

JOHN COLEY )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 HOLT CARGO SYSTEMS, )  
 INCORPORATED )  
 )  
 and )  
 U.S. FIRE INSURANCE COMPANY ) DATE ISSUED: 01/23/2007  
 )  
 and )  
 )  
 GREENWICH TERMINALS )  
 )  
 and )  
 )  
 AMERICAN MOTORISTS, )  
 INCORPORATED COMPANY )  
 )  
 Employers/Carriers- )  
 Respondents ) DECISION and ORDER

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

David M. Linker (Freedman & Lorry, P.C.), Cherry Hill, New Jersey, for claimant.

John E. Kawczynski (Field, Womack & Kawczynski, L.L.C.), South Amboy, New Jersey, for Holt Cargo and U.S. Fire Insurance Company.

Eugene Mattioni and Francis X. Kelly (Mattioni, Ltd.), Philadelphia, Pennsylvania, for Greenwich Terminals and American Motorists.  
Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2003-LHC-1314, 2003-LHC-1315) of Administrative Law Judge Janice K. Bullard 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). This case is before the Board for a second time.

Claimant, who developed problems related to degenerative disc disease in his spine sometime in 1988, experienced neck and back pain in February and April 2001, while working for Holt Cargo Systems (Holt Cargo). As a result, claimant missed work from April 5, 2001, through October 26, 2001, for which he was ultimately awarded temporary total disability benefits by Administrative Law Judge Ralph A. Romano based on his determination that claimant aggravated his pre-existing back condition.

On September 11, 2002, claimant, while working for Greenwich Terminals (employer) at the former Holt Cargo facility, experienced sharp pains in the left side of his chest and soreness in his back and neck. After confirming he had not had a heart attack, claimant visited Dr. Lefkoe who diagnosed acute cervical, thoracic and lumbosacral strains/sprains aggravating claimant's pre-existing degenerative disc disease, spondylosis, and multiple herniations. Cl. Ex. 1 at 16-17. Claimant thereafter sought benefits under the Act.

In her decision dated June 29, 2004, Administrative Law Judge Janice K. Bullard (the administrative law judge) found that claimant established a *prima facie* case that his work for employer aggravated his pre-existing condition, but that employer rebutted the Section 20(a) presumption. Decision and Order at 14. In weighing the evidence as a whole, the administrative law judge credited the opinions of Drs. Mandel and Cohen that claimant's underlying spinal disease was the sole cause of claimant's increased symptoms and that those symptoms were not triggered by anything claimant did at work. Decision and Order at 16-18. The administrative law judge thus found that there was no aggravation for which employer was liable. She also found that the increase in symptoms was not the natural progression of anything that occurred in 2001 while Holt Cargo employed claimant. Accordingly, she denied benefits, prompting claimant to appeal. Decision and Order at 19.

In its decision, the Board held that the administrative law judge had not addressed the aggravation rule and erred in requiring that an "unusual" event had to occur for claimant's condition to be work-related. *Coley v. Holt Cargo Systems, Inc.*, BRB No. 04-

0795 (June 28, 2005) (unpub.). The Board thus vacated the administrative law judge's denial of benefits and remanded the case for reconsideration of whether employer rebutted the Section 20(a) presumption, and if so, for a weighing of the relevant evidence of record as a whole in light of the applicable law. *Id.*

On remand, the administrative law judge again determined that claimant established a *prima facie* case that his work for employer aggravated his pre-existing condition, that employer established rebuttal of the Section 20(a) presumption, and that the preponderance of the evidence of record establishes that claimant's work activities with employer played no role in the manifestation of his flare-up of pain symptoms on September 11, 2002. She therefore concluded that claimant did not meet his burden of proving a causal relationship between his work for employer and his back condition. The administrative law judge further found, based on the credited opinion of Dr. Mandel, that even if claimant's employment on September 11, 2002, aggravated his condition, it had completely resolved as of September 30, 2002.<sup>1</sup> Decision and Order on Remand at 16. Accordingly, the administrative law judge denied the claim for additional benefits.

On appeal, claimant challenges the administrative law judge's findings that employer established rebuttal of the Section 20(a) presumption and that the evidence as a whole is insufficient to establish a work-related aggravation of his pre-existing injuries. Alternatively, claimant asserts that the administrative law judge did not fully consider Holt Cargo's liability for the September 11, 2002, injury based on a "natural progression" theory. Employer responds, urging affirmance. Holt Cargo also responds, arguing that the administrative law judge's finding that claimant's employment on September 11, 2002, did not aggravate his condition should be reversed. Alternatively, Holt Cargo urges affirmance of the denial of benefits.

In its prior decision, the Board held that the administrative law judge, in addressing rebuttal, "did not cite or address" the relevant case law regarding aggravation, *i.e.*, *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3<sup>d</sup> Cir. 2002); *see e.g.*, *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002), and furthermore that her rationale for crediting the opinions of Drs. Cohen and Mandel was inconsistent with the applicable legal standard. *Coley*, slip op. at 4. The Board thus

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<sup>1</sup> The administrative law judge observed that the parties previously stipulated that employer voluntarily "paid claimant temporary disability benefits and medical expenses for the period from September 11, 2002, through September 30, 2002." *See* Decision and Order on Remand at 16; Decision and Order at 4. She further concluded "that the preponderance of the evidence establishes that claimant is not permanently totally disabled by the symptoms he experienced on September 11, 2002." Decision and Order on Remand at 16.

stated that the administrative law judge “must determine whether employer produced substantial evidence to rebut the Section 20(a) presumption that claimant’s work aggravated his underlying condition or caused it to become to symptomatic,” and that if so, then “she must consider the relevant evidence of record as a whole in light of applicable law.” *Coley*, slip op. at 5-6. Where aggravation of a pre-existing condition is at issue, the employer must produce substantial evidence that the work events neither directly caused the injury nor aggravated a pre-existing condition, resulting in the injury, in order to rebut the Section 20(a) presumption. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5<sup>th</sup> Cir. 1999). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant disability is compensable. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5<sup>th</sup> Cir. 1999); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5<sup>th</sup> Cir. 1986) (*en banc*); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968).

In examining rebuttal of the Section 20(a) presumption, the administrative law judge reviewed the Board’s decision in *Burley*, 35 BRBS 185. She found that the instant case is distinguishable from *Burley* because “the medical experts whom I give credit directly do state that claimant’s spinal condition was not caused or aggravated by his employment.” Decision and Order on Remand at 8. Specifically, the administrative law judge found that Drs. Mandel and Cohen stated that claimant’s onset of symptoms on September 11, 2002, was not attributable to his employment activities, as they both stated that claimant’s flare-up of pain symptoms on that date was not related in any way to and/or was not caused by his employment or employment conditions.

The record supports the administrative law judge’s interpretation of the opinions of Drs. Mandel and Cohen. Dr. Mandel responded “no” when asked whether “the type of activity [claimant] might perform in his job would increase or cause him at times to have his symptoms to flare.” EX 1 at 26. While Dr. Mandel subsequently admitted that such activity could possibly and potentially produce symptoms which may cause pain, EX 1 at 27, he further stated that “symptoms can occur coincidentally with an activity,” and that “[t]hat doesn’t mean that the activity caused an injury or caused the symptoms to occur.” EX 1, Dep. at 29. The administrative law judge could thus reasonably find that Dr. Mandel’s statements as a whole are sufficient to support rebuttal in this case. *See generally Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5<sup>th</sup> Cir.), *cert. denied*, 540 U.S. 1056 (2003).

Dr. Cohen provided a more definitive statement regarding the lack of any relationship between claimant’s work for employer and his flare in symptoms on September 11, 2002. He stated that claimant’s work for employer “really had nothing to do with bringing on the symptoms from the diseases.” EX 2, Dep. at 47, 65, 85. Dr. Cohen acknowledged that claimant had a flare-up of his symptoms on September 11,

2002, but he stated that he “personally feel[s] it’s not related to his employment.” EX 2, Dep. 85. When asked, “[s]o even the increase in symptoms [on September 11, 2002], you would not attribute to his employment?” Dr. Cohen replied “[t]hat’s my opinion in this case, yes.” EX 2, Dep. at 85.

As the administrative law judge, on remand, followed the Board’s instructions to reconsider employer’s rebuttal evidence in terms of the aggravation rule, and as her finding that the opinions of Drs. Mandel and Cohen establish that claimant’s flare-up of symptoms was not in any way related to his work for employer is rational and supported by substantial evidence, it is affirmed. *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). Consequently, we affirm the administrative law judge’s finding that employer’s evidence is sufficient to establish rebuttal of the Section 20(a) presumption.<sup>2</sup> See generally *Manente v. Sea-Land Serv., Inc.*, 39 BRBS 1 (2004); *O’Kelley v. Dep’t of the Army/NAF*, 34 BRBS 39 (2000); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999), *aff’g* 31 BRBS 98 (1997) (doctor’s opinion that claimant’s pre-existing back condition was not aggravated by his subsequent work accident is sufficient to rebut the Section 20(a) presumption).

Considering the record as a whole, the administrative law judge concluded that it contains no credible evidence relating claimant’s onset of pain to his work but rather that the credible medical evidence demonstrates that claimant has a deterioration of his spine that would cause him periodic pain with or without activity. In this regard, she accorded greater weight to the opinions of Drs. Mandel and Cohen that claimant did not become symptomatic on September 11, 2002, because of his work conditions or activities, and in turn, rejected the contrary opinion of Dr. Leftkoe. The administrative law judge additionally observed that claimant’s onset of pain on September 11, 2002, was similar to other incidents he had experienced since 1988, without any demonstrable relation to the conditions of his employment. The administrative law judge thus concluded that although claimant experienced pain in the course of his employment, it did not arise out of his employment. She further determined that the coincidence that the symptoms occurred while claimant was at work is insufficient to satisfy the claimant’s burden of proving that the conditions of his employment contributed to his pain.

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<sup>2</sup> We thus reject claimant’s contention that the administrative law judge was, on remand, compelled to find that employer could not establish rebuttal of the Section 20(a) presumption and thus that claimant is entitled to benefits as a matter of law, since, as the administrative law judge properly noted in her opinion, the Board specifically issued remand instructions requiring her to reconsider rebuttal in light of the relevant case law. *Coley*, slip op. at 5-6.

The administrative law judge is entitled to weigh the evidence and may draw her own inferences and conclusions from the evidence. *Calbeck*, 306 F.2d 693; *Donovan*, 300 F.2d 741; *Hughes*, 289 F.2d 403. Moreover, the Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9<sup>th</sup> Cir. 1988). As the administrative law judge followed the Board’s remand instructions in considering the evidence on the issue of aggravation, and as her decision to accord greater weight to the opinions of Drs. Mandel and Cohen to find, based on the record as a whole, that claimant has not established that his work for employer caused his symptoms on September 11, 2002, or otherwise aggravated his pre-existing condition, is supported by substantial evidence, her conclusion that claimant is not entitled to benefits payable by employer is affirmed.<sup>3</sup>

Claimant alternatively argues that liability for his ongoing disability should revert to Holt Cargo under the “natural progression” rule. The concept of natural progression pertains to determining which employer is liable for the totality of a claimant’s disability in a case involving cumulative traumatic injuries. *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT). In her initial decision, the administrative law judge found that “on September 11, 2002, claimant experienced a recurrent episode of chest wall and back and neck pain that was related to a spinal condition that predated his compensable injury in his 2001 claim and is unrelated thereto.” Decision and Order dated June 29, 2004, at 19. She added that claimant’s “onset of pain on September 11, 2002, was similar to other similar incidents that he has experienced since 1988, without any relation to his prior compensable injury.” *Id.* The administrative law judge further found that claimant’s previous compensable injury, sustained while working for Holt Cargo, had entirely resolved. *Id.* She thus concluded that “the evidence supports a finding that the claimant’s condition [as of September 11, 2002] is the result of the natural progression of the deterioration of his spine,” and thus is not, in any way, related to “any condition of employment, or specific traumatic event experienced in either 2001, or 2002.” *Id.* Thus, as Holt Cargo argues, there is no evidence to support an inference that the September 11, 2002, flare-up was a continuation of the injury which claimant sustained while working for Holt Cargo on April 5, 2001. For these reasons, we reject claimant’s contention that Holt Cargo is liable for benefits related to claimant’s September 11, 2002, work injury.

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<sup>3</sup> Moreover, we note that as the administrative law judge found, even if claimant had established that his pain on September 11, 2002, arose out of his employment, the record establishes that this flare-up resolved no later than September 30, 2002, a period during which employer paid temporary total disability and medical benefits. Decision and Order on Remand at 16; Employer’s Exhibit 1.

Accordingly, 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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BETTY JEAN HALL  
Administrative Appeals Judge