BRB No. 14-0002

FREDDIE BOGGS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WASHINGTON GROUP INTERNATIONAL, INCORPORATED	)	
	)	
	)	DATE ISSUED: Aug. 25, 2014
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Erin E. Jewell (Patten, Wornom, Hatten & Diamonstein, L.C.), Newport News, Virginia, for claimant.

John V. Quaglino (Juge, Napolitano, Guilbeau, Ruli, Frieman & Whiteley), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2012-LHC-00478, 2012-LHC-00845) of Administrative Law Judge Alan L. Bergstrom rendered on claims 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 worked for a succession of companies, Catalytic, Raytheon and Washington Group International (WGI, employer), which contracted him out as a carpenter at the Amoco Oil Refinery (the Refinery) in Yorktown, Virginia, from 1983 until he retired on January 2, 2004. Claimant testified on deposition that about 95 percent of his work at the Refinery was performed at the plant itself and on the Refinery's dock on the York River. CX 25. He stated specifically he was exposed to asbestos during his work building scaffolding around the pipes at the Refinery, including on the piers, as well as generally throughout the course of his work at that facility. *Id.* Claimant also stated that breathing the air at the Refinery during his daily work exposed him to gasoline, kerosene, crude oil, and other toxic chemicals. *Id.* Claimant, alleging that his occupational exposure to asbestos and other toxic substances, e.g., benzene and polycyclic aromatic hydrocarbons (PAHs), at the Refinery caused his asbestosis and bladder cancer, diagnosed respectively in 2008 and 2009, filed claims against Catalytic, Raytheon and WGI. All three employers controverted the claim.

After concluding that claimant is covered under the Act, 33 U.S.C. §§902(3), 903(a), the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to his asbestosis and bladder cancer and related urinary and bladder dysfunction, and that employers did not rebut the presumption. The administrative law judge found claimant entitled to, and WGI, as claimant's last covered employer, liable for, separate awards of permanent partial disability benefits under Section 8(c)(23) of the Act,[1] 33 U.S.C. §908(c)(23), as well as medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's award of benefits. Claimant responds, urging affirmance of the administrative law judge's decision.

Bladder Cancer

Employer contends the administrative law judge erred in finding claimant entitled to the Section 20(a) presumption that his bladder cancer is related to his employment, as the evidence presented merely suggests that claimant may have been exposed to a chemical that may or may not have increased his risk of developing bladder cancer.[2] In this regard, employer maintains that, other than claimant's testimony, there is no

[1]The administrative law judge awarded claimant permanent partial disability benefits for a 15 percent impairment arising out of his work-related asbestosis, commencing June 26, 2008, and for a 42 percent impairment arising out of his work-related bladder cancer and associated conditions, commencing September 24, 2009.

[2]It is undisputed that claimant has bladder cancer.

evidence that he was actually exposed to any materials that have the potential to cause, much less that are recognized as a cause of, bladder cancer. Additionally, employer contends that Dr. Frank's opinion that because claimant worked at a refinery he was exposed to petrochemical products containing PAHs and benzene, and thus, was at risk of developing bladder cancer, is invalid because it is based on an incomplete understanding of claimant's possible exposures and lacks scientific/medical support.

In determining whether a disabling injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a prima facie case. To establish a prima facie case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In presenting his case, claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, claimant must show that working conditions existed which could have caused his harm. *See generally U.S. Industries/Federal Sheet Metal, Inc.,* 455 U.S. 608, 14 BRBS 631; *see also Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

In this case, the administrative law judge rationally relied on claimant's deposition testimony, the Environmental Protection Agency (EPA) reports and the opinion of Dr. Frank, as bolstered by medical literature,[3] to find that claimant established the working conditions element of his prima facie case. Specifically, the administrative law judge found that claimant testified that in the course of his building scaffolding around pipelines at the Refinery, he got chemicals on his skin from leaking pipes and that he inhaled fumes from petroleum products on a regular basis merely from breathing the ambient air at the Refinery. CX 25 at 11, 12, 20. Additionally, the administrative law judge found that EPA reports, addressing proposed environmental cleanup measures at

[3]The administrative law judge observed that the scientific literature upon which Dr. Frank relied stands for the proposition that benzene and PAH exposure can give rise to bladder cancer. Specifically, the administrative law judge found that the literature included: an abstract from an epidemiological study which concluded that petrochemical workers had an increased risk of developing cancer; three articles describing epidemiological studies that specifically linked PAH exposure to male bladder cancer; a fourth article summarizing ten epidemiological studies that concluded the current exposure threshold for PAHs (as of 1996) was unacceptable because of a corresponding risk of lung and bladder cancer; and materials from the International Agency for Research on Cancer which indicated that occupational exposures in petroleum refining are "probably carcinogenic to humans." Claimant's Exhibit 30-35.

the Refinery, confirmed the presence of "unacceptable" exposure levels of petroleum byproducts, including PAHs and benzene, in the soil and water at the site of the Refinery.[4] CXs 36, 37. Moreover, the administrative law judge found that Dr. Frank opined that claimant's exposures to benzene and PAHs while employed at the Refinery were sufficient to have contributed to his development of bladder cancer. CXs 10, 44. Thus, substantial evidence supports the administrative law judge's finding that claimant's exposures to petroleum products, specifically PAHs and benzene, in the course of his work for employer at the Refinery, could have contributed to his development of bladder cancer and related conditions. Therefore, we affirm the conclusion that claimant established the working conditions element and, thus, a prima facie case with regard to his bladder cancer. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see generally O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

Employer next avers that the administrative law judge erred in concluding that the opinion of Dr. Gots is insufficient to rebut the Section 20(a) presumption with regard to claimant's bladder cancer. Employer's contention has merit. Once, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *See Moore*, 126 F.3d 256, 31

[4]The record contains two reports from the EPA. CXs 36, 37. The first, from 1991, is a Corrective Action Order between the EPA and Amoco Oil Company, the owner of the Refinery, outlining corrective actions, under the Resource Conservation and Recovery Act (RCRA), to remediate hazardous waste contamination, including benzene contamination, of workers through incidental ingestion, dermal contact or inhalation of volatiles and particulates in ambient air. CX 36. The second, dated February 22, 2002, is an update on RCRA remediation efforts at the Refinery, and reflects that Phase 2 of the RCRA Facility Investigation had begun. It noted that the main contaminants in the soil, surface water, and groundwater at the Refinery were heavy metals and petroleum hydrocarbons including PAHs and that, at that time, the EPA needed additional information to determine whether human exposures had been controlled. CX 37. The EPA reports, therefore, document the existence of harmful materials, such as benzene and PAHs, at the Refinery, and establish that workers at that facility were exposed to such toxins in the course of their employment. Employer's contention that there is no evidence, outside of claimant's testimony, indicating exposure to toxic chemicals may have occurred at the Refinery, thus, is without merit.

BRBS 119(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Employer's burden on rebuttal is to produce substantial evidence of the lack of a connection between claimant's employment and the harm.[5] *Holiday*, 591 F.3d at 226, 43 BRBS at 69-70(CRT); *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT). In this regard, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has stated that,

> [t]he substantial evidence standard of proof requires the employer to put forward as much relevant factual matter as a reasonable mind would need to accept, as one rational conclusion, that the employee's injury did not arise out of his employment. [citation omitted] The standard requires more than a scintilla of evidence, but is not a preponderance standard. *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 386 (4th Cir. 2000).

Holiday, 591 F.3d at 226, 43 BRBS at 69(CRT). In his decision, the administrative law judge acknowledged Dr. Gots's opinion that claimant's bladder cancer was not linked to his occupational exposures to petroleum products but rather was caused entirely by his significant smoking history. Decision and Order at 37. However, the administrative law judge found that Dr. Gots's opinion does not rebut the Section 20(a) presumption because it is insufficient to show that claimant's demonstrated exposures to benzene and PAHs at the Refinery could not have contributed to his development of bladder cancer. *Id.* at 39. In this regard, the administrative law judge found Dr. Frank's opinion better reasoned and more persuasive. *Id.* The administrative law judge thus found that employer did not produce substantial evidence that claimant's demonstrated exposures to benzene and PAHs at the Refinery could not have contributed to his development of bladder cancer. Consequently, he concluded that the Section 20(a) presumption was not rebutted with respect to claimant's bladder cancer.

As employer correctly asserts on appeal, the administrative law judge erred in weighing the evidence at rebuttal, and thus, erred in placing the burden of persuasion on employer at this point in the analysis, as employer need only produce substantial evidence to the contrary in order to rebut the Section 20(a) presumption. *Holiday*, 591

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[5]Thus, employer's burden on rebuttal is one of production, not persuasion. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 180, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Bath Iron Works Corp. v. Director, OWCP* [*Harford*], 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1988).

F.3d at 226, 43 BRBS at 69(CRT). A review of Dr. Gots's testimony reveals that he stated that claimant's occupational exposures to PAHs and benzene did not cause his bladder cancer or accompanying difficulties and that he provided epidemiological studies as support for this opinion. WX 6-8. Dr. Gots's opinion constitutes substantial evidence of the lack of a causal relationship between claimant's work exposures and his bladder cancer. *Holiday*, 591 F.3d at 226, 43 BRBS at 69-70(CRT). Accordingly, we reverse the administrative law judge's finding that employer did not rebut the Section 20(a) presumption.

The administrative law judge's error in finding Dr. Gots's opinion insufficient to rebut the Section 20(a) presumption is, however, harmless, as the administrative law judge fully weighed the relevant evidence of record, and found that claimant established a work-related bladder condition, based on Dr. Frank's opinion. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988); *see generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Specifically, the administrative law judge discussed the conflicting opinions of Drs. Gots and Frank, examining the underlying scientific literature upon which each relied, and found that Dr. Frank's opinion is better reasoned and more persuasive than Dr. Gots's. Decision and Order at 37. In light of Dr. Frank's "clear reasoning and superior credentials,"[6] the administrative law judge credited his opinion that claimant's occupational exposures to PAHs and benzene were sufficient to contribute to his development of bladder cancer. *Id.* at 38.

The administrative law judge is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. 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. Tann*, 841 F.2d 540, 543, 21 BRBS 10, 15-16(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982); *Ennis v. O'Hearne*, 223 F.2d 755 (4th Cir. 1955). As the administrative law judge's findings of fact are rational and supported by substantial evidence, his conclusion that claimant's bladder cancer is due to his exposure to petroleum products while working for employer at the Refinery is affirmed. *See Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011). We thus affirm the administrative law judge's award of permanent partial disability benefits for a

[6]The administrative law judge found that Dr. Gots is less qualified than Dr. Frank to offer an opinion in this case, because he is not Board-certified in any field of medicine and has less clinical experience than Dr. Frank, who is Board-certified in Internal Medicine and Occupational Medicine. *See* CX 11; RX 7.

42 percent impairment and medical benefits due to claimant's work-related bladder cancer and related conditions. 33 U.S.C. §908(c)(23).

Asbestosis

Employer contends that the opinion of Dr. Gots, that claimant's lung dysfunction is not related to his employment at the Refinery, is sufficient to rebut the Section 20(a) presumption with regard to the asbestosis claim.[7] Dr. Gots opined that claimant does not have asbestosis and that the quantity and nature of claimant's exposure to asbestos were insufficient to give rise to asbestosis. The administrative law judge found that employer did not produce "any evidence to show claimant sustained asbestos exposures in any way other than through his job at the Refinery." Decision and Order at 39. The administrative law judge found that Dr. Gots's opinion, that claimant's significant smoking history rather than any work-related asbestos exposure caused his asbestosis, is unsubstantiated as there is no evidence that cigarette smoking can cause asbestosis or could have caused the opacities seen on claimant's chest x-ray, which were the shape, location, and profusion typical of asbestosis. *Id.* The administrative law judge surmised that "claimant's smoking history therefore does not serve as a plausible alternative explanation for his asbestosis, although it very likely contributed to his other respiratory problems."[8] *Id.* He thus concluded that because employer did not produce any other evidence "that a reasonable mind would accept as adequate to support the conclusion that claimant's asbestosis did not arise, at least in part, out of occupational exposures to asbestos sustained at the Refinery," the Section 20(a) presumption was not rebutted with respect to claimant's asbestosis.

Dr. Gots's opinion that claimant does not have asbestosis and that the quantity and nature of claimant's exposures were insufficient to cause asbestosis may be sufficient to

[7]Employer does not dispute the administrative law judge's finding that claimant established a prima facie case, pursuant to Section 20(a), that his "early or mild form" of asbestosis is related to his work for employer at the Refinery. Decision and Order at 31-32.

[8]Employer meets its burden on rebuttal by producing substantial evidence of the absence of a causal relationship between the harm and the employment exposures, and need not prove another agency of causation in order to rebut the Section 20(a) presumption. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Thus, to the extent that the administrative law judge's rebuttal discussion appears to require employer to produce evidence of "a plausible alternative explanation for his asbestosis," it is in error. *Id.*

rebut the Section 20(a) presumption. *See Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013). Nonetheless, we hold that any error by the administrative law judge in finding that employer did not rebut the Section 20(a) presumption is harmless, as the administrative law judge fully addressed the evidence and found that claimant met his burden of establishing that his asbestosis is related to his employment exposures. *See generally Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT).

After discussing the conflicting opinions of Drs. Gots and Frank, the administrative law judge found that Dr. Gots's opinion is less well-reasoned than Dr. Frank's. Dr. Frank opined that claimant's exposure to asbestos at work was sufficient to cause the low level of asbestosis with which claimant was diagnosed. The administrative law judge found that Dr. Frank's opinion is consistent with medical literature offered to support his opinions. Decision and Order at 35. In contrast, the administrative law judge found there is no evidence in the record to support Dr. Gots's opinion that claimant does not have asbestosis or that cigarette smoking can cause the specific abnormalities found on claimant's chest x-rays. Additionally, the administrative law judge noted Dr. Frank's superior qualifications. *See* n. 6, *supra*. Consequently, in light of Dr. Frank's "clear reasoning" and superior credentials, the administrative law judge rationally gave greater weight to his opinion in concluding that claimant's asbestosis is related to his work exposures to asbestos. *See Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003). As the administrative law judge's findings of fact are rational and supported by substantial evidence, his conclusion that claimant's asbestosis is work-related is affirmed. *Young*, 45 BRBS 35. We thus affirm the administrative law judge's award of permanent partial disability benefits for a 15 percent impairment and medical benefits due to claimant's work-related asbestosis. 33 U.S.C. §908(c)(23).

Accordingly, the administrative law judge's finding that employer did not rebut the Section 20(a) presumption with regard to claimant's bladder cancer is reversed. However, in all other respects, the administrative law judge's Decision and Order – Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge