BRB Nos. 12-0359
and 12-0359A

ROBERT HILL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CASCADE GENERAL	)	DATE ISSUED: 02/27/2013
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston Bunnell & Flynn, LLP), Portland, Oregon, for claimant.

Norman Cole (Sather Byerly & Holloway), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer/carrier cross-appeals, the Decision and Order Denying Benefits (2010-LHC-1309) of Administrative Law Judge Russell D. Pulver 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked off and on in the Portland, Oregon, shipyards as a rigger from 1972, including with employer beginning in 1986 and ending with his last day of work on September 29, 2003.[1] In February 2005, claimant went to an emergency room to address an onset of flu-like symptoms and, following a battery of tests, he was diagnosed with renal cell carcinoma (RCC). Claimant began treatment with Dr. Tezcan, which included surgery by Dr. Clark on February 10, 2005, to remove his left kidney, followed by chemotherapy. Claimant had additional surgeries in September 2006 and October 2009 to remove enlarged cancerous lymph nodes from his left kidney bed.

Claimant filed a claim for benefits under the Act on September 25, 2008, alleging that his exposure to asbestos, noxious polycyclic aromatic hydrocarbons (PAHs), and organic solvents during his work at the Portland shipyard for employer caused or contributed to his RCC. Employer controverted the claim, asserting that the claim was not timely filed, that there is no causal connection between claimant's condition and his work exposures, and, thus, that the claim is not compensable. In his decision, the administrative law judge initially found that claimant's notice of injury and claim were timely filed pursuant to Sections 12 and 13 of the Act. 33 U.S.C. §§912, 913. On the merits, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his RCC is related to his work exposures but that employer established rebuttal thereof. The administrative law judge then found, based on the record as a whole, that claimant did not establish that the chemicals and fumes to which he was exposed in his work as a rigger caused, contributed, accelerated and/or aggravated his RCC. He thus denied the claim for benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits, and claimant has replied. In its cross-appeal, employer challenges the administrative law judge's finding that claimant's claim was timely filed. Claimant responds in support of the administrative law judge's finding in this regard.

Claimant contends the administrative law judge erred in finding that the opinions of Drs. Austin and Martin are sufficient to rebut the Section 20(a) presumption with regard to claimant's RCC. Claimant avers that the Section 20(a) presumption could not be rebutted because employer did not offer any evidence that claimant's exposures were materially different from the kinds of PAHs exposures, which Dr. Harris opined, increase the risk of RCC. Claimant maintains that without evidence that claimant's exposure did not include one of the PAHs that is a "strong carcinogen" for RCC, there is no substantial evidence to rebut the Section 20(a) presumption.

[1]Claimant was terminated from employer for reasons unrelated to any injury.

It is undisputed that claimant is entitled to the Section 20(a) presumption that his RCC is due at least in part to his occupational exposures while working for employer. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). Therefore, the burden shifted to employer to produce substantial evidence that claimant's RCC is not work-related. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has stated that employer's burden on rebuttal is to produce "evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT); *see also Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Employer's burden on rebuttal is one of production only, not one of persuasion. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). An employer satisfies this burden of production when it presents evidence that could satisfy a reasonable fact-finder that the employee's injury was not causally related to his employment. *Id.*, 608 F.3d at 651, 44 BRBS at 50(CRT); *see also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 55, 44 BRBS 13, 17(CRT) (1st Cir. 2010); *Rainey v. Director, OWCP*, 517 F.3d 632, 637, 42 BRBS 11, 14(CRT) (2d Cir. 2008); *American Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). The opinion of a physician, given to a reasonable degree of medical certainty, that no relationship exists between an injury and an employee's employment is sufficient to rebut the presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *see also Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT).

In finding that employer established rebuttal of the Section 20(a) presumption, the administrative law judge relied on the opinions of Drs. Martin, Austin and Smith. Dr. Martin, after reviewing claimant's statements regarding his occupational exposures in conjunction with medical literature regarding the potential of a causal relationship between RCC and those occupational exposures, concluded, "based on a standard of reasonable medical probability," that the chemicals and fumes claimant encountered during his shipyard employment did not contribute, hasten, accelerate, or aggravate his RCC. EX 49. Dr. Austin similarly stated that while claimant experienced greater PAHs and organic solvent exposures than someone not in his occupation, there is insufficient evidence to associate his occupational exposures with an increased risk of RCC.[2] EX 61.

[2]Dr. Austin stated that while there is convincing evidence that chronic exposure to the PAHs in coke oven fumes increased the risk of RCC, claimant was not a coke oven worker, such that this type of exposure to PAHs would not apply to him. EX 61. In his decision, the administrative law judge referenced the Encyclopedia of Occupational Health and Safety to confirm Dr. Austin's conclusion that since claimant was not a coke oven worker, he could not have had the chronic exposure to the PAHs in coke oven fumes which has been shown to increase the risk of RCC. While the record reveals that the administrative law judge did not provide notice of his intention to take judicial notice

Id. Dr. Austin thus concluded that since claimant possesses several substantial and common risk factors for RCC and no risk factor associated with occupational exposure (not considering asbestos) has been established, claimant's RCC most likely resulted from his smoking and obesity.[3] *Id.* The administrative law judge rationally found that the opinions of Drs. Martin, Austin and Smith are specific and comprehensive enough to sever the potential connection between claimant's work environment and his RCC. *Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT); *see also Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT). Contrary to claimant's contention, the doctors acknowledged that claimant was exposed to PAHs in his employment, but opined that there is no association between those exposures and his RCC.

As the opinions of Drs. Martin, Austin and Smith constitute substantial evidence that claimant's occupational exposures with employer did not cause, contribute, hasten, accelerate, or aggravate his RCC, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See Hawaii Stevedores*, 608 F.3d at 651, 44 BRBS at 50(CRT); *see also Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Ramey*, 134 F.3d 954, 31 BRBS 206(CRT); *O'Kelley*, 34 BRBS 39. Moreover, claimant has not raised any allegation of error in the administrative law judge's finding, based on the record as a whole, that claimant did not establish that the chemicals and fumes to which he was exposed in his work as a rigger caused, contributed, accelerated and/or aggravated his RCC. Thus, we affirm the administrative law judge's denial of benefits as claimant has not established an essential element of his claim, i.e., a causal connection between his

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of this reference work, 29 C.F.R. §18.45; *Jordan v. James G. Davis Constr. Corp.*, 9 BRBS 528.9, 530 (1978); *see generally Shrout v. General Dynamics Corp.*, 27 BRBS 160 (1993), any error is harmless because claimant has failed to demonstrate he was prejudiced by this action, given the administrative law judge's reliance on other evidence to rebut the Section 20(a) presumption. *See generally Shinseki v. Sanders*, 556 U.S. 396 (2009).

[3]Dr. Smith concluded that there is no association between asbestos and kidney cancer, and more specifically, he stated, "to a reasonable medical certainty," that he could not find any scientific evidence that claimant's asbestos exposure in any quantity has caused, accelerated, or contributed in any way to his RCC. HT at 132, 161, 169. Claimant has not raised any error in the administrative law judge's finding that Dr. Smith's opinion rebuts the Section 20(a) presumption regarding a causal connection between claimant's occupational exposure to asbestos and his RCC. That finding is therefore affirmed as unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

work for employer and his RCC.[4] *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[4]As employer concedes, the affirmance of the administrative law judge's denial of benefits renders moot the contentions raised in its cross-appeal. Thus, we will not address them in this decision.