BRB No. 97-1405

VIOLET HAAS (Widow of JOSEF HAAS)	)	
Claimant-Petitioner	)	DATE ISSUED:
v.	)	
TODD SHIPYARDS	)	
and	)	
TRAVELERS AETNA PROPERTY CASUALTY	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Robert A. Skoblar, Englewood, New Jersey, for claimant.

Joseph F. Manes (Manes & Manes), Millwood, New York, for employer/ carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (96-LHC-1357) of Administrative Law Judge Ralph A. Romano 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).

Claimant's husband (the decedent), an outside machinist, worked for employer from

1961 to 1983, at least seventeen days of which involved work aboard the *NS Savannah*, a nuclear powered commercial vessel, during which time it is alleged that he was exposed to injurious levels of radioactivity.[1] The decedent was diagnosed as suffering from acute myelogenesic leukemia on April 26, 1993, and succumbed to this illness on August 9, 1994.

In his Decision and Order, the administrative law judge found that claimant had established her *prima facie* case based upon the decedent's diagnosed condition and the fact that he worked on board a nuclear powered vessel. Hence, the administrative law judge held that claimant was thus entitled to invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), but determined that employer rebutted the presumption. The administrative law judge then weighed the evidence of record and concluded that claimant failed to establish that the decedent's condition arose out of his employment with employer. Accordingly, the administrative law judge denied the instant claim for benefits.

Claimant now appeals, challenging the administrative law judge's determination that employer's evidence is sufficient to establish rebuttal of the invoked presumption and, moreover, arguing that the administrative law judge erred in concluding that she failed to establish causation based on the record as a whole. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

[1]Prior to his death, the decedent testified by deposition that he worked in the reactor room cleaning and inspecting piston valves, CX 1 at 13, and that on one occasion he was sprayed with water from a broken pipe which may have been radioactively contaminated. CX 1 at 19.

Where, as here, claimant establishes the two elements of her *prima facie* case,[2] the Section 20(a) presumption applies to link the harm with the decedent's employment.[3] *See Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that the decedent's condition was neither caused nor aggravated by his employment. *See Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1994). 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*, 909 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 decedent'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 Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 270 (1990).

In the present case, the administrative law judge determined that the opinions of Drs. Frazier and Hamilton were sufficient to establish rebuttal of the Section 20(a) presumption. In addressing the issue of causation, Dr. Frazier opined that the decedent's fatal leukemia was unrelated to his work conditions. EX 20. Similarly, Dr. Hamilton concluded that the probability that the decedent's disease was caused by exposure to work-place radiation was one hundred times lower than the probability that it was due to the decedent's CAT scan or skull and cervical spine X-rays. EX 4.

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[2]We need not address employer's contention that claimant did not establish her *prima facie* case.

[3]In this regard, Section 9 of the Act, 33 U.S.C. §909 (1994), provides for death benefits to certain survivors "if the injury causes death."

In support of her contentions on appeal, claimant avers that the opinions of Drs. Frazier and Hamilton are unreliable and are therefore insufficient to support employer's position because they are based on inaccurate exposures, *i.e.*, they fail to include the decedent's internal exposure to radiation, if any. Contrary to claimant's argument, however, the administrative law judge could find these medical opinions sufficient regardless of whether they are supported by definitive, underlying data; a medical opinion may be sufficient to rebut the presumption if it is specific and comprehensive and rules out a causal relationship between the decedent's harm and his employment. *See Neeley*, 19 BRBS at 138. In the instant case, Dr. Frazier based his opinion regarding the lack of a causal relationship between the decedent's condition and his employment with employer on evidence that the decedent's film badges showed a radiation reading of zero, there were no fuel failures during the period the decedent was on board ship, and the fact that the radiation contamination aboard ship was from low levels of specific fission or activation products. EX 20. Dr. Hamilton similarly based his opinion on his review of film badge readings, incident reports, supervision readings procedures, and the long latency period of over twenty-nine years between any exposure and the diagnosis.[4] EX 4. Accordingly, as the opinions of Drs. Frazier and Hamilton sever the causal link between the decedent's diagnosed leukemia and his employment with employer, we affirm the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Next, the administrative law judge weighed all of the evidence of record and credited the aforementioned physicians in concluding that claimant had failed to establish a causal connection between the decedent's condition and his employment. Specifically, the administrative law judge credited the opinions of Drs. Frazier and Hamilton, the ship's records, the zero film badge readings, and the extended latency period between exposure and diagnosis, over the testimony of Dr. Behling, who opined that it was probable that chronic radiation exposure of bone marrow from bone-seeking radio-nuclides caused the decedent's fatal illness. EX 8. However, Dr. Behling also stated that he did not have the information needed to define the actual probability of causation or risk, EX 19, and that following exposure to radioactivity, the risk of developing leukemia begins to rise after two to three years, reaches a peak at about ten years and thereafter declines to background levels after about 25 years following exposure. EX 8.

It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom, and he 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). In the instant case, the administrative law judge's credibility

[4]The administrative law judge noted that, regarding any internal contamination, these physicians calculated an estimated dosage of radiation based upon the possibility that the decedent was so exposed.

determinations regarding the medical opinions of record are reasonable. Moreover, pursuant to the decision of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994), the "true doubt rule" does not apply to cases under the Act, because it violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), which requires that the party seeking the award bear the burden of persuasion. We therefore find no error in the administrative law judge's ultimate finding that claimant failed to prove work-related causation based on the record as a whole. Accordingly, we affirm the administrative law judge's determination that claimant failed to establish that the decedent's condition was related to his employment with employer.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge