BRB Nos. 09-0159
and 09-0159A

J.M.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
TRADESMAN INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 08/28/2009
	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Scott C. Ford and Brian A. Richardson (McCandlish Holton, P.C.), Richmond, Virginia, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (2007-LHC-0119) of Administrative Law Judge Richard K. Malamphy 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.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which 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, a shipfitter, alleges that his current condition, demyelinating polyneuropathy, was caused by his exposure to harmful dusts while he was detailed to the sandblasting department for three weeks in May 2004.[1] Claimant sought compensation for total disability, as well as medical benefits.

In his Decision and Order, the administrative law judge found that claimant established his *prima facie* case that his injury is work-related but that employer rebutted the Section 20(a) presumption, 33 U.S.C. §920(a). Upon weighing the relevant evidence, the administrative law judge found that claimant failed to establish that his condition is related to his work. Accordingly, he denied benefits.

Claimant appeals, contending the administrative law judge erred in finding that employer established rebuttal of the Section 20(a) presumption and in his weighing of the evidence as a whole. Employer cross-appeals, arguing that the administrative law judge erred in finding that claimant established his *prima facie* case and in failing to address its objection to the admission of evidence used for claimant's *prima facie* case. We agree with both parties that the administrative law judge's decision cannot be affirmed, and, for the reasons discussed below, the case is remanded for further findings.

We address first employer's cross-appeal alleging that the administrative law judge erred in finding that claimant established his *prima facie* case. In establishing that an injury is work-related, a claimant is aided by Section 20(a) which provides a presumed causal nexus between the injury and the employment. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of a harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. *See, e.g., Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). If claimant establishes his *prima facie* case, Section 20(a) applies to presume that his condition is causally related to his employment. 33 U.S.C. §920(a); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

[1] The date of injury for purposes of this claim is January 6, 2006, the date Dr. Lee, claimant's neurologist, diagnosed the condition.

The administrative law judge found that claimant established a harm, *i.e.*, demyelinating polyneuropathy; this finding is not appealed.[2] The administrative law judge found that claimant established the second prong, *i.e.*, working conditions, based on Dr. Lee's review of the Material Safety Data (MDS) sheets, CX 16, which list toxins which may have been present in the workplace. We cannot affirm this finding for two reasons. First, the administrative law judge did not address employer's objections to the admission of this exhibit. At the hearing, claimant offered the MDS sheets as evidence of the substances to which he was exposed. Employer objected to the admission of the sheets on the grounds of relevancy, hearsay, and lack of foundation and authentication. HT at 6. The administrative law judge stated he would take employer's objection under advisement, *id.* at 7, but he did not rule on the issue. The administrative law judge, however, has considerable discretion concerning the admission of evidence and is not bound by formal rules of evidence or procedure. 33 U.S.C. §923(a); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); 20 C.F.R. §702.339. He should admit any evidence that is relevant and material, notwithstanding any contentions regarding the weight to be accorded to such evidence. *See generally Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999).

More importantly, the administrative law judge did not address the issue of whether claimant actually was exposed to any of the substances he alleged caused or contributed to his disease. Claimant must establish he was actually exposed to the injurious substances which form the basis of his claim. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989). Claimant's credible testimony that he was exposed to injurious substances may suffice in this regard. *See Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Damiano v. Global Terminal & Container Serv.*, 32 BRBS 261 (1998). Claimant testified that he sandblasted for 40 hours per week for three weeks without a respirator, and thereafter became ill. HT at 22-23, 40. The administrative law judge invoked the Section 20(a) presumption based on Dr. Lee's statement that he attributed claimant's disease to sandblasting based on claimant's statement to him that he was exposed to sandblasting components and on the MDS sheets. CX 9. In weighing the evidence as a whole, however, the administrative law judge noted that there is evidence that contradicts claimant's testimony regarding the length of his exposure to any deleterious substances and that he was denied a respirator at work, and that claimant's credibility thus was suspect.[3] Decision and Order at 8. The

[2] This condition has resulted in a reduction in claimant's pulmonary function and chronic pain and numbness in both legs. Dr. Lee stated that claimant is totally disabled. CXs 7-9.

[3] Mr. Evans, a process foreman, testified that claimant worked in sandblasting for three or four hours a day for no more than four days and that a respirator was required.

administrative law judge did not resolve these conflicts in the evidence. Therefore, we must vacate the administrative law judge's finding that the Section 20(a) presumption applies in this case. On remand, the administrative law judge should address employer's objection to the admission of the MDS sheets. The administrative law judge also must make a specific finding, based on all the relevant evidence, regarding the "working conditions" element of claimant's *prima facie* case, in order to determine if the Section 20(a) presumption is invoked. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985).

If, on remand, the administrative law judge finds claimant is entitled to invocation of the Section 20(a) presumption the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition is not caused or contributed to by his employment exposure. *Universal Maritime Corp.*, 126 F.3d 256, 31 BRBS 119(CRT). Claimant contends on appeal that the administrative law judge erred in finding rebuttal of the Section 20(a) presumption based on the opinion of Dr. Peterson. We agree with claimant that this finding cannot be affirmed.

Dr. Peterson stated that it is difficult to correlate "claimant's symptoms and problems with any work-related activity" and that his symptoms could be due to non-work related causes. Dr. Peterson stated that claimant's symptoms "point away" from claimant's condition being related to an "acute" work-related problem. CXs 10, 11 at 1. He opined that "most" of claimant's problems can be explained by medical factors other than the alleged exposure at work, such as claimant's smoking, obesity, hyperinsulinism and coronary disease. EX 24.

These statements are legally insufficient to rebut the Section 20(a) presumption. Employer must produce substantial evidence of the absence of work-related connection in order to rebut the Section 20(a) presumption. A physician's opinion that a claimant's condition is not work-related must be given to a reasonable degree of medical certainty. *See O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). In this case, the facts that Dr. Peterson found it difficult to establish that claimant's condition is work-related or that it could be due to other causes do not equate to a finding that it is not work-related. Employer must produce facts, not speculation, in order to rebut the Section 20(a) presumption. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Moreover, claimant does not have an acute condition; Dr. Peterson himself diagnosed "chronic polyneuropathy," CX 10, so it is irrelevant that claimant's acute symptoms are not indicative of a work-related condition. Dr. Peterson's opinion that "most" of claimant's symptoms can be explained by other factors" does not establish the

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HT at 73-74. Mr. Gillespie, a former account manager for employer, testified that there are no exceptions to the practice that each employee is fitted with a respirator. HT at 62.

absence of a work-related component to claimant's condition. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). In this regard, consistent with the aggravation rule, employer must produce evidence that claimant's condition was not caused or aggravated by his employment. *See, e.g., Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT). Therefore, we must vacate the administrative law judge's finding that these statements by Dr. Peterson rebut the Section 20(a) presumption. On remand, the administrative law judge should address whether any other evidence of record constitutes substantial evidence of the absence of a connection between claimant's injury and his employment.

If the administrative law judge again finds the Section 20(a) presumption rebutted, we would agree that claimant has failed to establish the work-relatedness of his condition. *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). The administrative law judge found insufficient Dr. Lee's opinion that claimant's condition is work-related because Dr. Lee found the connection based only on the temporal relationship between claimant's exposure and the onset of symptoms; Dr. Lee conceded he was not familiar with the characteristics of the chemicals and their adverse effects. CX 20 at 10, 17. Dr. Lee also stated that claimant's condition could be caused by many factors. *Id.* at 18. Thus, the administrative law judge found that Dr. Lee's opinion was based on speculation and conjecture and is insufficient to support an award of benefits. Decision and Order at 8. Moreover, the administrative law judge noted the discrepancy between claimant's testimony and that of Mr. Evans and Mr. Gillespie regarding the degree of claimant's exposure to sandblasting materials.

It is well-established that the administrative law judge is entitled to determine the weight to be accorded to the evidence of record and that the Board cannot reweigh the evidence. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge's finding that Dr. Lee's opinion is insufficient to establish the work-relatedness of claimant's condition is rational and within his discretion. *Id.* Thus, denial of benefits may be reinstated if the administrative law judge again finds the Section 20(a) presumption invoked and rebutted.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge