U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0254

JIMMIE WILSON Claimant-Petitioner v. FLUOR FEDERAL GLOBAL PROJECTS, INCORPORATED and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA c/o AIG CLAIMS, INCORPORATED Employer/Carrier-Respondents	)	DATE ISSUED: 06/18/2019 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

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Monica F. Markovich and Krystal L. Layher (Brown Sims), Houston, Texas, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Benefits (2016-LDA-00099) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to 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 rational, supported by substantial evidence, and 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 served for 21 years in the United States military where he studied "bulk fuel" and "became pretty much an expert" in fuel distribution and handling. HT at 53, 55. After being honorably discharged, he worked for various military contractors[1] as a fuel foreman, logistician, and most recently for employer as a fuel distribution manager in Afghanistan from 2009 through 2012.[2] *Id.* at 64-71. His work involved transferring a specific type of jet fuel propellant, called JP8, from tanker trucks to fuel bladders. *Id.* at 75-76. This particular jet fuel was not end-product JP8 from a specific manufacturer, but was produced by mixing various chemical additives – including a static dissipating agent, a corrosion inhibitor, and a fuel system icing inhibitor – into Jet A fuel from Pakistan and Russia. *Id.* at 56, 73-74.

Claimant testified that he was regularly exposed to JP8 jet fuel, its chemical additives, and their corresponding fumes, stating, "when you're working with fuel in Afghanistan, you're always exposed. I mean, it's just you're always exposed." HT at 76. When working with fuel in the United States military, he had all the equipment needed to properly do his job, but as a contractor "you got to do with what you have at the time." *Id.* In particular, the hoses provided to transfer the JP8 jet fuel often "didn't have the fitting" or a hose clamp to ensure a proper fit, requiring that he "rig it up to download the fuel." *Id.* at 75. He experienced "a lot of spills . . . when chang[ing] the hoses out." *Id.* "A lot of [the] time . . . you got to take hoses and you spill fuel on you[.]" *Id.* at 75-76. Due to the lack of proper equipment, claimant also often "had to open the top [of the tanker and] drop the hose over the top to take the fuel out which the books tell you don't do it." *Id.* at

[1]Claimant previously worked as a fuel foreman for KBR (2003-2007) in Kuwait, HT at 65-66, and as a logistician for ManTech in Afghanistan in 2008, HT at 69-70.

[2]Employer had the contract for fuel distribution to American military forces in the southern part of Afghanistan. HT at 72. In furtherance of its mission, employer operated five fuel bases in Afghanistan. *Id.*

75. When opening the manholes on top of the trucks, the fuel "evaporates and comes out." *Id.* at 77.

In 2010, claimant was promoted to area manager with responsibility for setting up fuel distribution systems at several military bases. HT at 83-85. He continued to be exposed to "the JP8 [jet fuel] that contains these different chemicals [he previously described]." *Id.* at 85-87. Exposure occurred when changing bladders, hoses, and meters "because of leaking." *Id.* When he did not have the proper fittings for the hoses, "then we just let it go over the top, to take it out." *Id.* at 89. Additionally, when cleaning up fuel spills, he did not always have gloves "because just sometimes they don't have the equipment." *Id.* at 87. Although he would "try to be less exposed as possible," he still got JP8 jet fuel on his hands and inhaled its vapors. *Id.*

The bladders claimant loaded with JP8 jet fuel typically held 210,000 gallons. HT at 77. When the bladders became defective or had holes in them, claimant was responsible for cleaning up spills and transferring the remaining fuel to another bladder, but "anywhere from 3,000 to 4,000 gallons would be left in that bag." *Id.* at 78. Claimant recounted an incident when a few thousand gallons of JP8 jet fuel leaked out of a bladder that had been punctured. *Id.* at 78-80. Claimant dug up the fuel-soaked dirt and let it dry out on a tarp. *Id.* A colonel on the base ordered that the damaged bladder and remaining 3,000 to 4,000 gallons of fuel be thrown into a burn pit and lit on fire, approximately 100 yards from where claimant lived in a tent and 100 yards from the fuel station where claimant worked. *Id.* at 80-81. According to claimant, "the burn pit was burning constantly" and was itself ignited with JP8 jet fuel. *Id.* at 81. This was not the only burn pit claimant was exposed to, as "mostly all the [forward operating bases] had burn pits." *Id.* at 82.

A routine visit with claimant's stateside primary care physician, Dr. Skinner, in November 2011, revealed elevated protein levels, prompting a referral to Dr. Chowdhury, who diagnosed him with multiple myeloma in June 2012. EX 7. Claimant told Dr. Chowdhury he wanted to return to work in Afghanistan, but she told claimant he needed additional tests which led claimant to seek an extension of leave from employer. Employer initially placed claimant on a six-month leave of absence but two weeks later it terminated his employment because he had cancer.[3] HT at 92. Claimant began chemotherapy in September 2012, followed by a stem cell transplant in February 2013, and a second round of chemotherapy. Bone marrow biopsies in August and December 2013 were negative for

[3]Claimant stated he thereafter looked for supervisory/management type jobs until he got a letter in December 2012 approving his claim for Social Security disability benefits at which time he stopped looking for work. HT at 118.

residual disease but claimant's last bone marrow biopsy, in February 2014, showed slightly hyper-cellular marrow.

Claimant filed a claim under the Act on December 10, 2012, alleging that his multiple myeloma is a work-related injury. He asserted that his employment in fuel distribution caused his multiple myeloma based on the opinions of Drs. Checkoway and Spitzer that benzene, a carcinogen and known component of jet fuel, caused or contributed to his disease.[4] He thus sought an award of temporary total disability benefits from June 28, 2012 until August 4, 2014, and permanent total disability benefits thereafter. Employer controverted the claim, arguing that even if claimant was exposed to benzene in his employment, he did not establish that benzene can cause multiple myeloma.

The administrative law judge denied the claim, finding that claimant did not establish a prima facie case because he did not prove he was exposed to benzene during the course of his work with employer or that benzene causes multiple myeloma. Because claimant did not invoke the presumption that his disease is work-related, the administrative law judge also denied the claim for "secondary" psychological injuries which claimant alleged arose from his multiple myeloma diagnosis and treatment.

On appeal, claimant contends the administrative law judge erred in failing to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), that his multiple myeloma is work-related. Employer responds, urging affirmance of the decision. Claimant has filed a reply brief. We agree with claimant and reverse the finding that the Section 20(a) presumption is not invoked.

As an initial matter, the administrative law judge applied an incorrect legal standard to find that claimant is not entitled to the benefit of the Section 20(a) presumption. He found claimant failed to meet his burden to "establish that exposure to jet fuel [including benzene] causes multiple myeloma and that his jet fuel exposure caused his multiple myeloma." Decision and Order at 41. To establish a prima facie case, however, claimant is not required to prove that his working conditions in fact caused his harm; rather, he need only show that working conditions existed which *could have caused* his harm. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *see also Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Claimant's theory as to how the injury arose must go beyond "mere fancy." *See generally Champion v. S & M Traylor*

[4]Claimant subsequently asserted he developed a psychological injury, i.e., depression and Post-Traumatic Stress Disorder (PTSD), as a result of his contracting multiple myeloma due to his work for employer.

Bros., 690 F.2d 285, 295 (D.C. Cir. 1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Sinclair*, 23 BRBS at 152. To meet this threshold, "all the claimant need adduce is *some* evidence tending to establish the prerequisites of the presumption." *Brown v. I.T.T./Cont'l Baking Co. & Ins. Co. of N. Am.*, 921 F.2d 289, 296, 24 BRBS 75, 80(CRT) (D.C. Cir. 1990); *see also Ramey v. Stevedoring Services of Am.*, 134 F.3d 954, 960, 31 BRBS 206, 210(CRT) (9th Cir. 1998) (claimant's uncontradicted testimony regarding working conditions is sufficient to invoke the § 20(a) presumption).

It is undisputed claimant suffered a harm in the form of multiple myeloma as diagnosed by his treating physician, Dr. Chowdhury. Decision and Order at 39. It is also undisputed that he was exposed to JP8 jet fuel, which is a combination of Jet A fuel and several chemical additives, both in contact with his skin and through the inhalation of its fumes. *Id*. at 41, 45. Because the medical opinions on which claimant relies tie his multiple myeloma diagnosis to benzene, the questions for invocation thus become whether claimant introduced sufficient evidence to establish that his handling and breathing of JP8 jet fuel could have exposed him to benzene and, if so, whether it could have caused his multiple myeloma. *See Bolden v. G.A.T.X. Corp.*, 30 BRBS 71 (1996); *see also Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Sinclair*, 23 BRBS at 152.

On the first question, we agree with claimant that the administrative law judge erred in finding he was not exposed to benzene because "there is no evidence in the record that jet fuel always or typically contains benzene." Decision and Order at 41. To establish the working conditions element of his prima facie case, claimant need only proffer "some admissible evidence" that he was exposed to benzene and he need not establish that jet fuel always, or even typically, contains the chemical. *Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 1303, 44 BRBS 89, 91(CRT) (9th Cir. 2010).

The administrative law judge's finding that no such evidence exists is simply incorrect. Claimant submitted the medical opinion of Dr. Checkoway, an epidemiologist, who stated that claimant's "detailed account of having worked as a [JP8] fuel manager supervisor" and exposure to burn pits "clearly indicates past exposures to benzene" because "JP8 fuel is known to contain benzene that occurs as both an airborne and dermal exposure hazard." CX 31. Dr. Spitzer, who examined claimant on employer's behalf, similarly opined that benzene is a "component of jet fuel" and claimant thus "worked for employer in proximity to benzene for greater than [two] years."[5] CX 13. Dr. Sergile, employer's

[5]Several medical studies in the record support the physicians' assessment that claimant's handling of jet fuel exposed him to benzene. *See* CX 31 at 8 ("workers with regular contact with JP8 via fuel handling [including storage and distribution] or refueling maintenance [performed on fuel distribution trucks]" had exposure to benzene through

medical expert, agreed, stating, "[claimant] potentially has had multiple exposures to benzene . . . which would imply that it's accumulating in his body" and that "jet fuel contains some types of benzene."[6] EXs 14 at 158; 31.

Moreover, in response to claimant's request for the production of "any documents . . . containing information regarding fuels, solvents, chemicals or products containing benzene" during the time period when he was employed, employer produced a Material Safety Data Sheet [MSDS] for a corrosion inhibitor which, the administrative law judge noted, lists benzene as an ingredient.[7] Decision and Order at 40; CX 23. This is consistent with claimant's testimony that a corrosion inhibitor is one of the chemical additives used to make the JP8 jet fuel to which he was exposed.[8] That some of the other MSDS in the record do not list benzene as an ingredient for various types of petroleum products to which claimant may or may not have been exposed does not alone support a finding, based on the record in this case, that the fuels and additives with which claimant worked were, in fact,

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JP8); CX 26 at 31 (benzene "still is a component of petroleum products, including gasoline" and "is commonly emitted in several industrial and transportation settings leading to widespread environmental and occupational exposures"); *id.* at 222 ("[g]asoline serves as a major source of benzene exposure"); *id.* at 89-91 ("the presence of benzene in gasoline" is commonplace).

[6]Dr. Sergile's supplemental report similarly does not dispute that claimant was exposed to benzene in his employment with employer, but instead states, "[t]here is no evidence [claimant] had a personal exposure to benzene or jet fuel that exceeded the [Occupational Safety and Health Administration] permissible limits." EX 31.

[7]Claimant also testified that the Russian Jet A fuel used to make the JP8 is called TS-1. HT at 57. The only Material Data Safety Sheet [MSDS] in the record for TS-1 lists benzene as an ingredient. CX 22.

[8]There is no basis in the record for the administrative law judge's finding that "it is not clear that [claimant] had direct knowledge of what additives were or were not in the jet fuel he was exposed to while working for [e]mployer." Decision and Order at 40. Whether claimant personally mixed these ingredients into the Jet A fuel to make JP8 does not contradict his testimony, based on his experience and expertise obtained during more than twenty years of work in military fuel distribution, that a corrosion inhibitor is one of the chemical additives in the JP8 jet fuel he handled for employer. HT at 56, 74. The accuracy of claimant's testimony is confirmed by employer's identification of a corrosion inhibitor containing benzene as being among the chemical additives it used during the time period claimant was employed. CX 23.

benzene-free. *Richardson v. Perales*, 402 U.S. 389, 401 (1971) ("substantial evidence" is "such *relevant* evidence as a reasonable mind might accept as adequate" to support a finding) (emphasis added); Decision and Order at 41. Claimant thus has put forth sufficient evidence of his exposure to benzene to establish a prima facie case. *See Albina Engine*, 627 F.3d at 1303, 44 BRBS at 94(CRT) (claimant invoked presumption of asbestos exposure through: deposition statement that employer stored asbestos; testimony from decedent's wife that he came home dusty; testimony from doctor describing decedent's statements regarding exposure; and claimant's testimony regarding decedent's exposure).

The administrative law judge made further errors in determining there is no evidence that benzene exposure could have caused multiple myeloma. Dr. Checkoway concluded that claimant's benzene exposure was "more likely than not the cause" based on "studies of occupational groups with exposures to benzene [that have] consistently demonstrated excess risks for multiple myeloma, and in some instances relatively strong dose-response associations." CX 31. Similarly, Dr. Spitzer opined that claimant's work in proximity to benzene for two years "possibly contribut[ed] to [the] etiology of myeloma in a young person." CX 13.

In completely discrediting his opinion, the administrative law judge incorrectly reasoned that Dr. Checkoway's view is "primarily based on medical research showing associations between benzene and types of leukemia." Decision and Order at 45. Although some of the studies on which Dr. Checkoway relied address the association between benzene exposure and leukemia, the administrative law judge failed to consider Dr. Checkoway's statement that "[t]he assertion by [employer's counsel] that nearly all of the articles [in Claimant's Exhibit 26] only address benzene and the leukemia is not correct. Most of the published articles also address associations of benzene with multiple myeloma, especially the occupational cohort studies that consider risks for multiple diseases."[9] CX 31 at 4.

One such article submitted as part of Claimant's Exhibit 26, *Exposure and Multiple Myeloma – A Detailed Meta-analysis of Benzene Cohort Studies*, states, "there is a biologically plausible basis for establishing benzene as a cause of myeloma." CX 26 at 13. It explains that benzene exposure adversely affects the same organ and cells affected by

[9]Dr. Checkoway also cited as a "prominent example," *Benzene exposure and risk of lymphoaematopoietic cancers in 25,000 offshore oil industry workers*, which identified an "increased risk" between benzene exposure and several lymphoaematopoietic cancers, including multiple myeloma. CX 26 at 21, 29.

multiple myeloma, i.e., the bone marrow and B-lymphocytes[10] and concludes that "[a] meta-analysis of data from all well-conducted benzene cohort studies demonstrates a statistically significant elevation in the risk of death from [multiple myeloma]."[11] *Id.* at 13, 17.; *see also* CXs 26 at 29; 70; 86; 113; 125; 138; 183; 206; 217; 238-239; 279.

The administrative law judge also has not explained why Dr. Checkoway's acknowledgement that the causal relationship between benzene and leukemia is stronger undermines his opinion that "the published literature" nevertheless "suggests a causal relation" between benzene and myeloma. This statement, in conjunction with Dr. Checkoway's statement that such an association "is consistently strong," supports, rather than detracts, from his opinion that benzene caused claimant's myeloma in this case.[12] *See*

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[10]The report states:

> (a) MM is a tumor of plasma cells within the bone marrow, which are derived from B-lymphocytes; (b) the bone marrow is a target for benzene toxicity causing aplastic anemia, various cytopenias (including depression of B-lymphocytes, myelofibrosis, myelodysplastic syndrome, and leukemia; (c) benzene is associated with an increased risk of chromosomal damage to circulating lymphocytes; (d) and, more recently to DNA damage to B-lymphocytes specifically; (e) workers exposed to benzene also have demonstrated an elevated risk of chronic lymphocytic leukemia, which is also a cancer of B cell lineage. Thus, benzene has shown very specific toxicity and genetic alteration not only to the target organ, the bone marrow, but also to the specific cells within the bone marrow from which plasma cells are derived, e.g., the B-lymphocytes.

CX 26 at 13 (internal citations omitted).

[11]The report further states: "[t]he positive epidemiological evidence for benzene and myeloma is supported by other study results related to the biological plausibility for such an effect from benzene exposure." CX 26 at 17. "Cohort studies of refinery workers are difficult to interpret in relation to benzene exposure and risk of [multiple myeloma], because of limitations in exposure assessment, study design, and analysis. Yet, one large study of petroleum refinery workers provides suggestive additional evidence of an association between benzene exposure and myeloma." *Id*.

[12]Similarly, to the extent the administrative law judge discredited Dr. Checkoway's opinion that benzene causes myeloma for being based on "potential associations," the administrative law judge impermissibly substituted his own opinion for that of the medical experts and failed to resolve the medical dispute on this issue. *See generally Pietrunti v.*

generally Santoro v. Maher Terminals, Inc., 30 BRBS 171 (1996) (the administrative law judge must adequately detail the rationale behind his findings). Further, the administrative law judge has not explained his conclusion that Dr. Checkoway's opinion is "at best, that Claimant's condition could be caused by exposure to benzene, depending on the manner of his exposure and the levels of concentration." Decision and Order at 45. Although Dr. Checkoway stated that "detailed quantitative information" regarding claimant's "complete occupational benzene exposure history" would be "informative" and "valuable for reaching a firm conclusion regarding causality," he specifically opined that claimant's benzene exposure "more likely than not [is] the cause of his multiple myeloma." *See generally O'Kelley v. Dep't of the Navy/NAF,* 34 BRBS 39 (2000); CX 31 at 5.

Because claimant introduced sufficient evidence that benzene exposure could have caused his myeloma, he met his burden of establishing a prima facie case. *See Ramsay Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 331, 49 BRBS 87, 88(CRT) (5th Cir. 2015) (stating that the low burden required to establish a prima facie case may be satisfied with evidence that is "more than a scintilla"). We thus reverse the administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption.[13]

Director, OWCP, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997) (administrative law judge may not substitute his judgement for that of the physicians). Dr. Sergile acknowledged that some studies "have shown a statistically significant association [between benzene and multiple myeloma]," but concluded that "a causal relationship . . . has not been established." EX 31 at 2-4. Conversely, Dr. Checkoway opined that an absolute distinction cannot be made between "association" and "causation" because the "strength of the association," which he considers to be "strong" for benzene and myeloma, "is the information that supports causal inference." CX 31 at 4. According to Dr. Checkoway, "neither clinical nor epidemiological research can prove causation," which is an important consideration in this case "because findings from epidemiologic research indicate strong associations with [benzene] and risk of multiple myeloma." *Id*.

[13]However, we reject claimant's erroneous contention that in an occupational disease case the last employer to expose claimant is fully liable to claimant irrespective of a causation analysis. *See* Cl. Br. at 31-35. The law cited in claimant's brief concerns who, between two or more employers, is liable, once it is established that the claimant has a work-related condition. There is no suggestion in the law that the usual causation/Section 20(a) burdens are not applicable in an occupational disease case. *See, e.g., Albina Engine & Machine v. Director, OWCP* [*McAllister*], 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010).

Consequently, we remand this case for the administrative law judge to address whether employer rebutted the presumed causal connection with substantial evidence that claimant's multiple myeloma was not caused or aggravated by his work exposures to benzene.[14] *See Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *see also C&C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Employer's burden on rebuttal is one of production, not one of persuasion. *See Rainey*, 517 F.3d 632, 42 BRBS 11(CRT). The opinion of a physician that, to a reasonable degree of medical certainty, no relationship exists between an injury and the employment accident or exposures alleged to be the cause of the injury has been held to be sufficient to rebut the Section 20(a) presumption. *See O'Kelley*, 34 BRBS 39. If, on remand, the administrative law judge finds the Section 20(a) presumption rebutted, the issue of causation must then be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion.[15] *See Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 228, 46 BRBS 25, 27(CRT) (5th Cir. 2012); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

[14]On remand, the administrative law judge should address claimant's aggravation theory, i.e., that claimant's elevated protein levels and multiple myeloma may have pre-existed his work with employer and those conditions were aggravated by his work exposures with employer. Contrary to employer's contention, claimant's aggravation theory is not being raised for the first time on appeal. *See* HT at 30-31.

[15]Moreover, if, on remand, the administrative law judge determines that claimant's multiple myeloma is work-related, he must then address whether claimant sustained any secondary work-related psychological injuries. *See generally Metro Machine Corp. v. Director, OWCP* [*Stephenson*], 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017); *cf. Ins. Co. of the State of Pennsylvania v. Director, OWCP* [*Vickers*], 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013).

Accordingly, the administrative law judge's finding that claimant did not invoke the Section 20(a) presumption is reversed. The denial of benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to reverse the administrative law judge's finding that claimant did not invoke the Section 20(a) presumption and to remand the case for further consideration of causation. For the reasons set forth below, I would affirm the administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption that his multiple myeloma is work-related, and thus, affirm the denial of benefits, because his decision is supported by substantial evidence, is rational, and is in accordance with the law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As the majority states, there is no dispute that claimant's multiple myeloma diagnosis constitutes a "harm" for purposes of invoking the Section 20(a) presumption. However, I disagree with their assessment that the administrative law judge applied an improper standard in determining whether claimant established the "working conditions" element of his prima facie case. The administrative law judge laid out the correct standard for invoking the Section 20(a) presumption, recognizing that claimant bears the burden of establishing his prima facie case.[16] Based on the particular theory espoused by claimant,

[16]The majority points to the administrative law judge's findings that "there is no evidence in the record that jet fuel always or typically contains benzene," and that claimant failed to meet his burden to "establish that exposure to jet fuel [including benzene] causes multiple myeloma and that his jet fuel exposure caused his multiple myeloma," Decision and Order at 41, as indications that the administrative law judge applied an incorrect standard with regard to Section 20(a). These statements, however, represent an incomplete consideration of the administrative law judge's rationale for concluding that claimant did

i.e., his benzene exposure with employer in Afghanistan caused his multiple myeloma, CX 2,[17] actual benzene exposure is the necessary "working condition" in this case.

While claimant need not definitively prove that the working conditions caused claimant's harm in order to invoke the Section 20(a) presumption, *see, e.g., Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990), claimant must establish the existence of both the harm and, in this case, the working conditions that he alleges could have caused the harm. *Bis Salamis, Inc. v. Director, OWCP* [*Meeks*], 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016); *see Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). The administrative law judge is entitled to determine the weight to be accorded to the evidence of record, to address the credibility and sufficiency of any testimony, and to make the choice among reasonable inferences. *See Del Monte Fresh Produce v. Director, OWCP* [*Gates*], 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

In this case, the administrative law judge found that the MSDS submitted by the parties for a variety of fuels and additives shows that those substances do not always contain benzene or the same concentrations of benzene. Decision and Order at 40-41. The administrative law judge found that while claimant stated that the fuel distributed by employer was shipped into Afghanistan from Pakistan and Russia, and that additives were put into the fuel upon its arrival, there is no evidence in the record identifying the specific contents of the fuel and/or additives to which claimant was actually exposed during his

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not invoke the Section 20(a) presumption. The administrative law judge primarily relied on the undisputed facts that "Claimant did not specify a manufacturer and there is no other evidence in the record as to where this fuel came from, what manufacturer provided the fuel, or what the contents were of the fuel Claimant was actually exposed to," and that "there is no evidence in the record that any of the particular additives [which may contain benzene] were included in the jet fuel Claimant was exposed to." *Id.* Based on this, the administrative law judge found "there is insufficient evidence in the record to support a finding that claimant was exposed to benzene in the course of his work for employer." *Id.* The administrative law judge therefore concluded "claimant has not established that he was exposed to the substance [benzene] he claims caused his multiple myeloma." *Id.*

[17]Claimant's claim form alleges he "was working for Fluor as a fuel distribution manager where he was exposed to benzene. Thereafter, [he] was diagnosed with multiple myeloma which he had acquired from his exposure to benzene." CX 2.

work for employer.[18] The administrative law judge rationally inferred from the absence of any evidence identifying the specific substances to which claimant was exposed in his work with employer,[19] and evidence that not all jet fuel or additives contain benzene, that there is insufficient evidence in the record to support a finding that claimant was actually exposed to benzene in the course of his work for employer.[20] He thus concluded that

[18]The administrative law judge accurately stated "there is no other evidence in the record as to where this fuel came from, what manufacturer provided the fuel, or what the contents were of the fuel claimant was exposed to," including no evidence that "any of these particular additives" identified in the MSDS of record were included in the jet fuel. Decision and Order at 41. The administrative law judge also concluded that it is not clear that claimant directly handled any of these additives.

[19]Employer's failure to provide definitive evidence regarding the fuel and additives it distributed in Afghanistan does not bolster claimant's prima facie case. The burden is on claimant, and not employer, to establish the elements for invocation of the Section 20(a) presumption. In this case, claimant filed discovery requests with employer, which included "[a]ny documents from Employer, containing information regarding fuels, solvents, chemicals or products containing benzene used in Afghanistan from April 2009 through July 2012." CX 7. When employer initially refused to comply with claimant's discovery request, claimant's counsel informed employer, via email dated June 6, 2016, that "if you won't produce the information, [we] will file a Motion to Compel responses to discovery." CX 23. Employer responded on June 7, 2016, stating it "produced over 2500 pages of documents in response to claimant's requests for production," including documents related to claimant's request on the fuels and additives it used in Afghanistan. *Id.* At the hearing, those documents were admitted into the record as Claimant's Exhibits 22 and 23. HT at 17-18. If claimant was not satisfied with the evidence employer produced, he could have filed a motion to compel additional discovery. 29 C.F.R. §18.57. Claimant, therefore, had the opportunity to obtain specific information regarding the contents of the fuel and additives to which he was exposed while working for employer in Afghanistan, and review of the administrative law judge's decision reflects that he thoroughly considered the evidence submitted on that issue.

[20]Moreover, the administrative law judge rationally inferred that even assuming claimant was exposed to benzene in his work for employer, he did not establish a causal connection between benzene/jet fuel exposure and multiple myeloma. The administrative law judge reviewed the "various articles discussing research into benzene exposure and cancer" submitted by the parties, Decision and Order at 41-43, but found this evidence, at most, "shows a possible association that has not been explained." *Id.* at 43. The administrative law judge additionally found it is not clear from the record what kind of exposure to benzene, in terms of length of time and at what levels, might cause multiple

claimant did not establish he was exposed to the substance he claims caused his multiple myeloma.

Contrary to claimant's contentions, the administrative law judge rationally found there is insufficient evidence to establish that he was exposed to benzene while working for, and to invoke the Section 20(a) presumption against, employer. While, as the majority sets out in its opinion, there may be "some" evidence that there *could have been* working conditions in Afghanistan that *could have* caused claimant's disease, the administrative law judge acted within his discretion as fact-finder to find the evidence insufficient to invoke the Section 20(a) presumption. *See generally Ramsay Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015); *Kooley*, 22 BRBS 142. The administrative law judge permissibly accorded no weight to the opinions relied on by claimant to establish a causal link between his work exposures to benzene and the development of multiple myeloma, i.e., those proffered by Drs. Chowdhury, Spitzer, and Checkoway,[21] Decision and Order at 43-45, and otherwise found the evidence insufficient to show that claimant was exposed to benzene in the course of his work for employer. *See*

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myeloma to develop. The administrative law judge permissibly accorded no weight to the opinions of Drs. Chowdhury, Spitzer, and Checkoway. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge concluded claimant did not produce any evidence showing that he was exposed to a material or chemical in the course of his work for employer capable of causing multiple myeloma in humans. Therefore, he concluded claimant is not entitled to the Section 20(a) presumption. As the record contains substantial evidence to support these findings, I would affirm them.

[21]The administrative law judge found that Dr. Chowdhury did not render an actual opinion as to the cause of claimant's multiple myeloma, Decision and Order at 43-44, that Dr. Spitzer "did not discuss how much benzene claimant was exposed to, and did not identify the level of benzene exposure that would be required to create a risk for multiple myeloma," *id.* at 44, and that Dr. Checkoway's opinion "is based on generalities, potential associations, and incomplete information on the carcinogenic effect of benzene as it relates to multiple myeloma and claimant's exposure history." *Id.* at 45. While, as the majority states, Dr. Checkoway concluded that claimant's "benzene exposure was more likely than not the cause of his multiple myeloma," the administrative law judge, as is within his discretion, accorded diminished weight to that conclusion in part because Dr. Checkoway offered that conclusion "with the important caveat that more information [i.e., detailed quantitative information on claimant's past benzene exposure with employer] would be valuable for reaching a firm conclusion regarding causality." CX 31 at 5.

generally Mendoza v. Marine Personnel Co., Inc., 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *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 that there is insufficient evidence to establish that claimant's job with employer involved working conditions that could have caused his multiple myeloma is therefore supported by substantial evidence. *See R.F.* [*Fear*] *v. CSA, Ltd.*, 43 BRBS 139 (2009); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989); *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989). As claimant bears the burden of establishing the elements of a prima facie case, and as substantial evidence supports the administrative law judge's finding that he did not do so, I would affirm the administrative law judge's denial of benefits. Therefore, I dissent.

RYAN GILLIGAN
Administrative Appeals Judge