BRB No. 07-0709

B.L.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 05/14/2008
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

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

Stephen C. Embry and Jessica Teresa Kmiec (Embry & Neusner), Groton, Connecticut, for claimant.

Mark P. McKenney (McKenney, Quigley, Izzo & Clarkin, LLP), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-LHC-02253) of Administrative Law Judge Daniel F. Sutton 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 worked for employer from 1961 until he retired on January 29, 1997. As a shipfitter, claimant worked aboard submarines and was exposed to asbestos, cadmium from welding fumes, and solvents. On December 31, 2003, claimant underwent surgery to remove his right kidney. He was diagnosed with renal cell carcinoma with

sarcomatoid component and is monitored every six months for a return of the cancer. Claimant filed a claim for benefits under the Act, alleging that the cancer was due, at least in part, to his work-related exposure to asbestos, cadmium and solvents.

In his decision, the administrative law judge found that the evidence is insufficient to establish invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's kidney cancer is causally related to solvent exposure. However, the administrative law judge found that the evidence establishes invocation of the Section 20(a) presumption that claimant's kidney cancer was caused by exposure to asbestos and cadmium. The administrative law judge also found that employer submitted sufficient evidence to rebut the presumption. After weighing the conflicting evidence as a whole, the administrative law judge concluded that claimant's kidney cancer is not due, even in part, to his exposure to asbestos and cadmium. Therefore, the administrative law judge denied the claim for benefits.

On appeal, claimant contends that the administrative law judge erred in failing to invoke the Section 20(a) presumption that his kidney cancer is due to his exposure to solvents. Claimant also contends that the administrative law judge erred in finding that employer established rebuttal of the Section 20(a) presumption that his kidney cancer is causally related to his work exposure to asbestos and cadmium. Moreover, claimant contends that the administrative law judge erred in finding that the evidence as a whole does not establish that his kidney cancer is work-related. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant contends that the administrative law judge erred in finding that the evidence is insufficient to establish invocation of the Section 20(a) presumption that his kidney cancer is due, at least in part, to his exposure to work-place solvents. Claimant avers that the burden should be on employer to establish that the solvents to which claimant was exposed were not potentially carcinogenic. We reject these contentions of error.

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Contrary to claimant's contention, the administrative law judge properly placed the initial burden on him to establish that he was exposed to solvents that

could have caused kidney cancer, and not on employer to establish that the solvents could not have caused the cancer.[1] *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005).

The administrative law judge found that claimant did not establish a *prima facie* case that his kidney cancer was due, at least in part, to his exposure to workplace solvents. The administrative law judge found that Dr. Brautbar testified that solvents which contain benzene or tricholoroethylene are carcinogenic. Decision and Order at 8, 31. The administrative law judge found, however, that there is no evidence that claimant was exposed to these solvents. Claimant testified generally that he was exposed to unspecified solvents and paint cleaners. Tr. at 34-35. Contrary to claimant's contention, the administrative law judge did not find that exposure to harmful solvents cannot cause cancer. Rather, he found that claimant did not prove that he was exposed to the type of solvents Dr. Brautbar stated could cause cancer. This finding is supported by substantial evidence and thus we affirm the administrative law judge's finding that claimant did not establish a *prima facie* case that his kidney cancer is related to workplace exposure to solvents. *See Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985).

The administrative law judge invoked the Section 20(a) presumption with regard to claimant's claim that his cancer is related to work exposure to asbestos and cadmium. Claimant contends that the administrative law judge erred in finding that employer established rebuttal of the Section 20(a) presumption in this regard. Once the Section 20(a) presumption is invoked, employer bears the burden of producing substantial evidence that the claimant's condition was not caused, contributed to or aggravated by his employment. *Rainey v. Director, OWCP*, 517 F.3d 632 (2d Cir. 2008);[2] *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* [*Shorette*], 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). In order to establish rebuttal, employer is not required to rule out any possible causal connection between claimant's employment and his condition but must produce "substantial evidence" that the work injury is not due, even in part, to the work

[1] Claimant cites *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000), in support of this contention. This case, however, does not support the proposition for which it is cited. In *Hunter*, the court specifically affirmed the finding that the Section 20(a) presumption was invoked based on evidence that the claimant's forklift accident could have caused his shoulder injury. The court then shifted the burden to employer to produce substantial evidence that the forklift could not have kick-backed in the manner alleged by claimant. Thus, the court did not relieve claimant of his burden of establishing his initial *prima facie* case.

[2] We accept claimant's submission of this recent case as supplemental authority, as well as employer's brief in response thereto. 20 C.F.R. §§802.215, 802.219.

exposures. *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998). Thus, we reject claimant's contention that it was employer's burden to show that claimant's other risk factors for kidney cancer were more likely than not the sole cause of claimant's cancer, as employer is not required to establish another agency of causation in order to rebut the Section 20(a) presumption. *O'Kelley*, 34 BRBS at 41; *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986); *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).

Claimant contends the administrative law judge erred in relying on the opinion of Dr. Harbison, a Ph.D, to rebut the Section 20(a) presumption.[3] Claimant contends, first, that Dr. Harbison is not a medical doctor and therefore is not qualified to render an opinion regarding the cause of claimant's cancer.[4] Claimant also contends that Dr. Harbison's opinion does not constitute substantial evidence to rebut the Section 20(a) presumption because it is based on faulty premises.

We reject claimant's contention that Dr. Harbison is not qualified to render an opinion as to the relationship between environmental exposures and claimant's kidney cancer, as his training is relevant only to whether, generally, there is an epidemiological relationship between certain exposures and certain cancers. Employer is not required to produce opinions by a medical doctor in order to rebut the Section 20(a) presumption.

[3] The administrative law judge found that Dr. Gerardi's opinion does not rebut the Section 20(a) presumption.

[4] We reject claimant's contention that the administrative law judge erred in permitting Dr. Harbison to testify at the hearing because employer did not timely produce his reports in compliance with the administrative law judge's pre-trial order. Claimant filed a motion with the administrative law judge to this effect, and the administrative law judge ruled that employer substantially complied with the pre-trial order, and that, moreover, employer agreed to make Drs. Gerardi and Harbison available for deposition and to bear the cost of any additional deposition of Dr. Daum necessitated by the late production of the reports. Order dated December 22, 2006. Claimant renewed his motion at the hearing, Tr. at 12, which the administrative law judge denied on the ground that claimant would have the opportunity to cross-examine Dr. Harbison at the hearing and he granted claimant the opportunity to obtain any additional reports in view of the testimony elicited. *Id.* at 12-13. Claimant's due process rights were fully protected in this case, and thus the administrative law judge did not abuse his discretion in allowing Dr. Harbison to testify. *See Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

See generally Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In this case, the administrative law judge reviewed Dr. Harbison's extensive credentials related to the topics under consideration and rationally concluded that his opinion has probative value.[5] *See Casey v. Georgetown Univ. Med. Ctr.* 31 BRBS 147, 153 (1997). Claimant has not offered any reasoned argument as to why Dr. Harbison is not qualified to render an opinion regarding the causal link between occupational exposure to asbestos and cadmium and claimant's kidney cancer.

Nonetheless, we agree with claimant that the administrative law judge's rebuttal finding cannot be affirmed as he did not address the totality of Dr. Harbison's opinion in summarily finding it "adequate to support the conclusion that asbestos and cadmium did not cause, contribute to or aggravate the Claimant's kidney cancer." Decision and Order 31-32. The administrative law judge did not identify where in Dr. Harbison's opinions, and on what basis, he stated that claimant's kidney cancer is not due to cadmium exposure. With regard to asbestos exposure, the administrative law judge must address inconsistencies between some of Dr. Harbison's own statements, as well as those between the administrative law judge's findings and Dr. Harbison's opinion, in order to determine if employer produced substantial evidence to rebut the Section 20(a) presumption.

Dr. Harbison stated his belief that asbestos exposure does not cause kidney cancer generally, Tr. at 85, and specifically, that it did not cause claimant's kidney cancer. Emp. Ex. 2; Tr. at 91. This opinion arguably is sufficient to rebut the Section 20(a) presumption. *See O'Kelley*, 34 BRBS at 41-42. As claimant contends, however, the administrative law judge did not address the foundation for Dr. Harbison's opinion in terms of employer's rebuttal burden. Dr. Harbison stated that there was insufficient evidence of significant asbestos exposure, Emp. Ex. 2, but the administrative law judge did not address this in the context of his own findings that "Claimant had high exposure to asbestos" as demonstrated by claimant's credible testimony and the reports of Drs.

[5] Dr. Harbison is a professor of environmental and occupational health in the College of Public Health at the University of South Florida. He also is a professor of pathology and pharmacology in the University's College of Medicine, and he is the Director of the Center for Environmental and Occupational Risk Analysis and Management which assesses the risk associated with various occupational exposures, including asbestos, solvents and chlorinated hydrocarbons. Dr. Harbison has over 30 years experience as a toxicologist, human health risk assessor and pharmacologist, and is the editor of the fifth edition of Hamilton and Hardy's *Industrial Toxicology*, a textbook used by universities and occupational medicine physicians as a reference of the chemical causes of disease. Dr. Harbison is Board-certified by the Academy of Toxicological Sciences. Tr. at 63-70; Emp. Ex. 2.

Gerardi and Daum concerning their diagnosis of pleural plaques. Decision and Order at 35; *see Rainey*, 517 F.3d at 636; *American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). Moreover, Dr. Harbison testified that other risk factors would have to be first ruled out before asbestos could be considered a factor in causing claimant's kidney cancer. Tr. at 113. This statement, as well as much of Dr. Harbison's opinion, is centered on what is necessary to *prove* a relationship between asbestos exposure and kidney cancer.[6] *See, e.g.,* Emp. Ex. 2 at 1. Employer's burden on rebuttal, however, is to produce evidence *disproving* a connection between the work exposure and the harm. *See Rainey*, 517 F.3d at 636; *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). Because the administrative law judge did not provide sufficient findings regarding Dr. Harbison's opinion under the proper rebuttal standard, we must remand this case to the administrative law judge for further findings regarding rebuttal of the Section 20(a) presumption with regard to claimant's claim based on asbestos and cadmium exposure. *See Jones*, 35 BRBS at 41.

For the sake of judicial efficiency, we will address claimant's contention that, assuming Section 20(a) is rebutted, the administrative law judge erred in weighing the evidence as a whole. Claimant bears the burden of establishing the work-relatedness of his kidney cancer based on the record as a whole. *Universal Maritime Corp.*, 126 F.3d 256, 31 BRBS 119(CRT). The administrative law judge found that the parties provided causation opinions based on epidemiological evidence regarding the likelihood that claimant's exposures caused his cancer.[7] The administrative law judge found that the

[6] In this regard, the administrative law judge found that Dr. Harbison's opinion refutes Dr. Brautbar's conclusion that there is a relationship between claimant's cancer and his exposure to asbestos and cadmium. Decision and Order at 31. However, in order to rebut the Section 20(a) presumption, the administrative law judge must find that Dr. Harbison states that there is no relationship between the exposures and the cancer, not that claimant failed to show that there is such a relationship.

[7] Claimant contends that the administrative law judge misapplied the Second Circuit's decision in *Maiorana v. United States Mineral Products Co.*, 52 F.3d 1124 (2d Cir. 1995). In *Maiorana*, the court vacated the district court's granting judgment as a matter of law because the evidence regarding a causal relationship between asbestos and cancer raised credibility issues which were for the jury to decide. While the court addressed flaws in the lower court's analysis of the evidence, contrary to claimant's contentions, it did not require the evidence to be given any particular weight but left such a determination to the fact-finder. In the present case, the administrative law judge only applied the court's decision to find that all of the relevant evidence on the issue of whether there is a connection between asbestos and cadmium exposure and kidney cancer must be considered. As the court held that the question of whether a plaintiff's exposure

credited studies establish that the "standardized mortality ratio" (SMR) between asbestos and cadmium exposure and kidney cancer establishes that there is "some" increase in kidney cancer risk with high exposure to asbestos.[8] The administrative law judge found that the evidence establishes that claimant had high levels of asbestos exposure in the workplace which strengthens his claim, but found that the experimental evidence was inconclusive on the general issue of causation because the animal studies conducted are not analogous to the claimant's exposure.[9] As a result, the administrative law judge gave less weight to Dr. Brautbar's opinion which relied on the animal studies.

The administrative law judge then reviewed the opinions of Drs. Brautbar, Daum, and Harbison. Drs. Brautbar and Daum opined that the amount of claimant's exposure to asbestos was sufficient to cause kidney cancer and that claimant's exposure to cadmium fumes also was a substantial factor in causing his cancer. The administrative law judge found that these two physicians apparently believed that all risk factors for kidney cancer potentially interact with one another.[10] *See*, *e.g.*, Cl. Ex. 7 at 96; Cl. Ex. 11 at 45. Dr. Harbison disagreed that the risk factors merge or act synergistically to cause cancer. He opined that, due to the generally weak epidemiological association between claimant's exposures and kidney cancer, one cannot associate the cancer to the exposures without minimizing the effect of the other risk factors.

The administrative law judge implicitly credited the opinion of Dr. Harbison and therefore concluded that the opinions of Drs. Daum and Brautbar are insufficient to affirmatively establish that exposure to asbestos and cadmium was at least a contributing

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to asbestos more likely than not caused his cancer is for the trier-of-fact, which the administrative law judge is in the instant case, we hold that the Second Circuit's decision in *Maiorana* does not mandate a different outcome in this case.

[8] Contrary to claimant's contention, the administrative law judge did not find that an SMR of 1.5 was insignificant. Moreover, the administrative law judge rationally found that the Sali *et al*. study is entitled to determinative weight based on the finding that this study was the most current and reviewed a greater number of the cohort studies.

[9] The administrative law judge found that the animal studies are not analogous because the rats ingested asbestos and cadmium rather than inhaling the particles.

[10] Based on the doctors' opinions, the administrative law judge identified smoking, excess body weight of high body mass index, and phenacetin use as risk factors, and age, gender and alcohol use as possible risk factors. Decision and Order at 36.

cause of claimant's kidney cancer.[11] Given the epidemiological studies presented in this case, the administrative law judge rationally found that there is a generally weak association between kidney cancer and asbestos and cadmium exposure, and that risk factors for such cancer are not synergistic. The administrative law judge therefore rationally gave less weight to the opinions of Drs. Daum and Brautbar, as they are based on older studies and as they do not separately assess claimant's risk factors for kidney cancer. Since the administrative law judge as fact-finder is entitled to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion of any particular expert, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *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), we affirm the administrative law judge's findings that based on the medical evidence of record as a whole, claimant's kidney cancer was not work-related. *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also Rochester v. George Washington Univ.*, 30 BRBS 233, 236-237 (1997). Consequently, if the administrative law judge finds on remand that rebuttal of the Section 20(a) presumption has been established, the denial of benefits is affirmed.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[11] We note, however, that this does not establish that Dr. Harbison's opinion is sufficient to rebut the Section 20(a) presumption, as the burdens on the parties are different at the rebuttal and weighing stages of the analysis.