BRB No. 02-0603

WILLIAM A. EBRON)
)
Claimant-Petitioner)
)
v.)
)
AMERICAN NATIONAL RED CROSS) DATE ISSUED: May 16, 2003
)
and)
)
TRAVELERS INSURANCE COMPANY)
)
Employer/Carrier-)
Respondents) DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Thomas M. Nosewicz, William J. Joyce and Joseph S. Piacun (Jones, Walker, Waechter, Poitevent, Carrere & Denegre), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (1999-LHC-0283) of Administrative Law Judge Fletcher E. Campbell, Jr., 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.,* as extended by the Defense Base Act, 42 U.S.C. §1651 *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 began working for employer as an Assistant Field Director in the fall of 1967. After an initial assignment at the United States Marine Corps Base at Camp Lejeune, North Carolina, claimant was assigned in approximately May 1968 to Support Command, an Army supply base in Da Nang, Vietnam for a one-year tour of duty. During this deployment, claimant alleges that he was indirectly exposed to herbicides and other chemicals, herein generically referred to as Agent Orange,

which, he alleges, caused his prostate cancer. Claimant believes that his secondary exposure occurred as a result of the fact that high winds oftentimes blew the millions of gallons of Agent Orange that were sprayed over the country into his immediate vicinity. He added that he also came into close contact with people who had encountered Agent Orange.

In his decision, the administrative law judge initially determined that claimant did not show that he was exposed to Agent Orange during his tour of duty in Vietnam, and thus concluded that claimant could not establish that his work for employer, in any way, caused his prostate cancer. Alternatively, the administrative law judge considered the issue of causation pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a), working under the assumption that claimant was, in fact, exposed to Agent Orange during his time in Vietnam. Specifically, he found that claimant established invocation of the Section 20(a) presumption and that employer established rebuttal. After weighing the evidence as a whole, the administrative law judge concluded that claimant has not demonstrated that his prostate cancer was caused, at least in part, by his work with employer. Accordingly, benefits were denied.

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[1]In his job, claimant acted as a counselor for service people and made contact with their families back home through local Red Cross chapters. Hearing Transcript (HT I) dated June 6, 2001, at 41.

[2]Agent Orange was an herbicide used during the Vietnam conflict to kill unwanted plants and to remove leaves from trees which otherwise provided cover for the enemy. *See generally* Claimant's Exhibits (CX) 19-33. The name, "Agent Orange," came from the orange stripe on the 55-gallon drums in which it was stored. *Id.* Other herbicides, including Agent White and Agent Blue, were also used in Vietnam although to a much lesser extent. *Id.* In this decision, the term Agent Orange shall refer to all herbicides and other injurious chemicals to which claimant alleges exposure during his tour of duty.

On appeal, claimant challenges the administrative law judge's finding that claimant has not established the requisite causal connection between his employment in Vietnam and his prostate cancer. Employer responds, urging affirmance.

Claimant argues that the administrative law judge did not properly apply the Section 20(a) presumption to find that his employment-related exposure to Agent Orange caused his prostate cancer. Claimant maintains that the administrative law judge incorrectly ruled that the threshold issue was whether or not claimant was exposed to Agent Orange while in Vietnam and thus he did not sufficiently address whether claimant established a *prima facie* case of causation under Section 20(a). Claimant additionally contends that his work in Vietnam placed him within a "zone of special danger" wherein he was exposed to Agent Orange, which subsequently caused his prostate cancer. In light of this exposure, claimant avers that the Section 20(a) presumption should have been invoked and thus that he should have been awarded benefits.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, 33 U.S.C. §920(a), which may be invoked only after he establishes a *prima facie* case, *i.e.*, he demonstrates that he suffered a harm and that an accident occurred at work or working conditions existed which could have caused that harm. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest,* 22 BRBS 142 (1989). 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,* 455 U.S. 608, 14 BRBS 631. Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT). If the employer rebuts the presumption, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In the instant case, the administrative law judge first observed that the threshold question is whether claimant was exposed to Agent Orange during the course of his employment, and he rendered an initial finding that claimant had not proven by a preponderance of the evidence that he probably was so exposed. The administrative law judge did not specifically address claimant's assertion that the "zone of special danger" doctrine applies to establish causation under Section 20(a). In the alternative, the administrative law judge assumed that the evidence of claimant's exposure was sufficient to invoke Section 20(a), but found that employer presented sufficient evidence to rebut the presumption. In view of the administrative law judge's findings under Section 20(a), Decision and Order at 15-16, which are based on the appropriate legal standards and supported by substantial evidence in the record, we need not specifically address the administrative law judge's initial conclusions regarding claimant's exposure to Agent Orange or claimant's contention regarding the applicability of the "zone of special danger" doctrine.

Accordingly, we will review the administrative law judge's alternative findings regarding causation, assuming, *arguendo*, that Section 20(a) was invoked.

Assuming claimant was entitled to invocation of the Section 20(a) presumption, the administrative law judge determined that employer established rebuttal thereof as Dr. Johnson, an epidemiologist, and Dr. Harbison, a toxicologist, both opined that the evidence does not support a causal connection between claimant's alleged exposure to Agent Orange and his prostate cancer. As the opinions of Drs. Johnson and Harbison sever the causal link between claimant's work for employer and his prostate cancer, the administrative law judge's finding that Section 20(a) was rebutted is affirmed. *See Duhagon v. Metropolitan Stevedore Co.,* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), *aff'g* 31 BRBS 98 (1997); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Rochester v. George Washington University*, 30 BRBS 233 (1997). Next, after addressing the evidence as a whole, the administrative law judge concluded that claimant did not establish that his alleged work-related exposure to Agent Orange caused his prostate cancer.

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[3] Under the Defense Base Act, the United States Supreme Court has held a compensable injury occurred where the injury did not occur within the course of employment, *i.e.,* the space and time boundaries of work, but the employee was in a "zone of special danger, " by virtue of his work at a location outside the United States. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *see also Smith v. Board of Trustees, Southern Illinois University*, 8 BRBS 197 (1978). In the occupational disease context of this case, claimant seeks to use this doctrine to support his claim of exposure to Agent Orange, as that substance was in use in Vietnam, the general area in which he worked. We need not reach this argument in this case in light of the administrative law judge's alternative rebuttal finding. If Section 20(a) is rebutted, it falls from the case, rendering findings necessary to its invocation moot.

In particular, the administrative law judge found, based on the opinion of Dr. Harbison, that although claimant contracted prostate cancer at an unusually early age, he has other risk factors associated with that disease, *e.g.*, claimant is an African American male and a former smoker; these factors are entirely unrelated to exposure to Agent Orange and placed him at risk for prostate cancer. In addition, the administrative law judge determined, also based on Dr. Harbison's testimony, that there is no biologically plausible mechanism by which Agent Orange exposure could have caused claimant's prostate cancer. In arriving at this conclusion, the administrative law judge credited Dr. Harbison's testimony over the contrary opinion proffered by claimant's toxicologist, Dr. Kipen. Specifically, the administrative law judge found that Dr. Kipen's opinions were poorly reasoned and documented, observing, for example, that Dr. Kipen relied on a "herbicide spray map," Claimant's Exhibit 17, which the administrative law judge struck because its reliability was unproven. Order on Motions to Strike dated December 18, 2001, at 1-2. In contrast, the administrative law judge found Dr. Harbison's opinion was well-reasoned and documented. Lastly, the administrative law judge found, as supported by Dr. Johnson, that "overwhelmingly, the epidemiological evidence in support of a cause and effect relationship between Agent Orange or dioxin and prostate cancer is somewhere between very weak and nonexistent." Decision and Order at 18. Specifically, he determined that Dr. Johnson, a professor of epidemiology at Tulane University, testified unequivocally that the published epidemiological data does not support the contention that claimant's prostate cancer was caused by Agent Orange.

The administrative law judge credited Dr. Johnson's opinion since "he is the best

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[4]The administrative law judge observed that after applying the scientific method to determine whether claimant's alleged workplace exposure to Agent Orange could have caused his prostate cancer, Dr. Harbison concluded that no such causal relationship herein exists. Decision and Order at 12. Specifically, the administrative law judge acknowledged that Dr. Harbison set out the requisite criteria to make a positive supposition as to cause and effect, and concluded, after review of the evidence, that these criteria have not been met. HT I at 167-171.

[5]In particular, the administrative law judge determined that Dr. Johnson testified, without contradiction, that none of the Vietnam veterans' epidemiological studies demonstrated any statistically significant elevation of prostate cancer risk. Hearing Transcript (HT II) dated October 29, 2001 at 21-22. In addition, Dr. Johnson testified that most of the other, less relevant studies in non-veteran groups confirm this negative finding. HT II at 23-34.

qualified, if not the only epidemiologist, to testify or offer an opinion" in this case. Decision and Order at 17.

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, he may 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). In the instant case, the administrative law judge's decision to credit the opinions of Drs. Johnson and Harbison over the contrary opinions of Drs. Kipen and Sokol is neither inherently incredible nor patently unreasonable. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge's finding, based on the record as a whole, that claimant's prostate cancer is not causally related to his work for employer, and consequent denial of benefits, are therefore affirmed. *See Duhagon v. Metropolitan Stevedore Co.,* 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999); *see also Rochester*, 30 BRBS 233.

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

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[6]The administrative law judge found that Dr. Sokol's *curriculum vitae* indicates that his expertise is oncology, not epidemiology, CX 12, and that while Dr. Kipen "may believe himself to be an epidemiologist (CX 35 at 31) and he has published epidemiological studies," he "is not a full-time professional epidemiologist like Dr. Johnson." Decision and Order at 17 n. 7.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge