BRB No. 09-0551

P.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIPBUILDING, INCORPORATED	)	DATE ISSUED: 10/26/2009
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, PC), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-LHC-02022) of Administrative Law Judge Richard K. Malamphy 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 has worked for employer as a fireman for approximately 26 years. He was diagnosed with esophageal cancer in June 2007, which was treated surgically. In December 2007, Dr. Cross, an oncologist, opined that claimant's cancer was due, at least in part, to hydrocarbon combustion products that claimant was exposed to during the course of his employment as a fireman for employer. Dr. Wick, a pathologist, opined

that claimant's cancer is not related to his employment. Claimant filed a claim for benefits under the Act, which employer controverted.

In his decision, the administrative law judge found that claimant established a *prima facie* case and is entitled to the Section 20(a) presumption linking his esophageal cancer to his working conditions with employer. 33 U.S.C. §920(a). The administrative law judge found that employer rebutted the Section 20(a) presumption, and he concluded that claimant failed to establish, based on the record as a whole, that his esophageal cancer is related to his employment as a fireman. Accordingly, the administrative law judge denied the claim.

On appeal, claimant argues that the administrative law judge erred by finding that employer rebutted the Section 20(a) presumption and that claimant failed to establish that his esophageal cancer is related to his employment. Employer responds, urging affirmance of the denial of the claim. Claimant filed a reply brief.

Once, as here, the Section 20(a) presumption is invoked, employer bears the burden of producing substantial evidence that the claimant's condition was not caused by his employment in order to overcome the presumed causal connection between the injury and the employment. *Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Claimant asserts the administrative law judge erred by finding Dr. Wick's opinion sufficient to rebut the presumption.

In finding the Section 20(a) presumption rebutted, the administrative law judge relied on Dr. Wick's opinion that claimant had "Barrett's esophageal dysplasia, which is caused exclusively by GERS [gastrointestinal reflux syndrome], and is the only known and proven etiological factor for esophageal adenocarcinoma." Decision and Order at 10; EX 2. The administrative law judge also relied on Dr. Wick's opinion, given to a reasonable degree of medical certainty, that claimant's esophageal cancer was "totally unrelated to putative exposure to hydrocarbon combustion products." EX 3.

We affirm the administrative law judge's finding that Dr. Wick's opinion is sufficient to rebut the Section 20(a) presumption. *Rochester v. George Washington University*, 30 BRBS 233 (1997). Contrary to claimant's contention, the fact that Dr. Wick disagrees with Dr. Cross's contrary causation opinion or with Dr. Cross's opinion concerning the validity of the medical literature is not relevant in this case to whether Dr. Wick's opinion constitutes substantial evidence to rebut the Section 20(a) presumption. Employer's burden on rebuttal is one of production rather than persuasion, and Dr. Wick's opinion constitutes substantial evidence of the absence of a causal connection between claimant's cancer and his employment. *Universal Maritime Corp.,* 126 F.3d 256, 31 BRBS 119(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *cf.*

Rainey v. Director, OWCP, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008) (opinion not substantial evidence to the contrary where doctor's opinion is based on suppositions contrary to other findings of the administrative law judge); *see also 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).

If the administrative law judge finds the Section 20(a) presumption rebutted, he must weigh all of the relevant evidence, with claimant bearing the burden of persuasion on the issue of the work-relatedness of his condition. *See, e.g., Universal Maritime Corp.* 126 F.3d 256, 31 BRBS 119(CRT); *Burley v. Tidewater Temps*, 35 BRBS 185 (2002). Claimant contends the administrative law judge erred by finding that claimant did not establish a relationship between his esophageal cancer and his working conditions. Claimant contends the administrative law judge erred by not crediting Dr. Cross's opinion as he has treated claimant's cancer, is an oncologist, and his opinion is supported by medical literature.

The administrative law judge found that both Drs. Cross and Wick opined that claimant developed an adenocarcinoma-type of esophageal cancer, and that he had a condition known as "Barrett's esophagus." As the parties did not offer evidence of the differing subtypes of esophageal cancer, the administrative law judge referred to an internet site for this information. The site discusses the two types of esophageal cancer and states that Barrett's esophagus, which claimant had, is related to acid reflux problems, and that people with long-standing acid reflux problems are at increased risk for adenocarcinoma esophageal cancer, the type claimant suffered. Decision and Order at 11 *citing* The Society of Thoracic Surgery: Esophageal Cancer (Jeffrey P. Gold ed. 2007).[1] The administrative law judge found that, notwithstanding the medical studies referenced by Dr. Cross finding incidences of the risk of esophageal cancer in firefighters, Dr. Cross did not state that a causal link between esophageal cancer and exposure to hydrocarbon combustion products is generally accepted in the medical community. The administrative law judge also found that Dr. Cross's opinion is not unequivocal. Specifically, Dr. Cross stated that "it is not possible" to determine the exact cause of claimant's cancer, and that "I suspect" that environmental agents played a role. CX 2. The administrative law judge found that Dr. Cross's opinion, therefore, does not "create more than a mere suspicion" that claimant's cancer was related to his employment. Decision and Order at 12. The administrative law judge found it "more likely that claimant's adenocarcinoma was caused by his ten-year history of gastrointestinal reflux disease and Barrett's esophagus, which is a known cause of claimant's type of cancer." *Id*. Accordingly, the administrative law judge found that

[1]Accessed at www.sts.org/sections/patientinformation/esophageal/esophagealcancer. Decision and Order at 11.

claimant failed to establish that his esophageal cancer was caused or accelerated by occupational exposure to hydrocarbon combustion products.

It is well-established that an administrative law judge is not bound to accept the opinion or theory of any particular medical examiner but may instead draw his own inferences and conclusions from the evidence. *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). The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003); *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994), *aff'g Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Contrary to claimant's assertions, the administrative law judge did not err in failing to accord determinative weight to the opinion of Dr. Cross. The administrative law judge rationally determined that Dr. Cross did not state that a link between esophageal cancer and exposure to hydrocarbon combustion products is generally accepted in the medical community despite Dr. Cross's recitation of several studies suggesting a link between esophageal cancer and hydrocarbon combustion products.[2] Thus, the administrative law judge could rationally find that Dr. Cross's mere suspicion that there was link between claimant's cancer and his work exposure was insufficient to establish the work-relatedness of the disease, given that claimant suffered from two known causes of esophageal adenocarinoma, gastrointestinal reflux disease and Barrett's esophagus. As the administrative law judge's weighing of the evidence is rational, we affirm his conclusion that claimant failed to establish that his esophageal cancer actually was due, even in part, to occupational exposure to hydrocarbon combustion products. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Hice v. Director, OWCP*, 48 F.Supp.2d 501 (D. Md. 1999)

[2] Elsewhere in his decision the administrative law judge noted that Dr. Wick stated that there are no published peer-reviewed studies supporting such a link. EX 2; Decision and Order at 8.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge