BRB No. 98-0470

ANDREW WOODS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	
AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-2012) of Administrative Law Judge Daniel A. Sarno, Jr., 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 began working for employer in 1974 as a pipe fitter; as a pipe fitter, claimant's primary responsibility was purging Argon gas and other substances from piping systems aboard various vessels. It is undisputed that claimant was exposed to dust, mold and dirt during the course of his employment with employer, and that claimant was precluded from wearing a respirator due to a long-standing sinus

condition. Complaining of shortness of breath, hoarseness and sinus drainage, claimant saw his treating physician, Dr. Cypress, in December 1995. Dr. Cypress referred claimant to Dr. Sutton, an internist, who diagnosed claimant with occupational allergic rhinitis and laryngitis, excused claimant from work from December 1995 until August 5, 1996, and then returned claimant to work with the restriction of avoiding environments containing dust, molds, and damp conditions. Claimant was also examined by Dr. Carter, an ear, nose and throat specialist, who also diagnosed allergic rhinitis and post-nasal drainage, compounded by a hiatal hernia condition. In February 1996, claimant underwent an examination by Dr. King, an allergist, which revealed that claimant was allergic to numerous environmental irritants, including dust and molds.

Claimant returned to his employment duties with employer on August 5, 1996; on October 17, 1996, claimant suffered an uncontrollable nose bleed for which he was treated at a local hospital. Claimant thereafter underwent surgery in December 1996 for a deviated septum, but that procedure proved unsuccessful in curing claimant's symptoms of hoarseness and shortness of breath. Thereafter, claimant filed a claim under the Act seeking temporary total disability compensation for breathing problems arising out of occupational exposure to lung irritants during the course of his employment with employer.

In his Decision and Order, the administrative law judge found that claimant failed to establish that his work-related exposure to dust and molds constituted exposure to hazards greater than those involved in ordinary living, and thus, failed to establish that his employment caused an occupational disease, or aggravated a pre-existing condition, under Section 2(2) of the Act, 33 U.S.C. §902(2). Therefore, the administrative law judge denied claimant's claim for benefits. On appeal, claimant contends that he has presented a *prima facie* case sufficient to invoke the Section 20(a) presumption that his respiratory condition is work-related. Employer responds, urging affirmance of the administrative law judge's decision.

Section 20(a), 33 U.S.C. §920(a), of the Act provides claimant with a presumption that an injury is causally related to his employment. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.,* 20 BRBS 90 (1987). In order for Section 20(a) to apply, claimant must establish a *prima facie* case by proving that he suffered a harm and that employment conditions existed or an accident occurred which could have caused, aggravated or accelerated the harm. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *Care v. Washington Metropolitan Area Transit Authority,* 21 BRBS 248 (1988).

In the instant case, claimant contends that the administrative law judge erred in not giving him the benefit of the Section 20(a) presumption since, he asserts, he has established that he has a respiratory condition and that his work at employer's facility exposed him to numerous irritants which either caused of aggravated that condition. We agree. In denying claimant's claim, the administrative law judge improperly required claimant to come forward with evidence that the exposures he experienced at employer's facility were greater than those involved in ordinary living and of a sufficient intensity to cause or aggravate his respiratory condition. *See* Decision and Order at 4-5. Specifically, the administrative law judge found that claimant, at best, developed dust allergies while working for employer which, in turn, caused various respiratory symptoms. *Id.* at 4. In this regard, the physicians of record, Drs. Sutton, Carter and King, all concur that claimant suffers from a respiratory condition, specifically, allergic rhinitis and laryngitis. *See* CXS- 6, 9c; EXS- 3a, 4a, 5h. In fact, employer conceded that claimant suffers from a respiratory condition. *See* Tr. at 6. Thus, claimant has established the existence of a harm. The administrative law judge erred, however, in finding that claimant did not establish the existence of working conditions which could have caused or aggravated claimant's harm. Claimant's uncontroverted testimony that he was exposed to dust and mold without the aid of a respirator while working at employer's facility, *see* Tr. at 13-14, 23, together with employer's concession that dust and mold were common to claimant's job, *see* Decision and Order at 4, are sufficient to establish that working conditions existed which could have caused or aggravated claimant's respiratory condition. Contrary to the administrative law judge's conclusion, claimant is not required to prove that the level of irritant exposure experienced by claimant while working at employer's facility was greater than that involved in normal living, or that the exposure was sufficient, in fact, to cause or aggravate his respiratory condition. *See generally Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT)(D.C. Cir. 1990); *Stevens*, 23 BRBS at 193. We, therefore, reverse the administrative law judge's finding that claimant has failed to establish the working conditions element of his *prima facie* case and we hold that invocation of the Section 20(a) presumption has been established as a matter of law.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to establish that claimant's respiratory condition was not caused or aggravated by claimant's employment with employer. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). 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; the unequivocal testimony of a physician that no relationship exists between the injury and a claimant's employment is sufficient to rebut the presumption. *See Phillips v.*

Newport News Shipbuilding & Dry Dock Co., 22 BRBS 94 (1988). If employer establishes rebuttal of the presumption, the administrative law judge must weigh all of the evidence contained in the record 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 his June 10, 1996, report, Dr. Carter diagnosed allergic rhinitis with post-nasal drainage compounded by the effects of gastro-esophageal reflux; Dr. Carter offered, however, no opinion of record with regard to the cause of claimant's condition. *See* EX-4a. Similarly, Dr. King's opinion does not support a finding of rebuttal, as that physician stated in his March 27, 1997, report that he could not "quantitate any industrial 'irritant' problem that may or may not be contributing to [claimant's] symptoms." EX-5h. Thus, Dr. King did not rule out claimant's work environment as a cause or contributor to claimant's respiratory condition. Accordingly, as neither Dr. Carter or Dr. King state that claimant's work environment did not cause or aggravate claimant's respiratory condition, these opinions are insufficient as a matter of law to establish rebuttal pursuant to Section 20(a). *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). Thus, a causal relationship between claimant's employment and his respiratory condition has been established. *See Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *see generally ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989). The denial of benefits is therefore vacated, and the case is remanded to the administrative law judge for consideration of the remaining issues.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge