BRB No. 01-0274

DAYTON DREW	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: Nov. 26, 2001
	)	
BETA ANALYTICS, INCORPORATED	)	
	)	
and	)	
	)	
CIGNA PROPERTY AND CASUALTY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Charles David Morison, Hampstead, North Carolina, for claimant.

Keith L. Flicker (Flicker, Garelick & Associates), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (98-LHC-573) of Administrative Law Judge Mollie W. Neal 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 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).

In August 1995, claimant began work for employer as a construction surveillance

technician in the United States Embassy in Kuwait. After about two weeks on the job in Kuwait, claimant began to complain of symptoms of lightheadedness, which became progressively worse over the next several months. Claimant sought treatment at the Camp Doha United States Military Base on October 20, 1995, where he was treated by Dr. DeKonig. Dr. DeKonig noted that claimant had persistent problems with lightheadedness, vertigo, palpitations, occasional blurry vision, dislopia, and gait instability. He recommended that claimant return to the United States for further evaluation. Upon his return to the United States, claimant began treatment with Dr. Dubey. Following tests, a review of claimant's records, and examinations, Dr. Dubey diagnosed that claimant suffers from vertigo, hypertension, and pernicious and macrocytic anemias, and he began a series of vitamin B_{12} injections to treat the anemia. Cl. Ex. 14; Deposition Ex. 1. Claimant has attempted to return to his usual employment with limited success, and, thus, sought benefits under the Act.

In her decision, the administrative law judge found that claimant established that he suffered a harm, pernicious anemia, and that Dr. Dubey's opinion that claimant's work activities while in Kuwait could have aggravated his condition resulting in the increase in symptoms is sufficient to establish invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's condition is work-related. However, the administrative law judge also found that Dr. Berkowitz's opinion that there is no relationship between claimant's pernicious anemia and his employment is sufficient to establish rebuttal of the presumption. Therefore, the administrative law judge weighed the evidence as a whole, accorded greater weight to the opinion of Dr. Berkowitz, and found that while claimant does have pernicious anemia, his symptoms of lightheadedness and dizziness and the subsequent symptom of fatigue were not causally related to, or aggravated by, his working conditions or environment in Kuwait. Therefore, the administrative law judge denied benefits under the Act.

On appeal, claimant contends that the administrative law judge erred in finding that claimant's condition was not caused or aggravated by his employment, and that the administrative law judge erred in failing to render a decision within 20 days of the termination of the hearing in accordance with 20 C.F.R. §702.348, to the prejudice of claimant. Employer responds, urging affirmance of the administrative law judge's decision.

Section 20(a), 33 U.S.C. §920(a), provides claimant with a presumption that his injury is causally related to his employment, if claimant establishes that he has a physical harm, and that an accident or working conditions occurred that could have caused the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Where, as here, claimant establishes invocation of the presumption, employer may rebut the Section 20(a) presumption by producing substantial evidence that claimant's employment did not cause, accelerate, aggravate or contribute to the injury.

Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). We affirm the administrative law judge's finding that Dr. Berkowitz's opinion is sufficient to establish rebuttal of the Section 20(a) presumption in the instant case. Dr. Berkowitz stated that there was nothing in the working environment in Kuwait that could have caused or aggravated claimant's pernicious anemia, Emp. Ex. I at 41, 48, and that the symptoms claimant was suffering in Kuwait were not a consequence of his pernicious anemia.[1] Emp. Ex. I at 47, 49, 58 63; *see Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1998), *aff'd*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999).

[1]While the administrative law judge found that Dr. Berkowitz believed that "the balance problem the Claimant had in Kuwait could be attributed to pernicious anemia," Decision and Order at 10, Dr. Berkowitz testified that claimant's symptoms were not a consequence of his pernicious anemia, and that without more evidence than a positive Romberg test, "you can't point your finger at pernicious anemia." Emp. Ex. I at 49.

When employer produces substantial evidence that claimant's injury is not work-related, the Section 20(a) presumption drops out of the case, and the administrative law judge must weigh all of the evidence relevant to the causation issue, with claimant bearing the burden of proving that his disability is work-related. *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 found that the opinion of Dr. Berkowitz outweighs the contrary report of Dr. Dubey, and supports the conclusion that claimant's pernicious anemia is not related to his work with employer in Kuwait.[2] The administrative law judge credited Dr. Berkowitz's opinion based on his qualifications with a special expertise in hematology and pernicious anemia, and as the judge found the opinion to be better reasoned and documented by the objective evidence of record. Contrary to employer's contention, while Dr. Berkowitz did state that dehydration could exacerbate the symptoms of pernicious anemia, he further opined that, given the objective findings reported during examinations in Kuwait, claimant was not suffering from dehydration during his stay there.[3] Emp. Ex. I at 42, 45. In addition, claimant testified he did not become dehydrated while in Kuwait. H. Tr. at 108-110.

The administrative law judge considered the conflicting evidence of record and found that the opinion of Dr. Dubey is outweighed by the contrary opinion of Dr. Berkowitz. The administrative law judge is entitled to determine the relative weight to be accorded to the physicians' opinions, and the Board is not empowered to weigh the evidence. Thus, we affirm the administrative law judge's determination that, based on the record as a whole, claimant's pernicious anemia is not causally related to his work with employer, as it is rational and supported by substantial evidence.[4] *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Accordingly, the Decision and Order of the administrative law judge denying benefits

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[2]Dr. Dubey, who is board eligible in internal medicine, testified that working ten to twelve hours per day, six days a week in the construction business in 130 degree heat could worsen claimant's pernicious anemia.. Cl. Ex. 9 at 7. The administrative law judge found that Dr. Dubey did not provide a rationale based on medical findings for his opinion that claimant's anemia had been aggravated by his employment in Kuwait. Decision and Order at 10.

[3]Dr. Berkowitz noted that during the examination with Dr. DeKonig at Camp Dosha, claimant had normal blood pressure and pulse which indicate that he was not dehydrated at the time these vital signs were taken. Emp. Ex. I at 44-47.

[4]As the administrative law judge's findings are supported by the evidence, claimant's contention that errors in the decision demonstrates that he was prejudiced by the administrative law judge's delay in issuance of her decision is rejected. *See Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983).

is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge