BRB No. 03-0722

ROBERT K. GOODSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: July 23, 2004
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order Granting Reconsideration of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Jennifer West Vincent (Patten, Wornom, Hatten & Diamonstein, L.C.), Newport News, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order Granting Reconsideration (2001-LHC-2188) of Administrative Law Judge Richard E. Huddleston 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33

U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a welder, was employed by employer for approximately 37 years during which time he was exposed to airborne asbestos dust and fibers; he retired in 1979. On August 2, 1999, claimant was diagnosed with lung cancer. Subsequently, claimant filed a claim for compensation alleging his asbestos exposure contributed to the development of his lung cancer.

In his Decision and Order, the administrative law judge found that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption of causation based upon the parties' agreement that claimant had been exposed to asbestos during his work with employer and that he now suffers from lung cancer. Decision and Order at 11; Stips. 4, 5. Finding that employer failed to rebut this presumption, the administrative law judge found that claimant's lung cancer is work-related. He awarded claimant total disability compensation and further found employer entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

The Director, Office of Workers' Compensation Programs (the Director), filed a motion for reconsideration arguing that because claimant is a voluntary retiree, he is limited to an award of permanent partial disability based on the degree of his permanent impairment. 33 U.S.C. §§902(10), 908(c)(23). Moreover, as a consequence, the Director contended that employer's eligibility for relief under Section 8(f) must be determined under the permanent partial disability standard rather than that applicable to permanent total disability. In response, the parties submitted two additional stipulations: (1) claimant is a voluntary retiree; and (2) claimant suffers a 75 percent pulmonary impairment. Decision on Reconsideration at 2.

Based on the new stipulations, the administrative law judge vacated his award of permanent total disability benefits and awarded claimant permanent partial disability benefits based upon a 75 percent impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (5th Ed.). 33 U.S.C. §908(c)(23). Additionally, the administrative law judge re-evaluated the evidence submitted by employer to determine its entitlement to relief pursuant to Section 8(f) under the standards for a voluntary retiree with a permanent partial disability. The administrative law judge determined employer failed to meet the criteria under this standard and denied employer Section 8(f) relief.

Employer appeals, arguing that the administrative law judge erred in finding that it failed to establish rebuttal of the Section 20(a) presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits.

Once the Section 20(a) presumption is invoked, as in the instant case, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *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, he must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994).

In this case, employer argues that the administrative law judge erred in finding that the opinion of Dr. Churg is insufficient to establish rebuttal of the Section 20(a) presumption. Dr. Churg, an expert in the field of occupational lung disease pathology,[1] stated that, in the circumstances of this case, *i.e.*, the absence of a diagnosis of asbestosis and claimant's having a heavy smoking history, "that this [claimant's] lung cancer was caused entirely by cigarette smoking and not by asbestos exposure." EX 2 at 2. The administrative law judge found that Dr. Churg's opinion is insufficient to rebut the Section 20(a) presumption based upon his finding that the opinion is "hostile to the Act," is undocumented, and is unexplained. Decision and Order at 12. We cannot affirm the administrative law judge's finding that Dr. Churg's opinion does not rebut the Section 20(a) presumption, as the administrative law judge did not evaluate it in light of employer's burden on rebuttal, which is only one of production. Moreover, the administrative law judge's other bases for rejecting the opinion cannot support the finding that the Section 20(a) presumption is unrebutted. Thus, for the reasons that follow, we hold that employer rebutted the Section 20(a) presumption as a matter of law, and we remand the case for the administrative law judge to weigh the evidence as a whole. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

Initially, the administrative law judge rejected Dr. Churg's opinion as insufficient to rebut the Section 20(a) presumption because he had found it insufficient to prevent invocation of the Section 20(a) presumption in the first instance. On the facts of this case, this rationale is faulty. In order to invoke the Section 20(a) presumption in this case, claimant need only establish that he has a harm and that he was exposed at work to something that could have caused his harm. *See Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999). The parties stipulated that claimant has lung

[1] Dr. Churg is Board-certified in anatomic pathology and has authored many articles and book chapters on occupational lung diseases. EX 9.

cancer and that he was exposed to asbestos.[2] The administrative law judge invoked the presumption based on the stipulations, rejecting employer's contention that Dr. Churg's opinion is sufficient to prevent invocation.[3]

Claimant's burden on invocation is relatively light. He must "'at least allege an injury that arose in the course of employment as well as out of employment.'" *Moore*, 126 F.3d at 261, 31 BRBS at 123(CRT), quoting *U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *see also Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990). Claimant need not establish that his harm was actually caused by his employment in order to invoke the Section 20(a) presumption. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Thus, the fact that the administrative law judge found Dr. Churg's opinion insufficient to prevent the Section 20(a) presumption from being invoked in the first instance does not preclude the opinion from rebutting the Section 20(a) presumption if it is "substantial evidence to the contrary." 33 U.S.C. §920(a); *see Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT); *see also Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998). In this regard, we observe that employer's burden on rebuttal is one of production only, not one of persuasion. *American Grain Trimmers*, 181 F.3d at 816, 33 BRBS at 75(CRT). As Section 20(a) presumes that claimant's lung cancer is due to his work-related asbestos exposure and as Dr. Churg stated that claimant's lung cancer is not due to asbestos exposure, we turn then to the other reasons the administrative law judge provided for finding Dr. Churg's opinion insufficient to rebut the Section 20(a) presumption.

The administrative law judge first stated that Dr. Churg's opinion is "hostile to the Act." This statement is not explained. This concept appears in cases arising under the Black Lung Act,[4] and it has not been recognized in the context of cases arising under the Longshore Act. The administrative law judge's statement regarding hostility toward the Act may be interpreted in two ways. The first is that because Section 20(a) presumes claimant's lung cancer is related to asbestos exposure at work, an opinion that claimant

[2] Claimant specifically did not make a claim for work-related asbestosis. Tr. at 7.

[3] Employer does not contest this finding on appeal.

[4] The Fourth Circuit has stated, in a case arising under the Black Lung Act, that a physician's opinion may be discredited when its conclusion is based "on a premise fundamentally at odds with the statutory and regulatory scheme." *Thorn v. Itman Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166 (4th Cir. 1997).

does not have asbestosis, and therefore non-work-related lung cancer, is "hostile to the Act." Decision and Order at 12. This interpretation ignores the scope of the Section 20(a) presumption; the presumption is rebuttable and drops from the case altogether when employer adduces "substantial evidence" that claimant's harm is not work-related. *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT). The second is that Dr. Churg's opinion is "hostile to the Act" because he believes a diagnosis of asbestosis is necessary before lung cancer can be said to be related to asbestos exposure. This opinion is not "antithetical" to the purpose of the Longshore Act, as, unlike the Black Lung Act, the Longshore Act does not presuppose that any particular work exposure can cause a compensable disability. *See Lane v. Union Carbide Corp.*, 105 F.3d 166 (4th Cir. 1997); *Adams v. Peabody Coal Co.*, 816 F.2d 1116 (6th Cir. 1987) (an opinion that simple pneumoconiosis cannot cause a totally disabling pulmonary impairment is hostile to the Act because statute and implementing regulations presuppose that such a result is possible). Thus, as Dr. Churg specifically stated that claimant's lung cancer is not related to asbestos exposure, which is what Section 20(a) presumes in this case, his opinion rebuts the presumed causal connection between claimant's cancer and his asbestos exposure provided it constitutes "substantial evidence" to the contrary. *See generally Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT).

The administrative law judge also rejected Dr. Churg's opinion because he found it to be undocumented. Dr. Churg stated he reviewed claimant's medical records, which included x-ray interpretations, pulmonary function studies, and pathology materials. He was aware of claimant's extensive smoking history. Dr. Churg stated why he felt a diagnosis of asbestosis could not be made in this case. EX 2. Thus, the administrative law judge's finding that Dr. Churg's opinion is undocumented is not supported by the record and cannot be affirmed. *See generally Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000).

Finally, the administrative law judge rejected Dr. Churg's opinion because he found it to be unsupported by evidence documenting the validity of Dr. Churg's belief that a diagnosis of asbestosis is necessary for lung cancer to be asbestos-related. In this case, Dr. Churg's *curriculum vitae* lists his extensive publications on occupational lung diseases, EX 9, but the basis for his opinion that a diagnosis of asbestosis is prerequisite to a diagnosis of asbestos-related lung cancer is not stated in his opinion in this case.[5] *Compare with Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1988), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table). Nonetheless, we hold that, in this case, this deficiency goes to the weight to be accorded to Dr. Churg's opinion when

[5] Dr. Churg's opinion states, "As you are aware, I believe that the association of asbestos exposure and lung cancer is the association of the specific disease, asbestosis, and lung cancer." EX 2 at 2.

weighing the evidence as a whole. The fact that the opinion may not ultimately be persuasive is not relevant for purposes of determining whether the Section 20(a) presumption is rebutted. *See Leone v. Sealand Terminal Corp*., 19 BRBS 100 (1986); *see also Neeley v. Newport News Shipbuilding & Dry Dock Co*., 19 BRBS 138 (1986). Moreover, Dr. Churg did not merely surmise that claimant's cancer is due to smoking, *see Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989), but specifically stated it was due solely to smoking and not to asbestos exposure. Thus, employer has satisfied its burden of production, as Dr. Churg's opinion constitutes substantial evidence that claimant's cancer was not caused or contributed to by his asbestos exposure. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). As the administrative law judge's finding that Dr. Churg's opinion is insufficient to rebut the Section 20(a) presumption is not rational or supported by substantial evidence, it is reversed. *Harford*, 137 F.3d 673, 32 BRBS 45(CRT).

On remand, the administrative law judge must weigh all the relevant evidence, without the benefit of the Section 20(a) presumption, and determine if claimant has met his burden of establishing that his lung cancer is work-related. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The administrative law judge is entitled to weigh the evidence and to determine which medical opinions are more persuasive, and his findings must be affirmed if supported by substantial evidence. *See Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT)(5th Cir. 2002).

Accordingly, we reverse the administrative law judge's finding that employer did not rebut the Section 20(a) presumption. This case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge