BRB No. 92-1968

ROBERT DURBIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KNIGHT & CARVER YACHT CONSTRUCTION	)	DATE ISSUED:
	)	
and	)	
	)	
AMERICAN INTERNATIONAL ADJUSTMENT COMPANY, INC.	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

David I. Fallk (Law Offices of Gary L. Mark), San Diego, California, for claimant.

Bruno Giuffida (Mullen & Plummer, P.C.), San Diego, California for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (91-LHC-2598) of Administrative Law Judge Alfred Lindeman 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant worked for employer from 1983 until February 1988 as a fiberglass technician, during which time he was exposed to various resins and epoxies, solvents such as acetone and methylethyl-ketone, and formaldehydes. Near the end of 1986, claimant began to complain of tiredness and flu-like symptoms. In June 1987, after attempting to donate blood, claimant was

informed that he had an elevation of a liver enzyme and was advised to see a physician. During this period, claimant developed a sleeping disorder which caused excessive sleep at night and constant drowsiness during the day. Although claimant was laid off due to a reduction in force in February 1988, his symptoms have continued.

Claimant was examined several times in 1988 by Dr. Gard, who opined that claimant's sleep disorder was due to his exposure to toxic chemicals at work. CX 4. Claimant was subsequently referred to Dr. Bellucci, a psychologist who examined claimant in October and November 1988. Dr. Bellucci diagnosed organic brain syndrome and dysthymic disorder, ruled out narcolepsy, and recommended that claimant be considered totally disabled, stating that claimant's memory loss and extreme weakness were characteristic of chemical toxic exposure. CX 3. In September 1989, claimant was examined by Dr. Greenberger, who opined that since claimant's tiredness and sleepiness persisted away from the work-place, his sleep disorder was not due to occupational exposure. Dr. Greenberger thereafter affirmed this opinion in a December 1991 report. EX 1. Lastly, claimant was examined by Dr. Heuser, a neurologist, in January 1990, who ruled out anemia, hypothyroidism, diabetes and narcolepsy, and determined that Klein-Levin syndrome was highly unlikely; Dr. Heuser concluded that the only explanation for claimant's organic brain syndrome was his exposure to toxic chemicals. CX 2.

Previously, claimant filed a workers' compensation claim with the State of California in November 1988. After a hearing before a state administrative law judge, that claim was denied on March 13, 1990 based on the opinion of Dr. Greenberger. EX 4. Claimant's motion for reconsideration was denied by the California Workers' Compensation Appeals Board on April 26, 1990. EX 9. Subsequently, claimant entered the Scripps Clinic, a center for sleep disorders, where polysomnographies were conducted during the nights of October 9 and 10, 1990. These tests were supervised by Dr. Erman, a Board-certified psychiatrist specializing in sleep disorders; the findings of these tests confirmed that claimant did not suffer from narcolepsy. In a letter dated December 9, 1991,[1] Dr. Erman stated that, based on these findings and a description of toxin induced sleep disorder in *The International Classification of Sleep Disorders*, claimant's condition was most likely a toxin induced sleep disorder. CX 1.

Claimant filed a concurrent claim for benefits under the Act. In his Decision and Order, the administrative law judge, after noting the different standards of proof between the California and federal proceedings regarding claimant's claims, rejected employer's argument that, pursuant to the denial of claimant's state claim, claimant's claim under the Act is barred by the principles of *res judicata* and collateral estoppel. The administrative law judge found that claimant established his *prima facie* case, but that, by virtue of Dr. Greenberger's opinion, employer established rebuttal of the Section 20(a), 33 U.S.C. §920(a), presumption. Thereafter, the administrative law judge considered the record as a whole and concluded that claimant's sleep disorder was caused by his work-related exposure to toxic chemicals. He further found that claimant is permanently totally

[1]The physician testified that this letter was incorrectly dated, and was sent to claimant's attorney on December 9, 1990. Tr. at 167.

disabled as a result of his sleep disorder, and awarded claimant temporary total disability benefits from February 10, 1988 through January 15, 1990, and permanent total disability benefits thereafter. 33 U.S.C. §908(a), (b).

On appeal, employer contends that since claimant's state workers' compensation claim had been previously denied, the administrative law judge should have barred claimant's claim under the Act under the doctrines of *res judicata* and collateral estoppel. In the alternative, employer argues that the medical evidence of record does not support the administrative law judge's conclusion that claimant's work-related chemical exposure caused his sleep disorder. Claimant responds, urging affirmance of the administrative law judge's award of benefits.

Employer initially contends that the administrative law judge erred in failing to find that the doctrines of *res judicata* and collateral estoppel barred claimant's claim under the Act. In support of its contention of error, employer states that the elements of identity of parties and issues exist under both the Act and the California statute, and that the issue decided by the state administrative law judge, *i.e.*, whether claimant's condition was caused by his work environment, was strictly a factual one. While employer is correct in noting that *factual* findings of a state administrative tribunal are entitled to collateral estoppel effect in other state or federal administrative tribunals, *see Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 12 BRBS 828 (1980); *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988), the issue of causation is a mixed question of fact and law, and collateral estoppel effect can only be given to such questions when the legal standards are the same in the two jurisdictions. *See In Re Peterson*, 451 F.2d 1291 (9th Cir. 1971). In the instant case, administrative law judge specifically noted that the legal standard of proof regarding the issue of causation is different under the California statute and the Act. Specifically, under the Act, if a *prima facie* case is established, the claimant is entitled to the presumption at 33 U.S.C. §920(a) that his injury arose out of and in the course of his employment. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). An employment injury need not be the sole cause of a disability; rather, if the employment aggravates, accelerates, or combines with an underlying condition, the entire resultant condition is compensable. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Upon invocation of the presumption, the burden shifts to the employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton 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, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). In this regard, the United States Court of Appeals for the Ninth Circuit, wherein appellate jurisdiction of this case lies, has stated that even after substantial evidence is produced to rebut the Section 20(a) presumption, the employer still bears the ultimate burden of persuasion. *See Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980); *see also Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991).

Employer concedes that California's workers' compensation statute, in contrast to the Act, does not contain a similar presumption of causation, and that it was claimant's burden in that state's

forum to establish, by a preponderance of the evidence, that his sleep disorder was caused by his work environment. Contrary to employer's assertion, we do not consider the difference in the burdens of proof to be a meaningless procedural distinction; where a claimant has a different burden of proof under a state statute for establishing whether an injury arose out of and in the course of employment, the state tribunal's finding cannot be given *res judicata* or collateral estoppel effect. *See*, *e.g.*, *Smith v. ITT Continental Baking Co.*, 20 BRBS 142 (1987). Accordingly, as it is uncontroverted that the burden of proof for establishing causation under the California statute is different than the burden of proof required under the Act, the doctrines of *res judicata* and collateral estoppel cannot be applied in this case. Therefore, the administrative law judge's conclusion that he was not bound by the conclusions of the California proceedings arising from claimant's claim for state benefits is in accordance with law and is affirmed.[2]

In the alternative, employer contends that the administrative law judge erred when, after determining that employer had rebutted the Section 20(a) presumption, he concluded that employer had not met its ultimate burden of persuasion that claimant's sleep and fatigue disorder was not caused by his work-related exposure to toxic chemicals. Where, as in the instant case, employer presents evidence sufficient to establish rebuttal of the Section 20(a) presumption, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole, with employer bearing the ultimate burden of persuasion. *See Parsons*, 619 F.2d at 38, 12 BRBS at 234; *Wright*, 25 BRBS at 161. In the instant case, the administrative law judge, after finding rebuttal of the presumption, reviewed the evidence as a whole and credited the testimony of Dr. Erman, who opined that claimant's condition was caused by his exposure to toxic chemicals at work, over that of Dr. Greenberger, since Dr. Erman was claimant's treating physician, Dr. Erman's expertise and qualifications are directly related to the area of sleep disorders, and his opinion was supported by not only the opinions of Drs. Heuser, Bellucci and Gard,[3] but the medical literature as well. Decision and Order at 4. In contrast, Dr. Greenberger, who acknowledged that he does not treat patients with sleep disorders but rather refers those patients to other physicians, diagnosed claimant's condition as hypersomnia which he could not relate to any cause. *See* Tr. at 117, 136-137. 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). Rather, the administrative law judge is entitled to evaluate the credibility of all witnesses and

[2]We also note that Dr. Erman's opinion, which was credited by the administrative law judge, was not considered in the state proceedings, as Dr. Erman examined claimant subsequent to the denial of the state claim.

[3]Employer argues that it was error for the administrative law judge to rely on the opinion of Dr. Gard, since that physician's medical license has been revoked. We reject employer's argument. The administrative law judge noted that Dr. Gard's license has been revoked, *see* Decision and Order at 4 n.1, and denied claimant's request to be reimbursed for medical expenses he incurred with regard to Dr. Gard's treatment. In fact, the administrative law judge did not rely on Dr. Gard's opinion, but simply noted that his opinion was in concurrence with Dr. Erman's.

to draw his own inferences from the evidence.[4] *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Based upon the record before us, we cannot say that the administrative law judge's decision to credit the testimony of Dr. Erman over that of Dr. Greenberger is inherently incredible or patently unreasonable; accordingly, we affirm the administrative law judge's determination that claimant's sleep and fatigue disorder syndrome is causally related to his work-related exposure to toxic chemicals, and his consequent award of benefits under the Act. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990).

[4]Contrary to employer's assertion, Dr. Erman did not retreat from his original diagnosis. On cross-examination, Dr. Erman testified that he could not state with any assurance that claimant's condition was related to his exposure to formaldehyde alone. Tr. at 186. He then testified:

> What I can state is this - that a category of toxin-induced hypersomnia exists and is described; that he has objective hypersomnia; that the temporal relationship of the appearance of the hypersomnia to exposure at work and the absence of other explanations for his hypersomnia, suggested to me that this was the most appropriate and most correct diagnostic category within which to place him.

Tr. at 187.

Accordingly, the Decision and Order - Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge