BRB No. 09-0293

A.A.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
A.G. SHIP MAINTENANCE CORPORATION	)	DATE ISSUED: 08/26/2009
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Robert J. DeGroot, Newark, New Jersey, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-LHC-00283) of Administrative Law Judge Janice K. Bullard 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a stroke on May 6, 2005, during the course of his employment for employer as a gear man/lasher loading cars on board the M/V Asian Empire. Claimant alleged that stress from an argument with a supervisor that day, physical exertion, and the humidity/temperature and automobile fumes on board the ship combined with his underlying cardiovascular disease to cause the stroke. Employer controverted the claim.

In her decision, the administrative law judge found that the evidence is sufficient to establish invocation of the Section 20(a) presumption that claimant's stroke was caused, in part, by the working conditions alleged by claimant as contributing factors. 33 U.S.C. §920(a). The administrative law judge also found that employer submitted sufficient evidence to rebut the presumption. After weighing the conflicting evidence as a whole, the administrative law judge concluded that claimant's stroke was not due to his working conditions. Therefore, the administrative law judge denied the claim for benefits.

On appeal, claimant contends that the administrative law judge erred by finding that employer established rebuttal of the Section 20(a) presumption. Claimant also contends that the administrative law judge erred in finding that the evidence as a whole does not establish that his stroke is work-related. Employer responds, urging affirmance of the administrative law judge's decision.

Once, as here, the Section 20(a) presumption is invoked, employer bears the burden of producing substantial evidence that the claimant's condition was not caused, contributed to or aggravated by his employment. *C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). Claimant contends that Dr. Kipen's testimony does not establish rebuttal of the presumption because he did not state that there was no relationship between claimant's injury and his working conditions; rather, he acknowledged that air pollution increases the risk for strokes from one to three percent.[1] Moreover, claimant asserts that the administrative law judge's finding that employer submitted sufficient evidence that there was no air pollution on board the ship was contradicted by the testimony of claimant and a co-worker.

[1] Claimant does not challenge the administrative law judge's finding that employer produced substantial evidence that stress from an argument with a supervisor, physical exertion and the humidity/temperature on board the M/V Asian Empire did not contribute to the stroke. Decision and Order at 21.

We reject claimant's contention that Dr. Kipen's testimony is not sufficient to rebut the presumption. In order to establish rebuttal, employer is not required to rule out any possible causal connection between claimant's employment and his condition but must produce "substantial evidence" that the work injury is not due to work exposure to automobile fumes. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998). The administrative law judge found that Dr. Kipen concluded that claimant's underlying health problems, rather than any working conditions on board the ship, were the cause of the stroke. In his March 10, 2008 report, Dr. Kipen discussed the risk factors for stroke, including air pollution, and concluded that claimant's "stroke is not associated with his work." EX 3 at 3-4. At his August 13, 2008 deposition, Dr. Kipen testified, based on a reasonable degree of medical certainty, that claimant's stroke was due to his pre-existing heart disease, cigarette smoking, and drinking alcohol at lunch on the day of his stroke. EX 14 at 35, 54-55. Dr. Kipen also stated that he could "not 100 percent" rule out air pollution at work as a factor. EX 14 at 55. As Dr. Kipen rendered his opinion that the working conditions alleged did not contribute to the stroke to a reasonable degree of medical certainty and employer is not required to rule out claimant's employment as a potential cause of the injury in order to establish rebuttal, the administrative law judge's finding that Dr. Kipen's opinion is sufficient to rebut the Section 20(a) presumption is supported by substantial evidence. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

Moreover, we reject claimant's contention that, in view of the testimony by claimant and a co-worker, the administrative law judge erred by finding in her rebuttal analysis that employer produced substantial evidence that there was no air pollution on board the ship on the day of claimant's stroke. The administrative law judge found that, "employer has raised the suggestion that there was no pollution on board the ship." Decision and Order at 21. The administrative law judge credited the deposition testimony of claimant's supervisor, Mr. Puglisi, that there were no reported problems with fumes on board the ship that day, the ship's records indicating the ventilation system was running and the absence of any reported problems, and the report by Hendrik van Hemmen, a marine engineer, that that the ventilation system was sufficient to remove fumes from the hold of the ship. EXs 7, 13 at 3-4, 15 at 28-30. This evidence is sufficient for the administrative law judge to have found that employer rebutted claimant's assertion that there were harmful levels of automobile fumes on board the M/V Asian Empire on the day of claimant's stroke. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). Accordingly, we affirm the finding that the Section 20(a) presumption is rebutted.

Once the administrative law judge finds that the Section 20(a) presumption is rebutted, it falls from the case and all relevant evidence must be weighed to determine if a causal relationship has been established, with claimant bearing the burden of persuasion. *See Universal Maritime Corp.*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). The administrative law judge found that Dr. Kipen's opinion that claimant's stroke was not work-related is entitled to determinative weight because it was researched and unequivocal. Decision and Order at 24. She credited it over the opinions of Drs. Flores, Meer and Goldfarb that claimant's stroke was related to his employment. The administrative law judge found that Dr. Flores's opinion was not given to a reasonable degree of medical certainty and that Dr. Meer's report makes reference to a myocardial infarction which was not diagnosed by other physicians. The administrative law judge also discussed the opinion of Dr. Goldfarb, claimant's treating doctor. The administrative law judge found that it is not entitled to "special weight" because he did not treat claimant on the day of the stroke and did not provide any particular insight into claimant's condition based on his status as the treating doctor. The administrative law judge also observed that his notes were largely illegible. The administrative law judge also found that Dr. Goldfarb's opinion was based largely on claimant's version of the events of May 6, 2005.

Claimant does not specifically challenge the administrative law judge's weighing of this medical evidence. Claimant contends, however, that the evidence that there was air pollution onboard the ship is more credible than employer's contrary evidence and that, as Dr. Kipen stated that air pollution is a factor that can contribute to a stroke, claimant established by a preponderance of the evidence that his stroke is related to his working conditions. Claimant also asserts that all doubtful questions of fact must be resolved in his favor. The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). That the evidence is susceptible to other findings or inferences does not demonstrate error in the administrative law judge's decision. *See, e.g., Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

In weighing the evidence as a whole, the administrative law judge found that claimant produced his testimony and that of a co-worker that the air quality on the ship was poor, while the ship's logs indicate that the ventilation system was operational and technical data interpreted by Mr. van Hemmen establishes that the system was sufficient to remove fumes from the hold of the ship. Decision and Order at 26. The administrative law judge found that claimant and his co-workers had a tendency to exaggerate their testimony, but that employer did not establish that the ventilation system actually was working properly on the day of claimant's stroke, although she inferred that it was, based

on the absence of complaints on the ship's log. Moreover, the administrative law judge found that claimant produced no evidence based on a reasoned medical opinion that if automobile fumes were present they actually contributed to his stroke. Dr. Kipen stated that automobile fumes most likely would not have contributed to the stroke. The administrative law judge found that the evidence offered by the parties is, at best, in equipoise. Therefore, the administrative law judge concluded that claimant did not establish by a preponderance of the evidence that harmful levels of automobile fumes were present in the ship's hold and that his stroke is related to his working conditions.

In *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), the Supreme Court held that Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), which places the "burden of proof on a proponent of a rule or order," applies to cases arising under the Act. *Id.*, 512 U.S. at 271, 28 BRBS at 44-45(CRT). Thus, the Court held that application of the "true doubt" rule, violates the APA by easing the claimant's burden of proving the validity of his claim.[2] *Id.*, 512 U.S. at 276, 280-281, 28 BRBS at 46, 48(CRT). Therefore, we reject claimant's contention that the administrative law judge was required to find that there was air pollution on board the M/V Asian Empire on the day of claimant's stroke.[3] *See also Holmes v. Universal Maritime Corp.*, 29 BRBS 18 (1995) (Decision on Reconsideration). Moreover, we affirm as supported by substantial evidence the administrative law judge's finding that claimant did not establish by a preponderance of the evidence that his stroke on May 6, 2005, was caused or contributed to by his working conditions that day. *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997). Therefore, we affirm the administrative law judge's denial of benefits.

[2] Under the "true doubt rule," if the evidence was found to be in equipoise, the administrative law judge was required to find in favor of the claimant. *See, e.g., Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

[3] In his supplemental brief, claimant reiterated his contention that the administrative law judge erred by failing to resolve all doubtful questions of fact in his favor. Inasmuch as we reject claimant's contention, we need not address employer's assertion that claimant's supplemental brief was not timely filed in reply to its response brief. *See* 20 C.F.R. §802.213(a).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

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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JUDITH S. BOGGS
Administrative Appeals Judge