BRB No. 91-1712

RUSSELL HARFORD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	
	)	
and	)	
	)	
AMERICAN MUTUAL INSURANCE	)	
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE	)	
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE	)	
	)	
Carriers-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (McTeague, Higbee, Libner, MacAdam, Case & Watson), Topsham, Maine, for claimant.

Glenn H. Robinson (Thompson & Bowie), Portland, Maine, for self-insured employer.

James C. Hunt (Robinson, Kriger, McCallum & Greene, P.A.), Portland, Maine, for Birmingham Fire Insurance Company.

Kevin M. Gillis (Richardson & Troubh), Portland, Maine, for Commercial Union Insurance Companies.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (90-LHC-1707) of Administrative Law Judge Martin J. Dolan, Jr., denying benefits 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.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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 was employed as a hull insulator from 1952 until his retirement due to poor health in 1989, during which time he was exposed to asbestos. In the fall of 1988, claimant was diagnosed as suffering from lung cancer. Following surgery in January 1989, and a subsequent course of chemotherapy and radiation treatment, claimant returned to work on June 5, 1989. Claimant was physically unable to perform his job because of breathing problems and retired on July 31, 1989. Claimant thereafter filed a claim for compensation under the Act.

In his Decision and Order, the administrative law judge, based upon the opinions of Drs. Isler, Cagle, and Cadman, determined that employer rebutted the presumption contained in Section 20(a), 33 U.S.C. §920(a), of the Act. The administrative law judge then concluded, based upon the record as a whole, that claimant's lung cancer was not related to his employment exposure to asbestos; the claim for benefits was therefore denied.

On appeal, claimant contends that the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption. Employer, now self-insured, and two of its prior carriers respond, urging affirmance.

In establishing that an injury arises out of his employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption which applies to the issue of whether an injury is causally related to his employment activities. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). An employment injury need not be the sole cause of a disability; rather, if the employment aggravates, accelerates or combines with an underlying condition, the

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

entire resultant disability is compensable. *See Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991). Thus, it is sufficient for purposes of causation if claimant's employment "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). 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. *Sam v. Loffland Bros.*, 19 BRBS 288 (1987). 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 Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The unequivocal testimony of a physician that no relationship exists between the injury and 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, the administrative law judge 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).

In the instant case, claimant contends that the administrative law judge erred in finding the Section 20(a) presumption rebutted. Specifically, claimant alleges that employer failed to submit medical evidence sufficient to establish that claimant's exposure to asbestos did not cause or contribute to his lung cancer. We agree. After setting forth the medical evidence of record, the administrative law judge determined that the opinions of Drs. Isler, Cagle, and Cadman were sufficient to rebut the presumption. Our review of the record reveals that none of these opinions severs the causal nexus. Dr. Isler, after reviewing a series of claimant's chest x-rays from May 1982 through November 1989, found calcified pleural plaques suggestive of asbestos-related changes, no pneumoconiosis, and a right upper lobe pulmonary mass; Dr. Isler offered no opinion regarding the etiology of claimant's lung conditions. *See* Isler report dated April 4, 1990. Similarly, Dr. Cagle, after reviewing claimant's pathology reports and slides, concluded, without addressing the issue of causation, that claimant's lung biopsy revealed "alveolar damage [which] bears no histologic resemblance to the diffuse interstitial fibrosis which is seen in asbestosis." *See* Cagle report dated May 10, 1990. Dr. Cadman, who opined that the medical probability is that claimant developed his lung cancer as a result of cigarette smoking, additionally stated that claimant's exposure to asbestos may have contributed to claimant's lung cancer and that he could not exclude that exposure as having contributed to that disease. *See* CX 28 at 53, 60. Thus, while Dr. Cadman's opinion establishes that asbestos exposure did not directly cause claimant's cancer, it is insufficient to rebut Section 20(a) as it recognizes the contributory role of asbestosis exposure in the development of claimant's lung cancer.

Under the aggravation rule, if an employment-related injury contributes to, combines with, or aggravates an underlying condition to result in death or disability, the entire resultant condition is compensable; the relative contributions of the work-related injury and the prior condition are not weighed. *See Peterson v. General Dynamics Corp*, 25 BRBS 71 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Department of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993). It is employer's burden on rebuttal to come forward with substantial countervailing evidence that the work injury did not cause, contribute to or

accelerate the underlying condition. *See generally Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). In the instant case, none of the three physician's opinions relied upon by the administrative law judge unequivocally severs the potential contributory connection between claimant's lung cancer and his asbestos exposure. As the remaining medical evidence is consistent with a finding of causation, rebuttal of the Section 20(a) presumption cannot be found on this record, and employer is liable for the resultant disability. *See Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). Accordingly, the administrative law judge's finding that claimant's lung cancer was not causally related to his employment is reversed.

Inasmuch as claimant's injury is, as a matter of law, work-related, claimant is entitled to compensation for any disability due to his lung condition, as well as medical expenses, under the Act. Therefore, this case is remanded to the administrative law judge for consideration of the nature and extent of claimant's disability and any other remaining issues.

Accordingly, the Decision and Order of the administrative law judge denying benefits is reversed, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge