

RANDALL J. RESCONSIN )  
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 Claimant-Respondent )  
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 v. )  
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 AMSEC CORPORATION )  
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 and )  
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 AIG WORLD SOURCE ) DATE ISSUED: 04/18/2011  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden), Norfolk, Virginia, for claimant.

Michael W. Thomas and Lara D. Merrigan (Thomas, Quinn & Krieger, LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2007-LHC-00948) of Administrative law Judge Richard K. Malamphy 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). This case is before the Board for a second time.

Claimant allegedly sustained injuries to his neck and shoulders while working in Italy for employer on November 19, 2004, when a piece of tri-wall cardboard struck his neck in windy conditions. Claimant had previously undergone neck surgery in 2000 and 2003. Employer voluntarily paid compensation for temporary total and temporary partial disability, 33 U.S.C. §908(b), (e), until it terminated benefits approximately 18 months after the date of injury.<sup>1</sup> Claimant sought continuing compensation for temporary total disability and medical treatment for his neck and for depression. Claimant alleged that his psychological condition arose from chronic neck pain due to the work injury.

In his initial decision, the administrative law judge found that claimant's neck and psychological conditions are related to the November 19, 2004, work incident, that claimant's neck condition had not reached maximum medical improvement,<sup>2</sup> and that claimant was unable to perform any work due to totally disabling pain. The administrative law judge thus awarded claimant ongoing compensation for temporary total disability as of September 13, 2006, the date employer terminated its voluntary compensation payments.

Employer appealed, challenging the administrative law judge's findings that claimant's neck and psychological conditions are related to the work injury, that claimant is unable to work, and that claimant's neck condition had not reached maximum medical improvement. Employer also challenged the administrative law judge's failure to address whether it established the availability of suitable alternate employment and its entitlement to Section 8(f) relief. The Board held that the administrative law judge did not render adequate findings with respect to the conflicting evidence of record, and vacated his findings that claimant has totally disabling work-related neck and psychological injuries and that these conditions have not reached maximum medical improvement. *R.R. [Resconsin] v. AMSEC Corp.*, BRB No. 08-0743 (May 27, 2009) (unpub.). The Board

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<sup>1</sup>Employer paid \$39,302.40 in temporary total disability benefits for the period from February 23, 2005 through April 26, 2006, and \$12,282 in temporary partial disability benefits for the period from April 27, 2006 through September 13, 2006. CX 16.

<sup>2</sup>Accordingly, the administrative law judge did not address employer's application for Section 8(f) relief, 33 U.S.C. §908(f).

thus remanded the case for “for more detailed findings of fact and conclusions of law on the disputed issues.” *Id.*, slip op. at 2. On remand, the administrative law judge found that claimant’s present neck condition and depression are not related to the work incident of November 19, 2004. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge’s finding that his neck and shoulder conditions are not work-related and the consequent denial of benefits relating to those injuries.<sup>3</sup> Employer responds, urging affirmance.

Claimant argues that the administrative law judge erred in crediting Dr. Gold’s speculative and equivocal hearing testimony to find that employer established rebuttal of the Section 20(a) presumption with regard to the work-related aggravation of his pre-existing neck injury. Claimant contends that Dr. Gold’s hearing testimony, that if claimant sustained any aggravation due to the work injury it was short-lived, is contradicted by the physician’s earlier deposition and medical reports wherein he stated that the work incident resulted in an aggravation of claimant’s pre-existing condition.

The Board instructed the administrative law judge, on remand, to address employer’s contention that claimant sustained, at most, a temporary exacerbation of his pre-existing neck symptomatology due to the work incident. On remand, the administrative law judge found that Dr. Gold’s hearing testimony establishes that the November 19, 2004, work incident resulted in only a temporary aggravation of claimant’s pre-existing neck and shoulder conditions. The administrative law judge found that this opinion is based on Dr. Gold’s review of additional records, including Dr. Su’s post-accident reports.<sup>4</sup> Dr. Gold stated that these records support his conclusion of a

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<sup>3</sup>The administrative law judge’s finding that claimant’s psychological condition is not work-related, and his resulting denial of benefits for such a condition, is affirmed as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

<sup>4</sup>At the hearing, claimant’s counsel objected to Dr. Gold’s testimony on the ground that it was contrary to the physician’s written reports of November 18, 2005, and August 31, 2007, wherein counsel stated Dr. Gold “indicated that [the work incident] was a permanent aggravation” of claimant’s pre-existing condition. HT at 107. Dr. Gold, however, responded that “I never said permanent” in either of his written reports. HT at 108. Although Dr. Gold previously stated in 2007 that claimant’s condition “is” the result of both the prior injury and the aggravation caused by the work accident, *see CX 7* at 2, the administrative law judge rationally relied on Dr. Gold’s testimony to find that Dr. Gold’s review of additional treatment records clarified his opinion. Decision and Order at 20; HT at 115, 147, 160-161.

temporary aggravation because they revealed that claimant presented similar complaints of neck and shoulder pain both pre- and post-incident and provided no objective evidence to substantiate a claim of a permanent worsening of claimant's pre-existing injuries. Thus, the administrative law judge relied on Dr. Gold's hearing testimony, that claimant's chronic pain after November 26, 2004, "was definitely not due to the work injury" but rather "the pain that he had since 1999," HT at 145, to find that employer established rebuttal of the Section 20(a) presumption.

When claimant has a pre-existing condition, employer is liable for the entire resulting disability if the work injury aggravates, accelerates, or contributes to the underlying condition. *See Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4<sup>th</sup> Cir. 1982); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9<sup>th</sup> Cir. 1966); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). However, if the disability is due solely to the natural progression of a prior injury or condition, employer is not liable. It is employer's burden to produce substantial evidence that claimant's present disability is solely attributable to the prior injury or condition in order to rebut the Section 20(a) presumption that claimant's injury is work-related. *See generally Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); 33 U.S.C. §920(a). In this case, the administrative law judge's finding that Dr. Gold's hearing testimony rebuts the Section 20(a) presumption is affirmed for the period commencing November 26, 2004, as the finding is rational, supported by substantial evidence, and in accordance with law.<sup>5</sup> *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997); *see also Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2<sup>d</sup> Cir. 2008)(substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a finding); *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5<sup>th</sup> Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5<sup>th</sup> Cir. 1998). Therefore, we reject claimant's contention of error.

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<sup>5</sup>Dr. Gold's opinion that claimant's ongoing condition is not the result of a work-related aggravation is sufficient to rebut the Section 20(a) presumption. However, as Dr. Gold stated the work incident resulted in a temporary exacerbation of claimant's pre-existing condition that returned to the *status quo* as of November 26, 2004, we reverse the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption for the period between November 19 and 26, 2004. We nevertheless affirm the administrative law judge's denial of disability benefits for the period from November 20-26, 2004, since claimant testified that he continued to work for employer in his usual job at his usual pay without missing any work because of his injuries until February 1, 2005. HT at 32, 33, 56; *see generally Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5<sup>th</sup> Cir. 1998); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

Claimant next argues that the administrative law judge erred in concluding that his neck condition was not caused or aggravated by his November 19, 2004, work incident based on a weighing of the evidence as a whole. Specifically, claimant argues that the administrative law judge's conclusion revolves around his erroneous finding that claimant did not present any objective evidence to establish that his neck condition was exacerbated or aggravated by the work incident. Claimant maintains that the physicians who treated his neck condition all related his chronic neck pain to the work injury claimant sustained on November 19, 2004.

Once, as here, the Section 20(a) presumption is invoked and rebutted, it drops from the case. The administrative law judge must weigh the evidence as a whole and claimant bears the burden of establishing by a preponderance of the evidence the work-relatedness of his neck and shoulder conditions. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In addressing the causation issue based on the evidence as a whole, the administrative law judge compared the symptoms claimant reported to Drs. Mitchell, Levi, and Su prior to November 19, 2004, with those he reported to the physicians following that date.<sup>6</sup> The administrative law judge found that all three physicians premised their opinions, that the November 19, 2004, incident aggravated claimant's pre-existing conditions, solely on claimant's statements of increased pain, and that each physician acknowledged that claimant's complaints of shoulder and neck pain were essentially the same prior to and following that incident. Contrary to claimant's contention and as the administrative law judge found, all three physicians indicated that there was little to no change between claimant's pre- and post-incident condition.<sup>7</sup> Additionally, Drs. Mitchell and Levi both stated that there was no objective evidence to support claimant's position that the November 19, 2004, incident aggravated his pre-

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<sup>6</sup>In evaluating the evidence as a whole, the administrative law judge rationally limited his consideration of the medical evidence to the reports of those physicians who examined/treated claimant both prior to and following the November 19, 2004, work injury, *i.e.*, Drs. Su, Mitchell, and Levi, as they are in the best position to compare claimant's pre- and post-incident symptoms. For this reason, although the administrative law judge acknowledged the post-incident treatment claimant received from Dr. Gajjar, Decision and Order on Remand at 15, 17, he did not specifically address it in terms of causation.

<sup>7</sup>Drs. Mitchell and Levi both stated that claimant's symptoms were essentially the same before and after the November 19, 2004, work injury. CX 21, Dep. at 52, 53; CX 22, Dep. at 17-18. Additionally, Dr. Su stated that from a treatment perspective, claimant's "neck problem anteriorly and overall energy-wise had not changed much or at all" between the September and November visits. CX 25, Dep. at 33.

existing chronic neck and shoulder pain.<sup>8</sup> Moreover, while Dr. Su stated she found some objective changes, she added that those could have been the result of claimant's documented bronchitis for which he sought treatment with Dr. Chakraborty on November 23, 2004.<sup>9</sup> CX 25, Dep. at 30-31.

The administrative law judge further rejected claimant's subjective complaints of a worsening condition following the work incident citing "numerous irregularities" in claimant's testimony. The administrative law judge found that claimant's statements that his pain was "incredibly different" after the November 19, 2004, work incident, HT at 30, are contrary to the pre-work incident treatment records of Drs. Levi, Mitchell and Su which indicate that claimant had similar complaints of headaches and bilateral shoulder pain. See EX 15 at 303; CX 6 at 37; CX 14 at 8, 10. Additionally, despite testifying that the November 19, 2004, incident caused his neck to be "so painful that you don't want to live anymore," HT at 30, claimant made no mention of any neck pain when he visited his primary care physician, Dr. Chakraborty, on November 23, 2004, to address his cold symptoms.<sup>10</sup> Moreover, the administrative law judge found that claimant's statements regarding the work incident and his subsequent treatment with Drs. Bohan and Alford, are inconsistent with those provided by his supervisor, Mr. Morrell, and by those physicians. Specifically, contrary to claimant's statements, the administrative law judge found that Mr. Morrell credibly testified that although he was aware that the box had hit

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<sup>8</sup>Dr. Mitchell stated that there is nothing to support claimant's allegation of an injury on November 19, 2004, other than claimant's own statements regarding his symptoms. CX 21, Dep. at 45. Similarly, Dr. Levi testified that MRIs of claimant's cervical spine in 2002, 2004, and 2005 remained unchanged except for some expected surgical changes, CX 22, Dep. at 17, and that claimant's subjective complaints regarding his neck and shoulder pain "were not supported by any objective data." *Id.* at 26.

<sup>9</sup>Dr. Su also indicated that claimant's "upper respiratory infection" in November 2004, "could have caused a strain in some of the muscles" and thus, could have led to claimant's "new" complaints of pain. CX 25, Dep. at 30-31.

<sup>10</sup>Additionally, Dr. Chakraborty's notation, following a general examination, that claimant's neck was supple, *i.e.*, flexible and limber, belies claimant's complaints that he was in "incredible pain." EX 17 at 507. Moreover, claimant stated that he did not seek any medical treatment while in Italy, because he "did not feel that injured to where I needed medical care." HT at 30-31.

claimant in the head, he did not believe he was seriously hurt because claimant did not ask him to complete an injury report.<sup>11</sup> HT at 76-77.

It is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses and has considerable discretion in evaluating and weighing the evidence of record. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2<sup>d</sup> Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). It is equally well established that the Board may not reweigh the evidence. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). As the administrative law judge's decision to accord no weight to claimant's testimony that he incurred increased symptoms of neck and shoulder pain as a result of the November 19, 2004, work incident, is rational and supported by substantial evidence, it is affirmed. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911(1979). Consequently, given the absence of objective medical evidence to support claimant's claims of worsening pain after the work incident, we affirm the administrative law judge's finding that claimant did not establish that his present neck and shoulder injuries were caused, aggravated, or exacerbated by the work incident of November 19, 2004. Therefore, we affirm the denial of benefits.

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<sup>11</sup>Mr. Murrell also stated that none of claimant's co-workers mentioned that claimant seemed to be hurt, HT at 77, and that he remembered claimant's leaving work following the incident not because of any injury but because "he had some business he needed to take care of;" specifically, claimant "wanted to go back to the hotel so he could pack his bags and do his laundry" before his scheduled departure for the United States the next day. HT at 76-77.

Accordingly, we modify the administrative law judge's decision to reflect that claimant sustained a temporary work-related aggravation of his pre-existing neck and shoulder conditions for the period from November 19-26, 2004. In all other regards, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge