BRB No. 08-0833

S.A.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ACCUTRANS, INCORPORATED	)	DATE ISSUED: 06/18/2009
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Stephen C. Schletker, Covington, Kentucky, for claimant.

Douglas A. U'Sellis (U'Sellis & Kitchen, PSC), Louisville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-LHC-01577) of Administrative Law Judge Alice M. Craft 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*. (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, a tankerman, alleged that he sustained a pulmonary injury during the course of his employment. Claimant filed a claim based on his work exposures to asphalt,

diesel fuel, gasoline, benzene, toulene, styrene, jet fuel, crude oils and slurry. CX V. In particular, claimant alleged he was exposed to hazardous levels of hydrogen sulfide unloading a tank barge filled with heated asphalt on August 15-16, 2006. Claimant was subsequently diagnosed with acute bronchitis and Reactive Airways Disease Syndrome (RADS). Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), until December 31, 2006. Claimant has not returned to work. He sought additional compensation and medical benefits under the Act for his pulmonary condition. Employer asserted that claimant's condition is attributable to his prior use of tobacco and to a non work-related asthmatic condition.

In her decision, the administrative law judge found that the claim is within the coverage of the Act inasmuch as claimant spent 80 percent of his workday on navigable waters unloading barges. *See* 33 U.S.C. §§902(3), 903(a); *see Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). The administrative law judge found that claimant has RADS and that this pulmonary condition was caused by his employment with employer. The administrative law judge found that claimant is unable to work, as his medical restrictions require employment in a dust-free, fume-free, chemical-free, temperature-controlled environment. The administrative law judge accepted the parties' stipulation that claimant's pulmonary condition reached maximum medical improvement on April 17, 2007. The administrative law judge found employer liable for past-due medical bills incurred for the treatment of claimant's condition and that claimant is entitled to future medical care. The administrative law judge awarded claimant compensation for temporary total disability from August 16, 2006, to April 17, 2007, and for permanent total disability from April 18, 2007. 33 U.S.C. §908(a).

On appeal, employer challenges the administrative law judge's finding that claimant's pulmonary condition is related to his employment. Claimant responds, urging affirmance of the award of benefits.

Employer contends that claimant's contemporaneous account of the alleged work accident on August 15-16, 2006, and his activities immediately thereafter do not establish that he was exposed to hazardous levels of hydrogen sulfide. Employer also contends that claimant failed to establish that his condition meets the diagnostic criteria for RADS.

Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See, e.g., Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000)*; Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). 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); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In her decision, the administrative law judge did not separately address the working conditions and harm elements of claimant's *prima facie* case. Decision and Order at 26. Rather, she found the opinions of Drs. Saab, Kseibi, and Nelson provide sufficient evidence to invoke the Section 20(a) presumption that the injury to claimant's pulmonary system is work-related. Dr. Saab diagnosed claimant with RADS, which was caused or aggravated by his employment exposures to gasoline fumes, diesel, benzene and toulene. CX A at 9, 11-12; CX W at 9, 11, 16, 24. In addition, Dr. Saab stated that claimant's pre-existing chronic obstructive pulmonary disease due to smoking was "gravely aggravated" by his work exposures. CX A at 12. Dr. Kseibi examined claimant on September 27 and October 11, 2006, at which times he too diagnosed claimant as having RADS. CX A at 4, 6-7. Dr. Nelson opined that claimant developed RADS due to the incident on August 15-16, 2006, and to claimant's cumulative exposure to chemicals over time at work. Tr. at 74-77, 83-84; CX X at 2.

Employer contends that the administrative law judge erred in failing to address whether claimant actually was exposed to harmful levels of hydrogen sulfide on August 15-16, 2006. We agree that she did not adequately discuss the evidence regarding this specific exposure in finding the presumption invoked.[1] However, any error in this regard is harmless in view of the evidence regarding claimant's exposure to the other substances identified on his claim form. Claimant testified regarding these exposures, Tr. at 45-48, and, in addition, supplied a log of the substances unloaded from the vessels on which he worked.[2] CX X at 3-5. Moreover, claimant has been diagnosed with a pulmonary

[1] In addressing the evidence as a whole, the administrative law judge credited claimant's testimony that he was wearing a monitor on the date of his alleged exposure to hydrogen sulfide and that the monitor activated on two occasions during his shift, which he noted in his log book. Decision and Order at 28; *see* Tr. at 52-53; CX PP at 140. The administrative law judge stated that employer did not introduce any evidence that the monitor did not sound. The administrative law judge, however, did not discuss claimant's testimony that after his monitor activated employer brought a monitor to the vessel which did not detect any hydrogen sulfide. Tr. at 68-69. Moreover, the administrative law judge did not discuss whether claimant, contemporaneously, detected a "rotten egg" smell or reported such to his physicians; such an odor is an indicator of hydrogen sulfide.

[2] This log states that, over the course of his employment from December 2004 to August 2006, claimant unloaded calcium chloride, asphalt, unleaded gasoline, low sulfur diesel, ethylene glycol, high sulfur diesel, caustic soda, ethanol, slurry, jet fuel, and lube oil. CX X at 3-5.

impairment by each physician whose report is of record.[3] CX A at 4; CX W at 9-11; CX X at 1-2; EX A at 5, 26. Thus, in conjunction with the opinions of Drs. Saab, Kseibi and Nelson, cited by the administrative law judge, relating claimant's lung condition to his work exposures, claimant has established both elements of his *prima facie* case. The administrative law judge thus properly found the Section 20(a) presumption invoked in this case. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). As substantial evidence supports the administrative law judge's finding that claimant established a *prima facie* case for invocation of the Section 20(a) presumption, we affirm this finding. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's disabling condition was not caused or aggravated by his employment. *See 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). The administrative law judge found that the opinion of Dr. Lockey is insufficient to establish rebuttal. Employer contends this finding is in error. The administrative law judge found that Dr. Lockey "did not offer any explanation as to the cause of his (*sic*) the claimant's continuing symptoms nor did he provide a medical explanation for the onset of the claimant's symptoms or the rapid deterioration [of] the claimant's pulmonary function after his last job assignment on August 15-16, 2006." Decision and Order at 27. Employer, however, is not required to establish another agency of causation in order to rebut the Section 20(a) presumption; employer must only produce substantial evidence that the injury is not work-related. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Nonetheless, Dr. Lockey's opinion is legally insufficient to rebut the Section 20(a) presumption that claimant's pulmonary condition is not related to his employment exposures. Although Dr. Lockey stated that claimant does not have RADS and that the work exposures did not cause claimant's pulmonary condition, EXs A at 20-21; O at 23-24, 28, 59-60, he also stated that the work exposures at low concentrations can exacerbate claimant's asthmatic symptoms. EX O at 31, 34-37, 49, 53. As Dr. Lockey's opinion thus supports the conclusion that claimant's exposures aggravated his symptoms, Dr. Lockey's opinion cannot rebut the Section 20(a) presumption. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st

[3] It is not legally significant whether or not claimant has RADS. He made a claim for a "respiratory impairment, respiratory deficits including RADS." CX X. Although the administrative law judge need not have credited the physicians who diagnosed RADS, she may not substitute her judgment for their opinions that claimant has this condition. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

Cir. 2004). Thus, claimant's respiratory condition is work-related as a matter of law. *Id.*

Moreover, the administrative law judge found, assuming, *arguendo*, that rebuttal of the Section 20(a) presumption was established, claimant's pulmonary condition is work-related based on the opinions of Drs. Saab and Nelson. Dr. Saab, who treated claimant and who is Board-certified in pulmonary medicine, testified on deposition that RADS is typically associated with exposure to petrol chemicals. CX W at 9. Dr. Saab stated that regardless of whether claimant's condition is RADS or COPD due to smoking, his exposures at work either caused claimant's condition or aggravated it.[4] *Id.* at 11-12. Dr. Nelson, a consulting professor of clinical pharmacology, reviewed claimant's medical and employment records and opined that claimant was exposed to chemicals capable of producing RADS and that claimant in fact developed RADS due to his exposure to toxic chemicals. CX X at 1-2. These opinions constitute substantial evidence in support of the administrative law judge's finding that claimant's pulmonary condition is related to his employment. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Meehan Seaway Service, Inc. v. Director, OWCP*, 4 F.3d 633, 27 BRBS 108(CRT) (8th Cir. 1993). Therefore, we affirm the administrative law judge's finding that claimant's pulmonary condition is work-related. As employer does not challenge any other aspect of the administrative law judge's decision, the award of permanent total disability benefits is affirmed.

Claimant's counsel has filed an application for an attorney's fee, seeking $4,980 for services rendered before the Board in defense of his award, representing 24.9 hours of attorney time at $250 per hour. Employer has not responded to the attorney's fee request. Claimant is entitled to an attorney's fee payable by employer for successfully defending against employer's appeal. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); 20 C.F.R. §802.203(b). We find the hourly rate of $250 for attorney time requested by counsel reasonable in this case, 20 C.F.R. §802.203(d)(4), and the number of hours requested to be reasonably commensurate with necessary work performed. 20 C.F.R. §802.203(e). We therefore grant a fee of $4,980, payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

[4] Dr. Saab stated that RADS more fully explains the rapid onset of claimant's symptoms and the subsequent rate of deterioration of claimant's lung capacity. CXs A at 4; W at 27, 30. The administrative law judge also credited his opinion that claimant's respiratory deterioration is beyond what could be expected from COPD or other conditions alone. CX W at 27, 37.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed. Claimant's counsel is awarded a fee of $4,980 for work performed before the Board, payable directly to counsel by employer.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge