BRB No. 89-3866

CECILE Y. CHATTERTON (Widow of PATRICK H. CHATTERTON) Claimant-Respondent v. GENERAL DYNAMICS CORPORATION, ELECTRIC BOAT DIVISION Self-Insured Employer-Petitioner and DEPARTMENT OF THE NAVY NAVAL SEA SYSTEMS COMMAND Intervenor	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Matthew Shafner (O'Brien, Shafner, Bantinik, Stuart & Kelly, P.C.), Groton, Connecticut, for claimant.

Merle J. Smith, Jr. (Division Counsel, General Dynamics, Electric Boat Division), Groton, Connecticut, for self-insured employer.

Nanette L Oppenheimer and Catherine Donovan (Office of Counsel, Naval Sea Systems Command), for intervenor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (88-LHC-1927) of Administrative Law Judge David DiNardi 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 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's husband (decedent) allegedly was exposed to harmful conditions, including radiation, during 1966 and from 1973 to 1987, while working as a test mechanic for employer. In 1986, decedent was diagnosed as having Hairy Cell Leukemia (HCL); decedent subsequently died on June 16, 1987, due to gram negative bacterial septicemia which resulted from his HCL.

In his Decision and Order, the administrative law judge determined that claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that his illness was caused by conditions of his employment and that employer had introduced evidence sufficient to establish rebuttal of the presumption. The administrative law judge thereafter resolved the issue of causation based on the record as a whole and concluded that decedent's exposure to radiation, as well as benzene, resulted in his HCL. Accordingly, the administrative law judge awarded claimant temporary total disability benefits for decedent's period of disability prior to his death and death benefits thereafter. 33 U.S.C. §§908(b), 909.

On appeal, employer and intervenor challenge the administrative law judge's invocation of the Section 20(a) presumption and his resolution of the causation issue in claimant's favor based on the record as a whole.[1] Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that decedent's condition was causally related to his employment if she establishes that decedent suffered a harm and that employment conditions existed or an accident occurred which could have caused, aggravated or accelerated the harm. *See, e.g., Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd* 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). The Board and the courts have never required claimant to introduce medical evidence establishing that the conditions to which decedent was exposed in fact caused his disability and death in order to invoke the Section 20(a) presumption. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Once claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976); *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

Initially, the administrative law judge invoked the Section 20(a) presumption to link decedent's HCL and subsequent death as a result of that condition to decedent's working conditions. The administrative law judge then found that the presumption was rebutted by the testimony of Drs.

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[1]By Order dated January 14, 1991, the Board granted the request of the Department of the Navy, Naval Sea Systems Command, to intervene in this case. Intervenor thereafter filed a Petition for Oral Argument; we hereby deny that petition, since the facts and legal contentions are adequately presented in the materials before us and oral argument is not necessary for disposition of this case.

Saenger and Moloney. The administrative law judge's rebuttal finding is unchallenged on appeal. Since the Section 20(a) presumption was rebutted, the administrative law judge properly found it fell out of the case, *see Del Vecchio v. Bowers*, 296 U.S. 280 (1935), and weighed the evidence as a whole. We, thus, need not address the argument that Section 20(a) was not properly invoked. Resolution of the causation issue in this case turns on whether the administrative law judge's finding, based upon the record as a whole, that decedent's HCL was casually related to his employment with employer is supported by substantial evidence.

After setting forth the evidence of record regarding the issue of causation, the administrative law judge determined that claimant had been exposed to radiation while working for employer in excess of the amounts documented by employer. The administrative law judge then credited the testimony of Dr. Ratain over the testimony of Drs. Cullen, Moss, Saenger and Moloney, and concluded that decedent's HCL was causally related to his employment with employer. Dr. Ratain testified that exposure to radiation and benzene is associated with leukemia, that HCL is an extremely rare form of adult leukemia, and that research has established that patients with HCL are more frequently involved in occupations with high risks of radiation exposure; thus, Dr. Ratain concluded that there could be no other event related to decedent's HCL than his exposure to radiation. In contrast, Drs. Cullen, Moss, Saenger and Moloney each opined that decedent's HCL was unrelated to his exposure to radiation while working for employer.

In evaluating the medical testimony and evidence of record regarding the alleged causal relationship between claimant's HCL and his exposure to radiation while working for employer, the administrative law judge determined that, in his judgment, decedent had been exposed to doses of radiation in excess of those documented by employer. Acknowledging that this issue had not been discussed by the parties in their respective briefs, the administrative law judge, after noting that decedent had worn his radiation-detecting dosimeter incorrectly for five months, concluded that he was "not persuaded that Decedent was exposed to relatively safe or low doses of radiation" while working for employer. *See* Decision and Order at 26. This finding regarding the extent of claimant's exposure to radiation affects the administrative law judge's evaluation of the medical evidence.

Employer entered into evidence detailed accounts of the amount of total work-life radiation to which decedent was exposed, *i.e.*, 6.071 REMs. *See* Rx. 3. Mr. Lavimoniere, employer's senior supervisor of Radiological Health and Dosimetry, testified that following the discovery of decedent's incorrectly-placed dosimeter, employer's and decedent's records were corrected using a worst case scenario so that any exposure decedent may have incurred would be reflected in the records as if the decedent had been working directly next to a radiation source. *See* Lavimoniere Tr. at 70-75, 82, 83-85. This evidence and testimony was unchallenged by claimant. The administrative law judge, however, concluded that decedent had been exposed to extensive unrecorded radiation based on the testimony of claimant and decedent's son that decedent suffered from dermatitis on his hand following an exposure incident in 1974. This conclusion is not supported by the medical evidence. Regarding the condition affecting decedent's hand, Dr. Saenger opined that the onset of radiation-caused dermatitis would require an exposure of at least 200 REMS and would result in a transient redness of the skin and erthemia. Claimant and her son, however, described decedent's hand

condition as white and long-lasting. Furthermore, the medical evidence of record reflects that a medical review of decedent performed one day after the 1974 incident described decedent's skin condition as chronic,[2] and that Dr. Berman repeatedly observed that decedent had no acute side effects from his exposure and that his skin was "unremarkable." *See* CX-3, 8, 10. Although it is well-established that an administrative law judge may evaluate the evidence before him and draw his own inferences from it, *see John W. McGrath v. Hughes*, 289 F.2d 403 (2d Cir. 1961), an administrative law judge may not substitute his expertise for that of medical professionals. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 280 (1990). In the instant case, the administrative law judge's conclusion that claimant's skin condition establishes extensive radiation exposure is unsupported by the medical evidence. As the record contains no evidence sufficient to establish that decedent's radiation exposure was greater than that recorded and documented by employer, we reverse the administrative law judge's finding that decedent was exposed to radiation while working for employer in excess of that documented by employer, since that finding is unsupported by the evidence of record. *See generally Corodreo v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

In evaluating the medical evidence, the administrative law judge stated that while he was "most impressed with the professional qualifications of Dr. Moloney and Dr. Saenger," he could not accept their unqualified opinions that radiation exposure did not cause decedent's HCL. Decision and Order at 27. Specifically, the administrative law judge stated, without elaboration, that the "basis of [these physicians] dogmatic denial is highly questionable as it appears to be based on an incomplete understanding of the basis of the HCL line of cellular differentiation." In addition, the administrative law judge stated their conclusion failed because it was based upon "their opinion that Decedent had insufficient exposure to cause any form of leukemia." *Id.* Dr. Saenger, who is Board-certified in radiology and nuclear medicine, testified that the decedent's exposure level is not considered to be harmful and is not enough to result in any biological effect.[3] He further stated that HCL is not considered radiogenic or resulting from radiation exposure. *See* Tr. at 163-177. In reaching this conclusion, Dr. Saenger noted that the International Code for Diagnosis excludes HCL from the radio-epidemiological tables and that a National Institute of Health epidemiological study does not consider HCL to be caused by ionizing radiation. *Id.* at 163-187. Similarly, Dr. Moloney, who served as Deputy Director of Research for the Atomic Bomb Casualty Commission, opined that he has never seen a case of HCL caused by any level of radiation exposure and that decedent's radiation exposure would not have caused a detectable effect on the decedent. *See* Rx. 6; Tr. at 189-215.

Additionally, the administrative law judge declined to accept the opinions of Drs. Cullen and

[2]*Dorland's Illustrated Medical Dictionary* (25th ed.) defines the term 'chronic' as "persisting over a long period of time."

[3]Dr. Saenger is additionally a Professor Emeritus of radiology at the University of Cincinnati College of Medicine and was the Director of the Eugene L. Saenger Radioisotope Laboratory at that university from 1950 to 1987.

Moss, stating that, subsequent to their testimony, new research had been conducted which concludes that a relationship exists between HCL and radiation. *See* Decision and Order at 26-27. The record does not support the administrative law judge's conclusion that new research undermined those doctors' opinion. The new research specifically identified by the administrative law judge was published in 1984 at the latest, while Drs. Cullen and Moss offered their opinions in 1986. *Compare* RX-7, 8 to RX-21, 23, 26, 31. In addition to having been conducted prior to the testimony of Drs. Cullen and Moss, the research findings expressed in the reports cited by the administrative law judge appear to support the conclusions reached by Drs. Cullen and Moss.[4] The 1980 Caldwell report, for example, states that "[HCL] may be related to chronic lymphocytic leukemia, which is not associated with radiation exposure." *See* RX-21 at 1578. Similarly, the 1984 Golomb study noted that "findings from studies investigating the relationship between ionizing radiation and chronic leukemia forms, including hairy cell leukemia, have been either negative or unconvincing," *see* RX-31 at 680, while the 1980 Stuart and Keating study did not affirmatively conclude that HCL could result from radiation exposure. *See* RX-26.

While it is well established that, in adjudicating a claim, an administrative law judge is not bound to accept the opinion or theory of any particular medical examiner, *see Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), the administrative law judge, in rendering a decision, must adequately detail the rationale behind his decision; he must analyze and discuss the medical evidence of record; and he must explicitly set forth the reasons as to why he has accepted or rejected such evidence. *See, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *see also* 5 U.S.C. §557(c)(3)(A). In the instant case, the administrative law judge specifically rejected the testimony of Drs. Moloney and Saenger due, at least in part, to his unsupported determination that decedent had been exposed to a greater amount of radiation than those physicians had considered in rendering their respective opinions. As we have reversed the administrative law judge's unsupported finding regarding decedent's radiation exposure, we must vacate the administrative law judge's credibility determinations regarding these two physicians. We additionally vacate the administrative law judge's decision to discredit the opinions of Drs. Cullen and Moss based upon a determination that subsequent medical reports undermine their testimony since, as discussed, those reports actually pre-date the testimony of Drs. Cullen and Moss and appear to support their theories regarding the lack of a relationship between HCL and radiation exposure. This case must be remanded to the administrative law judge for reconsideration of the causation issue. On remand, the administrative law judge must reconsider the medical evidence of record in light of decedent's documented exposure to radiation, as well as the chronological sequence of the medical reports documenting the ongoing research involving the possible relationship between HCL and radiation exposure.[5]

[4]Dr. Cullen opined that the level of decedent's exposure to radiation was too low to cause HCL. RX-7. Dr. Moss, after noting that the most recent study performed by Dr. Golomb found that there was no association between radiation exposure and HCL, similarly opined that no clear association existed between radiation exposure and the development of HCL. RX-8.

[5]We note that, as employer contends, the administrative law judge adopted substantial sections of claimant's brief in his discussion of the medical evidence of record. Although it is not *per se* error for an administrative law judge to adopt or to incorporate verbatim language from a party's pleading,

Lastly, employer contends that the administrative law judge erred in addressing decedent's possible exposure to benzene while working for employer. We agree. The administrative law judge found that employer had failed to establish that decedent's HCL "was not caused or contributed to by any environmental work agent." Specifically, the administrative law judge noted that employer had failed to address decedent's incidental exposure to solvents such as benzene. *See* Decision and Order at 28. Claimant's LS-203 Claim for Compensation, and employer's subsequent Notice of Controversion, however, reveal that the instant claim for compensation under the Act was based solely upon decedent's alleged exposure to radiation while working for employer. *See* CX 16; RX 1. Furthermore, claimant's counsel's opening statement at the hearing refers only to a claim based on radiation exposure. Tr. at 27-29. Although it is within the administrative law judge's discretionary authority to consider new issues, *see* 20 C.F.R. §702.336, an administrative law judge may not raise a new issue *sua sponte* in his Decision and Order. *See Bukovac v. Vince Steel Erection Co., Inc.*, 17 BRBS 122 (1985). Rather, should the administrative law judge determine that a case presents an issue not raised by the parties, he must give the parties notice that he is raising a new issue and hold the record open in order to provide them an opportunity to respond. *Id.;* 20 C.F.R. §702.336(b). As the administrative law judge in the instant case failed to give any indication to the parties that he would consider decedent's possible exposure to solvents, specifically benzene, when addressing the issue of causation, his findings regarding decedent's possible exposure to solvents are vacated; on remand, the record must be reopened in order to allow employer the opportunity to respond to this new issue.

Accordingly, the administrative law judge's Decision and Order awarding benefits is is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

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see Williams v. Newport News Shipbuilding & Dry Dock Co., 17 BRBS 61 (1985), an administrative law judge's incorporation of factual or legal assertions from a party's brief is impermissible to the extent it prevents independent review of the evidence by the adjudicator. Thus, on remand, the administrative law judge must independently evaluate the evidence of record regarding the possible causal relationship between decedent's HCL and his radiation exposure.

NANCY S. DOLDER
Administrative Appeals Judge