BRB No. 04-0553

ROBERT B. OVERTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARMAC CORPORATION	)	DATE ISSUED: FEB 18, 2005
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Charlsey Wolff (Wolff & Wolff), and Arthur J. Brewster, Metairie, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2002-LHC-1978) of Administrative Law Judge Richard D. Mills rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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 commenced working for employer as an assistant yard manager on August 18, 1997. Claimant's employment duties in this position included overseeing

employer's employees, checking barges and the dry dock area, and maintaining the Red Fox Sewage Unit which serviced employer's facility. Claimant testified that these later duties involved checking the sewage system daily for obstructions caused by toilet paper or other materials coming through the system, clearing the obstruction if one was found to be present, and testing the system for compliance with the appropriate state regulations. On December 10, 1998, employer sent to claimant a memorandum offering to vaccinate claimant for hepatitis B because of claimant's occupational exposure to blood-borne pathogens occasioned by his maintaining its sewage system; claimant accepted employer's offer on December 28, 1998. CX-6 at 2. In August 2000, after experiencing stomach complaints, claimant underwent a blood test and was subsequently diagnosed with hepatitis C. On September 29, 2000, claimant notified employer of this diagnosis; employer thereafter terminated claimant on October 8, 2000. Claimant subsequently sought disability and medical benefits under the Act on the basis that his work-related exposure to raw and untreated sewage resulted in his contracting hepatitis C.[1]

In his Decision and Order, the administrative law judge found claimant entitled to the presumption at Section 20(a), 33 U.S.C. §920(a), linking his present medical condition, specifically hepatitis C, to his employment with employer. The administrative law judge determined that the presumption was rebutted by the testimony of Drs. Hill and Rabito. Based upon his review of the record, the administrative law judge concluded that claimant failed to carry his burden of persuasion on the issue of causation. Accordingly, the administrative law judge denied the claim for benefits.

On appeal, claimant challenges the administrative law judge's determination that employer produced evidence sufficient to rebut the presumption. Employer responds, urging affirmance of the administrative law judge's decision.

The administrative law judge properly invoked the Section 20(a) presumption linking claimant's diagnosed condition of hepatitis C to his employment with employer on the basis that claimant's hepatitis C constituted a harm and that claimant's work-related contact with raw and untreated sewage could have caused this medical condition.[2] *See* CX-3; CX-5. *See also Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Upon invocation of the presumption, the burden shifts to employer to rebut it by producing substantial evidence that claimant's condition was not caused or aggravated by his employment conditions. *See Ortco Contractors, Inc. v. Charpentier*,

[1] Claimant commenced employment with a petroleum surveyor company in December 2000, and was employed as a petroleum inspector for another company at the time of the formal hearing.

[2] In his decision, the administrative law judge specifically acknowledged claimant's testimony that he came into contact with untreated sewage while working for employer. Decision and Order at 13. *See* Tr. 27-36; CX-6 at 2.

332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). In establishing rebuttal of the presumption, proof of another agency of causation is not necessary as long as employer introduces substantial evidence that the injury is not related to the employment. Employer cannot rebut the Section 20(a) presumption merely by demonstrating that the cause of the condition cannot be medically determined. *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). However, despite the lack of definitive studies determining the cause of a condition, employer can rebut the Section 20(a) presumption if it introduces substantial evidence that this claimant's condition was not caused or aggravated by his employment. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986). If the presumption is rebutted by employer, it drops from the case, and the administrative law judge must then weigh all the evidence and resolve the causation issue on the record as a whole with claimant bearing the burden of persuasion. *See Port Cooper*, 227 F.3d 285, 34 BRBS 96(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); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In the instant case, the administrative law judge found rebuttal of the Section 20(a) presumption established based upon the testimony of Drs. Hill and Rabito. *See* Decision and Order at 14. In order to meet employer's burden of production in this case, either the opinion of Dr. Hunt or Dr. Rabito must therefore provide substantial evidence that claimant's employment did not cause or aggravate his diagnosed condition of hepatitis C. *See Ortco Contractors*, 332 F.3d 283, 37 BRBS 35(CRT). Our review of the testimony of these two physicians, however, reveals that neither physician provided such an opinion. Initially, the administrative law judge's discussion focuses on whether the doctors' opinions could establish a causal relationship with certainty, rather than addressing the inquiry relevant to rebuttal of Section 20(a), *i.e.*, whether the doctors opined with a reasonable degree of medical certainty that there was no relationship between claimant's employment conditions, which included contact with raw sewage, and his contracting hepatitis C. The administrative law judge recognized that both physicians stated that it was possible that claimant's hepatitis C was caused by his exposure to raw sewage,[3] but relied on evidence including Dr. Rabito's statement that it

[3] Although both Dr. Hill and Dr. Rabito acknowledged the lack of any scientific data documenting the transmission of hepatitis C through sewage, both testified that the virus is blood-borne and that, as such, it can be transmitted in fecal waste products. *See* RX-8 at 3, 8; RX-9 at 2, 9.

was impossible to know with certainty whether claimant's condition was related to his sewage work, both doctors' testimony that the literature as well as their personal experiences did not establish a link and the fact that 30-40 percent of hepatitis C cases are not related to the usual risk factors.[4] *See* Decision and Order at 8, 9, 14. However, the administrative law judge failed to recognize that whether the evidence definitely links claimant's hepatitis C to his employment is not determinative of rebuttal, as the critical question is whether the evidence produced by employer establishes that the condition was probably not work-related. In this case, the relevant evidence consists of the opinions of Drs. Hill and Rabito, and neither doctor gave such an opinion.

In fact, Dr. Hill, after determining that claimant could not be related to any of the common risk factors for contracting the hepatitis C virus, opined that claimant contracted hepatitis C as a result of his contact with sewage waste while working for employer. *See* CX-3 at 2, 5; RX-8 at 9. In this regard, Dr. Hill, who is Board-certified in internal medicine and infectious diseases, initially opined that, within a reasonable degree of medical certainty, claimant's medical condition more likely than not is related to his employment with employer. CX-3 at 2, 5. Moreover, while Dr. Hill subsequently acknowledged during his deposition the possibility that an unknown environmental factor could be responsible for claimant's medical condition, s*ee* RX-8 at 9, the fact that such hypothetical possibilities exist is not sufficient to rebut Section 20(a).[5] Since Dr. Hill opined it was more likely than not that claimant's condition is work-related, his opinion cannot rebut Section 20(a). Similarly, Dr. Rabito, who is Board-certified in internal medicine and gastroenterology, testified that while the medical community has much to learn about the epidemiology of the hepatitis C virus, it is plausible that exposure to sewage can cause that condition. *See* CX-5 at 8; RX-9 at 4, 7. As neither Dr. Hill nor Dr. Rabito at any point in their reports or deposition testimony stated that claimant's hepatitis C was not caused by his exposure to untreated sewage while working for employer, neither opinion is sufficient, as a matter of law, to meet employer's burden of production. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.,* 29 BRBS 84 (1995). As these opinions constitute the only relevant evidence proffered by employer on rebuttal,[6] we reverse the administrative law judge's determination that the Section 20(a)

[4] The most common risk factors for contracting hepatitis C include intravenous drug use, blood transfusions, tattoos, and sexual promiscuity.

[5] Moreover, Dr. Hill stated that one such environmental factor would be the exposure of a person to raw sewage. *See* RX-8 at 9.

[6] The administrative law judge, in finding rebuttal established, additionally stated that "the fact that [claimant] has no obvious risk factors is not unusual and would not in and of itself be an indication that he contracted Hepatitis C from contact with untreated sewerage . . . ." Decision and Order at 14. Upon invocation of the Section 20(a) presumption, however, it is employer's burden to come forward with substantial evidence that no relationship exists between claimant's injury and his employment. *See Holmes v.*

presumption was rebutted with regard to claimant's diagnosed condition of hepatitis C. In light of this decision we need not address the administrative law judge's weighing of the evidence as a whole with regard to claimant's hepatitis C. Causation with regard to this condition is established as a matter of law. *See Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *see generally ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989). The case must be remanded to the administrative law judge for consideration of the remaining issues relating to claimant's claim for benefits resulting from his work-related hepatitis C.

Accordingly, the administrative law judge's determination that that claimant's hepatitis C is not work-related is reversed, and the case is remanded for consideration of the remaining issues.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

Universal Maritime Serv. Corp., 29 BRBS 18, 21 n.3 (1995). Moreover, the administrative law judge's finding that claimant had a pre-injury history of elevated liver enzyme levels which could be an indication of hepatitis C does not establish rebuttal, as the record contains no diagnosis of that condition prior to August 2000.