BRB No. 99-0810

JAMES O'KELLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY/NAF	)	DATE ISSUED: May 2, 2000
	)	
Self-Insured	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fee of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Douglas R. Powell (Hinton & Powell), Atlanta, Georgia, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fee (1997-LHC-1441) of Administrative Law Judge David W. Di Nardi rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C.

§921(b)(3). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, who suffered from polio during his early childhood, was employed by employer as the superintendent of the Follow Me Golf Course at Fort Benning, Georgia, from 1980 through June 22, 1995. During his tenure at employer's facility, claimant was responsible for, *inter alia*, determining the need for and directing the application of numerous insecticides, herbicides, and fungicides. As a result of these employment duties, claimant, who was not issued protective clothing until sometime during 1987-1988, was exposed to fumes during the preparation and application of these materials. During his period of employment, claimant experienced dizziness and instability while walking, as well as coughing, speech difficulties, and a worsening in the pulling of his facial muscles. On June 22, 1995, claimant ceased working for employer due to his present neurological condition.

In his Decision and Order, the administrative law judge determined that employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption of causation. Accordingly, the administrative law judge found that claimant's work-related exposures aggravated his current neurological disorder. Next, the administrative law judge found that employer conceded that claimant was incapable of returning to his usual employment duties, and that employer failed to offer any evidence demonstrating the availability of suitable alternate employment. Thus, the administrative law judge concluded that claimant was permanently totally disabled from June 23, 1995, to the present and continuing. *See* 33 U.S.C. §908(a). Lastly, the administrative law judge awarded claimant medical expenses, exclusive of the charges rendered by Dr. Gunter, and employer relief pursuant to Section 8(f) of the Act. *See* 33 U.S.C. §§907, 908(f).

Claimant's counsel thereafter sought an attorney's fee of $57,155.48, including expenses. Employer filed multiple objections to the fee petition, whereupon claimant's counsel responded. On June 21, 1999, the administrative law judge issued a Supplemental Decision and Order Awarding Attorney's Fee, wherein the administrative law judge set forth employer's objections, reduced both the hourly rate as well as the number of hours requested by counsel, and awarded claimant's counsel a fee of $50,449.32, including expenses.

On appeal, employer challenges the administrative law judge's finding that claimant is entitled to invocation of the Section 20(a) presumption; alternatively, employer asserts that the administrative law judge erred in determining that it failed to present evidence sufficient to rebut that presumption and that the administrative law judge erred in finding causation established based upon the record as a whole. Lastly, employer challenges the fee awarded to

counsel by the administrative law judge. Claimant responds, urging affirmance of the administrative law judge's decisions in their entirety.

Causation

Employer initially contends that the administrative law judge erred in invoking the Section 20(a), 33 U.S.C. §920(a), presumption. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). In presenting his case, claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, claimant must show that working conditions existed which could have caused his harm. *See generally U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. at 608, 14 BRBS at 631.

In the instant case, employer does not dispute that claimant has suffered a harm, *i.e.*, a neurological condition, and that claimant presented evidence of his exposure to pesticide fumes during his employment with employer; rather, employer challenges the administrative law judge's invocation of the Section 20(a) presumption on the ground that no credible evidence exists that claimant's exposure to pesticides could have caused his current neurological condition. In his decision, the administrative law judge specifically set forth the testimony of Dr. Dawkins, who opined that claimant's chemical exposures aggravated his neurological condition. Moreover, the administrative law judge noted that employer's expert, Dr. Gerr, conceded that claimant had been exposed to some pesticides and chemicals that can cause some symptoms similar to those which claimant described. *See* CX 10 at 83. Given this evidence, we reject employer's argument that claimant did not establish a *prima facie* case and affirm the administrative law judge's invocation of the Section 20(a) presumption, as claimant has established a harm and the existence of working conditions which could have caused or aggravated that harm. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996). It is employer's burden on rebuttal to present substantial evidence sufficient to sever

the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *See, e.g., Cairns v. Matson Terminals*, 21 BRBS 252 (1988). In establishing rebuttal of the presumption, however, proof of another agency of causation is not necessary. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982)(Kalaris, J., concurring and dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984). Rather, the testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Greenwich Collieries*, 512 U.S. at 267, 28 BRBS at 43 (CRT).

In the instant case, employer avers that the administrative law judge erred in concluding that the testimony of Dr. Gerr is insufficient to establish rebuttal of the Section 20(a) presumption. We agree. The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction the instant claim arises, has espoused a "ruling out" standard when addressing the issue of rebuttal of the Section 20(a) presumption. *See Brown*, 893 F.2d at 294, 23 BRBS at 22 (CRT). In *Brown*, the court specifically found that the Act placed on employer the duty of rebutting the Section 20(a) presumption with evidence that the employee's employment neither caused nor aggravated his harm. Where none of the physicians of record expressed an opinion ruling out a causal connection, the court determined that there was no direct concrete evidence sufficient to rebut the presumption. *Id.*, 893 F.2d at 297, 23 BRBS at 24 (CRT). *Cf. Conoco v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999) (court rejects "ruling out" standard, but affirms finding Section 20(a) was not rebutted). In the instant case, the administrative law judge found that while Dr. Gerr opined within a reasonable degree of medical certainty that claimant's present medical condition was neither caused nor contributed to by his exposure to chemicals while working for employer, he conceded on cross-examination that it was possible that claimant's condition is work-related. Additionally, the administrative law judge noted that Dr. Gerr offered no opinion as to the cause of claimant's present condition. The administrative law judge thus concluded that since Dr. Gerr could neither "rule out" the possibility that claimant's condition is work-related nor determine the cause of claimant's ailments, his testimony is insufficient to rebut the presumption.

Contrary to the administrative law judge's statement, however, employer is not required to establish another agency of causation in order to rebut the Section 20(a) presumption. *See Stevens*, 14 BRBS at 626. Moreover, as employer asserts, a review of Dr. Gerr's reports and hearing testimony reveals that he stated unequivocally that claimant's work-related chemical exposures did not cause, contribute to, or aggravate his present medical condition. *See* RXS 20, 26; Tr. at 190. As the administrative law judge found, Dr. Gerr stated at all times that his opinion regarding the lack of a causal nexus was rendered within a reasonable degree of medical certainty. *Id.* Moreover, contrary to the administrative law judge's characterization of Dr. Gerr's admission on cross-examination of a possible causal connection between claimant's employment and his present medical condition, Dr. Gerr's statement regarding "possibilities" reflects his opinion that in the medical profession there is no absolute certainty. *See* Tr. at 213-214. This acknowledgment does not render his opinion equivocal, as Dr. Gerr repeatedly expressed his opinion that no causal relationship exists between claimant's present condition and his employment with employer. Thus, as Dr. Gerr's reports and testimony unequivocally express his opinion, rendered within a reasonable degree of medical certainty, that claimant's medical condition is not work related, we hold that employer has produced evidence sufficient to sever the causal relationship between claimant's employment and his harm. *See, e.g., Brown*, 893 F.2d at 294, 23 BRBS at 22 (CRT). To hold otherwise, as the administrative law judge did in the case at bar, would raise the standard regarding rebuttal of the presumption to an unreachable level since, as Dr. Gerr implied during his hearing testimony, "absolute certainty" is a difficult concept in the medical profession. Accordingly, we reverse the administrative law judge's finding that employer has failed to meet its burden on rebuttal.

Employer next challenges the administrative law judge's alternative finding that causation has been established based on the record as a whole. In support of its position on appeal, employer assigns error to the administrative law judge's decision not to rely upon the testimony of Dr. Gerr. Specifically, employer avers that the administrative law judge erred by not giving determinative weight to Dr. Gerr's testimony based upon that physician's credentials and status as a treating physician, that the administrative law judge incorrectly interpreted Dr. Gerr's ultimate opinion regarding the issue of causation, and that the administrative law judge erred in failing to discuss the totality of Dr. Dawkins' testimony. Contrary to employer's initial contention, an administrative law judge is not required to find determinative the opinion of employer's medical expert simply because the expert is more highly trained or is claimant's treating physician. *See generally Avondale Shipyards v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990). Rather, the administrative law judge, as factfinder, must independently analyze and discuss the medical evidence before him. *See generally Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). In so doing, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v.*

Hughes, 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

We agree, however, that the administrative law judge's finding on this issue cannot be affirmed based upon his not having discussed the totality of the testimony before him and his misinterpretation of Dr. Gerr's testimony. In the instant case, the administrative law judge declined to rely upon the testimony of Dr. Gerr based upon his interpretation that it did not rule out the possibility of a causal relationship between claimant's work-related exposures and his present neurological condition. As set forth *supra*, a complete reading of Dr. Gerr's reports and testimony indicates that Dr. Gerr unequivocally opined that claimant's work-related exposures did not cause, contribute to, or aggravate claimant's present medical condition. *See* RXS 20, 26; Tr. at 190. Thus, the administrative law judge's decision to give this opinion less weight based upon its alleged equivocation regarding the issue of causation is not supported by the record. Moreover, as employer notes, Dr. Dawkins testified that claimant's condition should have stabilized since the date of his examination, that he would be surprised if claimant's condition had deteriorated since that time, and that any deterioration in claimant's condition should be marginal since claimant has been removed from his work-related exposure, yet both claimant and Dr. Gerr testified that claimant's condition has become progressively worse. The administrative law judge did not address this portion of the testimony of Dr. Dawkins. We therefore vacate the administrative law judge's finding that causation has been established based upon the record as a whole, and remand the case for reconsideration of all of the evidence regarding the issue of causation.

Attorney's Fee

Lastly, employer challenges the fee awarded to claimant's counsel by the administrative law judge. Initially, employer contends that the administrative law judge erred in awarding counsel an hourly rate of $200. After considering employer's contentions, the customary rates awarded in both the Atlanta, Georgia area, where claimant's counsel's office is located, and the Savannah, Georgia area, where claimant resides and the formal hearing was held, the complexity of the case, and the results obtained, the administrative law judge reduced the $225 hourly rate requested by counsel to $200 per hour. As the administrative law judge considered both the hourly rate that was reasonable and appropriate in the geographic area, as well as the factors contained in Section 702.132, 20 C.F.R. §702.132, of the regulations, we affirm the hourly rate awarded by the administrative law judge to counsel, as employer has not shown that the administrative law judge abused his discretion in this regard. *See Moore v. Universal Maritime Corp.,* 33 BRBS 54 (1999); *Thompson v. Lockheed Shipbuilding & Constr. Co.,* 21 BRBS 94 (1988).

Employer next challenges the fee awarded to claimant's counsel for travel time. Fees for travel time may be awarded only where the travel is necessary, reasonable, and in excess

of that normally considered to be a part of overhead. *See Griffin v. Virginia International Terminals, Inc.*, 29 BRBS 133 (1995); *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982). In the instant case, the administrative law judge specifically rejected employer's objection in determining that counsel's travel time between Atlanta, Georgia, and Savannah, Georgia, was reasonable, necessary and in excess of normal office overhead. Inasmuch as employer has failed to establish that the administrative law judge's finding in this regard is unreasonable, it is affirmed. *See generally Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 592 (1981).

Employer also asserts that the administrative law judge improperly awarded an attorney's fee for the time spent on the instant case by an associate in claimant's counsel's office. In addressing this objection by employer, the administrative law judge specifically found that claimant's counsel's delegation of work to an associate is both common and proper. Accordingly, the administrative law judge denied employer's objection, stating that employer's specific objections to the time requested by counsel's associate would be considered in turn. The Board has stated that there is nothing objectionable to several attorneys participating in the litigation of a claim where the complexity of the case or other factors warrent it. *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table). We therefore reject employer's assertion that the administrative law judge erred in awarding a fee to more than one attorney in this case.

Employer next avers that the administrative law judge erred in awarding counsel time spent on a losing issue, specifically the compensability of Dr. Gunter's medical services. We disagree. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434; *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 992 (1988). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results,

the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc)*(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc,* 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Ahmed v. Washington Metropolitan Area Transit Authority,* 27 BRBS 24 (1993).

In the present case, the administrative law judge, citing *Hensley*, 461 U.S. at 424, found that while employer succeeded in establishing that it should not be held liable for the medical services rendered to claimant by Dr. Gunter, overall counsel obtained excellent results for claimant in this case. Moreover, he also found that the time here concerned time spent preparing for and attending Dr. Gunter's deposition which was scheduled by employer. The fact that employer is not liable for the costs of Dr. Gunter's treatment under Section 7, however, is inapposite to the question of whether counsel's attendance at his deposition, scheduled by employer, was reasonable and necessary. Under the circumstances, there is no error in the administrative law judge's award of time for these services. While the administrative law judge also stated that Dr. Gunter's opinion was relevant to causation and, as employer asserts on appeal, Dr. Gunter did not render a specific opinion regarding the cause of claimant's present medical condition, he did address claimant's ailments and their effect on claimant's employability. More importantly, the test for compensability concerns whether the attorney, at the time the work was performed, could reasonably regard it as necessary, rather than whether the evidence was actually used. *See, e.g., Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). We therefore affirm the administrative law judge's determination that counsel is entitled to a fee for the time spent preparing for and attending the deposition of Dr. Gunter.

Employer next argues that the administrative law judge erred by not specifically addressing each of its objections to time entries contained in counsel's fee petition, and in awarding counsel the time spent on defending his fee . In addressing employer's objections, the administrative law judge set forth the individual date of service challenged by employer, considered employer's objection as to whether the service rendered on that date was necessary, duplicative, or excessive, acknowledged claimant's responses to employer's objections when such responses were made, and ultimately disallowed 20.95 hours requested by counsel. Accordingly, the administrative law judge reduced the fee requested by from $58,473.73 to $50,449.23.

We affirm the $50,449.23 attorney's fee awarded to claimant's counsel by the administrative law judge, contingent upon claimant's success on remand. In the instant case, the administrative law judge considered employer's objections to counsel's fee request as

well as counsel's response. Pursuant to Section 702.132, 20 C.F.R. §702.132, a fee award shall be reasonably commensurate with the necessary work done. *See Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n.*, 22 BRBS 434 (1989). Moreover, a fee award should be for an amount that is reasonable in relation to the results obtained. *See Hensley*, 461 U.S. at 424. In this case, the administrative law judge adequately addressed employer's objections, and employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in determining the amount of the fee. *See generally Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67 (9th Cir. 1996). As the administrative law judge committed no reversible error, his attorney's fee award is affirmed.

Accordingly, the administrative law judge's finding that employer failed to establish rebuttal of the Section 20(a) presumption is reversed, his determination that claimant established causation based on the record as a whole is vacated, and the case is remanded for reconsideration consistent with this opinion. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fee is affirmed, contingent upon claimant's success on remand.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge