BRB No. 01-0560

JAMES O'KELLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY/NAF	)	DATE ISSUED: March 18, 2002
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Douglas R. Powell (Hinton & Powell), Atlanta, Georgia, for claimant.

Lawrence P. Postol (Seyfarth Shaw), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (1997-LHC-1441) of Administrative Law Judge David W. Di Nardi 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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).

This is the second time that this case has come before the Board. Claimant, who

suffered from polio during his early childhood, was employed by employer as the superintendent of the Follow Me Golf Course at Fort Benning, Georgia, from 1980 through June 22, 1995. During his tenure at employer's facility, claimant was responsible for, *inter alia*, determining the need for and directing the application of numerous insecticides, herbicides, and fungicides. As a result of these employment duties, claimant, who was not issued protective clothing until sometime during 1987-1988, was exposed to fumes during the preparation and application of these materials. During his period of employment, claimant experienced dizziness and instability while walking, coughing, speech difficulties, and a worsening in the pulling of his facial muscles. On June 22, 1995, claimant ceased working for employer due to his present neurological condition.

In his initial Decision and Order, the administrative law judge determined that claimant established a *prima facie* case, thus invoking the Section 20(a), 33 U.S.C. §920(a), presumption, and that employer failed to rebut that presumption. Accordingly, the administrative law judge found that claimant's work-related exposures aggravated his current neurological disorder. Next, the administrative law judge found that employer conceded that claimant was incapable of returning to his usual employment duties, and that employer failed to offer any evidence demonstrating the availability of suitable alternate employment. Thus, the administrative law judge concluded that claimant was permanently totally disabled from June 23, 1995, to the present and continuing. *See* 33 U.S.C. §908(a). Lastly, the administrative law judge awarded claimant medical expenses, exclusive of the charges rendered by Dr. Gunter, and employer relief pursuant to Section 8(f) of the Act. *See* 33 U.S.C. §§907, 908(f).

On appeal, the Board, *inter alia*, discussed at length the standard for rebuttal of the Section 20(a) presumption espoused by the United States Court of Appeals for the Eleventh Circuit and concluded that the unequivocal opinion of Dr. Gerr satisfied that standard. Accordingly, the Board reversed the administrative law judge's finding that employer failed to establish rebuttal of the Section 20(a) presumption, vacated the administrative law judge's alternate determination that claimant established causation based on the record as a whole, and remanded the case for the administrative law judge to reconsider all of the evidence and testimony of record regarding the issue of causation. *See O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). Claimant's motion for reconsideration was subsequently denied by the Board.

In his Decision and Order on Remand, the administrative law judge determined that employer rebutted the invoked Section 20(a) presumption by producing substantial evidence severing the presumed connection between claimant's employment and his present medical conditions. Therefore, he found that the Section 20(a) presumption drops from the case, and that the case must be decided on the record as a whole. After reviewing the extensive medical records which had been submitted into evidence, the administrative law judge

credited the opinion of Dr. Gerr over those opinions proffered by claimant in concluding that claimant failed to establish that his current medical conditions are related to his employment with employer. Accordingly, the administrative law judge denied the claim for benefits.

Claimant now appeals, arguing that the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption, and in crediting the opinion of Dr. Gerr over that of Dr. Dawkins. Employer filed a response brief in support of the administrative law judge's denial of benefits.

Where, as in the instant case, it has been established that claimant is entitled to invocation of 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 his employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996). It is employer's burden on rebuttal to present substantial evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). The 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 Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, claimant avers that the employer failed to rebut the Section 20(a) presumption. Specifically, claimant contends that the opinion of Dr. Gerr is insufficient to rebut the presumption since that physician clearly fails to state unequivocally that no relationship exists between claimant's ongoing medical condition and his employment with employer. Although the administrative law judge on remand once again addressed the issue of whether employer rebutted the invoked Section 20(a) presumption, this time finding in the affirmative, that issue was throughly considered and addressed by the Board in its previous decision and its prior determination that the testimony of Dr. Gerr is sufficient to rebut the statutory presumption of causation constitutes the law of the case.[1] *See Lewis v. Sunnen*

[1]As the Board wrote at length in its previous decision, the testimony and reports of Dr. Gerr unequivocally express his opinion, rendered within a reasonable degree of medical

Crane Service, Inc., 34 BRBS 57 (2000); *Ricks v. Temporary Employment Services*, 33 BRBS 81 (1999). Claimant has raised no basis for the Board to depart from this doctrine.[2] Claimant's contention is therefore rejected and, for the reasons set forth in our previous decision, we affirm the administrative law judge's finding that the opinion of Dr. Gerr is sufficient to rebut the Section 20(a) presumption.

Claimant also challenges the administrative law judge's finding that causation was not established based on the record as a whole. Specifically, claimant assigns error to the administrative law judge's decision not to rely upon the testimony of Dr. Dawkins. In support of his contention, claimant asserts that, contrary to the administrative law judge's statement, Dr. Dawkins has performed research regarding different chemical exposures and that he is the only physician of record who offered an opinion as to the cause of claimant's

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certainty, that claimant's medical condition is not work related. Specifically, Dr. Gerr stated within a reasonable degree of medical certainty that claimant's occupational exposures did not cause, aggravate or contribute to his current condition. *See* Tr. at 190. Moreover, contrary to claimant's assertion on appeal, employer is not required to establish another agency of causation in order to rebut the presumption. *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).

[2]Under the "law of the case" doctrine, an appellate tribunal generally will adhere to its initial decision on an issue when a case is on appeal for the second time, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first result was clearly erroneous and allowing it to stand would result in manifest injustice. *See Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999).

medical condition. In his Decision and Order on Remand, after considering at length all of the medical evidence of record, the administrative law judge credited the opinion of Dr. Gerr rather than the contrary opinion of Dr. Dawkins, because Dr. Gerr possessed superior credentials and Dr. Gerr's opinion was well-reasoned, well-documented, and supported by the record. Dr. Gerr, who is Board-certified in both internal and occupational medicine and was commissioned by the United States Congress to study the neurological effects of chemicals on military personnel who served during military operations in the Persian Gulf region, based his opinion regarding the absence of a causal relationship between claimant's medical condition and his employment exposures upon his finding that claimant's condition is not the type of disease known to be caused by pesticides and agricultural chemicals, that claimant's condition has progressed despite his removal from the exposures, and that such a chronic condition as experienced by claimant would not occur from pesticides or agricultural chemicals without an acute poisoning occurring first. *See* Emp. Ex. 4. In declining to rely upon the contrary opinion of Dr. Dawkins, the administrative law judge found that Dr. Dawkins admitted that there are no medical articles or studies supportive of his opinion that claimant's exposure to pesticides aggravated his pre-existing polio, that Dr. Dawkins mistakenly believes that it is not necessary to have an acute reaction from a chemical exposure prior to the onset of a chronic condition, and that Dr. Dawkins conceded that once claimant's workplace exposures ceased claimant's condition should have either improved or stabilized when, based on the evidence, claimant's condition has continued to deteriorate. *See* Clt. Ex. 82. Accordingly, after considering all of the evidence of record, the administrative law judge found that claimant's present medical condition is not related to his employment with employer.

It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom and 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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the case at bar, the administrative law judge fully set forth and evaluated all of the relevant evidence of record, and his findings regarding the medical opinions are supported by the record. As the administrative law judge thus acted within his discretion in crediting Dr. Gerr's opinion over that of Dr. Dawkins, claimant did not meet his burden of persuasion in this case. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT). We therefore affirm the administrative law judge's determination, based on the record as a whole, that claimant's present medical condition is not causally related to his employment with employer. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Rochester v. George Washington University*, 30 BRBS 233 (1997).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge