



BRB No. 16-0030

LINDA KELLEY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
SERVICE EMPLOYEES)	DATE ISSUED: <u>July 14, 2016</u>
INTERNATIONAL, INCORPORATED)	
)	
and)	
)	
INSURANCE COMPANY OF THE STATE)	
OF PENNSYLVANIA c/o AIG CLAIMS)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Gary B. Pitts and Joel S. Mills (Pitts & Mills), Houston, Texas, for claimant.

Robert L. Bamdas (Schouest, Bamdas, Soshea & BenMaier, PLLC), Boca Raton, Florida, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2014-LDA-00199) of Administrative Law Judge Daniel F. Solomon 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working for employer in Iraq as a database specialist in April 2010. She stopped working in Iraq in October 2010 when she returned to the United States, and her last day of paid employment for employer was November 17, 2010. CX 1 at 1; EX 3. Claimant alleged she sustained multiple injuries during the course of her employment in Iraq. These injuries were: neurological and cardiac related to a stroke; psychological; deep vein thrombosis (DVT); and pulmonary. CXs 2-5, 8. Claimant's entitlement to medical benefits for her alleged pulmonary injury and the nature and extent of her work-related disabilities were at issue before the administrative law judge.¹

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking her pulmonary condition to her employment and that the report of employer's expert, Dr. Feingold, does not rebut the presumption. Decision and Order at 18-22. The administrative law judge found that claimant is unable to return to work due to her DVT and pulmonary condition. *Id.* at 23. The administrative law judge awarded claimant ongoing compensation for total disability and medical benefits for her DVT and pulmonary and psychological conditions. *Id.* at 26; *see* 33 U.S.C. §§907, 908(a), (b).

On appeal, employer challenges the administrative law judge's findings that claimant is entitled to the Section 20(a) presumption linking her pulmonary injury to her working conditions in Iraq and that Dr. Feingold's report and deposition testimony do not rebut the presumption. Claimant responds, urging affirmance of the administrative law judge's findings and the award of benefits.

Employer contends the administrative law judge erred in finding that claimant is entitled to the Section 20(a) presumption that her pulmonary condition is related to her working conditions in Iraq. In order to be entitled to the Section 20(a) presumption, claimant is not required to affirmatively prove that her working conditions in fact caused or aggravated the harm; rather, claimant need establish only that her working conditions *could have* caused or aggravated the harm alleged. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *see also Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Damiano v. Global Terminal & Container Serv.*, 32 BRBS 261 (1998). The administrative law judge rationally credited evidence that: (1) claimant was exposed in Iraq to sand and dust

¹ An Order issued on October 18, 2012, by Administrative Law Judge Pamela J. Lakes incorporated the parties' stipulations that claimant's neurological and cardiac conditions are not work-related and that employer accepted liability for medical benefits for the DVT and psychological injuries. CX 8; *see also* Decision and Order at 1-2.

generally, and more specifically, when she was trapped inside an upside-down container for eight hours after a mortar attack;² (2) claimant worked for one half-day near a burning sulphur mine;³ (3) claimant's pulmonary function study test results show severe obstruction⁴ and Dr. Tolle diagnosed chronic obstructive pulmonary disease (COPD), dyspnea and chronic bronchitis;⁵ and (4) Dr. Tolle noted a possible connection between claimant's working conditions in Iraq and claimant's respiratory condition.⁶ Contrary to employer's contention, substantial evidence supports the finding that claimant's employment exposures could have caused her respiratory condition. *Ramsay Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015). Therefore, the administrative law judge's application of Section 20(a) to presume that claimant's pulmonary condition is related to her employment in Iraq is affirmed. *Id.*; *see generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F.App'x 249 (4th Cir. 2007).

Employer next contends the administrative law judge erred in finding that the opinion of Dr. Feingold does not rebut the Section 20(a) presumption. Dr. Feingold opined that the exposures claimant experienced in Iraq were insufficient to produce the claimed pulmonary conditions. *See* EX 29 at 39, 50-51. Dr. Feingold opined that claimant has Munchausen syndrome because, in his opinion, claimant has a history of factitious medical disorders and that the evidence does not support the level of pulmonary impairment diagnosed by Dr. Tolle. *See* EX 28 at 73-74. Dr. Feingold stated that claimant's CT scan does not show evidence of COPD. EX 29 at 29, 30, 32, 38.

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by her employment exposures. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Kelley v. Dep't of*

² EX 24 at 13-15, 42.

³ EX 24 at 15-16.

⁴ CX 1 at 54-55.

⁵ CX 1 at 42, 47, 51, 55, 59, 65.

⁶ CX 1 at 51, 59. Dr. Tolle is a pulmonologist and an assistant professor of medicine at Vanderbilt University Medical Center. CX 1 at 38-39.

the Army/NAF, 34 BRBS 39 (2000). If employer rebuts the Section 20(a) presumption, it no longer controls, and the issue of causation must be resolved on the whole body of proof, 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, the administrative law judge rationally found that Dr. Feingold, who is board-certified in internal medicine and pulmonary medicine, is not qualified to render a psychiatric diagnosis of Munchausen syndrome. Although Dr. Feingold questioned the pulmonary function results, he did not invalidate them. Decision and Order at 21.⁷ The administrative law judge also rejected Dr. Feingold's conclusion that claimant does not have a work-related respiratory impairment because he did not examine claimant, he did not include claimant's daily exposure to sand and dust in his summary of claimant's relevant working conditions, and he stated that further testing was necessary to determine if claimant has COPD or any other disabling lung condition. *Id.*; CXs 1 at 47; 29 at 37, 39, 50.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Although the employer's burden on rebuttal is one of production only, it "cannot satisfy its burden of production simply by submitting any evidence whatsoever. To meet its 920(a) burden, the employer must introduce such relevant evidence as a reasonable mind might accept as adequate to support a finding that workplace conditions did not cause the accident or injury." *Rainey v. Director, OWCP*, 517 F.3d 632, 637, 42 BRBS 11, 14(CRT) (2^d Cir. 2008) (internal citations omitted); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). In this case, the administrative law judge provided a rational basis for his conclusion that Dr. Feingold's opinion is not substantial evidence of the absence of a work-related pulmonary impairment. *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT). Therefore, we affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption that claimant's respiratory condition is work-related.⁸ *Brown*, 893 F.2d 294, 23 BRBS 22(CRT). Accordingly, we

⁷ In this regard, the administrative law judge noted that the administrator of the pulmonary function tests did not note any lack of effort on claimant's part. Decision and Order at 21.

⁸ The administrative law judge also stated that Dr. Tolle, as claimant's treating physician, "had better insight" into her condition than Dr. Feingold. Dr. Tolle opined that claimant has "end-stage" pulmonary function and may require a lung transplant. CX 1 at

affirm the award of disability compensation and medical benefits. *See generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

59. In addition to the pulmonary function study testing, he noted objective symptoms of pink-tinged sputum after the pulmonary function study testing and that claimant's condition improved with treatment. *Id.* at 44, 47-48, 51-52. Dr. Tolle attributed a "possible connection" to claimant's employment in Iraq because there was no evidence of pulmonary impairment prior to claimant's working there. CX 1 at 52, 59, 63. We note that the administrative law judge's finding that Dr. Tolle's assessment of claimant's pulmonary condition is more credible provides further support for the administrative law judge's conclusion that claimant is entitled to compensation and medical care for her pulmonary condition. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).