatment by her supervisor, were legitimate or justified. The Board held that under *Marino v. Navy Exch.*, 20 BRBS 166 (1988), the administrative law judge should have considered whether, irrespective of disciplinary and termination procedures, the cumulative stress in claimant's working conditions could have caused or aggravated her psychological injury. Since the record contained incidents of day-to-day working conditions, other than personnel actions, that could have caused or aggravated claimant's psychological injury, the Board held that claimant established working conditions sufficient to demonstrate a *prima facie* case, and therefore was entitled to invocation of the Section 20(a) presumption. *Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127 (1997) (McGranery, J., dissenting), *aff'd on recon. en banc*, 32 BRBS 134 (1998) (Brown and McGranery, JJ., dissenting).

The Ninth Circuit adopted the Board's decision in *Marino*, 20 BRBS 166 (1988), holding that psychological injuries resulting from legitimate personnel actions are not compensable, as opposed to injuries arising from general working conditions such as harassment, which are compensable, *see Sewell*, 32 BRBS 127 (1997), *on recon.*, 32 BRBS 134 (1998). The court stated that this rule strikes an appropriate balance between the needs of employers and employees. The court rejected claimant's contention that such a holding runs afoul of the no-fault scheme of Section 4(b). In this case, claimant conceded that substantial evidence supported the finding that his psychological injuries were caused by legitimate personnel actions, namely disciplinary actions and reprimands. Thus, the court affirmed the denial of benefits. *Pedroza v. BRB*, 624 F.3d 926, 44 BRBS 67(CRT) (9<sup>th</sup> Cir. 2010).

The Board rejected claimant's assertion that the *Marino-Sewell* line of cases encompasses only those actions which culminate in an employee's loss of employment. The personnel action taken in this case permitted employer to continue claimant's employment, and it was reasonable for the administrative law judge to consider it a "legitimate personnel action" covered by *Marino*. *Raiford v. Huntington Ingalls Indus., Inc.*, 49 BRBS 61 (2015).

Claimant worked for employer for nearly 30 years in the paint shop on the first shift. Upon the closing of the paint shop, employer reassigned claimant to painting on ships and, thereafter, changed his shift from the first to the second. Claimant subsequently was hospitalized and was told he had suffered a stroke and had depression and anxiety. Claimant contended the conditions were due to his change of shift and he filed a claim for disability and medical benefits. The administrative law judge denied benefits because, *inter alia*, the working conditions on which claimant relied were "legitimate personnel actions;" therefore, claimant failed to demonstrate "working conditions" that could have caused his harm. As claimant alleged only that the cause of his medical conditions was the change of shift itself, the Board affirmed the denial of benefits, holding the administrative law judge properly found the shift change was a legitimate personnel action which cannot establish the working conditions element of a *prima facie* case. As claimant's condition is

not work-related as a matter of law, he is not entitled to disability or medical benefits. *Raiford v. Huntington Ingalls Indus., Inc.*, 49 BRBS 61 (2015).

The Board affirmed the administrative law judge's finding that claimant established the working conditions element of his *prima facie* case, as he rationally credited claimant's testimony regarding the level of noise to which he was exposed over the contrary testimony of one of employer's witnesses. *Damiano v. Global Terminal & Container Serv.*, 32 BRBS 261 (1998).

The Board affirmed the administrative law judge's finding that claimant established the working conditions element of his *prima facie* case, as the judge rationally credited claimant's testimony regarding his stressful work environment. Moreover, the administrative law judge credited medical opinions that claimant suffered angina while working for employer and that stress may cause such a cardiac event. *Marinelli v. Am. Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

The Board affirmed the administrative law judge's finding that the decedent had work-induced stress associated with unreasonable expectations for the vessel's completion and delivery based on the testimony of decedent's fellow employees and his family members. In addition, the administrative law judge found that decedent was required to work long hours and endure further stress associated with interference from the shipyard's superintendent. Work events need not be unusually strenuous to establish a compensable injury. *Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003) (court held status and situs elements not met).

The First Circuit affirmed a decision after remand, as substantial evidence supported the administrative law judge's decision that stressful working conditions could have aggravated claimant's pre-existing neurological condition. The administrative law judge found that claimant was teased incessantly about his medical condition which exacerbated claimant's condition. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

In this case where decedent worked in the shipyards for 3 companies between 1956 and 1960, and he was exposed to asbestos which caused mesothelioma and his death, and where there is no dispute that Lockheed was, chronologically, his last maritime employer, the administrative law judge invoked the Section 20(a) presumption based solely on deposition testimony taken in an unrelated tort case, wherein the deponent testified that asbestos was present at Lockheed's facility during the period decedent worked there. The Board held that, although the deposition in question is hearsay, it is admissible in this administrative proceeding, as the administrative law judge found it to be reliable, probative and relevant, and as circumstantial evidence is permissible. Nevertheless, the testimony serves only to

support the finding that asbestos was present at Lockheed's facility, it does not establish that decedent was exposed to asbestos. Accordingly, the deposition, alone, is insufficient to invoke the Section 20(a) presumption, and the Board vacated the invocation of the Section 20(a) presumption and the award of benefits. The Board instructed the administrative law judge to reconsider this issue in light of all the evidence of record and not just one piece of evidence standing alone, as there exists other evidence, which, if credited and considered in conjunction with the deposition, could support a finding that decedent was exposed to asbestos. *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005). See also *K.M. [McAllister] v. Lockheed Shipbuilding*, 42 BRBS 105 (2008); *McAllister v. Lockheed Shipbuilding*, 41 BRBS 28 (2007); *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64 (2005), modified in part on recon., 40 BRBS 1 (2005), aff'd sub nom. *Dillingham Ship Repair v. U.S. Dep't of Labor*, 320 F. App'x 585 (9<sup>th</sup> Cir. 2009). The Ninth Circuit subsequently reversed all the *McAllister* decisions. *Albina Engine & Mach. v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9<sup>th</sup> Cir. 2010).

In reversing the Board's decision, the Ninth Circuit held that claimant must invoke the Section 20(a) presumption against each employer claimed against in an occupational disease case. The court held that, contrary to the Board's holding, claimant produced "some evidence" sufficient to invoke the presumption against Lockheed, the last employer. Specifically, 1) the Norgaard deposition stating that asbestos-containing materials were stored at Lockheed's shipyard during the period decedent worked there and that pipe insulation containing asbestos was installed on ships being constructed in Lockheed's yard; (2) testimony from decedent's first wife that he would come home from work at Lockheed's shipyard with dusty clothes; (3) testimony from Dr. Zbinden describing statements that decedent made to claimant and Dr. Zbinden regarding his asbestos exposure; and (4) testimony from claimant regarding statements made by decedent. The Ninth Circuit held that the Board erred in dismissing these statements as "not proof of exposure," holding them sufficient to support the administrative law judge's decision to invoke the Section 20(a) presumption. *Albina Engine & Mach. v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9<sup>th</sup> Cir. 2010).

The Board held Claimant has produced "some evidence" that she encountered working conditions which could have caused her psychological injury, as the undisputed evidence establishes repeated occurrences of terror attacks and explosions at the base where she worked in Afghanistan for Employer. It therefore held Claimant produced evidence sufficient to establish the requisite working conditions element of her prima facie case. The Board reversed the ALJ's finding to the contrary and remanded for further proceedings. *Rose v. Vectrus Systems Corp.*, 56 BRBS 27 (2022) (Decision on Recon. en banc), appeal pending with Middle Dist of FL.

## Proper Invocation

The Board and courts have affirmed the administrative law judge's invocation of Section 20(a) where the finding that claimant established a *prima facie* case is supported by substantial evidence.

## Digests

The Board held that an administrative law judge's findings that decedent was exposed to asbestos in his job with employer and that decedent suffered from a pulmonary impairment was supported by the medical evidence and testimony and was sufficient to raise the Section 20(a) presumption. *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

In *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985), the Board held that the administrative law judge erred in finding no causation without considering the application of Section 20(a). Claimant established she suffered a physical harm, *i.e.*, hepatitis, and there was conflicting evidence as to whether claimant met her burden of establishing exposure to potentially toxic chemicals which could have caused the harm. If claimant was exposed to toxic chemicals during the incubation period for hepatitis, then her *prima facie* case was established. The case was remanded to the administrative law judge for fact-finding.

The administrative law judge properly invoked the Section 20(a) presumption where claimant suffered from cancer (a harm) and was exposed to asbestos, which could have caused the disease. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

The Board affirmed the administrative law judge's invocation of the Section 20(a) presumption where claimant established a *prima facie* case by introducing a report of a physician establishing decedent suffered an attack of chest pains at work and showed no signs of life when he arrived at employer's clinic. The report establishes a work-related incident had occurred and that decedent suffered a harm. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984), *aff'd sub nom. Bell Helicopter Int'l, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984).

The Board held that claimant met his burden of showing the existence of an injury through medical evidence showing claimant had a lung condition which resulted in symptoms of chest pain and shortness of breath. Claimant also established exposure to asbestos. This evidence is sufficient to invoke the Section 20(a) presumption. *Fortier v. Gen. Dynamics Corp.*, 15 BRBS 4 (1982) (Kalaris, concurring and dissenting), *aff'd mem.*, 729 F.2d 1441 (2d Cir. 1983).

The Board held that the administrative law judge erred in failing to apply the presumption where the employee had chronic obstructive pulmonary disease, a harm or injury, and

where it was undisputed that the employee was exposed to various substances at work which could have caused his lung problems. The case was remanded for fact-finding since the administrative law judge failed to properly apply the presumption. On remand, the administrative law judge was also directed to apply the maxim that “to hasten death is to cause it.” *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1982) (Ramsey, dissenting). See *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

The administrative law judge properly invoked the presumption where he reasonably inferred from the employee’s testimony and general information regarding the chemical composition of petroleum products that the employee was exposed to benzene and where there was substantial evidence that benzene has been implicated as a carcinogen. Conditions thus existed which could have caused the injury, myelomonocytic leukemia. *Compton v. Pennsylvania Avenue Gulf Serv. Ctr.*, 14 BRBS 472 (1981).

The Board held that the administrative law judge erred in holding the Section 20(a) presumption did not apply where it was undisputed that claimant had a work-related accident and that he suffered a disabling back condition. Error, however, is harmless as there is substantial evidence to rebut the presumption. *Novak v. I.T.O. Corp. of Baltimore*, 12 BRBS 127 (1979).

The Board affirmed the administrative law judge’s application of the Section 20(a) presumption to the determination of whether the work-related aggravation of claimant’s back condition constitutes a cause of his present permanent disability. The Board noted that resolving this issue involves a causation determination rather than a permanency determination. *Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986).

The Board held that the administrative law judge did not err in applying the Section 20(a) presumption, since claimant had established that he suffered a harm, lung cancer, and that working conditions existed, exposure to asbestos, which could have caused the harm. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

The Board stated that the administrative law judge erred in determining whether claimant’s back problems and chronic pain syndrome were causally related to his employment. Because it was undisputed that claimant suffered from back pain and chronic pain syndrome and that a work accident occurred, claimant was entitled to the Section 20(a) presumption that these conditions were causally related to his employment. *Frye v. Potomac Elec. Power Co.*, 21 BRBS 194 (1988).

The Board rejected employer’s contention that the Section 20(a) presumption should not have been invoked. Claimant sustained a harm, chest pains at work, and it is undisputed that claimant was exposed to hazardous chemicals at work. *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988).

The Board held that the Section 20(a) presumption applied as a matter of law, since it held that pleural plaques constitutes a harm, *i.e.*, an injury, and the parties agreed that the pleural plaques are caused by claimant's exposure to asbestos while employed with employer. Thus, although claimant was not disabled, he was entitled to medical benefits. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

The Board held that since claimant sustained a harm, *i.e.*, asbestosis, and working conditions existed which could have caused that harm, he was entitled to the Section 20(a) presumption that his injury was work related. *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989).

The Board concludes that because it is undisputed that claimant had a back condition and that claimant's 1979 work accident occurred, claimant is entitled to the Section 20(a) presumption that his back condition was causally related to his employment. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989).

Claimant is entitled to the Section 20(a) presumption as he testified to working conditions that exposed him to industrial pollution and the medical evidence documents a pulmonary impairment causing claimant to miss work. *Janusiewicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376 (1989).

The administrative law judge erred in relying on *U.S. Indus.*, 455 U.S. 608, 14 BRBS 631 (1982) to conclude that the instant case did not present an issue for proper application of the Section 20(a) presumption. Because claimant successfully alleged that work-related chest pains constituted a part of his injury, the administrative law judge specifically found that claimant experienced sharp pains in his arm and left side of his chest while moving 55 gallon drums, and two physicians related claimant's chest pains to this exertion, claimant established a *prima facie* case under Section 20(a). *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990).

The Board reversed the administrative law judge's finding that claimant was not entitled to the Section 20(a) presumption because he failed to show that harmful working conditions caused a benign tumor found in his lung. Claimant need only show the presence of working conditions which could have caused the harm, and since he proved that he was exposed to asbestos, which potentially could have caused the need for surgery which resulted in chest wall pain, *i.e.*, the harm, claimant invoked the Section 20(a) presumption. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989).

The Board affirmed the administrative law judge's invocation of the presumption, rejecting employer's contention that claimant's carpal tunnel syndrome is not work-related because she did not introduce medical evidence linking her condition to her accident at work. Claimant need not introduce affirmative medical evidence that the working conditions in fact caused the alleged harm in order to invoke the presumption. Claimant need only

establish the existence of working conditions that could have caused the harm. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

The administrative law judge erred in placing on claimant the burden of establishing a causal connection between the injury and the employment. The Board held that the administrative law judge erred in not invoking the Section 20(a) presumption where decedent had lung cancer and the record contains uncontradicted evidence in the form of co-workers' testimony, that there was exposure to asbestos at employer's facility that could have caused the cancer. *Peterson v. Gen. Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. INA v. U.S. Dep't of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

The Board affirmed the administrative law judge's invocation of the Section 20(a) presumption with regard to both claimant's back and psychological injuries. With regard to claimant's back injury, the administrative law judge found that claimant has back pain based on claimant's testimony and medical records and that he could have injured his back while closing a shanty door. With regard to the psychological claim, the presumption is invoked as a doctor testifies that claimant's condition was caused in part by the work injury. *Manship v. Norfolk & W. Ry. Co.*, 30 BRBS 175, 179 (1996).

Claimant testified that he experienced back pain immediately after the work injury. While the court stated that this testimony "may appear incredible" given other contrary evidence of record, the administrative law judge acted within his discretion in crediting claimant's testimony and thereby finding claimant entitled to the Section 20(a) presumption. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

The Fifth Circuit noted that it is well settled that a heart attack suffered in the course and scope of employment is compensable even though the employee may have suffered from a related pre-existing heart condition. Accordingly, the administrative law judge erred in focusing his analysis and findings on the underlying disease; he should have considered whether claimant's employment caused his heart attack. The case thus is remanded. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

The Board affirmed the administrative law judge's invocation of the Section 20(a) presumption when employer did not dispute that claimant suffered a harm, specifically a neurological condition, claimant presented evidence of his exposure to pesticide fumes during his employment, and two physicians opined that such exposure could have caused or aggravated claimant's symptoms. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

The Fifth Circuit affirmed the administrative law judge's invocation of the Section 20(a) presumption based on his finding that claimant introduced sufficient evidence to establish that his torn shoulder ligament could have been caused by an accident at work. The

administrative law judge credited claimant's testimony that while he was unloading steel pipes with a forklift, the steering wheel "kicked back," catching his left arm and jerking his shoulder. Claimant testified that the pain caused him to report the incident to his supervisor a few hours after it happened, and he sought medical care, where an x-ray revealed the torn ligament in his left shoulder. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

The Board affirmed the administrative law judge's finding that the Section 20(a) presumption is invoked as he rationally determined employer conceded invocation, and moreover, the evidence establishes that claimant had a broken wrist and his doctor stated that claimant's working conditions could have caused the injury. *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002).

Where claimant testified as to his job duties and that videotapes submitted by carrier do not accurately portray all aspects of his usual work as slingman, and a physician testified that claimant described his job duties to him, the Board affirmed the administrative law judge's finding that the testimony of claimant and the physician establish that claimant's working conditions could have caused or aggravated claimant's degenerative back condition. Therefore, claimant established a *prima facie* case for invocation of the Section 20(a) presumption. *Price v. Stevedoring Services of Am.*, 36 BRBS 56 (2002), *aff'd, vacated and remanded, and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004) and No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), *cert. denied*, 544 U.S. 960 (2005).

The Board held that in order for the injury to decedent to be compensable, his exposure to asbestos must have occurred, at least in part, on a covered situs, that is, a covered portion of employer's facility. Thus, while it is neither necessary that the last exposure nor the majority of the exposure comes from the covered areas, some exposure must have occurred within a covered area for employer to be held liable. Where there is conflicting testimony as to whether decedent was exposed to asbestos while working on the covered portions of employer's facility, the case must be remanded for a determination by the administrative law judge as to where decedent's injury occurred and, thus, whether the injury is compensable. The Board notes that as decedent was a covered employee who has a work-related injury, the burden is on employer to establish that decedent was not exposed on a covered situs. *Jones v. Aluminum Co. of Am.*, 35 BRBS 37 (2001).

The First Circuit rejected employer's contention that the Board erred in remanding the case after the first appeal, as the administrative law judge had not made necessary findings with regard to whether the Section 20(a) presumption was invoked and rebutted. The court rejected employer's assertion that the administrative law judge's second decision should be vacated because it was based on what employer called "coerced findings of fact," as (1) the Board did not order the administrative law judge to find that claimant experienced stress and harassment in the workplace, but rather ordered him to find whether they occurred; (2)

to the extent that the administrative law judge read the Board's decision as requiring him to find in favor of claimant, he misread the Board's decision; and because (3) most importantly, there was substantial evidence in the record to support the administrative law judge's findings in favor of claimant. The court affirmed the decisions after remand as the finding that the presumption was invoked is supported by substantial evidence; specifically, the administrative law judge credited instances of stressful working conditions. The court discussed the elements of a *prima facie* case where aggravation of a prior condition is alleged. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

The Board affirmed the administrative law judge's finding that the Section 20(a) presumption was invoked based on a diagnosis of COPD and claimant's testimony that he was exposed to dust and fumes in the course of his employment. Moreover, two physicians related claimant's COPD to his employment. *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F. App'x 249 (4th Cir. 2007).

In this DBA case, claimant alleged a physical harm to his face as the result of his use of a cosmetic chemical peel while in Kuwait. The administrative law judge found that the "zone of special danger" would bring any injury claimant may have suffered into the course of his employment, but found that claimant did not suffer a physical harm, and therefore no psychological harm as a result of the physical harm. The Board reversed the latter findings and held there was uncontradicted evidence of a psychological harm. However, as the psychological harm was the result of the perceived injury claimant believed he suffered related to the chemical peel, and as use of a chemical peel was a personal act, was not rooted in the obligations of his employment, and was not related to the fact that claimant worked in Kuwait, the Board held that any psychological injury related to that use did not have its genesis in claimant's employment. Accordingly, the Board held that the zone of special danger did not apply to bring claimant's actions/injury within the course of his employment. As claimant did not establish the working conditions element of his *prima facie* case, the Board affirmed the administrative law judge's denial of benefits. *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009).

The Ninth Circuit rejected employer's contention that the administrative law judge erred in crediting Dr. Keller's opinion that claimant's stroke began at work and was caused in part by job stress. The court stated that the administrative law judge's reasons for crediting Dr. Keller's explanation about the changes to his report were not "inherently incredible" or "patently unreasonable." Employer had argued that because the doctor admitted to strengthening the conclusions in his revised report after he talked to claimant's attorney his opinion was not credible. The administrative law judge, however, found Dr. Keller's opinion credible based on his testimony at trial that he changed the language to more accurately reflect his opinion, but did not change the substance of his opinion because he was unfamiliar with how medical reports are used in litigation. The administrative law

judge did not err in relying on this evidence to invoke the Section 20(a) presumption. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9<sup>th</sup> Cir. 2010).

The Board affirmed the administrative law judge's finding that claimant's light-duty work aggravated his back condition that had been caused by a previous work injury. All three doctors of record opined that claimant's work activity aggravated or could have aggravated his condition. As there is no evidence contradicting claimant's testimony regarding the work he performed, the administrative law judge properly found that the Section 20(a) presumption was invoked and that employer did not present substantial evidence rebutting the presumption. Accordingly, the Board affirmed the finding that claimant's back condition is work-related as a matter of law. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

In this case, where it was undisputed that claimant had a harm, COPD, due to his cigarette smoking and not caused by his employment, the question of invocation of the Section 20(a) presumption turned on whether claimant's disabling COPD or its symptoms could have been aggravated by his working conditions with employer. The Board affirmed the administrative law judge's finding that claimant's testimony, in conjunction with the opinion of Dr. Tudor, that claimant's work exposures could result in temporary exacerbations of his COPD, entitled claimant to the Section 20(a) presumption as it was supported by substantial evidence. *Lamon v. A-Z Corp.*, 45 BRBS 73 (2011). Nevertheless, on reconsideration, the Board held that although the administrative law judge properly found that claimant sustained work-related aggravations of his COPD, the administrative law judge did not adequately address the cause of claimant's total disability. Specifically, the Board stated that the administrative law judge did not address: that claimant last worked in non-covered employment; his finding that claimant had voluntarily removed himself from the workforce for reasons unrelated to his medical condition; or the medical evidence as to the cause of claimant's COPD at the time he became totally disabled. The Board remanded the case for the administrative law judge to determine, based on the evidence, whether claimant's total disability is due, even in part, to the work exacerbations or is it due solely to the natural progression of his non-work-related COPD. The Board thus vacated the award of total disability benefits and remanded the case. *Lamon v. A-Z Corp.*, 46 BRBS 27 (2012), *vacating on recon.* 45 BRBS 73 (2011).

The Board affirmed the administrative law judge's invocation of the Section 20(a) presumption where claimant showed that he suffered a respiratory condition that could have been caused by the fumes he was exposed to at work. The Board held that claimant's testimony as to the symptoms he experienced at work and the following morning supported the administrative law judge's finding of a respiratory condition. Further, the Board held that claimant's testimony as to working in poorly ventilated areas of the ship where he was exposed to smoke and fumes in conjunction with a physician's statement that exposure to fumes may have caused claimant's respiratory condition supported the administrative law judge's finding that claimant established the working conditions element of his prima facie case. *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013).

The Fifth Circuit affirmed the Board's decision affirming the administrative law judge's invocation of the Section 20(a) presumption. The administrative law judge relied on claimant's diagnosis of asbestosis; claimant's testimony that he changed brakes and clutches on a variety of equipment that he believed had asbestos in them while working for employer; and the report issued by the industrial hygienist who reviewed claimant's work history and stated it was well documented that brakes and clutches, the components that claimant handled, exposed workers to "significant concentrations of asbestos." The court observed that the administrative law judge was entitled to credit this evidence, that this evidence was "more than a scintilla," and therefore the administrative law judge's invocation finding was supported by substantial evidence of record. *Ramsay Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015).

In this case, claimant alleged injuries to his neck, back, and mouth as a result of being bumped and jolted when the personnel basket he was on collided with the vessel. The Fifth Circuit reversed the Board's reversal of the denial of benefits. The court reiterated that an administrative law judge may make credibility determinations and choose between inferences in ascertaining whether a claimant has established his prima facie case. While the court agreed this was a difficult case, it held that substantial evidence supported the administrative law judge's finding that claimant failed to establish a prima facie case because the administrative law judge found claimant lacked credibility and doctors relied on his statements as to how his injuries occurred from jostling of the personnel basket. Moreover, the results of allegedly objective medical tests were compromised by claimant's "faked pain." Therefore, the court reinstated the administrative law judge's denial of benefits for claimant's neck and back injuries. Because claimant had complained of a loose tooth immediately after the incident, and a tooth had fallen out by the time he saw a dentist, the court affirmed the Board's determination that a prima facie case was established and that, absent any rebuttal, employer is liable for costs associated with the missing tooth. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016).

In a case where claimant suffered injuries to both his lungs and his vertebra, employer challenged the administrative law judge's finding that the injury to claimant's lungs is compensable, asserting that claimant's doctor's opinion is insufficient to establish a prima facie case. The court affirmed the finding of invocation, stating that the administrative law judge did not rely on Dr. Ripoll's opinion, as the parties stipulated to exposure to welding and epoxy fumes on February 18, 2008, and claimant established he has COPD. Claimant also established evidence that the exposure could have exacerbated his lung condition, as he was hospitalized for eight days following the exposure. The court also rejected employer's assertion that the administrative law judge required it to prove by a preponderance of the evidence that the work exposure did not aggravate the condition. Rather, the court held that Dr. Ripoll's opinion, which was the only evidence produced by employer, was insufficient to rebut the presumption because Dr. Ripoll had abandoned his prior opinion that there was no aggravation. Thus, the court affirmed the award of medical

benefits for COPD. *Metro Mach. Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017).

In a case where claimant asserted a primary injury to his lungs and a secondary injury to his vertebra, a fracture due to coughing and the use of steroid medication, the court concluded that, although the Section 20(a) presumption applies to both injuries, the presumption must be applied slightly differently to the secondary injury. That is, for a secondary injury, a claimant must show that he sustained a primary work-related injury and that the primary injury could have “naturally or unavoidably caused, aggravated, or accelerated,” the secondary injury in order to invoke the Section 20(a) presumption on the secondary injury claim. In this case, the court held that the administrative law judge’s failure to apply the “naturally or unavoidably” standard for the vertebra injury was harmless. Specifically, as there is substantial evidence to support the administrative law judge’s finding that the vertebra fracture “could have resulted” from the primary injury, the court concluded the same evidence would support a finding that the fracture “could have unavoidably resulted” from the lung condition. Accordingly, the Fourth Circuit stated it was unnecessary to remand this case for the administrative law judge to apply the proper standard. *Metro Mach. Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017).

## Failure to Properly Apply Section 20(a)

It is an error of law for the administrative law judge to fail to address the Section 20(a) presumption where it is applicable. *Rajotte v. Gen. Dynamics Corp.*, 18 BRBS 85 (1986); *Adams v. Gen. Dynamics Corp.*, 17 BRBS 258 (1985); *Dower v. Gen. Dynamics Corp.*, 14 BRBS 324 (1981); *Kielczewski v. The Washington Post Co.*, 8 BRBS 428 (1978). In *Rajotte*, the Board vacated an administrative law judge's finding that causation was not established where claimant established a *prima facie* case by demonstrating that he had a lung disease which could have been caused or aggravated by asbestos exposure. As the administrative law judge erred in failing to apply Section 20(a), the case was remanded for reconsideration.

However, where the administrative law judge fails to properly apply the presumption, the Board will consider whether there is substantial evidence to support the administrative law judge's ultimate conclusion. If there is such evidence, the administrative law judge's failure to consider the presumption is harmless. *Fortier v. Gen. Dynamics Corp.*, 15 BRBS 4 (1982) (Kalaris, concurring and dissenting), *aff'd mem.*, 729 F.2d 1441 (2d Cir. 1983); *Reed v. The Macke Co.*, 14 BRBS 568 (1981); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981); *Roberts v. Bath Iron Works Corp.*, 13 BRBS 503 (1981); *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981) (Miller, concurring and dissenting); *Novak v. I.T.O. Corp. of Baltimore*, 12 BRBS 127 (1979). *Cf. Volpe v. Ne. Marine Terminal Corp.*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982), *rev'g* 14 BRBS 1 (1981) (Miller, dissenting) (reversing Board decision affirming administrative law judge where administrative law judge failed to apply presumption and Board engaged in fact-finding to supplement his decision).

The Board has held that an administrative law judge's error in failing to find the presumption rebutted is harmless where there is substantial evidence to support the administrative law judge's conclusion that a causal connection exists between claimant's injury and employment. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 125 (1984); *Seaman v. Jacksonville Shipyards, Inc.*, 14 BRBS 148.9 (1981); *Shoemaker v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 141 (1980).

The Board has also held that an administrative law judge's error is harmless where there is substantial evidence to support the administrative law judge's finding that no causal relationship existed. *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336 (1981). However, where the administrative law judge's finding of no causation is based on an improper application of Section 20(a) and the record lacks evidence rebutting the presumption, the Board has reversed the administrative law judge's decision. *Adams*, 17 BRBS 258; *Dower*, 14 BRBS 324.

## Digests

The Board remanded the case for the administrative law judge to address the causation issue pursuant to the Section 20(a) presumption. The administrative law judge's statements regarding causation were merely *dicta*, given his findings under Section 12, and moreover, the statements relied on do not bear on the causation issue. *Horton v. Gen. Dynamics Corp.*, 20 BRBS 99 (1987).

Any error the administrative law judge may have made in failing to expressly discuss rebuttal of the Section 20(a) presumption is harmless, because the evidence he credited is sufficient to support a finding of no causation. *Bingham v. Gen. Dynamics Corp.*, 20 BRBS 198 (1988).

The Board affirmed the administrative law judge's finding that claimant's lung impairment was due to asbestos exposure while working for employer, rather than to a pre-existing obstructive condition. Although administrative law judge erred in failing to consider the Section 20(a) presumption, this error is harmless in that there is no evidence sufficient for rebuttal. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

The administrative law judge did not err in applying the Section 20(a) presumption to link claimant's back condition to his work-related ankle injury. Although the administrative law judge failed to go through the prescribed analysis for the application of Section 20(a), the administrative law judge considered all relevant evidence prior to making his supportable finding that causation is established. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988).

Because the record contained conflicting evidence as to the cause of claimant's back problems and his chronic pain syndrome, which the administrative law judge failed to consider in concluding that these conditions were not work-related, the Board remanded for the administrative law judge to reconsider this evidence in light of the Section 20(a) presumption and the Administrative Procedure Act. *Frye v. Potomac Elec. Power Co.*, 21 BRBS 194 (1988).

Failure to apply the presumption is harmless error if the evidence relied upon to find no causal connection is sufficient to rebut the presumption. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

Although the administrative law judge did not apply the Section 20(a) presumption to claimant's asbestos claim, the Board held that any error is harmless in this case because the administrative law judge's ultimate finding that claimant's lung condition is due to his work-related siderosis and not to asbestosis is supported by substantial evidence, and the credited evidence is sufficient to rebut the presumption. *O'Berry v. Jacksonville Shipyards*,

*Inc.*, 21 BRBS 355 (1988), *aff'd and modified on other grounds on recon.*, 22 BRBS 430 (1989).

The Board affirmed the administrative law judge's finding that claimant's injury is work-related based on the testimony of claimant and other witnesses and on medical evidence even though the judge did not apply the Section 20(a) presumption. There is no evidence of record sufficient to rebut the presumption. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *see also Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

As the administrative law judge found the disability claim time-barred and did not address causation or claimant's entitlement to medical benefits, the Board remanded for the administrative law judge to consider whether employer has produced sufficient evidence to rebut Section 20(a) and if so to weigh all of the relevant evidence as to the cause of claimant's back injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989).

Where the administrative law judge finds no causation based on the record as a whole, but fails to apply the Section 20(a) presumption, the Board will affirm the administrative law judge's finding if the evidence credited by the administrative law judge is sufficient to rebut the presumption. However, if the credited evidence is insufficient to rebut, and there is no other evidence in the record to support rebuttal, then causation is established as a matter of law. In the instant case, the Board reversed the administrative law judge's finding that causation was not established, as no medical opinion refuted a relationship between claimant's injury and his employment. *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989).

The Board held that the administrative law judge erred in applying Section 7(d)(4) to conclude that claimant's refusal to undergo back surgery broke the causal nexus between his back injury and subsequent disability. Section 7(d)(4) does not apply to the causal connection, but provides for the suspension of compensation under certain circumstances where the claim is otherwise compensable. As the administrative law judge's conclusory statement that there is "substantial evidence" to rebut the Section 20(a) presumption does not comport with the APA, the case is remanded for reconsideration. The administrative law judge must address causation and disability before applying Section 7(d)(4). *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989).

The District of Columbia Circuit held that in analyzing causation, the administrative law judge erred by placing the burden of proof on claimant. Claimant is entitled to the benefit of the Section 20(a) presumption of causation once the "minimal requirements" of establishing a *prima facie* case have been met. The court notes that the presumption is invoked and rebutted in this case, and the court remanded the case for the administrative law judge to determine whether employer's evidence establishes that claimant's elbow condition was not causally related to his work accident. *Brown v. I.T.T./Cont'l Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990).

Although the administrative law judge did not apply the Section 20(a) presumption, this error is harmless as he analyzed the evidence as a whole and his decision is supported by substantial evidence. The administrative law judge rationally determined that claimant's back pain at home in 1987 is work-related based on the medical opinions of record that the pain at home was not a new injury but an exacerbation of his continuing back pain and on Dr. London's failure to establish that claimant's disability is not related to the original work injury. Merely because the administrative law judge used the term "aggravation" regarding the 1987 incident does not mean claimant's current condition is not the natural and unavoidable result of the 1985 work injury. *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140 (1991).

Although the administrative law judge did not analyze the evidence in terms of the Section 20(a) presumption with regard to claimant's back condition, the Board held that any error in this regard was harmless, since the administrative law judge's finding that claimant's back condition is the natural and unavoidable result of claimant's 1977 work-related knee injury is supported by substantial evidence. *Bass v. Broadway Maint.*, 28 BRBS 11 (1994).

Although in the instant case the administrative law judge did not specifically invoke the Section 20(a) presumption, any error in this regard is harmless as his decision is supported by substantial evidence; he considered the relevant evidence and applied the appropriate legal standard in determining that claimant's disability was the natural and unavoidable result of the work injury and was not due to other causes. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

The administrative law judge erred in placing the burden of proof on claimant to prove that his psychological condition is work-related and failing to apply the Section 20(a) presumption to this issue. The Section 20(a) presumption is invoked as a matter of law as it is uncontested that claimant has a psychological condition and as two doctors stated that the work accident could have played a role in the condition. The Board remanded the case to the administrative law judge to make a determination as to whether the presumption is rebutted and, if so, as to whether a causal relationship is established based on the record as a whole. *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon.*, 32 BRBS 224 (1998). On reconsideration, the Board rejected employer's contention that the Board applied an improper burden of proof on the issue of causation.

The court held that the Board correctly determined that the administrative law judge's failure to discuss the aggravation rule is harmless error, inasmuch as the administrative law judge, in weighing the evidence relevant to causation, rationally rejected the medical opinion of claimant's treating doctor, the only evidence of record sufficient to support a finding of causation under an aggravation theory. *Hice v. Director, OWCP*, 48 F. Supp. 2d 501 (D. Md. 1999).

The administrative law judge did not address the issue of whether claimant sustained injuries to his left knee or back as a sequela of the initial work injury, and thus the Board remanded the case for further consideration pursuant to Section 20(a). *Seguro v. Universal Mar. Serv. Corp.*, 36 BRBS 28 (2002).

Any error the administrative law judge made in not discussing rebuttal is harmless, since in discussing causation/aggravation based on the record as a whole, the administrative law judge relied on the opinion of claimant's treating physician which he found credible and well-reasoned, in which the physician stated that claimant's back disability is wholly attributable to the industrial injury, thus establishing a causal connection. *Price v. Stevedoring Services of Am.*, 36 BRBS 56 (2002), *aff'd in part and rev'd on other grounds*, No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), *and aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

To the extent that causation, rather than the responsible employer, is at issue, the Board holds that causation is established as a matter of law. The evidence is uncontradicted that decedent was exposed to asbestos in the course of his employment, the death certificate lists asbestosis as a contributing cause of death, and the parties stipulated that there is no evidence that the death was not hastened by asbestosis. *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64 (2005), *modified in part on recon.*, 40 BRBS 1 (2005), *aff'd sub nom. Dillingham Ship Repair v. U.S. Dep't of Labor*, 320 F. App'x 585 (9th Cir. 2009).

The Board remanded the case for the administrative law judge to address whether claimant's second work-related back injury aggravated the first back injury to result in disability and to apply the Section 20(a) presumption to new injuries to claimant's thoracic spine and right shoulder. *L.W. [Washington] v. Northrop Grumman Ship Sys., Inc.*, 43 BRBS 27 (2009).

The Ninth Circuit adopted the "harmless error" doctrine with respect to the application of Section 20(a). Although the administrative law judge erred in weighing the evidence at rebuttal and thus engaging in a two-step process rather than a three-step process, the error is harmless as substantial evidence supports the administrative law judge's finding that claimant's injury is compensable. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010) (*see digests, infra* at rebuttal and weighing).

The Board vacated the denial of benefits in this case where the administrative law judge failed to apply the Section 20(a) presumption to claimant's shoulder condition which allegedly restricts him from performing his usual work. This includes a degenerative condition, especially as there is no evidence to support the administrative law judge's finding that claimant's degenerative shoulder condition pre-existed his work-related shoulder injuries. If the administrative law judge finds the condition is work-related, then

he must address any remaining issues. *Leyva v. Serv. Employees Int'l., Inc.*, 46 BRBS 51 (2012).

In a case where claimant asserted a primary injury to his lungs and a secondary injury to his vertebra, a fracture due to coughing and the use of steroid medication, the court concluded that, although the Section 20(a) presumption applies to both injuries, the presumption must be applied slightly differently to the secondary injury. That is, for a secondary injury, a claimant must show that he sustained a primary work-related injury and that the primary injury could have “naturally or unavoidably caused, aggravated, or accelerated,” the secondary injury in order to invoke the Section 20(a) presumption on the secondary injury claim. In this case, the court held that the administrative law judge’s failure to apply the “naturally or unavoidably” standard for the vertebra injury was harmless. Specifically, as there is substantial evidence to support the administrative law judge’s finding that the vertebra fracture “could have resulted” from the primary injury, the court concluded the same evidence would support a finding that the fracture “could have unavoidably resulted” from the lung condition. Accordingly, the Fourth Circuit stated it was unnecessary to remand this case for the administrative law judge to apply the proper standard. *Metro Mach. Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017).

In this case where claimant established he had a gastrointestinal condition that could have developed or been aggravated by his work for employer in Iraq, the administrative law judge found that employer failed to rebut the Section 20(a) presumption. The Board concluded that the administrative law judge erred in making such a finding, as it was Dr. Rajman’s unequivocal opinion that claimant’s GI condition was not related to his employment in Iraq. However, the Board held the administrative law judge’s error was harmless because he also found, on the record as a whole, that the preponderance of the evidence established that claimant sustained a work-related injury. Consequently, the Board affirmed the administrative law judge’s award of medical benefits. *Suarez v. Serv. Employees Int'l., Inc.*, 50 BRBS 33 (2016).

## Rebutting the Presumption

### In General

In finding that employer did not rebut the Section 20(a) presumption that claimant's heart attack was related to his employment in *Wheatley v. Adler*, 407 F.2d 307, 314 (D.C. Cir. 1968) (en banc), the court stated "Rebutting evidence may be hard to develop, given the limits of medical ability to reconstruct why 'something unexpectedly goes wrong within the human frame.' But that is precisely why the presumption was inserted by Congress. It signals and reflects a strong legislative policy favoring awards in arguable cases."<sup>1</sup>

The Section 20(a) presumption is not affirmative evidence, giving weight to claimant's evidence, but rather is a procedural tool. *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11 (CRT) (1<sup>st</sup> Cir 1982), *aff'g* 13 BRBS 1083 (1981) (Miller, dissenting); *Novak v. I.T.O. Corp. of Baltimore*, 12 BRBS 127 (1979). *Accord Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4<sup>th</sup> Cir. 1997).

Section 20(a) places the burden on the employer to go forward with substantial countervailing evidence to rebut the presumption that the injury was caused by claimant's employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Employer's burden is one of production; once employer produces substantial evidence of the absence of a causal relationship, the Section 20(a) presumption is rebutted. *See, e.g., Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Am. Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *E.g., Rainey*, 517 F.3d 632, 42 BRBS 11 (CRT) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *Am. Grain Trimmers*, 181 F.3d at 818, 33 BRBS at 76(CRT); *Sprague*, 688 F.2d at 865, 15 BRBS at 15 (CRT). Thus Section 20(a) is not rebutted by "any" evidence; it must be substantial. *See, e.g., Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *Am. Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT).

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<sup>1</sup> While the *Wheatley* court also cited the proposition that doubtful factual questions are to be resolved in favor of claimant, a rule which was rejected by the Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), that decision did not affect application of the Section 20(a) presumption. Citing Section 20 of the Act, the Court stated, "In part due to Congress's recognition that claims such as those involved here would be difficult to prove, claimants in adjudications under these statutes benefit from certain statutory presumptions easing their burden." 512 U.S. at 281, 28 BRBS at 47(CRT).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption also applies, and in order to rebut it, employer must establish that claimant's condition was not caused or aggravated by his employment. See, e.g. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1<sup>st</sup> Cir. 2004); *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11<sup>th</sup> Cir. 1990); *Rajotte v. Gen. Dynamics Corp.*, 18 BRBS 85 (1986); *Laplante v. Gen. Dynamics Corp./Elec. Boat Div.*, 15 BRBS 83 (1982); *Fortier*, 15 BRBS 4; *Seaman*, 14 BRBS 148.9. See also *Hensley v. Washington Metro. Area Transit Auth.*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982), *rev'g* 11 BRBS 468 (1979) (Miller, dissenting) (employer must establish that aggravation did not arise even in part from employment); *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9<sup>th</sup> Cir. 1980) (rebuttal requires evidence "specific and comprehensive enough to sever the potential connection between the disability and the work environment;" standard not met where expert could not say exposure did not trigger or accelerate disease).

Thus, once the Section 20(a) presumption is invoked, the relevant inquiry is whether employer produced substantial evidence of the lack of a causal nexus. See, e.g., *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1<sup>st</sup> Cir. 2004); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5<sup>th</sup> Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT); *Am. Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT); *Dower v. Gen. Dynamics Corp.*, 14 BRBS 324 (1981). Employer must produce facts, not mere speculation, in order to rebut the presumption of compensability. *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT); *Am. Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT); *Swinton*, 554 F.2d 1075, 4 BRBS 466; *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990). Thus, "reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by the Act." *Swinton*, 554 F.2d 1075, 4 BRBS 466 (quoting *Steele v. Adler*, 269 F. Supp. 376, 379 (D.D.C. 1967)). See *Smith v. Sealand Terminal, Inc.*, 14 BRBS 844 (1982); *Dixon v. John J. McMullen & Associates, Inc.*, 13 BRBS 707 (1981) (Smith, concurring and dissenting). Highly equivocal evidence is not substantial and will not rebut the presumption. *Dewberry v. S. Stevedoring Corp.*, 7 BRBS 322 (1977), *aff'd mem.*, 590 F.2d 331, 9 BRBS 436 (4<sup>th</sup> Cir. 1978).

The employer need only introduce medical or other evidence that claimant's condition was not caused or aggravated by his work and the presumption is rebutted. In *Brown*, 893 F.2d at 298, 23 BRBS at 24(CRT), the Eleventh Circuit stated that the presumption was not rebutted because "none of the physicians expressed an opinion ruling out the possibility that there was a causal connection between the accident and Brown's disability." Subsequent court decisions have disapproved a "ruling out standard," holding explicitly that employer need not "rule out" the possibility that there was a causal connection in order to rebut the presumption. E.g., *Ortco Contractors*, 332 F.3d 283, 37 BRBS 35(CRT); *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT); *Bath Iron Works Corp. v. Director, OWCP*

[*Shorette*], 109 F.3d 53, 31 BRBS 19(CRT) (1<sup>st</sup> Cir. 1997). The Board subsequently held in a case arising in the Eleventh Circuit that a physician's testimony regarding the lack of a causal nexus, rendered to a reasonable degree of medical certainty, is sufficient to rebut the presumption; the doctor's statement regarding "possibilities" reflects his opinion that in the medical profession there is no absolute certainty. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

Thus, employer meets its burden with evidence demonstrating the absence of a causal relationship and need not prove another agency of causation to rebut the presumption. *O'Kelley*, 34 BRBS 39; *Stevens v. Todd Pac. Shipyards*, 14 BRBS 626 (1982) (Kalaris, concurring and dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984); *Champion v. S & M Traylor Bros.*, 14 BRBS 251 (1981) (Miller, dissenting), *rev'd and rem.*, 690 F.2d 285, 15 BRBS 33 (CRT) (D.C. Cir. 1982); *Compton v. Pennsylvania Avenue Gulf Serv. Ctr.*, 9 BRBS 625 (1979) (Miller, dissenting); *Carver v. Potomac Elec. Power Co.*, 8 BRBS 43 (1978). See also *Lobin v. Early-Massman*, 11 BRBS 405 (1979) (Miller, dissenting).

In *Wheatley*, 407 F.2d at 314, the court discussed negative evidence, stating

Sometimes so-called 'negative' evidence is informative. If a man has no blood in the sputum, no cough, no weakness, no headache, no elevation of temperature or pulse, no stuffiness or pain in the chest- then from all these facts, a doctor can say "with reasonable medical certainty," or as a matter of some probability, that this man does not have pneumonia.

In *Swinton*, 554 F.2d 1075, 4 BRBS 466, the court stated that the presumption may be rebutted by negative evidence if it is specific and comprehensive enough to sever the potential connection between the particular injury and a job-related accident. While in *Swinton* and *Wheatley* the evidence adduced was insufficient to meet the requirements of this test, the Board has held that a combination of medical testimony, a credibility determination and negative evidence (no medical record in union clinic or hospital books of claimant slipping or suffering pain) constituted sufficient evidence to rebut the presumption. *Craig v. Maher Terminal, Inc.*, 11 BRBS 400 (1979) (Miller, dissenting). See *Holmes v. Universal Mar. Serv. Corp.*, 29 BRBS 18 (1995) (Decision on Recon.).

Once the Section 20(a) presumption is rebutted, it falls from the case, and the administrative law judge must then weigh all the evidence and resolve the case based on the record as a whole. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997); *Swinton*, 554 F.2d 1075, 4 BRBS 466; *Travelers Ins. Co. v. Belair*, 412 F.2d 297 (1st Cir. 1969); *John W. McGrath Corp. v. Hughes*, 264 F.2d 314 (2d Cir.), *cert. denied*, 360 U.S. 931 (1959); *Hislop v. Marine Terminals Corp.*, 14 3R6S 927 (1982). See also *Greenwood v. Army & Air Force Exch. Serv.*, 6 BRBS 365 (1977), *aff'd*, 585 F.2d 791, 9 BRBS 394 (5th Cir. 1979); *Gifford v. John T. Clark & Son of Boston, Inc.*, 4 BRBS

210 (1976); *Norat v. Universal Terminal & Stevedoring Corp.*, 3 BRBS 151 (1976). This rule is an application of the “bursting bubble” theory of evidentiary presumptions, derived from the Supreme Court’s interpretation of Section 20(d) in *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). See *U.S. Indus.*, 455 U.S. at 612, n. 5, 14 BRBS at 632, n.5 (assuming Section 20(a) presumption is of the same nature as Section 20(d)); *Brennan v. Bethlehem Steel Corp.*, 7 BRBS 947 (1978) (applying *Del Vecchio* to Section 20(a)). See *Evaluating the Evidence*, *infra*.

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Once claimant shows physical harm and a work-related accident which could have caused the harm, the Section 20(a) presumption applies, and it is employer’s burden to rebut the presumption by introducing substantial evidence that claimant’s injury did not arise out of employment. When employer produces such substantial evidence, the presumption drops out of the case, and the administrative law judge must weigh all of the evidence relevant to the causation issue. *MacDonald v. Trailer Marine Transp. Corp.*, 18 BRBS 259 (1986), *aff’d mem. sub nom. Trailer Marine Transp. Corp. v. Benefits Review Board*, 819 F.2d 1148 (11<sup>th</sup> Cir. 1987).

The Board remanded the case for the administrative law judge to determine if employer rebutted the Section 20(a) presumption by showing that exposure to asbestos did not cause the lung cancer. *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

An opinion that is equivocal as to etiology is insufficient to support rebuttal of the Section 20(a) presumption. Thus, a doctor’s opinion that claimant’s fibrosis was “perhaps” related to previous inflammatory disease cannot rebut. However, rebuttal was established based on another medical opinion. *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

The Board remanded the case where the administrative law judge properly allowed claimant to amend his claim but did not discuss evidence relevant to rebuttal on the amended claim, specifically evidence that claimant’s ongoing pain involves an emotional response to stress which is unrelated to her employment. *Dangerfield v. Todd Pac. Shipyards Corp.*, 22 BRBS 104 (1989).

The Board reversed the finding of rebuttal since the administrative law judge based his finding on the ground that no forthright medical opinion linked claimant’s injury to his employment. The administrative law judge erred by placing the burden on claimant to establish that his injury was work-related, rather than on employer to establish that the injury is not work-related. No medical opinion of record stated that claimant’s injury was not caused or aggravated by his employment. The administrative law judge’s reliance on the negative evidence of a three-year gap between the last day of claimant’s employment and claimant’s first post-employment complaint of injury is insufficient evidence, by itself,

to establish rebuttal. *Gencarelle v. Gen. Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989).

Employer can rebut the presumption in a case involving a potential intervening cause by showing that claimant's disabling condition was caused by a subsequent non work-related event, provided the subsequent event was not caused by claimant's work-related injury. *Bass v. Broadway Maint.*, 28 BRBS 11 (1994); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).

The Board held that the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), does not change or affect the law regarding invocation and rebuttal of the Section 20(a) presumption. Therefore, the Board rejected claimant's contention that loss of the "true doubt" rule increases the import of the presumption of causation, requiring an employer to present a greater "quantum of evidence" to rebut it. Moreover, where claimant initially injured his back in 1979 and then worked until herniated discs prevented his continued employment in 1985, the Board concluded that negative evidence, which supplements "positive" medical evidence and a credibility determination, is sufficient to rebut the Section 20(a) presumption. It noted that this case contains an unequivocal medical opinion of no causation, a rational credibility determination crediting that doctor, and negative evidence of the absence of back pain for six years following the initial injury. Therefore, the Board re-affirmed its decision that the administrative law judge rationally determined that claimant's 1985 condition was not caused by his 1979 work injury. *Holmes v. Universal Mar. Serv. Corp.*, 29 BRBS 18 (1995) (Decision on Recon.).

The Fifth Circuit held that while the administrative law judge blended the second and third steps regarding causation, *i.e.*, whether employer rebutted the Section 20(a) presumption and weighing the evidence of causation as a whole, this departure was not in error, because if the evidence was sufficient to defeat the claim, it would surely suffice to rebut the presumption. However, as the administrative law judge erred in focusing on claimant's pre-existing condition, *i.e.*, his underlying heart disease, rather his ultimate injury, the case was remanded for reconsideration. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

The Seventh Circuit held that the burden for establishing rebuttal at Section 20(a) is a burden of production only, as the burden of persuasion rests at all times on the claimant, by force of Section 7(c) of the APA. In order for employer to satisfy its burden at Section 20(a), it is required to introduce substantial evidence which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The court stated that the rejection of vague and speculative evidence at rebuttal is not inconsistent with this standard. *Am. Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (en banc), *cert. denied*, 528 U.S. 1187 (2000).

The Second Circuit concurred with the Seventh Circuit's holding in *Am. Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT), that although the burden for establishing Section 20(a) rebuttal is one of production and not persuasion, an employer cannot satisfy its burden of production simply by submitting any "evidence" whatsoever. Where the administrative law judge had rejected the reasoning underlying a medical report, she erred in finding that the report rebutted the presumption as she made clear her view that a reasonable mind would not accept it as evidence that the decedent's lung cancer did not arise from his work-related asbestos exposure. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008).

The First Circuit affirmed the Board's decision that employer failed to rebut the Section 20(a) presumption. The court stated that the rebuttal standard does not require employer to rule out any possible causal connection between claimant's employment and his condition, as this goes beyond the substantial evidence standard. In this case, however, employer submitted no evidence. *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997).

The First Circuit rejected employer's assertion that the Board usurped the administrative law judge's fact-finding authority in its first decision when it stated that employer's evidence was not, as a matter of law, sufficient to rebut the Section 20(a) presumption, as the Board's conclusion was a legal one. The court affirmed the Board's initial conclusion that rebuttal could not be established as a matter of law. The court therefore affirmed the administrative law judge's finding, on remand, that claimant established that his neurological condition is work-related. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

The Fifth Circuit held that the Board erred in stating that employer is required to "rule out" the possibility of a causal connection in order to rebut the Section 20(a) presumption. The plain language of the statute requires employer to produce "substantial evidence to the contrary" and this burden is lighter than "ruling out." Moreover, employer's burden is one of production rather than persuasion. The court nonetheless affirmed the award of benefits as the administrative law judge permissibly credited evidence that claimant's condition is due to the work injury. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

The Fifth Circuit held that, on rebuttal, the employer cannot be made to "rule out" every conceivable connection between the death and the employment. Reiterating its position in *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT), the Fifth Circuit held that to rebut the Section 20(a) presumption, employer need only submit substantial evidence that the injury was not work-related. The court stated that requiring medical opinions that "affirmatively state" or "unequivocally state" creates a higher evidentiary standard than that stated in the statute. The court held that the administrative law judge properly found rebuttal in this case, as decedent's heart attack began at home and the credited evidence stated that it would have

progressed regardless of where he was or what he was doing. Thus, the aggravation rule is inapplicable as the fact that the death occurred at work is mere coincidence. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1056 (2003).

The Board reversed the administrative law judge's finding that employer failed to meet its burden on rebuttal. Although the Eleventh Circuit has espoused a "ruling out" standard when addressing the issue of rebuttal, *Brown*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990), the Board held that a physician's unequivocal testimony regarding the lack of a causal nexus, rendered to a reasonable degree of medical certainty, is sufficient to sever the causal relationship between claimant's employment and his harm, even when the physician admits that in the medical profession there is no absolute certainty. Employer also is not required to establish another agency of causation in order to rebut the Section 20(a) presumption. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

The First Circuit rejected the identical argument made by employer in *Preston*, 380 F.3d 597, 38 BRBS 60(CRT), that the Board usurped the administrative law judge's factual findings and credibility determinations in its first decision when it held that employer's evidence was legally insufficient to rebut the Section 20(a) presumption. The court stated that the requirement at the rebuttal step is, in effect, an "objective test" which requires the employer to produce the degree of evidence which *could* satisfy a reasonable factfinder of non-causation; the determination that the employer has or has not produced sufficient evidence is a legal judgment and is not dependent on credibility. The court affirmed the Board's initial holding that employer's evidence was legally insufficient to rebut because the evidence did not address the question of whether claimant's disabling back *pain* was related to his working conditions. The court further rejected employer's contention that the Board erroneously required employer to "rule out" any possible causal relationship between claimant's employment and his condition, stating that the Board correctly focused on whether employer's evidence rebutted claimant's claim that his working conditions had caused his disabling pain. *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1<sup>st</sup> Cir. 2010).

Decedent worked in the shipyards for three different companies between 1956 and 1960, and was exposed to asbestos which caused mesothelioma and his death. The Ninth Circuit held that the Board erred in stating that the Section 20(a) presumption applies to the claim instead of against each individual employer or to the responsible employer issue. The court held that the proper application of the Section 20(a) presumption in a multi-employer, occupational disease case is: 1) the presumption must be invoked (by "some" evidence) against each employer and if not invoked against a particular employer, that employer may not be held liable; 2) each employer may rebut the presumption with substantial evidence that it is not the last responsible employer; 3) once the employer rebuts the presumption, it may only be held liable if the claimant has shown that the employer is responsible by a preponderance of the evidence. This analysis is to occur sequentially beginning with the

most recent employer and working backwards. If a recent employer is found to be responsible, then the administrative law judge need not address the liability of earlier employers. In this case, the court affirmed the first administrative law judge's decision to invoke the Section 20(a) presumption against Lockheed, the last employer. As Lockheed did not introduce any evidence to rebut the Section 20(a) presumption, it is liable for compensation to claimant. *Albina Engine & Mach. v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9<sup>th</sup> Cir. 2010), *rev'g McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005).

The Fifth Circuit held that on rebuttal, the employer cannot be made to “demonstrate” the absence of a causal connection. The court stated that “the Board’s ‘demonstrate’ requirement heightens the substantial evidence standard by making the employer prove the deficiency in the Claimant’s prima facie case, when all it must do is advance evidence to throw factual doubt on the prima facie case.” Evidence supporting an alternative explanation for the cause of claimant’s hearing loss is sufficient to rebut. Employer offered a doctor’s opinion, credited by the administrative law judge, that claimant’s hearing loss was not due to noise exposure because his hearing was better than average for someone of his age and the noise surveys did not reveal noise levels sufficient to cause hearing loss. The court held that the administrative law judge could rely on this opinion to rebut the Section 20(a) presumption. Therefore, the court reinstated the denial of benefits. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5<sup>th</sup> Cir. 2012).

The First Circuit affirmed the finding that the Section 20(a) presumption was rebutted. Citing its decision in *Fields*, 599 F.3d 47, 44 BRBS 13(CRT), the court stated that at the rebuttal stage, the credibility of the witnesses is not in issue and that the requirement that the employer identify “substantial evidence” to rebut the presumption merely requires evidence that *could* satisfy a reasonable factfinder that the employee’s death was attributable to a cause not covered under the Act. *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1<sup>st</sup> Cir. 2012).

The Fifth Circuit held the “substantial evidence” showing needed to rebut the presumption is a “minimal requirement” less demanding than a preponderance of the evidence. Medical opinions offering an alternative cause for claimant’s symptoms is sufficient to rebut. In this case, UMS offered three medical opinions indicating claimant’s symptoms were the result of his 1997 original injury and were not aggravated in a 2011 work injury to his hands and shoulder. The court held the administrative law judge could rely on this evidence to rebut the Section 20(a) presumption. *Sea-Land Services, Inc., v. Director, OWCP [Ceasar]*, 949 F.3d 921, 54 BRBS 9(CRT) (5<sup>th</sup> Cir. 2020).

The following sections discuss fact patterns resulting in rebuttal or non rebuttal of the presumption.

## Cases holding Section 20(a) was not rebutted

The cases where Section 20(a) was not rebutted are premised on the lack of evidence that claimant's disabling condition, whether a traumatic injury or occupational disease, was unrelated to the work events which form the basis of claimant's *prima facie* case.

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*Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (en banc), is most often cited for its definition of injury as occurring "if something goes wrong within the human frame," but the case is also instructive in regards to rebuttal of the presumption. In *Wheatley*, a claimant with pre-existing arteriosclerosis had a heart attack following his urinating in the cold during the course of employment. The court reviewed the record to determine whether there was substantial evidence to dispel the presumption, concluding that neither the testimony of Dr. Thomas relied on by employer nor anything else in the record constituted such evidence. In this regard, Dr. Thomas testified that, with reasonable medical certainty, coronary arteriosclerosis was the major reason for the heart attack. However, when asked what "pushed it over the brink," he stated he could not say what the precipitating event was. The court concluded that the doctor was unable to state an opinion on the key question of whether there was a work-related factor that aggravated claimant's pre-existing condition. Moreover, while the doctor concluded that death was not the result of any employment activity, he referred to urinating-in-the-cold as sufficient to produce death but his assumption that this act was not work-related involved a point of law on which his testimony had no weight. The court concluded that in the absence of an opinion based on reasonable medical probability that claimant's action was not the factor bringing on the heart attack, the presumption was not rebutted.

The D.C. Circuit also reversed the Board's holdings that Section 20(a) was rebutted in two later cases. In *Champion*, 14 BRBS 251, the Board affirmed an administrative law judge's decision that employer had rebutted the presumption with evidence showing that, following a temporary period of work-related asthma, claimant's asthma was not work-related. Finding that the Board failed to give full scope to Section 20(a), the court held that the record lacked evidence to rebut the presumption that emotional trauma caused by claimant's original period of asthma was a contributing cause of his persistent and disabling asthma. *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33 (CRT) (D.C. Cir. 1982), *rev'g and remanding* 14 BRBS 251 (1981) (Miller, dissenting). Similarly in *Hensley v. Washington Metro. Area Transit Auth.*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982), *rev'g* 11 BRBS 468 (1979) (Miller, dissenting), the D.C. Circuit held that the administrative law judge and the Board failed to properly apply the Section 20(a) presumption. The court emphasized that, in order to rebut the presumption, employer must establish that the condition was not aggravated by the employment and found that the testimony of employer's physician was insufficient to

establish that claimant's psoriasis was not aggravated by bus driving as it was based on unsupported assumptions regarding claimant's work conditions.

In *Bell Helicopter Int'l, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984), *aff'g Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984), the court affirmed the Board's holding that Section 20(a) was not rebutted where decedent sustained a fatal heart attack at work and employer offered no evidence that it did not arise out of and in the course of employment. *Accord Smith v. Sealand Terminal, Inc.*, 14 BRBS 844 (1982) (fatal heart attack in the course of employment).

In several cases, the Board found the presumption was not rebutted on the basis that mere hypothetical probabilities are insufficient to rebut Section 20(a). *Smith*, 14 BRBS 844. *See Dower v. Gen. Dynamics Corp.*, 14 BRBS 324 (1981) (evidence which is inconclusive regarding causal connection between asbestos exposure and rectal cancer is insufficient to rebut); *Taylor v. Smith and Kelly Co.*, 14 BRBS 489 (1981) (where it is uncontested that claimant suffered some disabling pain, the evidence is insufficient to rebut the presumption that claimant's pain was due to his work-related fall where a doctor testified that there was no way to say that any current problems could not possibly be related to the fall and there was no way of ruling out the fall in any current pain). Thus, the presumption was not rebutted where employer did not provide concrete evidence but merely suggested alternate ways that claimant's injury might have occurred, where there was no evidence of another cause, and where the medical evidence was inconclusive as to causation. *Williams v. Chevron U.S.A., Inc.*, 12 BRBS 95 (1980). *See Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980), *aff'g* 8 BRBS 846 (1978) (Smith, dissenting); *Owens v. Newport News Shipbuilding & Dry Dock Co.*, 11 BRBS 409 (1979) (Miller, concurring and dissenting); *Gunter v. Parsons Corp. of California*, 6 BRBS 607 (1977), *aff'd sub nom. Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980).

In *Compton v. Pennsylvania Avenue Gulf Serv. Ctr.*, 9 BRBS 625 (1979) (Miller, dissenting), the Board initially vacated the administrative law judge's decision finding causation established based on Section 20(a), holding that the presumption that claimant's disease, myelofibrosis with myeloid metaplasia, was caused by exposures at work was rebutted. The Board stated that employer need not prove another agency of causation but must only prove the condition is not caused by employment and that employer did so with medical evidence which, while not unequivocally ruling out petroleum products or benzene as a cause of myelofibrosis, was substantial evidence that claimant's work environment did not cause his disease. The case was remanded for findings without the benefit of Section 20(a). On remand, finding the employee had subsequently developed leukemia, the administrative law judge admitted additional evidence and invoked Section 20(a) to link his leukemia and benzene exposure. The Board affirmed her finding of causation, holding employer failed to meet its burden of providing substantial evidence to rebut the presumption where its doctor had inadequate information on the amount of employee's past exposure to benzene and employer failed to show that the employee's level of

exposure to benzene could not or did not cause the employee's leukemia. *Compton v. Pennsylvania Avenue Gulf Serv. Ctr.*, 14 BRBS 472 (1981).

While negative evidence may rebut Section 20(a), it must be specific and comprehensive. *Swinton*, 554 F.2d 1075, 4 BRBS 466; see *Adams v. Gen. Dynamics Corp.*, 17 BRBS 258 (1985) (pathologist's report silent for asbestosis is inadequate rebuttal evidence). Thus, the Board affirmed the administrative law judge's finding that there was insufficient evidence to rebut the presumption that sarcoidosis (disease of unknown etiology) was related to claimant's employment. Although proof that employment was not the cause is sufficient in appropriate cases, even though an actual cause cannot be identified, employer's negative evidence here did not rise to the necessary level. *Stevens v. Todd Pac. Shipyards*, 14 BRBS 626 (1981). Cf. *Champion*, 14 BRBS 251 (presumption that sarcoidosis is related to employment exposure to dust rebutted by evidence that, although exact cause is unknown, dust is not a factor).

Similarly, the Board reversed an administrative law judge's finding that the presumption was rebutted where no direct, positive evidence was presented in the record. The administrative law judge relied on his decision to discredit claimant's testimony to rebut the presumption. The Board held that claimant's contradictory testimony could not constitute substantial evidence on rebuttal because it did not sever the potential connection between the injury and employment. Also, inaccurate medical histories did not serve as substantial rebuttal evidence. The Board, however, did not foreclose the possibility that negative credibility determinations alone could constitute substantial evidence to rebut the presumption in an appropriate case. *Webb v. Corson & Gruman*, 14 BRBS 444 (1981).

Where employer did not offer direct evidence to rebut the Section 20(a) presumption but only relied on the speculative testimony of a medical witness, the administrative law judge erred in finding the presumption was rebutted. *Dixon v. John J. McMullen & Associates, Inc.*, 13 BRBS 707 (1981). Cf. *Craig v. Maher Terminal, Inc.*, 11 BRBS 400 (1979) (Miller, dissenting) (combination of medical evidence, a credibility determination adverse to claimant and negative evidence sufficient to rebut). See also *Mock v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 275 (1981) (discussing use of negative evidence in establishing alleged accident did not occur).

Where claimant concededly suffers from a non-work-related disease which could have caused his lung symptoms as well as work-related asbestosis and was exposed to conditions at work which could also have caused his lung condition, employer's burden on rebuttal can be met with evidence that claimant's disability is not due, in whole or in part, to the work-related condition or that it is due to the non-work-related condition. *Fortier v. Gen. Dynamics Corp.*, 15 BRBS 4 (1982) (Kalaris, concurring and dissenting), *aff'd mem.*, 729 F.2d 1441 (2d Cir. 1983). As employer failed to produce substantial evidence that claimant's lung condition and symptoms were not caused at least in part by asbestos exposure, Section 20(a) was not rebutted. *Id.* Similarly, in *LaPlante v. Gen. Dynamics*

*Corp./Elec. Boat Div.*, 15 BRBS 83 (1982) (Kalaris, concurring and dissenting), the Board affirmed the administrative law judge's finding that claimant was entitled to permanent total disability benefits for the combination of his non work-related heart disease and asbestosis. Initially, the Board affirmed the finding of work-related asbestosis, as employer submitted no evidence to rebut Section 20(a). As there was no evidence his heart condition did not pre-exist his work-related asbestosis, the Board applied the aggravation rule and held employer did not rebut the Section 20(a) presumption. Claimant's entire disability was thus compensable.

An administrative law judge's finding that claimant failed to follow prescribed medical treatment is insufficient to rebut. *Ogundele v. Am. Sec. & Trust Bank*, 15 SRBS 96 (1980). Further, the fact that claimant's application for health insurance benefits certified that his injury was not work-related is insufficient to rebut the presumption especially since, in this case, claimant had agreed to termination should he sustain another occupational injury. *Muse v. Pollard Delivery Serv.*, 15 BRBS 56 (1981) (Kalaris, concurring and dissenting).

Where claimant was injured by another employee during an altercation at work and there was no evidence that claimant had social or personal contacts with his assailant outside of their employment, the Section 20(a) presumption that the injury arose out of employment was not rebutted. *Williams v. Healy-Ball-Greenfield*, 15 BRBS 489 (1983). *Accord Twyman v. Colorado Sec.*, 14 BRBS 829 (1981).

In a course of employment case, the Board reversed an administrative law judge's finding that claimant's injury which occurred when his hand was caught in a planing machine did not occur in the course of his employment. *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593 (1981). The Board concluded that employer failed to produce specific and comprehensive evidence sufficient to rebut Section 20(a).

The Board affirmed a finding of causation where there is no evidence that claimant's fall did not cause his back injury, nor is there evidence of an injury prior to the one at issue or of a subsequent fall that could account for the herniated disc. *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986).

The D.C. Circuit held that employer failed to rebut the Section 20(a) presumption that the employee's non work-related pre-existing disability, when combined with his work-related lung disease, produced a fully compensable permanent total disability by failing to offer any general evidence that the employee's non work-related condition did not pre-exist or occur simultaneously with his work-related lung disease. *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987).

The Board affirmed the administrative law judge's finding that the presumption is not rebutted as he found the medical evidence to be inconclusive in that although each physician stated that claimant's injury was not caused by the work accident, each

acknowledged that there was a possibility that the injury was related to the accident. The Board stated that the administrative law judge could have found this evidence sufficient to rebut, but his inferences are reasonable. *MacDonald v. Trailer Marine Transp. Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transp. Corp. v. Benefits Review Board*, 819 F.2d 1148 (11<sup>th</sup> Cir. 1987).

Where claimant had an on-the-job seizure causing him to fall and sustain an injury to his head and hands, the administrative law judge properly found that claimant's injury was work-related pursuant to Section 20(a) even though the seizure was not induced by a condition of his employment. The medical expert stated he could not rule out the possibility that claimant's fall at work caused his condition. Moreover, a compensable injury need not involve unusually dangerous employment conditions, and employers have been held liable where a claimant is injured in a fall even though the fall was due to an idiopathic condition. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987).

The Section 20(a) presumption applies to the issue of whether an injury arises in the course of employment. The fact that an activity is not authorized is not sufficient alone to sever the connection between the injury and the employment. Employer did not present any evidence that claimant's work activity at the time of his injury was unrelated to his employment. Since there was no evidence of record directly controverting the presumption, claimant's injury arose in the course of his employment as a matter of law. *Willis v. Titan Contractors, Inc.*, 20 BRBS 11 (1987).

If the evidence relied upon to find no causal connection is not sufficient to rebut the presumption, and no other evidence in the record is sufficient, causation is established as a matter of law. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

The Board held that employer failed to rebut the Section 20(a) presumption as a matter of law as all doctors' opinions agree that claimant's chest pains were at least in part related to stress experienced at work. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988).

Since employer failed to produce evidence sufficient to rebut the Section 20(a) presumption, the Board reversed the administrative law judge's finding that claimant failed to establish the existence of a work-related injury. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989) (pleural plaques are a "harm" even though they cause no disability, and the parties agreed they are caused by asbestos exposure; causation thus established for entitlement to medical benefits); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989) (a doctor on whom employer relied did not state back complaints are unrelated to his employment); *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988) (affirming the finding that claimant established the alleged injury occurred, causation affirmed as employer submitted no rebuttal evidence).

The Board reversed the finding that the presumption is rebutted. The doctor's opinion relied on states that claimant's impairment is due in part "to the possibility of his having minimal asbestosis." This opinion is not affirmative evidence that claimant's condition was not caused, in any part, by asbestos exposure. *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989).

The Board affirmed the causation finding as there is no evidence that claimant's absences from work were not due to exposure to industrial pollution. The uncontradicted evidence is that claimant's underlying pulmonary disease is aggravated by this exposure. *Januszewicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376 (1989).

The Board affirmed the administrative law judge's finding that the presumption is not rebutted with regard to claimant's psychological condition. Employer's first two theories regarding claimant's limited exposure to the conditions alleged to have caused the symptoms relate only to the physiological basis for the complaints and not the psychiatric basis. The administrative law judge further rejected the doctor's opinion that stated that claimant's symptoms are not work-related for rational reasons. The Board also affirmed the administrative law judge's finding that the presumption is not rebutted with regard to the carpal tunnel syndrome by merely suggesting that this condition frequently occurs in women of claimant's age without any known cause. The presumption is not rebutted by mere hypothetical possibilities, or by suggesting an alternate way that claimant's injury might have occurred. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Although the administrative law judge identified claimant's harm as the pain resulting from surgery, he erred in focusing on whether the nodule removed during the surgery resulted from asbestos exposure rather than on whether there was a causal nexus between claimant's surgery, which caused the harm, and his asbestos exposure. Employer failed to rebut the presumption since the evidence is uncontradicted that claimant was advised to undergo surgery at least in part as a result of his previously diagnosed asbestosis and asbestos exposure. Therefore, the Board holds that the surgery was employment-related and that any complications or conditions stemming from the surgery, including chest wall pain, are work-related. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989).

The Eleventh Circuit affirmed the administrative law judge's finding of causation as none of the physicians of record ruled out the possibility of a causal connection between the accident and claimant's disability. The court stated that the presumption is not rebutted in this case as there is no direct, concrete evidence ruling out a causal relationship. *Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11<sup>th</sup> Cir. 1990).

Although the administrative law judge erred in failing to consider rebuttal when he was instructed to do so on remand, the Board held that it is not necessary to again remand for

consideration of this issue as there is no evidence of record sufficient for rebuttal where all doctors rendering relevant opinions recognized that claimant's chest pains were due at least in part to exertional stress related to his work. *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990).

Employer failed to rebut the presumption that claimant's cervical disk problems are related to his work injury based solely on claimant's failure to inform his physicians of his injury. The administrative law judge also did not err in finding a doctor's statement that he would have difficulty relating claimant's neck problems to being struck on the hand with a pail insufficient to rebut the presumption. The administrative law judge concluded that this statement is insufficient to preclude the possibility that claimant's neck condition was caused or aggravated by other aspects of his accident. *Alexander v. Ryan-Walsh Stevedoring Co.*, 23 BRBS 185 (1990), *vacated and remanded mem.*, 927 F.2d 599 (5th Cir. 1991) (in its unpublished opinion, the court found rebuttal and remanded for weighing on the record as a whole).

The Board held that where there is no indication in the record that the physician who filled out a disability form and checked the box indicating claimant's disability did not arise out of his employment nor was it caused by occupational disease was aware of claimant's chemical exposure, the administrative law judge's error in failing to consider the form is harmless. The presumption is rebutted on other evidence. *Devine v. Atl. Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting).

The Board affirmed the administrative law judge's conclusion that employer failed to rebut the presumption. The Board held that the administrative law judge rationally discredited the physician who opined that claimant's injury was not work-related because the opinion was based on the erroneous assumptions that the specific incident at work did not occur and that claimant was doing the same work for employer for her entire period of employment. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

The Board held that the presumption is not rebutted, and that causation is established as a matter of law, as employer failed to produce substantial evidence that decedent's cancer was not caused, contributed to or accelerated by asbestos exposure during his employment with employer. Although one doctor relied on by the administrative law judge stated that smoking was the primary cause of the disease, he also stated that asbestos would be a minor factor to be considered as a cancer inducer. The other doctor opined that the combination of the asbestos exposure and smoking resulted in claimant's tumor. Employer thus failed to establish rebuttal under the aggravation rule. *Peterson v. Gen. Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of N. Am. v. U.S. Dep't of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

The Board affirmed the administrative law judge's finding that the Section 20(a) presumption was not rebutted, as substantial evidence did not sever the causal relationship

between claimant's work injury and surgery at C5-6 and his current complaints at C6-7. The sole doctor relied upon by employer stated the work accident did not play a "significant" role in claimant's condition, but did not state that it played no role. Two other doctors testified that the C5-6 surgery created a risk of a problem at C6-7. Thus, the Board affirmed the finding that causation was established. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

The Board affirmed the administrative law judge's finding that alleged discrepancies in testimony and medical evidence are insufficient to establish rebuttal of the Section 20(a) presumption in this case. The administrative law judge considered the facts that claimant did not file an accident report, that he did not see a doctor for two months after the accident, and that he continued working, but found that they are not determinative. The administrative law judge found that claimant did not initially recognize the severity of his injury, that a co-worker and a foreman were aware of the incident, and that a doctor's opinion supported the finding of a causal relationship. The finding of a causal relationship is affirmed. *Simonds v. Pittman Mech. Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mech. Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

The Board affirmed the administrative law judge's finding that claimant's back condition is the natural and unavoidable result of the work-related knee injury as the only doctors of record opined that claimant's back symptoms were aggravated by the gait disturbance caused by the knee injury. The presumption is not rebutted as employer offered no evidence severing the causal connection between the knee injury and the back condition. *Bass v. Broadway Maint.*, 28 BRBS 11 (1994).

The Board affirmed the administrative law judge's finding that employer did not rebut the Section 20(a) presumption where the doctor on whom employer relied stated that decedent's working conditions could have been aggravating factors in his depression and suicide. *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994).

The Board reversed the finding of rebuttal. The doctor on whom the administrative law judge relied stated that the effect of workplace noise on claimant's hearing could not be calculated and thus he could not determine whether noise exposure contributed to claimant's hearing loss. A physician's opinion that workplace noise may have played a part in claimant's hearing loss does not meet employer's burden of demonstrating that claimant's work environment did not aggravate or contribute to his hearing loss, and therefore, does not establish rebuttal of the Section 20(a) presumption. *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

The Board rejected employer's contention that rebuttal was established because claimant's disability was due only to a temporary aggravation of previous injuries. The evidence

supports the finding that the prior injuries were not more than temporarily disabling, and there is no evidence that the work injury itself was only temporarily disabling. Moreover, there is no specific and comprehensive evidence severing the causal connection because the doctors' opinions either relate claimant's disability to the work injury or are too speculative and equivocal to rebut the Section 20(a) presumption. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

In a claim for a back injury, the administrative law judge found rebuttal established based on the testimony of claimant's supervisor that claimant was having back difficulties on the day of the work accident, but ultimately found causation established based on the crediting of claimant's co-worker that claimant was not having any back problems before the alleged accident. The Board held that the supervisor's testimony fails to sever the causal connection, but that any error the administrative law judge may have committed in finding rebuttal was harmless since employer failed to establish that the administrative law judge's crediting of the co-worker was irrational. With regard to claimant's psychological injury, the Board affirmed the administrative law judge's finding that employer failed to establish rebuttal, as there was no evidence to suggest that the psychological injury was not related to the back injury. *Manship v. Norfolk & W. Ry. Co.*, 30 BRBS 175 (1996).

The First Circuit affirmed the Board's decision that employer failed to rebut the Section 20(a) presumption because it did not present evidence that claimant's medical condition was not caused or aggravated by his exposure to asbestos at employer's facility. Employer had contended that claimant's condition as evidenced on x-rays taken in 1982 could not have been caused by his 1981 exposure; however, it did not present any evidence that the progression of the condition shown on 1989 x-rays was not due to work-related asbestos exposure. The court stated that the rebuttal standard does not require employer to rule out any possible causal connection between claimant's employment and his condition, as this goes beyond the substantial evidence standard. In this case, however, employer submitted no evidence. *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997).

Where claimant injured her back in 1986 while working for employer, and again in 1992 while working for a different, non-maritime, employer, the Board held that employer was liable for benefits because the evidence of record indicated that the current disability was caused by both injuries, and neither doctor credited by the administrative law judge attributed the current disability to the 1992 injury alone. Therefore, as the current disability was caused, at least in part, by the 1986 injury, and because there was no evidence which apportioned the disability between the two injuries, the Board affirmed the administrative law judge's finding that employer did not rebut the Section 20(a) presumption as well as his decision holding employer liable for the entire disability. *Plappert v. Marine Corps Exch.*, 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997). In its decision on reconsideration, the Board distinguished this case from several other subsequent injury/natural progression cases. It held that, while it is true claimant's 1992 herniation,

which occurred subsequent to her covered employment, was not the natural result of her 1986 work-related back injury, employer is liable for benefits for claimant's entire 1992-1994 disability, as it was the result of the 1992 herniation as well as the natural progression of the chronic osteophytic and spondylitic changes claimant suffers because of her 1986 work injury. Further, because no doctor apportioned the disability between the two injuries, the Board reaffirmed the panel's conclusion that employer is liable for the entire disability.

Inasmuch as there was no medical evidence in the record suggesting that claimant's psychological condition was not related, at least in part, to her work environment, the Board held that employer did not rebut the Section 20(a) presumption, and that claimant's psychological injury was work-related as a matter of law. *Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127 (1997) (McGranery, J., dissenting), *aff'd on recon. en banc*, 32 BRBS 134 (1998) (Brown and McGranery, JJ., dissenting).

The Board affirmed the administrative law judge's finding that employer did not rebut the Section 20(a) presumption, as the doctors employer relied upon conceded that claimant's condition could have been aggravated by claimant's work. As the doctors' opinions do not address aggravation or establish that working conditions played no role in claimant's back pain, they are insufficient to rebut the Section 20(a) presumption. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

Employer's argument that claimant's SLAP lesion was caused by something occurring after September 15, 1993, rather than the June 1992 work accident, is rejected, as the Section 20(a) presumption is not rebutted where employer does not provide concrete evidence but merely suggests alternate ways that claimant's injury might have occurred. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

The case law pertaining to intervening cause rests on an interpretation of the Section 2(2) term "or as naturally or unavoidably results from such accidental injury," and requires that an employee show a degree of due care in regard to his work injury and take reasonable precautions to guard against re-injury. The duty of care required of an employee to guard against a subsequent injury does not apply to the initial work injury; Section 4(b) of the Act eliminates negligence or fault as a consideration with respect to the work event which caused the primary injury. Thus, the Board, holding that the administrative law judge erroneously applied intervening cause case law in considering the cause of an initial work injury, reversed the administrative law judge's finding that the Section 20(a) presumption was rebutted based on his finding that claimant's intentional misconduct was the cause of his injury. *Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998) (Smith, J., concurring & dissenting).

The Board affirmed the administrative law judge's determination that employer did not establish rebuttal of the Section 20(a) presumption in this hearing loss case. The administrative law judge rationally rejected employer's assertion that its noise surveys, documenting the absence of noise at or in excess of that proscribed by OSHA, are sufficient to establish rebuttal of the Section 20(a) presumption, concluding that this evidence cannot demonstrate the absence of a work-related injury. The administrative law judge further rejected Dr. Katz's opinion regarding causation as it was based in part on employer's noise surveys, and because there is no underlying evidence in the record to support his opinion that either claimant's heart surgery and/or his age adversely affected his hearing. Lastly, the administrative law judge rejected lay testimony regarding noise levels at employer's facility as the individual testifying did not begin to work for employer until 1987, well after claimant's greatest exposure to injurious noise levels occurred. *Damiano v. Global Terminal & Container Serv.*, 32 BRBS 261 (1998).

The Board affirmed the administrative law judge's determination that employer failed to establish rebuttal of the Section 20(a) presumption in a hearing loss case. The administrative law judge rationally rejected employer's assertion that its noise surveys, documenting the absence of noise in excess of that proscribed by OSHA, as such evidence cannot demonstrate the absence of a work-related injury incurred over the course of claimant's employment. The Board further held that the administrative law judge rationally found that claimant's testimony that electric winches are 50 to 60 percent quieter than steam winches was insufficient to establish rebuttal, as claimant's lay testimony cannot establish with specificity the exact level of noise exposure which he experienced. *Everson v. Stevedoring Services of Am.*, 33 BRBS 149 (1999).

The Seventh Circuit affirmed the finding that employer did not establish rebuttal of the Section 20(a) presumption. Although the doctor stated that decedent's work did not cause his death, he also stated that he did not know what work the decedent had been performing in the days and weeks preceding his death. Thus, the administrative law judge did not err in finding it was not "substantial evidence to the contrary." *Am. Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (en banc), cert. denied, 528 U.S. 1187 (2000).

The Fifth Circuit affirmed the administrative law judge's finding that LIGA failed to rebut the Section 20(a) presumption as it did not produce substantial evidence that claimant's condition was not caused or aggravated by his employment. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

The Fifth Circuit affirmed the administrative law judge's finding that employer did not introduce substantial evidence to rebut the Section 20(a) presumption. Employer alleged that the forklift claimant was operating could not have "kicked back" the way claimant alleged. The court held that the record failed to prove what type of fork-lift claimant was operating on the day of his accident, and employer did not introduce any records which

reflected the particular forklifts used on each ship. The court noted that although the record clearly indicated that claimant reported the accident to his supervisors some hours after the accident happened, employer did not examine the forklifts until two days after the accident. Moreover, the manager of the crane and gear department acknowledged that he did not record the identification number of the forklift that claimant operated on the day of the accident. Finally, the court held that even assuming, *arguendo*, that claimant was operating a hydraulic forklift, his testimony that his forklift was immobilized by the tonnage is consistent with a circumstance which employer's expert admitted could cause even a hydraulically steered forklift to produce a kick back. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

As no doctor stated that decedent's cancer was not caused in part by asbestos exposure, the medical opinions are insufficient to rebut the Section 20(a) presumption under either the "ruling out" standard of the 11th Circuit, in whose jurisdiction this case arose, or the "substantial evidence" standard. Employer's doctor identified cigarette smoking as the greatest risk factor and asbestos exposure as a lesser factor, stating these two factors were additive in the development of lung cancer. Moreover, the absence of diagnostic evidence of asbestosis does not constitute substantial evidence sufficient to rebut the presumption, given that the physicians' opinions allow for asbestos exposure to have contributed to decedent's cancer and subsequent death. Therefore, the Board reverses the administrative law judge's decision and holds that decedent's death was work-related as a matter of law. *Jones v. Aluminum Co. of Am.*, 35 BRBS 37 (2001).

The Board affirmed the administrative law judge's finding that Dr. Ellis's opinion is insufficient to sever the connection between the displacement of claimant's left wrist fracture and claimant's employment and thus is insufficient to establish rebuttal of the Section 20(a) presumption as it does not state that claimant's wrist condition was not aggravated by his employment. *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002).

The First Circuit rejected employer's assertion that the Board usurped the administrative law judge's fact-finding authority in its first decision when it stated that employer's evidence was not, as a matter of law, sufficient to rebut the Section 20(a) presumption, as the Board's conclusion addressed only the legal sufficiency of the evidence. The court rejected employer's contention that the Board had applied a "rule out" standard and affirmed the Board's initial conclusion that rebuttal was not established as a matter of law. In this regard, Dr. Kolkin stated that stress could aggravate claimant's pre-existing condition, and thus his opinion supports causation rather than rebuts it. Dr. Bourne specifically addressed only claimant's mental condition and declined to comment on his physical symptoms; thus, his testimony could not rebut the presumption that the physical injury was work-related. The court therefore affirmed the administrative law judge's finding, on remand, that claimant established that his neurological condition is work-related. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

The Second Circuit reversed the Board's affirmance of the administrative law judge's finding that the opinions of Drs. Teiger and Pulde rebutted the Section 20(a) presumption. With respect to Dr. Teiger's statement that given decedent's smoking history, he likely would have developed lung cancer even had he never been exposed to asbestos, the court held that, in view of the aggravation rule, this statement does not rebut the presumption. The court also held that Dr. Teiger's statement that decedent's smoking history was entirely responsible for his respiratory condition was a reference not to his lung cancer, but to his COPD; the court ruled that this statement has no relevance to the Section 20(a) presumption as the claim was based on decedent's lung cancer and not his COPD. The court further held that because the administrative law judge in weighing the evidence rejected the reasoning underlying Dr. Pulde's opinion that decedent's lung cancer was not related to his asbestos exposure, she erred in finding that his opinion rebutted the presumption. Specifically, the court observed that the administrative law judge had rejected Dr. Pulde's premise that decedent's asbestos exposure was clinically insignificant. Second, the court stated that Dr. Pulde's opinion was based on the medical theory that lung cancer develops not from asbestos but rather from the scarring caused by asbestosis, a theory that the administrative law judge found had been widely discredited by the medical community. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008).

Where claimant was burned when he stepped in chemicals on May 3, 2000, and the burns healed but his ankle continued to bother him, resulting in surgery fusing his ankle to his leg, the court held that employer failed to rebut the Section 20(a) presumption because employer did not provide substantial evidence that the burns did not aggravate the underlying condition. As claimant's doctor originally thought there was no relationship between the burn and the ankle condition but later opined that the burn injury exacerbated claimant's pre-existing arthritic condition in his ankle, the court held that the Section 20(a) presumption was not rebutted and that substantial evidence supported the finding that claimant's ankle condition was aggravated by the chemical burn at work. Accordingly, the court affirmed the award of benefits. *C & C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008).

The Fourth Circuit affirmed the Board's decision reversing the administrative law judge's finding that employer rebutted the Section 20(a) presumption. In this case, claimant injured his back at one of employer's facilities but declined treatment. Ten days later, his back gave out while he was working at another of employer's facilities. The court held that the three pieces of evidence originally relied upon by the administrative law judge to rebut the presumption demonstrated that claimant had injured his back and then experienced continued pain thereafter, and they did not address the material change in claimant's condition related to the aggravating injury. As an aggravation is an injury, and as the evidence did not address aggravation at all, the court held that the evidence did not constitute substantial rebuttal evidence, and it affirmed the compensability of the injury. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4<sup>th</sup> Cir. 2009).

The First Circuit affirmed the Board's holding in its first decision that employer's evidence was legally insufficient to rebut the Section 20(a) presumption because it did not address the question of whether claimant's disabling back pain was related to his working conditions. The court stated that the doctors focused on the question of whether there was a connection between claimant's working conditions and his underlying osteoarthritis and did not address whether claimant's working conditions caused his underlying condition to become symptomatic. As none of employer's evidence addressed the issue of a relationship between claimant's pain and his working conditions, the court upheld the Board's conclusion that rebuttal was not established as a matter of law. *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010).

The Board affirmed the administrative law judge's finding that claimant's light-duty work aggravated his back condition that had been caused by a previous work injury. All three doctors of record opined that claimant's work activity aggravated or could have aggravated his condition. As there is no evidence contradicting claimant's testimony regarding the work he performed, the administrative law judge properly found that the Section 20(a) presumption was invoked and that employer did not present substantial evidence rebutting the presumption. Accordingly, the Board affirmed the finding that claimant's back condition is work-related as a matter of law. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

In this case, as neither physician opined that claimant's working conditions did not aggravate the symptoms of claimant's COPD, and, in fact, stated that it did, the Board affirmed the administrative law judge's conclusion that employer did not rebut the Section 20(a) presumption. The Board thus affirmed the finding that claimant's COPD is related to his employment exposures. *Lamon v. A-Z Corp.*, 45 BRBS 73 (2011). Nevertheless, on reconsideration, the Board held that although the administrative law judge properly found that claimant sustained work-related aggravations of his COPD, the administrative law judge did not adequately address the cause of claimant's total disability. Specifically, the Board stated that the administrative law judge did not address: that claimant last worked in non-covered employment; his finding that claimant had voluntarily removed himself from the workforce for reasons unrelated to his medical condition; or the medical evidence as to the cause of claimant's COPD at the time he became totally disabled. The Board remanded the case for the administrative law judge to determine, based on the evidence, whether claimant's total disability is due, even in part, to the work exacerbations or is it due solely to the natural progression of his non-work-related COPD. The Board thus vacated the award of total disability benefits and remanded the case. *Lamon v. A-Z Corp.*, 46 BRBS 27 (2012), *vacating on recon.* 45 BRBS 73 (2011).

The Fifth Circuit affirmed the finding that employer did not rebut the Section 20(a) presumption. Employer's rebuttal evidence consisted only of OSHA regulations greatly limiting asbestos exposure during the period of claimant's alleged exposure. The court observed that employer did not present any evidence that any safety measures were ever implemented and did not present any evidence contradicting claimant's testimony and

expert witness report that there was asbestos in the brakes and clutches that claimant changed during his employment. Thus, a reasonable mind could accept that employer did not cast “factual doubt” as to whether the working conditions of the Port of Baton Rouge caused claimant’s asbestosis. The court additionally agreed with the administrative law judge that employer failed to rebut the presumption with its suggestion that claimant could have been exposed to asbestos in his subsequent employment with Westway, during which claimant testified he worked around cranes, trucks, and other equipment, as employer did not put forth any factual evidence that contradicted claimant’s testimony that he was not exposed to asbestos and did not change brakes and clutches at Westway. *Ramsay Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015).

In a case where claimant suffered injuries to both his lungs and his vertebra, employer challenged the administrative law judge’s finding that the injury to claimant’s lungs is compensable, asserting that claimant’s doctor’s opinion is insufficient to establish a prima facie case. The court affirmed the finding of invocation, stating that the administrative law judge did not rely on Dr. Ripoll’s opinion, as the parties stipulated to exposure to welding and epoxy fumes on February 18, 2008, and claimant established he has COPD. Claimant also established evidence that the exposure could have exacerbated his lung condition, as he was hospitalized for eight days following the exposure. The court also rejected employer’s assertion that the administrative law judge required it to prove by a preponderance of the evidence that the work exposure did not aggravate the condition. Rather, the court held that Dr. Ripoll’s opinion, which was the only evidence produced by employer, was insufficient to rebut the presumption because Dr. Ripoll had abandoned his prior opinion that there was no aggravation. Thus, the court affirmed the award of medical benefits for COPD. *Metro Mach. Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017).

With regard to claimant’s fractured vertebra, which was secondary to his primary injury of aggravated COPD, the court held that the administrative law judge properly found that there is no evidence that claimant’s fracture was not related to claimant’s aggravated lung condition, increased cough, and increased steroid use. The court stated that, at best, employer showed that it was possible the fracture was not hastened, aggravated, or caused by the exposure which aggravated claimant’s lung condition. As that is insufficient to rebut, the administrative law judge rejected employer’s arguments and affirmed the award for the vertebra injury. *Metro Mach. Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017).

## Cases Where the Presumption Was Rebutted

Section 20(a) is rebutted where employer produces substantial evidence of the absence of a causal relationship. Thus, the Board held that the administrative law judge erred in stating that a doctor's testimony was not sufficient to rebut the presumption where he testified unequivocally that there was no relationship between claimant's exposure to asbestos and cancer. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). The Board, however, held in *Kier* that the administrative law judge's error was harmless as he properly relied on the testimony of two other physicians who treated claimant to establish a causal relationship. See *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1<sup>st</sup> Cir. 1982), *aff'd* 13 BRBS 1083 (1981) (Miller, dissenting) (Section 20(a) rebutted by medical evidence osteotongelitis caused by staph infection and not by alleged work-related leg wounds); *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1981) (medical report establishing heart attack did not arise out of exposure to carbon monoxide at work rebutted presumption); *Orkisz v. U.S. Army Tank Auto. Command*, 13 BRBS 948 (1981) (Miller, dissenting), *aff'd*, 708 F.2d 726 (6th Cir. 1982) (medical evidence sufficient to establish that claimant did not sustain a compensable injury as a result of a slip and fall at work rebutted Section 20(a)); *Clymer v. E-Systems*, 13 BRBS 1067 (1981) (Miller, dissenting), *rev'd mem.*, 694 F.2d 720 (5th Cir. 1982) (table) (physician's testimony that claimant's hypertension and diabetes mellitus would have occurred regardless of employment and were not aggravated by his work environment sufficient to rebut; in its unpublished opinion reversing the Board, the Fifth Circuit found the doctor stated that claimant's working conditions would have aggravated but not caused his illnesses and thus rebuttal was not established).

Where there is evidence that claimant suffered chest pain after a 1973 auto accident up until one month before he was involved in a work-related shoving match in 1976, and x-rays taken after the work accident did not reveal any evidence of trauma, the Board found substantial evidence to support the administrative law judge's finding that the presumption was rebutted. *Yarbough v. C & P Tel. Co.*, 12 BRBS 104 (1980) (Miller, dissenting).

Reversing an administrative law judge's award of benefits, the Board held that the testimony of claimant's two former co-workers indicating that claimant had a noticeable tremor in his hand even prior to his fall at work was sufficient to rebut the presumption where claimant never raised an aggravation theory. *Sinnott v. Pinkerton's, Inc.*, 14 BRBS 959 (1982) (Miller, dissenting), *rev'd and rem. mem.*, 744 F.2d 878 (D.C. Cir. 1984) (table) (court reversed as experts' opinions in favor of causation were based on conversion reaction, not aggravation, and substantial evidence supported administrative law judge).

## Digests

The Board vacated the administrative law judge's summary finding that a medical opinion is "unpersuasive" and therefore cannot establish rebuttal of the Section 20(a) presumption

and remanded the claim for the administrative law judge to weigh all the relevant evidence without the benefit of the presumption. The conclusion that an opinion in “unpersuasive” is not relevant to rebuttal if the opinion disproves a causal relationship. *Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986).

The administrative law judge erred in finding that Section 20(a) was rebutted on the grounds that the reporting physicians’ opinions were unsupported by a definitive scientific study on the co-carcinogenic effects of smoking and asbestos exposure. The opinions are sufficient to rebut as they rule out a causal relationship between claimant’s cancer and asbestos exposure. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

The Fifth Circuit affirmed the finding of rebuttal based on medical opinions that unequivocally state that claimant’s aneurysm is unrelated to his work. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986).

The Eighth Circuit affirmed the administrative law judge’s determination that employer introduced substantial evidence to rebut the Section 20(a) presumption where claimant’s injured eyes and ears were examined at the time of the injury and found to be functioning normally. The first eye problem was noticed two years later, and this negative evidence is sufficient to rebut the presumption. There is a medical report that claimant’s hearing loss is not related to the facial trauma. *Arrar v. St. Louis Shipbuilding Co.*, 837 F.2d 334, 20 BRBS 79(CRT) (8th Cir. 1988).

Where claimant testified that the overall stress of his job but no one stressful incident had caused or aggravated his on-the-job heart problems, the D.C. Circuit held that a doctor’s opinion that claimant’s disabling heart condition did not result from stress but from his atherosclerosis constituted substantial evidence in support of the administrative law judge’s finding of Section 20(a) rebuttal. *Whitmore v. AFIA Worldwide Ins.*, 837 F.2d 513, 20 BRBS 84(CRT) (D.C. Cir. 1988).

The Board agreed with employer that the administrative law judge erred in finding that the presumption is not rebutted as two doctors stated that claimant’s chest pains are not related to exposure to chemicals at work. The administrative law judge’s error is harmless, however, as he relied on substantial evidence to find that claimant’s condition is work-related. *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988).

The Board affirmed the administrative law judge’s finding that the injury to claimant, an off-duty bartender injured during a fight which began on employer’s premises, did not arise out of or in the course of his employment, and that there was substantial evidence to rebut the Section 20(a) presumption. The Board noted that although claimant may have initially responded to employer’s request to protect patrons and property in the event of an altercation, so that he was theoretically on duty, claimant acted voluntarily and beyond the

scope of that request by going across the street with a two-by-four to assist a patron who had run out of the bar. *McNamara v. Mac's Pipe & Drum, Inc.*, 21 BRBS 111 (1988).

The Board affirmed the administrative law judge's determination that the presumption is rebutted where a doctor stated that claimant's permanently totally disabling breathing disorder is not causally related to his exposure to asbestos. Claimant's severe chronic obstructive pulmonary disease, is caused by prolonged cigarette smoking, and is not a restrictive lung disease, which is indicative of asbestosis. *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

The Board held that regardless of the absence of a definitive study regarding the relationship between certain chemicals and claimant's type of cancer, the opinions of physicians that, based upon existing scientific evidence, claimant's cancer is not related to his exposure to hazardous chemicals are a result of their professional assessment of the current available scientific evidence regarding the cause of claimant's injury and therefore are adequate to constitute specific and comprehensive evidence sufficient to rebut the presumption. *Devine v. Atl. Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting).

The Board affirmed the administrative law judge's decision that claimant's disability was due to supervening incidents, which were not the natural or unavoidable result of the initial work injury, as it was supported by a doctor's testimony, objective medical data, and the fact that claimant was capable of working until the incidents. The Board rejected the contention of claimant and the Director that the Act requires employer to establish that the effects of the subject work injury were "overpowered and nullified" by the subsequent traumatic events in order to rebut the Section 20(a) presumption noting that the Ninth Circuit in *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954), held that a subsequent injury is compensable if it is the natural and unavoidable result of a compensable work injury. *Wright v. Connolly-Pac. Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993).

As the unequivocal evidence of record establishes that the 100 percent hearing impairment of the left ear is solely the result of a non-work-related subsequent intervening cause, the Section 20(a) presumption is rebutted as a matter of law. *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996).

The administrative law judge properly found that the medical evidence was sufficient to rebut the Section 20(a) presumption where physicians concluded that claimant's dystonia "cannot be attributed to [his] lumbar injury," that it "is not related to his accident nor to his work," and that "there is no causal connection." *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

The Board held that a doctor's opinion that claimant's work accident did not involve any injury to claimant's back, did not cause any worsening of his spondylolisthesis, and did not result in any different work restrictions attributable to claimant's back condition than were present prior to the accident, severed the causal link between the work accident and claimant's back condition. Accordingly, the Board affirmed the administrative law judge's finding that the Section 20(a) presumption was rebutted. *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Affirming the Board's decision, the Ninth Circuit held that the doctor's opinion that claimant's pre-existing 1979 back condition was not aggravated by the October 27, 1992, accident is sufficient to rebut the Section 20(a) presumption. Dr. Bernstein did not review claimant's entire medical file but pointed to specific evidence from all parts of the record to support his opinion. *Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), *aff'g* 31 BRBS 98 (1997).

The Fourth Circuit held that employer's evidence is sufficient, as a matter of law, to rebut the Section 20(a) presumption. Specifically, the medical evidence of record does not contain a complaint of back pain until at least 6 months after the work injury and a medical report 2 months after the work injury notes no complaints of back pain. Moreover, there is also medical evidence that claimant experienced back pain before the work injury to which any later back pain could have been attributed. The court stated that as employer presented substantial evidence "casting doubt" on the causative link between the fall and the subsequent back pain, the presumption is rebutted. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

The First Circuit reversed the Board's holding that a doctor's opinion is insufficient to rebut the Section 20(a) presumption as it puts an impossible burden on employer to require that a doctor's opinion "exclude possibilities." In this case, the doctor stated that as claimant did not have fibrosis, his lung cancer was most likely the result of smoking. Notwithstanding the doctor's statement that he could not exclude asbestos exposure as a contributor to the cancer, the court affirmed the administrative law judge's determination that employer introduced sufficient evidence of non-causation to rebut the Section 20(a) presumption and to establish the lack of a causal relationship based on the record as a whole. *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998).

The Board affirmed the administrative law judge's determination that employer rebutted the Section 20(a) presumption by presenting evidence which demonstrated that claimant's purpose for venturing into the depths of a darkened vessel was to smoke a marijuana cigarette in private and, therefore, that claimant's injury did not occur during the course of his employment. Specifically, the Board held that it was reasonable for the administrative law judge to rely on credible circumstantial evidence to rebut the presumption, and to find, based on the record as a whole, that claimant's injury occurred when he was on this personal frolic. *Compton v. Avondale Indus., Inc.*, 33 BRBS 174 (1999).

The Board affirmed the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption, as employer presented a medical opinion that noise played no role in claimant's hearing loss. *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

The Board reversed the administrative law judge's finding that employer's evidence was insufficient to rebut the Section 20(a) presumption. The doctor unequivocally stated, to a reasonable degree of medical certainty, that claimant's work-related chemical exposures did not cause, contribute to, or aggravate claimant's condition. The fact that the doctor stated that there is no absolute certainty in the medical profession does not render his opinion equivocal. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

The Fifth Circuit held that, on rebuttal, the employer cannot be made to "rule out" every conceivable connection between the death and the employment. Reiterating its holding in *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT), the Fifth Circuit held that to rebut the Section 20(a) presumption, employer need only submit substantial evidence that the injury was not work-related. Requiring medical opinions to "affirmatively state" or "unequivocally state" creates a higher evidentiary standard than that stated in the statute. The court held that the administrative law judge properly found rebuttal in this case, as decedent's heart attack began at home and the credited evidence stated that it would have progressed regardless of where he was or what he was doing. Thus, the aggravation rule is inapplicable as the fact that the death occurred at work is mere coincidence. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1056 (2003).

The Board rejected claimant's contention that the administrative law judge erred on remand in permitting employer to submit an additional medical report addressing causation and in finding the opinion sufficient to rebut the Section 20(a) presumption. The doctor's original report stated that claimant's rotator cuff injury was not caused by the work accident. His additional report stated that the injury was not aggravated by the work accident. The Board affirmed the finding that the two reports constitute substantial evidence rebutting the Section 20(a) presumption. *Manente v. Sea-Land Serv., Inc.*, 39 BRBS 1 (2004).

The Ninth Circuit reversed the administrative law judge's finding that employer failed to establish rebuttal of the Section 20(a) presumption. In declining to credit employer's evidence, the administrative law judge cited to more credible, contradictory testimony offered by claimant, claimant's co-workers, and Dr. Keller. The court held that the administrative law judge's credibility assessment has "no proper place" in determining whether employer met its burden of production to establish rebuttal. The court further stated that at rebuttal the administrative law judge's task is to decide, as a legal matter, whether employer submitted evidence that could satisfy a reasonable fact-finder that the claimant's injury was not work-related. The court concluded that the evidence submitted by employer was sufficient to meet its enunciated standard on rebuttal. This evidence

included claimant's delay in reporting the stroke as work-related, the absence of references to right-arm weakness in the emergency room records and testimony that such records are the most reliable, the testimony that claimant's job was not stressful, and evidence that personal matters might have caused claimant's stress. Nonetheless, the court held that the administrative law judge's finding of no rebuttal was harmless error given his rational weighing of the evidence. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9<sup>th</sup> Cir. 2010).

The Fifth Circuit reversed the Board's holdings that evidence of noise studies at locations other than the site of the injury and a comparison of the claimant's hearing with that of a "normal" man are insufficient to rebut the Section 20(a) presumption that his hearing loss is work-related. The court held substantial evidence is evidence that "throw[s] factual doubt on the prima facie case;" evidence supporting an alternative explanation for the cause of the claimant's hearing loss is sufficient to rebut, and a physician's reliance on noise level surveys goes to the weight of the opinion, which is exclusively under the administrative law judge's control. Employer offered a doctor's opinion, credited by the administrative law judge, that claimant's hearing loss was not due to noise exposure because his hearing was better than average for someone of his age and the noise surveys did not reveal noise levels sufficient to cause hearing loss. The court held that the administrative law judge could rely on this opinion to rebut the Section 20(a) presumption. Therefore, the court reinstated the denial of benefits. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5<sup>th</sup> Cir. 2012).

The Board agreed with employer that the administrative law judge erred in finding that the Section 20(a) presumption was not rebutted as employer's doctor stated that claimant's lung condition was not related to his work exposure. The Board, citing *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT), emphasized that employer's burden on rebuttal is one of production, not persuasion. Thus, the administrative law judge erred in weighing the medical evidence at this stage. The Board reversed the administrative law judge's finding that the Section 20(a) presumption was not rebutted and remanded the case for the administrative law judge to weigh the evidence as a whole. *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013).

The First Circuit affirmed the finding that the Section 20(a) presumption was rebutted in this DBA case where the employee was found dead due to asphyxiation by hanging inside his villa in Saudi Arabia. The court held that evidence supporting two plausible alternative explanation for decedent's death: suicide or accidental strangulation in the course of autoerotic activity, neither of which cause would be covered under the Act, was sufficient to rebut the Section 20(d) presumption. *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1<sup>st</sup> Cir. 2012).

In this case where claimant established he had a gastrointestinal condition that could have developed or been aggravated by his work for employer in Iraq, the administrative law

judge found that employer failed to rebut the Section 20(a) presumption. The Board concluded that the administrative law judge erred in making such a finding, as it was Dr. Raijman's unequivocal opinion that claimant's GI condition was not related to his employment in Iraq. However, the Board held the administrative law judge's error was harmless because he also found, on the record as a whole, that the preponderance of the evidence established that claimant sustained a work-related injury. Consequently, the Board affirmed the administrative law judge's award of medical benefits. *Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016).

The Board rejected claimant's contention that the administrative law judge erred in finding the Section 20(a) presumption rebutted by ignoring substantial evidence that the labrum tear is related to the work injury. Employer's burden on rebuttal is one of production, not persuasion. The administrative law judge properly found that an opinion from claimant's treating physician that claimant's shoulder pain was a "new issue" and his prior notes documenting negative shoulder impingement and full shoulder range of motion sufficient to rebut the Section 20(a) presumption. *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff'd sub nom. International-Matex Tank Terminals v. Director, OWCP*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

The Board affirmed the administrative law judge's finding that employer rebutted the Section 20(a) presumption through a doctor's opinion that claimant's condition was unlikely to have been caused by the flu vaccine she received for work, as her disease is an autoimmune condition. The Board stated the doctor's opinion did not need to address whether claimant's general working conditions could have aggravated her condition as employer is not required to rebut a claim that was not made. *Powell v. Serv. Employees Int'l, Inc.*, 53 BRBS 13 (2019).

The Fifth Circuit affirmed the finding that the Section 20(a) presumption was rebutted by a medical opinion stating the contemporaneous MRIs showed no labral tear. *Bourgeois v. Director, OWCP*, 946 F.3d 263, 53 BRBS 91(CRT) (5th Cir. 2020).

The Fifth Circuit affirmed the finding that the Section 20(a) presumption was rebutted by medical opinions stating claimant's preexisting neck and back conditions were not aggravated in a 2011 work injury to his hands and shoulder. *Sea-Land Services, Inc., v. Director, OWCP [Ceasar]*, 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020).

The First Circuit affirmed the administrative law judge's finding that the Section 20(a) presumption was rebutted because the opinions of three doctors stating claimants' illnesses were not caused by the plutonium radiation they were exposed to while working as civilian contractors to clean up an Air Force crash site constituted substantial evidence from which a reasonable person could conclude the injuries were not work-related. *Carswell v. E. Pihl & Sons*, 999 F.3d 18, 55 BRBS 27(CRT) (1st Cir. 2021), *cert. denied*, 142 S.Ct. 1110 (2022).

## Evaluating the Evidence

Once the presumption is overcome by the introduction of substantial evidence, the fact-finder must evaluate all of the evidence and reach a decision based on the record as a whole. *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); *Glover v. Aerojet-Gen. Shipyard, Inc.*, 6 BRBS 559 (1977); *Norat v. Universal Terminal & Stevedoring Corp.*, 3 BRBS 151 (1976).

The presumption is not affirmative evidence but, consistent with the bursting bubble theory, is merely a procedural tool. *Del Vecchio*, 296 U.S. 280; *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982); *Novak v. I.T.O. Corp. of Baltimore*, 12 BRBS 127 (1979). *Accord Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In *Brennan v. Bethlehem Steel Corp.*, 7 BRBS 947 (1978), the Board rejected an administrative law judge's statement that the presumption would apply where the evidence was in "equipoise," holding that under the controlling precedent of *Del Vecchio*, once employer produced substantial evidence, the presumption falls out of the case.

In *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), the Supreme Court rejected the rule that in considering the evidence, the fact-finder operates under the statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee. This rule was based on holdings that the intent of the statute is to place the burden of possible error on those best able to bear it. *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969). Under the "true doubt" rule, where doubt existed in the administrative law judge's mind about the proper resolution of evidentiary conflicts, that doubt must be resolved in claimant's favor. See *Heckstall v. Gen. Port Serv. Corp.*, 12 BRBS 298, 303 (1980) (Miller, dissenting); *Melendez v. Bethlehem Steel Corp.*, 2 BRBS 395 (1975). This statutory policy was viewed as placing a less stringent burden of proof on the claimant than the preponderance of the evidence standard which is applicable in a civil suit. *Strachan Shipping Co. v. Shea*, 406 F.2d 521 (5th Cir.), *cert. denied*, 395 U.S. 921 (1969).

While the rule was often stated, its actual application was limited by holdings that the mere presence of conflicting evidence did not require a conclusion that there are doubts which must be resolved in claimant's favor. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982); *Heckstall*, 12 BRBS 298; *Bielo v. Navy Resale System*, 7 BRBS 1030 (1978). Before applying the true doubt rule, the Board held that the administrative law judge should attempt to evaluate the conflicting evidence. See *Betz v. Arthur Snowden Co.*, 14 BRBS 805 (1981) (Miller, dissenting).

In any event, the "true doubt" rule is now consigned to history. In *Greenwich Collieries*, the Supreme Court held that the rule violates Section 7(c) of the APA, which states that

“except as otherwise provided by statute the proponent of a rule or order has the burden of proof.” 5 U.S.C. §556(d). The Court construed “burden of proof” as the burden of persuasion as opposed to the burden of production. Thus, once Section 20(a) drops out of the case, claimant bears the burden of persuasion and must prove his claim by a preponderance of the evidence. If the evidence is in equipoise, claimant must lose. *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). Thus, cases indicating that claimant bears a lesser burden even after rebuttal are no longer good law. *See, e.g., Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986) (where Section 20(a) is rebutted, the true doubt rule applies, and claimant bears a less stringent burden than the preponderance of evidence standard applicable in a civil suit); *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980) (based on the true doubt rule, even if the presumption is rebutted, the party opposing entitlement still bears the burden of persuasion); *Hensley*, 655 F.2d at 267, 13 BRBS at 185 (D.C. Circuit “has not decided whether...the ultimate burden of persuasion as to work-relatedness rests with the employer or employee”).

The Board has held that an administrative law judge’s failure to explicitly apply Section 20(a) is harmless error where he weighs all the evidence and his decision is supported by substantial evidence. *See Reed v. The Macke Co.*, 14 BRBS 568 (1981); *Seaman v. Jacksonville Shipyards, Inc.*, 14 BRBS 148.9 (1981); *Roberts v. Bath Iron Works Corp.*, 13 BRBS 503 (1981). However, the Board is not authorized to make findings of fact, and thus may not supplement an inadequate decision with its own citations to the record. *Volpe*, 671 F.2d 697, 14 BRBS 538. *See Sprague*, 688 F.2d at 868 n.11, 15 BRBS at 18 n.11(CRT).

In evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is solely within the discretion of the administrative law judge to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). *See also Poole v. Nat’l Steel & Shipbuilding Co.*, 11 BRBS 390 (1979); *Grimes v. George Hyman Constr. Co.*, 8 BRBS 483 (1978), *aff’d mem.* 600 F.2d 280 (D.C. Cir. 1979); *Tyson v. John C. Grimberg Co., Inc.*, 8 BRBS 413 (1978).

For further discussion of the weighing of evidence, see Sections 19 and 21 of the Deskbook.

## Digests

In the decision which was affirmed in *Greenwich Collieries*, the Third Circuit, reversing the Board's affirmance of the administrative law judge's award of death benefits, held that Section 7(c) of the APA prohibits application of the "true doubt" rule to cases involving benefits under the Act because: 1) under the APA, the claimant bears the ultimate burden of persuasion by a preponderance of the evidence; and 2) the true doubt rule allows a claimant to prevail despite a failure to prove entitlement by a preponderance of the evidence. Inasmuch as claimant bears the ultimate burden of persuasion by a preponderance of the evidence in proving the work-relatedness of his injury pursuant to Section 20(a), and as it was not clear whether the administrative law judge ever considered whether the claimant's evidence satisfied that standard, the court vacated the Board's holding and remanded for the administrative law judge to make this determination, instructing him that if, on remand the evidence is determined to be in equipoise, the employer must prevail. *Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d 1277, 27 BRBS 1(CRT) (3d Cir. 1993), *aff'd sub nom. Director, OWCP v. Greenwich Collieries*, 512 U.S. 167, 28 BRBS 43(CRT) (1994).

Following remand after the Supreme Court's decision in *Greenwich Collieries*, 512 U.S. 167, 28 BRBS 43(CRT) (1994), the Board held that it was within the administrative law judge's discretion to credit Dr. Derby's opinion over that of Dr. Yazdan, and it was rational for him to conclude that decedent's condition and death were not work-related. The Board held that the administrative law judge properly applied the preponderance of the evidence standard. The Board discussed the standard and noted it is not a quantitative standard; rather, it is a standard which denotes a superiority of weight -- the rule requires that the party having the onus must prove his position by more convincing evidence than the opposing party's evidence. The Board concluded that the preponderance of the evidence standard is well-defined and that it need not separately delineate the standard for use in cases arising under the Act; the standard, as defined by the Supreme Court and legal references, is sufficient. Consequently, the Board affirmed the administrative law judge's finding that, at best, the evidence is in equipoise, and such finding is enough to defeat claimant's claim under the preponderance of the evidence standard. *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

Prior to *Greenwich Collieries*, the Fifth Circuit held that claimant's condition is work-related based on "substantial evidence" of record; claimant is not required to prove the causal connection by a preponderance of the evidence. In this case, one doctor testified that it was "possible" that claimant experienced job-related stress sufficient to increase his blood pressure enough to contribute to the rupture of the aneurysm, while two other doctors found no causal relationship. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986).

The Board held that claimant's subjective complaints buttressed by two medical opinions that claimant is totally disabled by the work accident constitute substantial evidence in support of the administrative law judge's finding of causation. *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987).

The Board rejected employer's argument that because the doctor on whom the administrative law judge relied to find causation was unable to identify the specific chemicals which produced claimant's chemical hypersensitivity, his opinion was insufficient to support a finding of causation, where the doctor stated that claimant's symptoms were due to the cumulative effect of chemical exposures over many years and that any or all of the chemicals to which he was exposed could have played a part in his symptomology. *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988).

The Board affirmed the administrative law judge's finding that there is no causal relationship based on the record as a whole. The administrative law judge relied on one doctor who stated there is an absence of a causal relationship, and another doctor who stated that claimant's condition was "perhaps" related to a prior disease. This latter opinion, while insufficient for rebuttal purposes, may properly be considered in support of a finding that causation is not established. *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

The Board affirms the finding of causation based on the record as a whole. The administrative law judge credited a medical opinion that claimant's work exposure may have facilitated the development or hastened the course of his disease. He further found in this pre-*Greenwich Collieries* case, that although employer established rebuttal, it could not carry the ultimate burden of persuasion, *see Parson's Corp.*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980), because the medical evidence which employer submitted did not state with a reasonable degree of certainty whether decedent's exposure to a paint chemical had any effect on the development or progression of his Jakob-Creutzfeldt disease. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

In this pre-*Greenwich Collieries* case, the court held that where employer successfully rebuts the presumption, the administrative law judge must then weigh the relevant evidence as a whole. The administrative law judge's finding of causation must be affirmed if it is supported by substantial evidence, which is a lesser standard than the preponderance of the evidence standard. As the administrative law judge rationally relied in part on the expert testimony, and credited claimant's subjective complaints of headaches and dizziness, his finding that claimant's condition is work-related is affirmed. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990).

In a pre-*Greenwich Collieries* case, the District of Columbia Circuit held that in analyzing causation, the administrative law judge erred by placing the burden of proof on claimant. The court stated that the administrative law judge erred in not applying the presumption but went on to say that even if the presumption was invoked and rebutted, the administrative law judge must find for claimant if the evidence is equal. The court remanded the case for the administrative law judge to determine whether employer's evidence establishes that claimant's elbow condition was not causally related to his work accident. *Brown v. I.T.T./Cont'l Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990).

The Board affirmed the administrative law judge's weighing of the evidence based on the record as a whole, and his finding that claimant's left knee condition was aggravated by the work accident, and is not due solely to prior accidents and osteoarthritis as it is supported by substantial evidence. The Board also affirmed the finding that claimant's right knee condition is the natural and unavoidable result of the left knee condition, as he rationally credited a doctor's opinion that claimant's favoring of his left leg exacerbated a pre-existing right leg degenerative condition. Where an employment-related injury aggravates, accelerates or combines with a non-work-related condition, the entire resultant disability is compensable. *Uglesich v. Stevedoring Services of Am.*, 24 BRBS 180 (1991).

The Board affirmed the administrative law judge's decision that claimant's disability was due to supervening incidents, which were not the natural or unavoidable result of the initial work injury, as it was supported by a doctor's testimony, objective medical data, and the fact that claimant was capable of working until the incident. The Board rejected the contention of claimant and the Director that the Act requires employer to establish that the effects of the subject work injury were "overpowered and nullified" by the subsequent traumatic events in order to rebut the Section 20(a) presumption noting that the Ninth Circuit in *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954), held that a subsequent injury is compensable if it is the natural and unavoidable result of a compensable work injury. The Board also rejected claimant's contention that employer must establish the lack of a causal connection between claimant's disability and his employment beyond a reasonable doubt, explaining its substantial evidence standard and that the mere presence of conflicting evidence does not require a conclusion that there are doubts to be resolved in claimant's favor. *Wright v. Connolly-Pac. Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993).

The Fifth Circuit affirmed the Board's decision to remand the case to the administrative law judge to reweigh the evidence and the finding of no causation in the administrative law judge's decision on remand. The administrative law judge's reliance on the opinion of one doctor who was unaware of all of claimant's previous diagnoses, to the exclusion of six other doctors, was irrational. *Lennon v. Waterfront Transp.*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994).

Where claimant initially injured his back in 1979 and then worked until herniated discs prevented his continued employment in 1985, the Board concluded that negative evidence, which supplements “positive” medical evidence and a credibility determination, is sufficient to rebut the Section 20(a) presumption and to establish the lack of causation based on the record as a whole. It noted that this case contains an unequivocal medical opinion of no causation, a rational credibility determination crediting that doctor, and negative evidence of the absence of back pain for six years following the initial injury. Therefore, the Board re-affirmed its decision that the administrative law judge rationally determined that claimant’s 1985 condition was not caused by his 1979 work injury. *Holmes v. Universal Mar. Serv. Corp.*, 29 BRBS 18 (1995) (Decision on Recon.).

Where employer rebutted the presumption and demonstrated that decedent’s death was not related to his exposure to halothane gas in 1977 at employer’s facility, the administrative law judge then properly considered the record as a whole. As is within his discretionary powers, he then credited the opinion of claimant’s expert, Dr. Harrison, and held that decedent’s death was accelerated by his 1977 exposure to halothane gas. The Board thus affirmed the award of death benefits. *Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147 (1997).

As the administrative law judge rationally credited the opinion of a physician that claimant’s back condition was not causally related to his work accident, the Board affirmed the denial of benefits. *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98 (1997), *aff’d*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

The Eighth Circuit affirmed the administrative law judge’s finding that causation was established where claimant and employer each offered substantial but conflicting evidence and the administrative law judge weighed the evidence and credited the evidence in favor of claimant. *Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

The administrative law judge erred in giving weight to the Section 20(a) presumption after employer rebutted it. Rather, the presumption drops from the case and the administrative law judge must weigh all the evidence to determine if a causal relationship is established. The case was remanded for the administrative law judge to properly weigh the evidence. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

The Board affirmed the award of death benefits, as the administrative law judge rationally credited medical opinions that decedent did have asbestosis as a result of his work-related exposure to asbestos which was a substantial contributing factor to his ultimately fatal lung cancer. The administrative law judge acted within his discretion in giving less weight to the opinion of another doctor whom the administrative law judge found applied objective criteria in an overly rigid manner in determining whether decedent had asbestosis. *Parks*

*v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table).

The court affirmed the administrative law judge's denial of benefits for an alleged work-related heart attack, based on a weighing of the evidence as a whole. Specifically, the court affirmed the administrative law judge's crediting of employer's experts who opined that claimant suffered from chronic cardiovascular disease which meant claimant was likely to suffer a second heart attack regardless of his working conditions, and the experts' denial that the stressful conditions described by claimant in Japan were likely to have produced the heart attack he later suffered in Australia. The administrative law judge found the opinion of claimant's treating doctor less persuasive, as not supported by the relevant facts. *Hice v. Director, OWCP*, 48 F. Supp. 2d 501 (D. Md. 1999).

The Board affirmed the administrative law judge's finding that claimant suffers from work-related asbestosis, as the administrative law judge rationally credited a medical opinion that claimant suffers from restrictive lung disease secondary to asbestos exposure as it was predicated on the credited x-ray reading and pulmonary function studies. *Flanagan v. McAllister Bros., Inc.*, 33 BRBS 209 (1999).

The Board affirmed the administrative law judge's determination that claimant's hearing loss was unrelated to his employment based on the record as a whole, as it was within the administrative law judge's discretion to rely on the medical opinion that claimant's hearing loss was not due to noise, as opposed to the contrary opinions of examiners who did not review all the audiograms of record and did not discuss other factors such as non-noise notch audiogram patterns, speech receptions thresholds and speech discrimination results. *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

The Board held that the administrative law judge acted within his discretion in crediting the medical opinions that the angina claimant suffered at work brought to a head his coronary and psychological conditions as a result of work-related stress. Thus, the Board affirmed the administrative law judge's finding that claimant's heart and psychological conditions were related to his employment. *Marinelli v. Am. Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

The Board rejected claimant's assertion that the statements of her deceased husband, as to his exposure to asbestos at work and his injury, served to conclusively establish that he suffered from a work-related disease. Rather, the Board held that, pursuant to Section 23(a), decedent's statements, which are corroborated by other evidence, are sufficient to establish the elements of a *prima facie* case. After invoking the Section 20(a) presumption and finding it rebutted, the administrative law judge is not required to credit decedent's statements in his review of the record as a whole. The evidence on the record as a whole supported the administrative law judge's determination that decedent's disease was not

work-related. Therefore, the Board affirmed the denial of benefits. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

The Fifth Circuit held that substantial evidence supports the administrative law judge's finding that decedent's illness was caused by asbestos, where a physician board-certified in anatomic and clinical pathology testified that even though decedent had not been diagnosed with asbestosis, exposure to asbestos, combined with cigarette consumption caused decedent's lung cancer, provided there was documented significant exposure to asbestos, and the administrative law judge expressly found that there was significant exposure. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002), *aff'd on other grounds* 35 BRBS 112 (2001).

The Board affirmed the administrative law judge's finding, based on the evidence as a whole, that claimant sustained a cervical spine injury as a result of his work accident with SSA on March 10, 1998, as it is supported by substantial evidence. Specifically, the Board held that the administrative law judge acted within his discretion by crediting the opinion of claimant's treating physician, Dr. O'Hara, that claimant sustained an injury to his cervical spine as a result of the March 10, 1998, work incident, over the contrary opinion of Dr. London. *Carpenter v. California United Terminals*, 37 BRBS 149 (2003), *vacated on other grounds on recon.*, 38 BRBS 56 (2004).

The Board affirmed the administrative law judge's finding that claimant sustained a work-related obstructive disease as a result of his inhalation of welding fumes based on his rational crediting of the treating physician who monitored claimant's overall condition for a long period and of a pulmonary specialist. The administrative law judge's failure to discuss the opinion of one physician is harmless error in that the opinion supports the administrative law judge's conclusion. *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F. App'x 249 (4th Cir 2007).

The Board rejected employer's argument that claimant failed to establish a psychological injury because his doctors did not analyze his condition using the *Diagnostic & Statistical Manual of Mental Disorders*. The Board stated that the Act does not require the use of this manual in assessing whether a claimant has any particular psychological injury either in establishing a *prima facie* case or in proving the work-relatedness of an injury based on the record as a whole. As all the doctors, including employer's expert, reported that claimant suffers from some form of psychological injury, and as the administrative law judge credited the physicians who opined that claimant's condition was caused by harassment at work, the Board affirmed the administrative law judge's determination on the record as a whole that claimant suffers from a work-related psychological injury. *S.K. [Kamal] v. ITT Indus., Inc.*, 43 BRBS 78 (2009), *aff'd in part and rev'd in part mem.*, No. 4:09-MC-348, 2011 WL 798464 (S.D. Tex. March 1, 2011).

The Second Circuit affirmed the administrative law judge's finding that claimant's pterygia were caused or aggravated by environmental exposure to sunlight and dry and dusty conditions during the course of his employment as it is supported by substantial evidence. The administrative law judge rationally found that claimant's intense exposure equated to several years of normal exposure and medical opinions support a causal relationship. *Serv. Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2<sup>d</sup> Cir. 2010).

The Ninth Circuit held that the administrative law judge's ultimate conclusion is supported by substantial evidence even though the administrative law judge erred in weighing the evidence as a whole at rebuttal. The administrative law judge's detailed analysis took into account all of the evidence bearing on whether claimant's stroke occurred at work, whether the storeroom maintenance clerk position was stressful, and whether workplace stress can accelerate a stroke. Therefore, the court affirmed the administrative law judge's ultimate conclusion that the totality of the evidence showed a relationship between claimant's stressful work conditions and his stroke as it is supported by substantial evidence. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9<sup>th</sup> Cir. 2010).

The Board affirmed the administrative law judge's determination that the opinion of claimant's doctor was entitled to greater weight as he was the most familiar with claimant's condition. Not only had he treated claimant's condition, but he had predicted that claimant's knees would continue to bother him based on the type of injury suffered. Further, the administrative law judge rationally rejected the opinion of employer's expert, who examined claimant only twice. As claimant's doctor's opinion was supported by medical reports, the administrative law judge rationally gave it greater weight and concluded that claimant's condition is work-related. *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011).

In this case where claimant established he had a gastrointestinal condition that could have developed or been aggravated by his work for employer in Iraq, the administrative law judge found that employer failed to rebut the Section 20(a) presumption. The Board concluded that the administrative law judge erred in making such a finding, as it was Dr. Rajjman's unequivocal opinion that claimant's GI condition was not related to his employment in Iraq. However, the Board held the administrative law judge's error was harmless because he also found, on the record as a whole, that the preponderance of the evidence established that claimant sustained a work-related injury. Consequently, the Board affirmed the administrative law judge's award of medical benefits. *Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016).

The Board rejected employer's contention that the administrative law judge erred in failing to accord dispositive weight to the opinion of the Section 7(e) independent medical expert, and reaffirmed its holdings in *Shell v. Teledyne Movable Offshore, Inc.*, 14 BRBS 585 (1984) and *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 38 (1990), that the reports of Section 7(e) independent physicians are not binding on the fact-finder

and, thus, should be weighed along with the other medical opinions in the record. The Board also rejected employer's alternative contention that the administrative law judge is required to give greater weight to the opinions of Section 7(e) medical examiners, holding that, in this case, the administrative law judge appropriately examined the logic of the Section 7(e) independent physician's conclusions and the evidence upon which they were based and rationally found the physician's opinion to have a questionable basis. *Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014), *aff'd sub nom. Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 92(CRT) (4th Cir. 2016).

The Fourth Circuit affirmed the Board's decision and rejected employer's contention that the administrative law judge was required to give dispositive weight to the report of the independent medical examiner, pursuant to Section 7(e). Employer's reading would nullify the second sentence of Section 7(e), which permits reexamination of the claimant if any party is dissatisfied with the results of the independent examination. The opinion of the independent examiner is to be weighed along with the other opinions of record. In this case, the administrative law judge credited the opinions of claimant's doctor and employer's doctor that claimant has PTSD due to the work accident over the opinion of the independent examiner. As the conclusion is supported by the substantial evidence on the record as a whole, the court affirmed the award of benefits. *Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016).

The Board affirmed the administrative law judge's conclusion that claimant failed to establish by a preponderance of the evidence that his labrum tear is related to the work accident. The administrative law judge rationally gave determinative weight to the opinion of claimant's treating physician that it was "not more probable" that claimant's work accident caused the labrum tear. Moreover, there is no medical opinion of record affirmatively linking claimant's labrum tear to the work accident. *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff'd sub nom. International-Matex Tank Terminals v. Director, OWCP*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

In this DBA case where the employee was found dead due to asphyxiation by hanging inside his villa in Saudi Arabia, the First Circuit affirmed the finding that claimant failed to meet her burden of establishing that decedent's death was covered under the Act. The court stated that none of claimant's suggested hypotheses regarding decedent's death that could arguably entail coverage under the Act have support in the record evidence whereas the plausible alternative explanations for decedent's death that are supported by the record entail non-covered causes: suicide or accidental strangulation in the course of auto-erotic activity. The court concluded that absent a showing that the employee's death arose from employment or from a "zone of special danger" related to employment, the DBA provides no coverage. *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012).

In this case where decedent worked in Iraq, returned home on multiple visits, and killed himself after he returned home for the last time in June/July 2006, the Board vacated the administrative law judge's award of death benefits to claimant (decedent's widow). The Board held that, in light of the Ninth Circuit's recent decision in *Kealoha*, 713 F.3d 521, 47 BRBS 1(CRT) (9th Cir. 2013), the administrative law judge applied incorrect law in determining whether decedent's suicide was compensable. The Ninth Circuit held that, in a suicide case, the appropriate test is the "chain of causation," which requires an unbroken chain of causation from the work to the suicide, and not the previously-used "irresistible impulse" test. On remand, as Section 20(a) has been invoked and rebutted, the administrative law judge must weigh the evidence as a whole to determine whether claimant established that decedent's suicide was the direct result of a work injury or whether the suicide was caused by events and information decedent experienced and learned once he returned home. *Dill v. Serv. Employees Int'l, Inc.*, 48 BRBS 31 (2014), *aff'd sub nom. Serv. Employees Int'l, Inc. v. Director, OWCP*, 793 F. App'x 655, 54 BRBS 47(CRT) (9th Cir. 2020).

The Board affirmed the administrative law judge's weighing of two doctors' reports and crediting of employer's doctor on the evidence as a whole, as within her discretion. However, the Board remanded the case for reconsideration because the administrative law judge did not discuss all the relevant medical evidence on the causation issue. *Powell v. Serv. Employees Int'l, Inc.*, 53 BRBS 13 (2019).

The Fifth Circuit affirmed the finding, on the record as a whole, that claimant's labral tear was not related to the work accident. The administrative law judge rationally gave greater weight to the opinion of employer's expert that a work accident did not cause a labral tear, based on the contemporaneous MRIs. In addition, claimant's doctor admitted that an intervening event could have caused the tear. The court also affirmed as supported by substantial evidence the administrative law judge's conclusion that claimant did not establish he suffered from lumbar facet arthrosis. *Bourgeois v. Director, OWCP*, 946 F.3d 263, 53 BRBS 91(CRT) (5th Cir. 2020).

The Fifth Circuit held substantial evidence supported the administrative law judge's finding, on the record as a whole, that claimant's current neck and back pains resulted from the natural progression of his 1997 injury; claimant's preexisting neck and back conditions were not aggravated in the 2011 work injury to his hands and shoulder. In so finding, the court held the administrative law judge rationally credited the opinions of independent medical experts over that of claimant's treating physician because they were more consistent with claimant's treatment records. The court explained, although the opinion of a treating physician may be entitled to considerable weight in determining disability, an "ALJ may give less weight to a treating physician's opinion when there is good cause shown to the contrary." The court further stated that to prevail on the record as a whole a party must "demonstrate that no reasonable mind could have arrived at the ALJ's

conclusion.” *Sea-Land Services, Inc., v. Director, OWCP [Ceasar]*, 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020).

The First Circuit affirmed the administrative law judge’s finding that the claimants did not establish a causal connection between their illnesses and their plutonium radiation. The court held the administrative law judge rationally determined the claimants’ expert witnesses provided vague and conclusory testimony that were not entitled to great weight. The court also rejected the claimants’ arguments challenging the credibility of the employers’ expert witnesses because it would require the court to impermissibly reweigh the evidence. *Carswell v. E. Pihl & Sons*, 999 F.3d 18, 55 BRBS 27(CRT) (1st Cir. 2021), *cert. denied*, 142 S.Ct. 1110 (2022).

## SECTION 20(b)

Section 20(b) provides: “In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary . . . that sufficient notice of such claim was given.” *See, e.g., Fortier v. Gen. Dynamics Corp.*, 15 BRBS 4 (1982) (Kalaris, J., concurring and dissenting), *aff’d mem.*, 729 F.2d 1441 (2d Cir. 1983).

The Board previously took the position that Section 20(b) applies only to Section 13, which sets forth the requirements for filing a claim, and that it does not apply to Section 12, which sets forth the requirements for filing of the notice of injury with employer. *See Horton v. Gen. Dynamics Corp.*, 20 BRBS 99 (1987); *Jackson v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 15 BRBS 299 (1983) (Miller, J., concurring and dissenting); *Carlow v. Gen. Dynamics Corp.*, 15 BRBS 115 (1982) (Miller, J., dissenting) (overruling *Kirkland v. Air Am., Inc.*, 13 BRBS 1108 (1981) (Smith, C.J., dissenting); *Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982) (Miller, J., dissenting).

Several of the United States Courts of Appeals, however, disagreed with this position and held Section 20(b) applicable to Section 12. *See, e.g., Stevenson v. Linens of the Week*, 688 F.2d 93 (D.C. Cir. 1982), *rev’g* 14 BRBS 304 (1981); *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 12 BRBS 478 (5th Cir. 1980); *United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979), *aff’g* 6 BRBS 503 (1977); *Duluth, Missabee & Iron Range Ry. Co. v. U.S. Dep’t of Labor*, 553 F.2d 1114, 5 BRBS 756 (8th Cir. 1977). In *Janusiewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 14 BRBS 705 (3d Cir. 1982), *rev’g* 13 BRBS 1052 (1982), the Third Circuit, assuming without deciding that the Section 20(b) presumption was applicable to the Section 12 notice of injury, stated that claimant’s prior application for non-occupational sickness benefits was sufficient to rebut the presumption. Thus, the Board applied the Section 20(b) presumption to both Sections 12 and 13 in cases arising within these circuits. *See Forlong v. Am. Sec. & Trust Co.*, 21 BRBS 155 (1988); *Gardner v. Railco Multi Constr. Co.*, 19 BRBS 238 (1987), *vacated on other grounds*, 902 F.2d 71, 23 BRBS 69 (CRT) (D.C. Cir. 1990); *Kulick v. Cont’l Baking Corp.*, 19 BRBS 115 (1986).

However, in *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989), the Board reconsidered its position, and held that, pursuant to Section 20(b), it is presumed, in the absence of substantial evidence to the contrary, that employer has been given sufficient notice of the injury pursuant to Section 12. To the extent that prior decisions are inconsistent with this holding, they were overruled in *Shaller*. *See also Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991).

Under the Section 20(b) presumption, employer’s burden includes establishing that it filed a first report of injury in compliance with Section 30, which tolls the Section 13 filing period where an employer with knowledge of the injury does not file a timely report, 33

U.S.C. §930(a), (f), before it can prevail under Section 13(a). *Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992) (Dolder, J., dissenting); *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201, *vacated on other grounds on recon.*, 24 BRBS 63 (1990); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Fortier*, 15 BRBS at 4; *Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891 (1981). In *Speedy v. Gen. Dynamics Corp.*, 15 BRBS 352, 354 n.4 (1983)(Ramsey, C.J., concurring in result only)(Miller, J., dissenting), the Board, citing *Keatts v. Horne Bros., Inc.*, 14 BRBS 605, 607 (1982), stated that an exception to the above rule has been recognized in those instances where the Section 13 limitation period has run prior to the time that employer gains knowledge of the injury for Section 30 purposes. *Keatts*, however, does not address the Section 20(b) presumption, *see Wendler v. Am. Nat'l Red Cross*, 23 BRBS 408 (1990) (dissenting opinion), and the statement in *Speedy* is of dubious legal value in light of employer's burden under Section 20(b). *See Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999), *rev'g in part* 32 BRBS 174 (1998). In order to rebut the Section 20(b) presumption, employer must prove, perhaps by negative inference, that it never gained knowledge or received notice of the injury for Section 30 purposes. *See Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40 (CRT) (D.C. Cir. 1987); *Steed*, 25 BRBS at 219. See Section 30 for additional discussion of this issue.

### Digests

The D.C. Circuit held that where an employer has not been put on notice that its employee's respiratory ailments could be work-related, its failure to file a Section 30(a) report of injury, does not serve to toll the Section 13(a) limitations period pursuant to Section 30(f). The court determines that even though employer began to require that employees wear breathing masks, and had knowledge of the claimant's respiratory problems, these considerations were insufficient to put employer on notice that claimant's difficulties could be work-related. Employer's failure to file a Section 30(a) report of injury therefore did not toll the Section 13(a) limitations period. *Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987).

The Board reversed the finding that the disability claim was untimely under Section 13. As there is no evidence that decedent was aware of the relationship between his disease, disability and covered employment before he filed his claim, employer did not rebut the Section 20(b) presumption that the claim was timely filed. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only).

Under the facts of this case, the Board affirmed the administrative law judge's finding that claimant's contacts with employer's agent, PMA, were sufficient to impute to employer knowledge of a work injury for which compensation liability was possible. Employer did not dispute that PMA is its agent, *see Derocher*, 17 BRBS 249 (1985). Since PMA had knowledge of the injury, and employer failed to file a Section 30(a) report, the Section 13

statute of limitations was tolled pursuant to Section 30(f), and employer failed to overcome the Section 20(b) presumption. *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991).

The Board reversed the administrative law judge's finding that the death benefits claim was timely filed in this asbestosis case after holding that employer's lack of knowledge rebutted the Section 20(b) presumption as a matter of law. In the instant case, employer did not have knowledge of decedent's work-related death before the claim was filed in 1992, well after the limitations period expired in May 1989. Therefore, employer's failure to file a Section 30(a) report cannot toll the statute of limitations as the claim was already time-barred by the time employer gained knowledge of the injury or death. *Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), *rev'd in part sub nom. Blanding v. Director*, OWCP, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999). In reversing the Board's decision, the Second Circuit held that employer and carrier did not rebut the Section 20(b) presumption. The court held that the carrier's controversion indicating that the date employer learned of the decedent's death was "unknown" was insufficient to rebut the presumption as it does not establish that employer lacked knowledge of the decedent's work-related death before the claim was filed in 1992, and as there is no evidence in the record indicating when the carrier learned of the decedent's death. The court also held that claimant's returned claim form (undeliverable by the post office) did not constitute substantial evidence that employer lacked knowledge of the decedent's work-related death before 1992, and that the carrier presented no evidence that it lacked knowledge of the decedent's work-related death prior to 1992. Lastly, the court held that employer and carrier's failure to file a Section 30(a) report tolled the statute of limitations under Section 30(f). Thus, the court reinstated the administrative law judge's award of death benefits. *Blanding v. Director*, OWCP, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999), *rev'g in part* 32 BRBS 174 (1998).

The First Circuit held that the Section 20(b) presumption applies to occupational disease claims filed pursuant to Section 13(b)(2). *Bath Iron Works Corp. v. U.S. Dep't of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003).

The Board reversed the administrative law judge's finding that the disability claim was untimely filed under Section 13(a). The administrative law judge did not apply the Section 20(b) presumption, and her reliance on certain inferences because, "The record does not clearly establish the exact date that Claimant was aware of the full character, extent and impact of her injury," does not constitute substantial evidence that the claim was untimely filed. *E.M. [Mechler] v. Dyncorp Int'l*, 42 BRBS 73 (2008), *aff'd sub nom. Dyncorp Int'l v. Director*, OWCP, 658 F.3d 133, 45 BRBS 61(CRT) (2<sup>d</sup> Cir. 2011).

The administrative law judge reasonably found employer had adequate knowledge of the possible work-relatedness of decedent's death by drowning on January 12, 2015, to warrant further investigation and to require the filing of a Section 30(a) report. These circumstances included an argument and altercation with the base commander following a

party on the base, the location of the base on the ocean, and the investigation of the death by the Navy. Because employer did not file a Section 30(a) report until January 31, 2018, employer did not rebut the Section 20(b) presumption and Section 30(f) tolled the time for claimant to file her claim until that date. The Board thus affirmed the finding that claimant's claim, filed on February 12, 2018, was timely. *Sabanosh v. Navy Exch. Serv. Command*, 54 BRBS 5 (2020).

The Board reversed the ALJ's finding that Claimant's March 2018 psychological injury claim was not timely filed. It concluded Employer did not rebut the Section 20(b) presumption, as it did not establish Claimant was aware of the relationship between his employment, his PTSD, and his disability more than two years prior to filing his claim in this occupational disease case. That is, Employer did not show Claimant was aware of his work-related disabling psychological injury in either 2010 or 2014. Contrary to the ALJ's finding, Claimant's rejection for a job in 2010 was not based on a diagnosis of an actual work-related psychological condition, so there could be no awareness at that time. Additionally, Claimant was not provided a copy of his 2014 psychological examination; therefore, even assuming it contained a diagnosis, "awareness" within the meaning of the Act could not be imputed to Claimant. The earliest date Claimant could have been aware of a work-related psychological injury was on October 21, 2016, when he was diagnosed with PTSD related to his employment in Iraq. As Claimant's claim was filed in March 2018, within two years of this time, his claim is timely. The Board remanded the case for further proceedings on this claim. *Rodriguez v. Triple Canopy, Inc.*, 55 BRBS 17 (2021).

The Board noted an employer's burden to rebut the Section 20(b) presumption that the claimant was aware of a disabling work-related injury can be especially problematic in psychological injury cases. *Rodriguez v. Triple Canopy, Inc.*, 55 BRBS 17 (2021).

Additional cases on timeliness are discussed in Sections 12, 13 and 30 of the deskbook.

## **SECTION 20(c) and (d)**

The presumptions in these subsections complement Section 3(c) of the Act and are discussed in that section of the deskbook.