BRB No. 01-398

MICHAEL J. PRESTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS ORPORATION	)	DATE ISSUED: Jan. 15, 2002
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland, Brunswick, Maine, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy, L.L.C.), Portland, Maine, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (1999-LHC-2444) of Administrative Law Judge David W. Di Nardi 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 worked as a rigger and substitute crane operator for employer. In 1998, his hereditary condition of myoclonus multiplex, the involuntary twitching and jerking of his head, neck and upper extremities, allegedly reached sufficient proportions to cause him concern over his ability to safely perform his job. Emp. Ex. 9. Based on his assertions,

claimant's doctor, Dr. Carinci, removed him from work as of August 15, 1998. Emp. Ex. 24. Claimant contended the increase in symptoms was due to stress and harassment at work, Tr. at 27-33, and he sought temporary total disability and medical benefits. The administrative law judge denied benefits, finding the Section 20(a), 33 U.S.C. §920(a), presumption rebutted and concluding that claimant's condition is familial and not work-related.[1] Decision and Order at 34-35. Claimant appeals, and employer responds, urging affirmance.

Claimant contends the administrative law judge did not properly apply the Section 20(a) presumption with regard to his work-related aggravation of a non-work condition, erred in finding that employer rebutted the presumption, gave inadequate weight to the opinions of the treating physicians, and ignored the evidence which supports claimant's position. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain *and* that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *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). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Kubin v. Pro-Football, Inc.* 29 BRBS 117 (1995). Thus, application of Section 20(a) gives claimant a presumption that the work injury aggravated or contributed to the pre-existing condition, and the employer must present evidence addressing aggravation or contribution in order to rebut

[1]Consequently, the administrative law judge did not address the remaining issues raised by the parties.

it. *See Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982).

In this case, the administrative law judge credited the opinions of Drs. Bourne and Kolkin, employer's psychiatry and neurology experts respectively, in finding that neither claimant's myoclonus nor psychological condition was caused by his employment. Indeed, it is undisputed that myoclonus multiplex is a hereditary condition. In addition, the administrative law judge credited Dr. Kolkin's opinion that a comparison of a sample of claimant's current handwriting with a sample written in 1993 showed no significant changes and, thus, no increased tremors or aggravation of claimant's underlying condition. Decision and Order at 31, 33; Cl. Exs. 12, 20 at 9. The administrative law judge also credited Dr. Bourne's opinion that claimant does not have a psychiatric disability, but he has a chronic adjustment disorder which is directly related to his myoclonus condition and his alcoholism and is not caused or aggravated by the alleged stressful working conditions.[2] Decision and Order at 33; Emp. Ex. 29. Based on these opinions, the administrative law judge found the Section 20(a) presumption rebutted. Decision and Order at 33. With respect to the evidence as a whole, the administrative law judge accepted and credited the opinions of these same doctors, as well as the testimony of Mr. Thiboutot, claimant's supervisor, and he considered significant portions of claimant's testimony to be unreliable. *Id.* at 33-34. Therefore, the administrative law judge concluded that claimant's disease was not caused or aggravated by claimant's employment, as there is no evidence that it progressed any further than it would have absent his employment. *Id.* at 35.

In order to address claimant's contention that the administrative law judge erred in finding the Section 20(a) presumption rebutted, we must first ascertain on what basis the presumption was invoked. In this case, however, although the administrative law judge stated he invoked the Section 20(a) presumption, Decision and Order at 28, he did so summarily and without explanation. Specifically, the administrative law judge stated:

> In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his essential myoclonus and psychological problems, resulted from working conditions at the Employer's shipyard. The Employer has introduced substantial evidence severing the connection between such harm and

[2]Claimant's myoclonus tremors decreased with alcohol intake; thus, he became an alcoholic in his attempts to self-medicate. Claimant has been treated for alcoholism. *See* Emp. Ex. 27.

> Claimant's maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of the record evidence.

Decision and Order at 28 (emphasis in original). While the administrative law judge identified claimant's allegations as to "harm" and "working conditions," he did not make specific findings on these issues. Most significantly, he did not determine whether the alleged stress and harassment at claimant's workplace occurred. Without findings evaluating the conflicting evidence on this issue the Board lacks the proper context for considering whether employer presented substantial evidence in rebuttal. *See Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985). Consequently, we must vacate the administrative law judge's decision and remand the case for further consideration regarding whether claimant established a *prima facie* case for invoking the Section 20(a) presumption. *Id.*

With regard to the harm, it is undisputed that claimant has a hereditary condition myoclonus multiplex, and that this condition was not caused by his employment. What is left in question, however, is whether that condition or its symptoms were aggravated by conditions or an accident at work. Answering this question requires findings identifying the accident or working conditions in existence which could have aggravated this condition. Claimant identified November 1, 1997, as the date of injury; however, he did not describe any event or set of events on that date to form the basis for his claim. Rather, he described general occurrences where he claims to have been harassed at work, *i.e.*, the victim of name-calling, practical jokes, or teasing, and stressful situations with the cranes or clamps which he called "close calls," and he contends these affected his ability to perform his job by increasing symptoms of his movement disorder. Tr at 27-33.

A claim need not be based on a specific accident or event; thus, claimant has stated a proper basis for his claim in testifying to these working conditions. *See Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994). If credited, his testimony can establish the working conditions element of his *prima facie* case. Employer, however, presented contrary evidence through testimony of Mr. Thiboutot, who stated that claimant was a good worker and that his condition did not prevent him from performing his job duties, although toward the end of his employment claimant asked to be excused from certain work, such as work in the cherry pickers. Tr. at 74, 80-81. Mr. Thiboutot, who had known claimant for 20 years, believed that claimant's condition was worse toward the end of his tenure than it was at the beginning, but that it was even worse at the hearing than it had been any time at work. Tr. at 73-74, 80. With regard to co-worker treatment, Mr. Thiboutot acknowledged mutual teasing between claimant and his co-workers, and he stated that claimant was not being singled out, but he was aware of some of the names co-workers had called claimant over the years. Tr. at 84-86. Mr. Thiboutot further testified that the first and only time claimant approached him with a complaint of people bothering him was in the spring of 1998, Tr. at 91, but he could not

recall any accident or unsafe situation caused by claimant's condition. Tr. at 93.

On remand, the administrative law judge must address this evidence and determine whether claimant's working conditions were stressful. In this regard, the administrative law judge must apply long-standing law that work events need not be unusually stressful or severe in order to give rise to a compensable injury. *See Konno,* 28 BRBS 57; *see generally Southern Stevedoring Co. v. Henderson,* 175 F.2d 863 (5th Cir. 1949). Even if work-related stress may seem relatively mild, the issue is the effect of the incidents on claimant. *Id.*

In addition, it is well-established that symptoms aggravated or exacerbated, even temporarily, by work-related stress constitute a compensable injury. *Crum v. General Adjustment Bureau,* 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *see also Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 151 (1989); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 1 (1988). This case law is pertinent in this case, because the opinion of Dr. Kolkin actually supports a causal connection rather than rebutting it as the administrative law judge found. It is thus apparent that claimant's assertion that Dr. Kolkin's opinion is insufficient to rebut the Section 20(a) presumption has merit. Dr. Kolkin testified that stress could temporarily worsen the symptoms of claimant's myoclonus disease. Ex. 20 at 28. He also stated that the increase of the involuntary movements would not be permanent but, rather, would dissipate when the stressor was removed. Cl. Ex. 20 at 36. This opinion is in agreement with that of Dr. Standaert, one of claimant's treating physicians. Specifically, Dr. Standaert stated: a "stressful environment can cause a temporary worsening of the twitching and shaking symptoms related to the myoclonus." Emp. Ex. 25 (Feb. 18, 1999 report). He also reported that "when the stress was removed, . . . the symptoms would return to their previous state." *Id.*

This medical evidence supports the conclusion that stressful working conditions could have aggravated claimant's condition. In this regard, the courts have held that an aggravation is compensable regardless of whether the employment actually altered the underlying disease process or whether it merely induced the manifestation of symptoms. *Crum,* 738 F.2d 474, 16 BRBS 115(CRT); *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). For example, in *Crum*, the United States Court of Appeals for the D.C. Circuit stated that aggravation of claimant's angina, a symptom of his underlying heart disease, as a result of stress and working conditions was compensable. *Crum,* 738 F.2d 474, 16 BRBS 115 (CRT). In *Crum,* claimant was held entitled to permanent disability benefits even though his symptoms abated when he was removed from the work environment. Following *Crum*, the Board has applied its analysis in *Marinelli, Cairns*, and *Care*. In *Obert*, the Board stated:

> If the work played any role in the manifestation of the disease, then the non-work-relatedness of the disease and the fact that the pains could have appeared anywhere are irrelevant; the entire resulting disability is compensable.

Obert, 23 BRBS at 160. In the present case, as Dr. Kolkin opined that stress could aggravate claimant's pre-existing condition, and as there is no other evidence of record severing the connection between work-related stress and aggravation or exacerbation of the symptoms of claimant's underlying condition, claimant is correct in arguing that employer has not presented substantial evidence rebutting the Section 20(a) presumption.[3]

Therefore, the case is remanded for the administrative law judge to render specific findings as to whether claimant was exposed to stressful working conditions which could have aggravated his condition. If so, Section 20(a) is invoked. If the administrative law judge reaches the issue of rebuttal, we hold that Dr. Kolkin's opinion is insufficient to rebut the presumption that claimant's condition has been aggravated by work-related stress; therefore, claimant's injury is work-related as a matter of law. *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *Konno*, 28 BRBS 57. If claimant's condition is work-related, then the administrative law judge also must address the remaining disputed issues to determine whether claimant is entitled to benefits.

[3]Dr. Bourne's report addressed only the alleged psychiatric injury and not the physical injury. In fact, Dr. Bourne specifically admitted he has no expertise to determine whether claimant's physical disorder had been aggravated by his employment. Emp. Ex. 29. Claimant does not challenge the administrative law judge's findings that he has no psychiatric disability and that any psychological condition is not work-related. Therefore, those findings are affirmed.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration in accordance with this opinion.[4]

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[4]In light of our decision, we need not address claimant's remaining contentions. Nevertheless, we reject claimant's assertion that the administrative law judge failed to give proper weight to the opinions of claimant's treating physicians. The opinions of treating physicians are entitled to special weight only when the claimant is faced with reasonable, competing, medical opinions as to how to best treat his work-related injury, in which case he, and not the employer or the administrative law judge, is to decide his course of treatment, *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 120 S.Ct. 40 (1999), or, in the absence of substantial contrary evidence, *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).