

HENRI TARDIFF)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BATH IRON WORKS CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	
)	
and)	
)	DATE ISSUED:
COMMERCIAL UNION INSURANCE)	
COMPANY)	
)	
Carrier-Respondent)	
)	
and)	
)	
LIBERTY MUTUAL INSURANCE)	
COMPANY)	
)	
Carrier-Respondent)	
)	
BIRMINGHAM FIRE INSURANCE)	
COMPANY)	
)	
Carrier-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Eric Feirtag, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (McTeague, Higbee, Libner, MacAdam, Case and Watson), Topsham, Maine, for claimant.

James C. Hunt (Robinson, Kriger, McCallum & Greene, P.A.), Portland, Maine, for Commercial Union Insurance Company.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-LHC-1496) of Administrative Law Judge Eric Feirtag 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 the 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).

Claimant, a pipefitter for employer from 1954 until the late 1970's who was subsequently employed in employer's tin shop until 1991, sought permanent total disability compensation under the Act, contending that he was forced to retire due the combined effects of his pre-existing heart disease and asbestosis. At the hearing before the administrative law judge, the parties stipulated that claimant developed asbestosis as the result of his employment with employer, that claimant has been permanently totally disabled since he terminated his employment in 1991, that for many years prior thereto he had been afflicted with a cardiac condition unrelated to his employment, and that claimant's average weekly wage at the time of his retirement was \$412.55. The cause of claimant's permanent total disability remained in dispute, however, with employer contending it was due entirely to the effects of his pre-existing heart disease.

In his Decision and Order, after considering the medical evidence of record, the administrative law judge determined that employer was not liable for disability compensation because claimant's total disability was entirely attributable to the effects of his non-work-related heart disease, noting that claimant continued to work steadily until he underwent heart catheterization surgery in June 1991. Inasmuch as it was undisputed that claimant suffered from work-related asbestosis, however, the administrative law judge awarded claimant medical benefits and determined that Commercial Union Insurance Company was liable as the responsible carrier.

Claimant appeals, arguing that the administrative law judge's finding that asbestosis was not a contributory factor in causing his disability is inconsistent with applicable law and is not supported by substantial evidence. Claimant also contends that the administrative law judge erred by failing to consider whether claimant's heart disease was caused in part by his employment, and argues that even if his heart disease alone caused him to stop working, he is at least entitled to benefits for his respiratory impairment as a voluntary retiree under Section 8(c)(23) of the Act, 33 U.S.C. 908(c)(23)(1988). Employer and Commercial Union respond, urging that the administrative law judge's finding regarding the cause of claimant's disability be affirmed and that his remaining arguments not be addressed as these arguments are being made for the first time on appeal. Self-insured employer, Liberty Mutual Insurance Company, and Birmingham Fire Insurance Company have filed letters of non-participation.

We agree with claimant that the administrative law judge's analysis of the cause of his total disability does not comply with applicable law. In establishing the cause of a disabling condition, claimant is aided by the Section 20(a) presumption, 33 U.S.C. §920. *See Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 118-119 (1995). In order to be entitled to the Section 20(a) presumption,

however, claimant bears the burden of establishing that he suffered an injury and that an accident or working conditions existed that could have cause the harm. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). Once the Section 20(a) presumption is invoked, employer must rebut it by producing facts to show that claimant's employment did not cause, aggravate, or contribute to his disability. *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2nd Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993)

In the present case, as it is undisputed that claimant suffers from asbestosis as a result of asbestos exposure while working for employer, we hold that he is entitled to invocation of the Section 20(a) presumption as a matter of law. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Inasmuch as claimant is entitled to invocation of the Section 20(a) presumption and the administrative law judge did not analyze the record evidence in terms of the Section 20(a) presumption in attributing claimant's permanent total disability entirely to his heart disease, we vacate this finding and remand for him to consider whether employer has produced sufficient evidence to rebut the Section 20(a) presumption. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989). If, on remand, the administrative law judge finds the Section 20(a) presumption rebutted he must then weigh the record as a whole to determine the cause of claimant's disability. If the administrative law judge determines on remand that claimant's permanent total disability was due, even in part, to asbestosis, he should enter an award consistent with the stipulations of the parties and consider any remaining issues necessary to the resolution of the claim.¹

¹If, on remand, the administrative law judge determines that claimant's asbestosis was not a contributing factor in his permanent total disability, he may consider claimant's entitlement to permanent partial disability compensation under Section 8(c)(23), 33 U.S.C. §908(c)(23), based on claimant's pulmonary impairment; a claim for total disability benefits includes any lesser degree of disability. *Rambo v. Director, OWCP*, F.3d. , No. 92-70783 (9th Cir. April 10, 1996).

Accordingly, the administrative law judge's determination that claimant's permanent total disability is unrelated to his work-related asbestosis is vacated, and the case is remanded for further consideration of this issue consistent with this opinion. In all other respects, his Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge