BRB No. 93-1370

CALVIN T. KANESHIRO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOLMES & NARVER, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANIES	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

Ronald P. Tongg (Tongg and Tongg), Honolulu, Hawaii, for claimant.

James N. Duca and Robert C. Kessner (Kessner Duca Umebayashi Bain & Matsunaga), Honolulu, Hawaii, and B. James Finnegan (Finnegan & Marks), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (91-LHC-2518) of Administrative Law Judge G. Martin Bober rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

Claimant was employed by employer as a waiter/cook on the Enewetok and Bikini Atolls from January 20, 1954, to January 19, 1955, from February 16, 1955, to November 15, 1955, and from December 16, 1955, to June 11, 1956, during which time those atolls were being utilized by the Atomic Energy Commission and Joint Chiefs of Staff in connection with the United States' atomic

weapons testing program. In January 1989, claimant was diagnosed with chronic granulocytic leukemia (CGL). Claimant thereafter sought total disability benefits under the Act, alleging that his exposure to radiation during the course of his employment with employer resulted in his CGL.

In his Decision and Order, the administrative law judge found, *inter alia*, that, as claimant established his *prima facie* case based upon his exposure to radiation and the diagnosis of CGL, claimant is entitled to the presumption of causation at 33 U.S.C. §920(a), and that employer had failed to rebut that presumption. Accordingly, the administrative law judge awarded claimant temporary total disability compensation commencing January 17, 1989, and continuing, interest on any accrued unpaid compensation benefits, penalties under Section 14(e), 33 U.S.C. §914(e), for the period from January 17, 1989, to December 8, 1989, and medical benefits.

On appeal, employer challenges the administrative law judge's findings regarding the existence of working conditions which could have caused claimant's CGL. Alternatively, employer contends that the administrative law judge erred in determining that it failed to rebut the Section 20(a) presumption with regard to causation. Claimant responds, urging affirmance of the administrative law judge's decision.[1]

[1]The Board denied claimant's request to expedite this appeal by Order dated August 30, 1995. We note that in seeking expedited review claimant asserted as a basis payments due on loans taken to pay fees and costs, including those of his expert witness in this case. However, no attorney's fees or costs payable by claimant were awarded by the administrative law judge. *See* 33 U.S.C. §928(c). Rather, all fees and costs awarded by the administrative law judge were assessed against employer. *See* 33 U.S.C. §928(b). Since an award of an attorney's fee does not become effective and is thus not enforceable until all appeals are exhausted, *see Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982); *Williams v. Halter Marine Service, Inc.*, 19

Employer initially contends that the administrative law judge erred in invoking Section 20(a), asserting that he erred in finding that claimant established the existence of working conditions which could have caused his CGL. We reject this contention. Claimant must establish a *prima facie* case in order to invoke Section 20(a). Claimant bears the burden of proving that he sustained an injury or harm, and that working conditions existed that could have caused the injury or harm, in order to demonstrate a *prima facie* case. *See Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Volpe v. Northeast Marine Terminals*, 14 BRBS 17 (1981), *rev'd on other grounds*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). In establishing his *prima facie* case, claimant is not required to introduce affirmative medical evidence establishing that the working conditions in fact caused the harm; rather, claimant must only show the existence of working conditions which could conceivably cause the harm alleged. *See Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989).

In the instant case, it is uncontroverted that claimant suffers from CGL; claimant, therefore, has established a harm. Moreover, it is undisputed that claimant was exposed to radiation while employed by employer. Employer, however, contends that, although claimant had been exposed to at least 1.13 rems of radiation during his employment, this level of exposure was insufficient to cause his CGL.[2] The administrative law judge determined that, even if employer's estimated exposure figure were accurate, such an exposure constituted working conditions which could have caused claimant's condition. As noted above, claimant is not required to introduce medical evidence establishing that the conditions to which he was exposed in fact caused his harm in order to invoke the Section 20(a) presumption. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*,

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BRBS 248 (1987), this fee order is not subject to enforcement during the pendency of employer's appeal. *See Thompson v. Potashnik Construction Co.*, 812 F.2d 574 (9th Cir. 1987). Accordingly, as counsel's fees and costs of litigations, including expert witness fees, if any are ultimately due after remand, are payable by employer, any attempt to obtain payment of any fees or costs from claimant is a violation of the Act. 33 U.S.C. §928(e).

[2]Claimant asserts that he was exposed to approximately 6.3 rems of radiation during his employment with employer.

455 U.S. 608, 14 BRBS 631 (1982). In this case, it is undisputed that claimant sustained some degree of radiation exposure. The administrative law judge also relied on evidence indicating a relationship between radiation exposure and CGL. Based on these facts, the administrative law judge did not err in finding claimant established the working conditions element of his *prima facie* case. Thus, we affirm the administrative law judge's invocation of the Section 20(a) presumption. *See Sinclair*, 23 BRBS at 148.

Employer next challenges the administrative law judge's finding that claimant's medical condition is related to his employment with employer. Specifically, employer alleges that the administrative law judge erred in determining that it failed to rebut the Section 20(a) presumption. Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993); *see also Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). In establishing rebuttal of the presumption, proof of another agency of causation is not necessary. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982)(Kalaris, J., concurring and dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied* 467 U.S. 1243 (1984). Rather, the unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). 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); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 270 (1990).

Employer, in contending that the administrative law judge erred in finding that it did not establish rebuttal, specifically challenges that the administrative law judge's credibility determinations and the administrative law judge's failure to address all of the medical evidence of record regarding the lack of a causal relationship between claimant's medical condition and his employment with employer. In the present case, the administrative law judge determined that the opinions of Drs. Goldman and Fabrikant were insufficient to establish rebuttal. Dr. Goldman concluded that there was a 99.5 percent chance that claimant's leukemia was caused by agents other than his radiation exposure. CX 6 at 4. Dr. Fabrikant stated that claimant's exposure between 1954 and 1956 did not cause his leukemia, Tr. IV at 171-172, and that the medical evidence precluded any causation between the exposure and the illness. Tr. IV at 177.

In reaching his conclusion that this evidence was not sufficient to establish rebuttal, the administrative law judge addressed the underlying studies supporting the conclusions of Drs. Goldman and Fabrikant but did not discuss the doctors' conclusions themselves. *See* Decision and Order at 12-14. The administrative law judge found the probability calculations developed by the

Advisory Committee on Biological Effects of Ionizing Radiation (*i.e.*, BEIR V Table, CX 11, Attachment Q), utilized by Drs. Goldman and Fabrikant in rendering their opinions, unpersuasive and, therefore, insufficient to support the physicians' conclusions. However, a medical opinion may not be rejected solely because it is unsupported by a definitive scientific study; rather, a medical opinion may be sufficient to rebut the presumption if it rules out a causal relationship between claimant's harm and a working condition. *See Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986). Accordingly, we vacate the administrative law judge's finding that employer failed to establish rebuttal of the Section 20(a) presumption based on the opinions of Drs. Goldman and Fabrikant.

In addition, our review of the record reveals medical testimony not addressed by the administrative law judge which, if credited by the administrative law judge, is sufficient to establish rebuttal of the Section 20(a) presumption. Specifically, Dr. Fry concluded that there was no evidence of a causal association between claimant's CGL and his exposure to radiation. EX 22 at 15. Similarly, Dr. Moloney opined that a radiation-induced etiology for claimant's condition was unacceptable. EX 27 at 3. Therefore, the case must be remanded for reconsideration of the issue of causation. On remand, the administrative law judge must address all of the medical evidence of record, including the opinions of Drs. Goldman, Fabrikant, Fry and Moloney, when determining whether employer established rebuttal of the Section 20(a) presumption. If Section 20(a) is rebutted, the administrative law judge must weigh the evidence in the record as a whole and render a decision supported by substantial evidence.[3] *See generally Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994).

Accordingly, the administrative law judge's determination to invoke the Section 20(a) presumption is affirmed. His Decision and Order Awarding Benefits, however, is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[3]In addressing the medical evidence of record, employer contends that Philip Manly, claimant's radiation expert, is unqualified to evaluate any medical evidence of record with respect to the causes of claimant's leukemia since Mr. Manly is neither a physician, biophysicist, or pathologist. Similarly, employer challenges the testimony of Dr. Rajdev, noting that that physician is not a radiation physicist. As employer implies, the administrative law judge on remand must set forth the qualifications of each witness when discussing the voluminous medical evidence of record; contrary to employer's assertion, however, the administrative law judge, after considering those qualifications, may accept or reject the testimony of any witness so long as he provides a rational basis for his decision.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge