BRB No. 09-0678

WARREN JOSEPH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 01/28/2010
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Warren Joseph, Pascagoula, Mississippi, *pro se*.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2008-LHC-1453) of Administrative Law Judge C. Richard Avery 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they 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).

While working for employer as an electrician on February 8, 2007, claimant was exposed to smoke and dust from welding that was taking place in the area where he was working. Claimant then left work early and, on February 10, 2007, he was transported to Singing River Hospital where he was diagnosed with septic shock secondary to bacterial community acquired pneumonia. Claimant subsequently treated with a number of

physicians and, after he was released to return to work in mid-March 2007, he returned to work for employer. Claimant continued to feel weak and experience shortness of breath, and he has not engaged in gainful employment since August 7, 2007. Employer voluntarily paid claimant temporary total disability benefits from February 12 to April 4, 2007, and claimant, contending that he sustained work-related "welding fume fever/breathing problems" as a result of his exposure to smoke and dust on February 8, 2007, sought additional benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant was entitled to the benefit of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), linking his pneumonia to his employment with employer. The administrative law judge further found, however, that employer produced substantial evidence sufficient to rebut the presumption. Thereafter, the administrative law judge concluded that claimant did not establish, based upon the evidence of record as a whole, that his pneumonia was related to his employment with employer, and he consequently denied claimant's claim for disability and medical benefits related to that condition.

On appeal, claimant, representing himself, challenges the administrative law judge's denial of his claim for benefits under the Act. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

In the instant case, the administrative law judge properly invoked the Section 20(a) presumption based on the findings that claimant was diagnosed with pneumonia[1]

[1] Claimant states on appeal that his privacy rights under the Health Insurance Portability and Accountability Act (HIPAA) were violated when the medical records documenting his treatment at Singing River Hospital were stolen, tampered with, given to employer, and ultimately entered into evidence by the administrative law judge over his objection. While this is not the proper forum for a claim of a violation of HIPAA, the regulations published by the United States Department of Health and Human Services permit entities covered by HIPAA, such as health care providers, to disclose protected health information to workers' compensation insurers, workers' compensation administrative agencies, or employers without the individual's authorization to the extent that such disclosure is necessary to comply with laws relating to workers' compensation or similar programs, specifically including the Longshore Act. *See* 45 C.F.R. §§164.522(a), 164.512(a), (l). Moreover, employer obtained claimant's records via a subpoena. As the administrative law judge is required to accept into evidence any documents which are relevant to the issues raised before him, *see* 20 C.F.R. §702.388, the administrative law judge committed no error in accepting claimant's medical records into evidence. Additionally, while claimant challenges the administrative law judge's statement that Dr. Cuccia, the physician who treated claimant upon his admission to

and that he was exposed to welding fumes while working for employer. Where claimant has established entitlement to invocation of the Section 20(a) presumption, *see Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989), the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); S*winton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence in the record and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See Ortco Contractors*, 332 F.3d 283, 37 BRBS 35(CRT); *Port Cooper*, 227 F.3d 285, 34 BRBS 96(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1984).

In finding that employer rebutted the presumption with regard to claimant's pneumonia, the administrative law judge relied upon the opinions of Drs. Travers, Taylor, and Tejedor. The administrative law judge stated that Dr. Tejedor concluded that claimant's pneumococcal pneumonia and sepsis were not related to his inhalation of fumes 24 to 48 hours prior to the diagnosis of his condition. Decision and Order at 5 – 6. The administrative law judge found that Drs. Travers and Taylor similarly opined that claimant's exposure to welding fumes had not contributed to his diagnosed pneumonia. *Id.* As these opinions sever the presumed causal link between claimant's pneumonia and his employment with employer, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See Prewitt*, 194 F.3d 684, 33 BRBS 187(CRT); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

In addressing the evidence on causation as a whole, the administrative law judge found that every physician who examined claimant agreed that claimant's diagnosed pneumonia was not caused by his exposure to welding fumes. Specifically, the administrative law judge found that Dr. Travers, who noted that community-acquired pneumonia is bacterial, opined that claimant's exposure to welding fumes had not contributed to his pneumonia. *See* EX 11 at 11. The administrative law judge found that Dr. Taylor, a pulmonary specialist, similarly opined that claimant's exposure to welding

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Singing River Hospital on February 10, 2007, ultimately changed his diagnosis of claimant's condition to one of pneumonia, the administrative law judge's finding in this regard is fully supported by the hospital medical records pertaining to claimant's stay during this period of time. *See* EX 10 at 20, 25, 36, 42 54, 90 - 97.

fumes did not contribute to his pneumonia. *See* EX 12 at 4. Lastly, the administrative law judge stated that Dr. Tejedor, a pulmonologist who is Chief of Pulmonary Medicine for the Department of Veteran's Affairs, could not relate claimant's pneumonia and sepsis to his inhalation of fumes, *see* EX 9 at 76; moreover, after reviewing claimant's medical records, Dr. Tejedor concluded that the diagnosis of pneumonia was correct. *See id.* at 34. Based upon this evaluation of the evidence, the administrative law judge concluded that claimant failed to carry his burden of establishing a causal relationship between his pneumonia and his employment with employer. It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961). In his decision, the administrative law judge discussed the relevant medical evidence of record, and his findings are supported by the record. The record contains no evidence linking claimant's diagnosed pneumonia to his exposure to welding fumes while working for employer; to the contrary, each of the physicians who examined claimant opined that his pneumonia was unrelated to such exposure. We therefore affirm the administrative law judge's determination that claimant failed to establish that his pneumonia was related to his employment with employer. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Sistrunk*, 35 BRBS 171; *Coffey v. Marine Terminals Corp.,* 34 BRBS 85 (2000); *Rochester v. Geo. Washington Univ.,* 30 BRBS 233 (1997).

Claimant next challenges the administrative law judge's statement that Dr. Travers was his choice of physician for the treatment of his pneumonia; additionally, claimant asserts that he is entitled to an assessment pursuant to Section 14(e) of the Act. We reject claimant's contentions. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v .Willamette W. Corp.,* 20 BRBS 184 (1988). In order for a medical expense to be assessed against employer, however, the expense must be both reasonable and necessary, and must be related to the injury at hand. *See Ezell v. Direct Labor, Inc.,* 37 BRBS 11 (2003); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Section 14(e) of the Act, 33 U.S.C. §914(e), provides that if an employer fails to pay any installment of compensation voluntarily with 14 days after it becomes due, the employer is liable for an additional ten percent of such installment, unless it files a timely notice of controversion pursuant to Section 14(d), 33 U.S.C. §914(d), or the failure to pay is excused by the district director based on employer's showing that the non-payment was due to circumstances beyond its control. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990); *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993). We affirm the administrative law judge's finding that claimant selected Dr. Travers as his choice of physician as that finding is supported by substantial evidence. See EX 6 (Change of Physician Form dated February 19, 2007, and

signed by claimant). Moreover, in light of our affirmance of the administrative law judge's determination that no causal relationship exists between claimant's employment and his pneumonia, we affirm the administrative law judge's findings that employer is not liable for the payment of compensation or medical benefits related to the treatment of claimant's pneumonia. As no disability benefits are due claimant, we hold that the administrative law judge committed no reversible error in not addressing claimant's potential entitlement to an assessment pursuant to Section 14(e) of the Act.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge