BRB No. 97-0939

HILDA JEAN ADCOCK	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
AAFES,	)	
FORT GILLEM	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Dismissing the Claim and Order Denying Claimant's Motion for Reconsideration of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Herbert J. Chestnut, Marietta, Georgia, for claimant.

Elisa A. Roberts (Hamilton, Westby, Marshall & Antonowich, L.L.C.), Atlanta, Georgia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Order Dismissing the Claim and Order Denying Claimant's Motion for Reconsideration (96-LHC-01001) of Administrative Law Judge Robert D. Kaplan 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).

Claimant, who was employed by employer as a warehouse foreman, was diagnosed with right breast cancer in October 1987. Claimant underwent two surgical procedures, chemotherapy, and consequently developed kidney stones. In 1991 she required surgery for a vocal chord lesion. Claimant filed for benefits under the Act, alleging that these conditions were caused by her exposure to asbestos and other chemicals during the course of her

employment with employer. On November 5, 1996, the administrative law judge ordered the parties to exchange exhibits and witness lists by January 9, 1997, since the hearing was scheduled for January 29, 1997. Thereafter, employer moved for summary judgment, arguing that claimant failed to produce any medical evidence linking her medical conditions to her employment. Following a conference call between the administrative law judge and both parties on January 24, 1996, the administrative law judge issued his Decision and Order on January 27, 1997.

In his Decision and Order, the administrative law judge granted employer's motion, finding that claimant's medical evidence is insufficient to invoke the Section 20(a), 33 U.S.C. §920(a), presumption. Next, assuming, *arguendo*, that claimant was entitled to invocation of the presumption, the administrative law judge found that the medical opinion of Dr. Whaley is sufficient to rebut the presumption. Lastly, the administrative law judge credited Dr. Whaley's opinion over statements by Drs. Bhat and Robbins, which he again assumed, *arguendo*, are opinions that could be construed as supporting a finding that claimant's conditions are related to her asbestos exposure, in concluding that the record as a whole fails to establish a causal nexus between claimant's employment with employer and her health conditions. Claimant's motion for reconsideration was denied by the administrative law judge in an Order dated February 27, 1997.

On appeal, claimant contends the administrative law judge erred by accepting, and thereafter granting, employer's motion for summary decision. Claimant also argues that the administrative law judge erred in holding that claimant is not entitled to invocation of the Section 20(a) presumption. Employer responds, urging affirmance.

Claimant initially alleges error in the administrative law judge's decision to accept, and ultimately grant, employer's motion for a summary decision. Specifically, claimant asserts that employer's motion was untimely filed, and that the administrative law judge prematurely issued his decision granting that motion. We disagree. Pursuant to the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (hereinafter the Rules),[1] any party may move, with or without supporting affidavits, for summary decision at least twenty days before the hearing. *See* 29 C.F.R. §18.40(a). Any party opposing the motion may serve opposing affidavits or countermove for a summary decision. If the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact, the administrative law judge may enter summary judgment for either party. *See* 29 C.F.R.

[1]The Rules apply unless inconsistent with a rule of special application as provided by statute or regulation. *See* 29 C.F.R. §18.1; *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

§§18.40(d), 18.41(a); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990).

In the instant case, while the administrative law judge's Decision and Order stated that employer's motion for summary decision was received on January 15, 1997, less than twenty days before the scheduled hearing set for January 27, 1997, the record establishes that on this date employer mailed the original of an affidavit by Dr. Whaley, pursuant to the administrative law judge's request. Moreover, employer sent its motion for summary decision via overnight delivery on January 8, 1997, and it was thus received by the administrative law judge twenty days before the scheduled formal hearing. Thereafter, claimant submitted a written response to employer's motion and, on January 24, 1997, the administrative law judge convened a conference call with both parties. At the conference call the administrative law judge denied claimant's motion to schedule Dr. Bhat as a witness at the formal hearing and also denied claimant's request for continuance to gather additional evidence regarding the cause of claimant's injuries.[2] Accordingly, as employer timely moved for summary decision and as claimant was afforded an opportunity to respond to employer's motion, we reject claimant's contention that the administrative law judge did not comply with the Rules governing summary decisions. *See* 29 C.F.R. §18.40; *see also Niazy v. The Capital Hilton Hotel*, 19 BRBS 266, 269 (1987).

Claimant next challenges the administrative law judge's finding that she is not entitled to invocation of the Section 20(a) presumption; additionally, claimant avers that the administrative law judge erred by failing to consider her evidence of a casual connection between her employment and her medical conditions in a light most favorable to claimant.

We hold that any error committed by the administrative law judge in initially determining that claimant is not entitled to invocation of the Section 20(a) presumption is harmless, since the administrative law judge then considered the evidence of record upon the assumption that claimant was in fact entitled to invocation of the presumption. Upon invocation of the presumption, the burden shifts to employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment, and therefore, to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by her employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). In the instant case, claimant does not challenge the administrative law judge's determination that the opinion of

[2]On appeal, claimant does not challenge the administrative law judge's denial of these motions.

Dr. Whaley is sufficient to rebut the presumption. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Thus, as the presumption was rebutted by employer, the administrative law judge was required to weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). In this regard, in determining if summary judgment is appropriate, the court must look at the record in the light most favorable to the party opposing the motion, and must draw all inferences favorable to the party opposing the motion. *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). To defeat a motion for summary judgment, the party opposing must establish the existence of a genuine issue of fact which is both material and genuine; material in the sense of affecting the outcome of the litigation, and genuine in the sense of there being sufficient evidence to support the alleged factual dispute. *Id*.

In addressing the issue of causation, the administrative law judge next found that no physician of record stated the opinion that claimant's health problems were related to her employment with employer; thus, the administrative law judge concluded that the record as a whole fails to establish a casual nexus between claimant's employment with employer and her health conditions. In rendering this finding, the administrative law judge determined that, even if the statements of Drs. Bhat and Robbins could be considered supportive of a finding of causation, those statements were equivocal and would thus be outweighed by the contrary, unequivocal opinion of Dr. Whaley. Dr. Whaley, in an affidavit submitted by employer to the administrative law judge, unequivocally attested that he found no evidence, indication or suggestion that any medical problem experienced by claimant is related to asbestos exposure. Dr. Bhat, in addressing claimant's condition, stated that

> "[t]he deterioration of pulmonary function tests in this patient can be multifactorial. It may be patient's cigarette smoking, age-related decline in pulmonary function, possible exposure to asbestos with asbestos lung disease. At the present time, chest x-ray does not show any evidence of asbestos exposure. The decline in PFTs may be related to past history of asbestos exposure; however, it is hard to say whether it is clearly related to asbestos exposure when patient has a normal chest x-ray.

CX 25. Similarly, Dr. Robbins, who treated claimant for her throat condition, stated that

> I, at this time, can not state that the asbestos is 100% related to her symptoms, although it could indirectly be related. There is no way for me to determine that this is nor was the cause of her symptoms.

CX 26.

In the instant case, after considering all of the evidence in the light most favorable to claimant, the administrative law judge concluded that no physician affirmatively found a casual relationship between claimant's health problems and her employment with employer. This finding is supported by the record; accordingly, the administrative law judge's decision to grant employer's motion for summary decision and his subsequent determination, based on the record as a whole, that claimant's present health conditions are not causally related to her employment with employer is affirmed. *See, e.g., Rochester v. George Washington University,* 30 BRBS 233 (1997).

Accordingly, the administrative law judge's Order Dismissing the Claim and Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge