BRB No. 97-0596

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| CALVIN T. KANESHIRO | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| HOLMES & NARVER, INCORPORATED | ) | DATE ISSUED: |
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| and | ) | |
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| WAUSAU INSURANCE COMPANIES | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | 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.

Ronald P. Tongg (Tongg and Tongg), Honolulu, Hawaii, for claimant.

Robert C. Kessner and James N. Duca (Kessner Duca Umebayashi Bain & Matsunaga), Honolulu, Hawaii, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (91-LHC-2518) 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, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 that this case is before the Board. To briefly reiterate, claimant was employed as a waiter/cook from January 20, 1954, to January 19, 1955, from February 16, 1955, to November 15, 1955, and from December 16, 1955, to June 11, 1956, on the Enewetok and Bikini Atolls, during which time those atolls were being utilized by the Atomic Energy Commission and the Joint Chiefs of Staff for atomic weapons testing

programs. In January 1989, claimant was diagnosed with chronic granulocyctic leukemia (CGL). Claimant sought total disability benefits under the Act, alleging that his exposure to radiation during the course of his employment with employer resulted in his CGL.

In the initial Decision and Order, Administrative Law Judge G. Marvin Bober found, *inter alia*, that claimant established his *prima facie* case based upon his exposure to radiation and the diagnosis of CGL, that claimant was thus entitled to the presumption of causation at 33 U.S.C. §920(a), and that employer failed to establish rebuttal of that presumption. Accordingly, Judge Bober awarded claimant temporary total disability compensation commencing January 17, 1989, and continuing, interest on any accrued unpaid compensation benefits, penalties under Section 14(e), 33 U.S.C. §914(e), and medical benefits. On appeal, the Board affirmed the administrative law judge's invocation of the Section 20(a) presumption, vacated the administrative law judge's finding that employer failed to establish rebuttal, and remanded the case for the administrative law judge to address all of the medical evidence of record when determining whether employer established rebuttal of the Section 20(a) presumption. *Kaneshiro v. Holmes & Narver, Inc.*, BRB No. 93-1370 (March 14, 1996)(unpublished).

On remand, the case was transferred to Administrative Law Judge Di Nardi (hereinafter the administrative law judge). In his decision on remand, the administrative law judge found that employer established rebuttal of the Section 20(a) presumption based on the medical opinions of Drs. Fry, Goldman, Fabrikant, Moloney, and Auxier. The administrative law judge subsequently weighed all the evidence of record and found that claimant had failed to establish that his condition arose out of his employment. Accordingly, the administrative law judge denied the instant claim for benefits.

Claimant now appeals challenging the administrative law judge's determination that employer's evidence is sufficient to establish rebuttal of the Section 20(a) presumption. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

Once the Section 20(a) presumption is invoked, 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 Manship v. Norfolk & Western Railway Co.,* 30 BRBS 175 (1996). 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. *See Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept. of Labor,* 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993); *see also Swinton v. J. Frank Kelly, Inc.,* 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). In establishing rebuttal of the presumption, proof of another agency of causation is not necessary. *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). Rather, the testimony of a physician, if credited by the administrative law judge, 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 Devine v. Atlantic Container Lines, G.I.E.,* 23 BRBS 270 (1990).

The administrative law judge found that the evidence submitted by employer, specifically the opinions of Drs. Fry, Goldman, Fabrikant, Moloney, and Auxier, was sufficient to rebut the presumed causal link between claimant's CGL and his exposure to radiation while working for employer. In addressing whether claimant's CGL arose out of his radiation exposure, Dr. Fry[1] concluded that there was no evidence of a causal association between claimant's condition and his exposure. EX 22 at 15. Dr. Goldman[2] concluded that there was a 99.5 percent chance that claimant's leukemia was caused by agents other than his radiation exposure, CX 6 at 4, and that it was extremely unlikely that it was due to claimant's radiation exposure. EX 19. Dr. Fabrikant[3] stated that claimant's exposure between 1954 and 1956 did not cause his leukemia, HT IV at 171-172, and that the medical evidence precluded any causal link between claimant's exposure to radiation and claimant's subsequent illness. HT IV at 177. Dr. Moloney[4] opined that a radiation-induced etiology for claimant's illness was unacceptable. EX 27 at 3. Lastly, Dr. Auxier[5]

[1]Dr. Fry, who holds a master's degree in public health, is a physician as well as a member of the teaching faculty of the Oak Ridge Associated Universities. EX 23.

[2]Dr. Goldman holds a doctorate in radiation biology and is professor of radiobiology at the Department of Radiology, School of Medicine, University of California at Davis. EX 20.

[3]Dr. Fabrikant is a physician, research professor of medicine and radiology, and author of publications on the relationship between radiation and illness. EX 25.

[4]Dr. Moloney is a physician, research scientist, professor emeritus of Harvard Medical School, and author of various articles on radiation-induced illness. EX 20.

[5]Dr. Auxier, who has a master's degree in health physics and a doctorate degree in

found the lack of a causal connection between claimant's exposure and his CGL based on statistical studies that reported no enhanced rate of leukemia as a result of low rates of radiation exposure. HT III at 247-248.

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nuclear engineering, is director of Health Physics at Oak Ridge National Laboratory. EX 22, Appendix 1.5.

In support of his contention on appeal, claimant avers that the aforementioned opinions credited by the administrative law judge are insufficient to establish rebuttal of the Section 20(a) presumption because they are not supported by definitive studies nor affirmative underlying evidence. *See Daubert v. Merrill Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). Specifically, claimant contends that the opinions credited by the administrative law judge were based on statistics and studies reflecting that there were no cases connecting claimant's radiation dose and long latency period (33 to 35 years) with CGL; this absence of any demonstrated evidence of low doses of radiation resulting in CGL over an extended latency period, claimant contends, is not the equivalent of proving that such exposure does not cause CGL.

Contrary to claimant's contention, the Board has held that a physician's medical opinion, regardless of the fact that a definitive study on the illness in question has not been done, may sever the connection between a claimant's injury and his employment if the opinion is specific and comprehensive. *See Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986). In concluding that employer rebutted the presumption, the administrative law judge noted the pre-eminent qualifications and international stature of employer's witnesses and determined that the scientific data presented by each of employer's experts was persuasive and credible. Accordingly, as the opinions of Drs. Fry, Goldman, Fabrikant, Moloney, and Auxier sever the causal link between claimant's radiation exposure and his CGL, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Lastly, the administrative law judge, based upon the clear weight of both the qualifications of employer's witnesses as well as the soundness of their scientific reasoning, concluded that causation had not been established based upon the record as a whole. As this conclusion is not challenged on appeal by claimant, it is affirmed. *See Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge