BRB No. 99-0564

NILES RICKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	DATE ISSUED: 3/1/00
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Samuel A. Denberg (Baker, Garber, Duffy & Pederson), Hoboken, New Jersey, for claimant.

Francis M. Womack III (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-2589) of Administrative Law Judge Paul H. Teitler 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 worked for employer as a longshoreman from 1979 until he retired on January 30, 1995, due to chronic obstructive pulmonary disease (COPD) and cor pulmonale. He testified that during the course of his employment he was exposed to diesel fumes and noxious dust. Tr. 1 at 63-77. Claimant also has a smoking history of approximately 45 pack years, he is obese, and he has sleep apnea. At the formal hearing, claimant alleged that his working conditions contributed to his present disability and/or that a return to his usual employment as a dockman would exacerbate his disability. Tr. 1 at 7, 12.

In his Decision and Order, the administrative law judge found that claimant timely filed a notice of injury and a claim for compensation. *See* 33 U.S.C. §§912, 913. The administrative law judge next found claimant entitled to the Section 20(a) presumption of compensability, 33 U.S.C. §920(a), based on the testimony of Dr. Nahmias and the reports of Dr. Eisenstein. These doctors stated that claimant's COPD was aggravated by his exposures to injurious substances at work. CX 2; Tr. 2 at 57. Dr. Nahmias stated that claimant initially noted an increase in his symptoms after a day's work, and that the progression of the disease eventually led to increased symptoms even when claimant was not working. Tr.2 at 42-43, 113-115. The administrative law judge found, however, that employer established rebuttal of the presumption based on the testimony and report of Dr. Adelman. Finally, the administrative law judge found that claimant failed to establish, based on the record as a whole, that his disability is work-related. He credited the opinion of Dr. Adelman that claimant's COPD is due to smoking and aggravated by sleep apnea. On appeal, claimant contends that employer failed to rebut the Section 20(a) presumption as Dr. Adelman's opinion does not state that claimant's work exposures did not aggravate his COPD or contribute to his disability. Employer responds, urging affirmance.

Once, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption by producing substantial evidence that claimant's condition was neither caused nor aggravated by his employment. *See American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999)(*en banc*); *Swinton v. J. Frank Kelley, Inc.*, 554 F.2d 1075, 4 BRBS 466(D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds the Section 20(a) presumption rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997). The administrative law judge then must weigh all the

evidence and resolve the issue of causation on the record as a whole with claimant bearing the burden of persuasion. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994).

The sole issue in this case is whether Dr. Adelman's opinion is sufficient to rebut the Section 20(a) presumption. Dr. Adelman stated in his report that although claimant had multiple exposures to fumes and chemicals, these are "local irritants" that do not cause significant obstructive airway disease and cor pulmonale. EX 1. Dr. Adelman stated that claimant's obstructive lung disease is secondary to chronic cigarette abuse, and is complicated by obstructive sleep apnea. *Id*. Dr. Adelman testified at the hearing that claimant's COPD is due to cigarette smoking, Tr. 2 at 139, and is not due to exposures at work. *Id.* at 160, 168. He thus concluded that claimant's functional impairment, as demonstrated by his pulmonary function studies, is not caused by his work exposure. *Id.* at 162-163.

Dr. Adelman further stated, however, his opinion that claimant was irritated by his exposure to dust and diesel fumes, and had industrial bronchitis, resulting in symptoms such as a cough and sputum production while claimant was at work, *id.* at 161-162, although this exposure did not result in functional decline. He stated that when such individuals are removed from the environment, their airways revert to their prior state. *Id.* at 185. Moreover, he testified that a cigarette smoker with bronchitis may have more sputum production, "may have more trouble in that [work] environment," and may have a temporary decline in function as with any other irritant. *Id.* at 176-178.

We hold that Dr. Adelman's opinion is not sufficient to rebut the Section 20(a) presumption as he does not state that claimant's COPD was not exacerbated by his employment or that claimant's disability is not due in part to his work exposure to dust and fumes. If the conditions of the claimant's employment cause him to become symptomatic, even if no permanent harm results, the claimant has sustained an injury within the meaning of the Act. *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT)(D.C. Cir. 1984); *see also Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981) (no distinction between acceleration of underlying disease and manifestation of symptoms). It then becomes employer's burden on rebuttal to produce substantial evidence severing the connection between claimant's disability and the work injury. *See generally American Grain Trimmers*, 181 F.3d at 817, 33 BRBS at 77(CRT). Moreover, where a claim is based on aggravation of an underlying condition, employer must produce substantial evidence that claimant's work did not aggravate the underlying condition. *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. INA v. United States Department of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). An opinion that allows for claimant's employment to have a role in the manifestation of

claimant's underlying disability is insufficient to rebut the Section 20(a) presumption. *See generally Crum*, 738 F.2d at 477-478, 16 BRBS at 119-121(CRT); *see also Wheatley v. Adler*, 407 F.2d 307, 312-314 (D.C. Cir. 1968); *Obert v. John T. Clark & Son of Maryland*, 16 BRBS 157,160-161 (1990). Inasmuch as Dr. Adelman did not state that claimant's work exposures did not aggravate his COPD, and in fact testified that the exposures increased claimant's symptomotology while he was at work, his opinion is insufficient to rebut the Section 20(a) presumption as a matter of law. *See generally Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). We therefore vacate the administrative law judge's finding that Dr. Adelman's opinion rebuts the Section 20(a) presumption. Decision and Order at 12. Moreover, as there is no other evidence of record which could rebut the presumption, we reverse the administrative law judge's conclusion that claimant's injury is not work-related. *See Cairns v. Matson Terminals Corp.*, 21 BRBS 252, 257 (1988). The denial of benefits therefore is vacated, and the case is remanded to the administrative law judge to address the remaining issues.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge