BRB No. 99-0197

JOHN E. PASKOSKI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES CORPORATION	)	DATE ISSUED: Nov. 2, 1999
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits Upon Remand from the Benefits Review Board of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Gerald F. Gay (Arnold & Gay, P.A.), Baltimore, Maryland, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits Upon Remand from the Benefits Review Board (88-LHC-945) of Administrative Law Judge Ainsworth H. Brown 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).

This is the second time this case is before the Board. Claimant was working for employer as a front-end loader driver when, on July 27, 1987, he was injured when a tire lost air causing the loader to turn over on its side. Claimant's head hit the left side window of the cab and struck the pavement as he fell several feet from the left side of the loader. Claimant did not seek medical attention following the accident, but several witnesses testified that he demonstrated decreased physical abilities for several weeks after the accident. On September

4, 1987, claimant suffered the first of a series of strokes. Contending that the strokes are causally related to the July 27, 1987, injury, claimant sought permanent total disability benefits under the Act.

In his Decision and Order, the Administrative Law Judge Gray concluded that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption of causation and that the presumption had not been rebutted. In addition, the administrative law judge found that claimant is permanently and totally disabled, and thus benefits were awarded. Finally, the administrative law judge found that employer is entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, the Board, *inter alia*, reversed the administrative law judge's determination that employer failed to rebut the Section 20(a) presumption, and remanded the case for the administrative law judge to determine whether claimant's employment injury caused his stroke based on the record as a whole. *See Paskoski v. Ceres Corp.*, BRB Nos. 92-1505/A (Aug. 21, 1996)(unpublished).

In his Decision and Order on remand, Administrative Law Judge Brown (the administrative law judge) considered the totality of the evidence and concluded that claimant's strokes are not causally related to his July 27, 1987, work incident. Accordingly, the administrative law judge denied claimant benefits under the Act.

On appeal, claimant challenges the denial of benefits. Employer responds, urging affirmance.

Where, as in the instant case, the claimant has been found to be entitled to the Section 20(a), 33 U.S.C. §920(a), presumption linking his condition to his employment, and employer has rebutted that presumption, the administrative law judge is required to weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997).

In the instant case, the administrative law judge found that claimant failed to establish a causal relationship based upon the record as a whole. Specifically, after considering the totality of the medical evidence of record, the administrative law judge credited the opinions of Drs. Khurana and Lancelotta in concluding that claimant's strokes are not related to his July 1987 work accident. In addressing this issue, Dr. Khurana unequivocally opined that claimant's stroke, which occurred at claimant's middle cerebral artery deep inside his brain, was not related to claimant's employment. In support of his opinion, Dr. Khurana testified

that no medical literature existed which related trauma to a stroke occurring at the middle cerebral artery, that this specific artery is so deep within the brain that only a tremendous injury to the brain would affect it, and that claimant's post-incident CT scan did not reveal such trauma. *See* July 23, 1998 Transcript at 90-95; *see also* EX 67. Lastly, Dr. Khurana stated that the interval between claimant's work incident and the onset of his first stroke - approximately 38 days - was significantly greater than the longest recorded connection between a trauma and a stroke, which is eleven days. *See* 1998 Transcript at 90; December 15, 1988 Transcript at 238-239. Similarly, Dr. Lancelotta testified that he could find no report of trauma causing a stroke or occlusion in the middle cerebral artery, that massive trauma would be needed to injure that artery, and that the delayed onset of claimant's stroke supported his opinion that claimant's strokes were not related to his employment with employer. *See* 1998 Transcript at 147-153. In declining to credit the contrary opinion of Dr. Schilder, who found that a causal relationship did in fact exist between claimant's July 1987 work incident and his subsequent strokes, the administrative law judge implicitly acknowledged the "flaws" contained in that physician's testimony and, moreover, noted that Dr. Schilder provided no rationale to overcome the analyses of Drs. Khurana and Lancelotta.[1] *See* Decision and Order on remand at 2-3.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may weigh the evidence and draw his conclusions from it. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 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). In the instant case, the administrative law judge rationally credited the opinions of Drs. Khurana and Lancelotta, and his decision is thus supported by substantial evidence. We therefore affirm the administrative law judge's determination, based on the record as a whole, that claimant's strokes were not causally

[1]Specifically, between the first and second hearings in this case, Dr. Schilder modified his opinion regarding the onset date of claimant's initial stroke, *compare* 1988 Transcript at 166 with 1990 Transcript at 399; moreover, Dr. Schilder conceded that he could not cite to medical literature reporting a trauma-caused injury to the right middle artery. *See* 1988 Transcript at 164.

related to his work accident.[2] *See, e.g., Rochester v. George Washington University*, 30

[2]Contrary to claimant's contention, the administrative law judge did not pre-determine the issue of causation based on the Board's holding that employer rebutted the Section 20(a) presumption. Rather, after specifically stating that the Board's decision "called for a global evaluation of the evidence to determine whether the event taking place in late July 1987...

caused [claimant's] subsequent cerebral vascular accident," the administrative law judge discussed the weight he accorded the medical evidence of record. While the administrative law judge's subsequent commentary regarding the issue of causation does lend some credence to claimant's argument, this discussion did not taint his evaluation of the evidence.

Because the administrative law judge made statements indicating a misapprehension of the operation of the Section 20(a) presumption, we feel constrained to explain it. In *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994), the

Court distinguished the "burden of persuasion," which is "the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose," from the "burden of production" which is " a party's obligation to come forward with evidence to support its claim." Upon invocation of the Section 20(a) presumption, the burden of *production* shifts to employer; employer must produce substantial evidence that a causal relationship does not exist between claimant's injury or harm and his employment. *See American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935)*; 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 (1st Cir. 1997). Thus, on rebuttal, only evidence supporting employer's position is considered by the factfinder in determining whether employer has produced sufficient evidence. *See, e.g., Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998). If so, the presumption drops from the case and the administrative law judge must decide the case based on the weight accorded the evidence in the record as a whole, *see Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997), with claimant bearing the ultimate burden of persuasion. Accordingly, while an employer may *produce* substantial evidence sufficient to sever the presumed causal connection between a claimant's injury and his employment and thus rebut the Section 20(a)

BRBS 233 (1997).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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presumption, after weighing all of the evidence, the factfinder may find claimant's evidence more *persuasive* and conclude that a causal relationship exists based upon the record as a whole. Ultimately, the administrative law judge properly determined that claimant failed to carry his burden of persuasion.