BRB No. 00-1054

AUDAZ F. REYES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ANTILLEAN SHIPPING CORPORATION	)	DATE ISSUED: July 20, 2001
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Bifurcated Hearing and the Order on Reconsideration of Thomas M. Burke, Associate Chief Administrative Law Judge, United States Department of Labor.

Howard L. Silverstein and Marc R. Silverstein (Silverstein and Silverstein), Miami, Florida, for claimant.

Lawrence B. Craig, III and Frank J. Soli (Valle & Craig, P.A.), Miami, Florida, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Bifurcated Hearing and the Order on Reconsideration (99-LHC-169) of Associate Chief Administrative Law Judge Thomas M. Burke 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in

accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

In 1988, claimant underwent a triple by-pass operation after suffering a heart attack. On February 17, 1997, claimant underwent a second heart procedure during which time a stent was placed in his left coronary artery. On March 11, 1997, while working for employer as a carpenter, claimant cut his left thumb on a saw blade, for which he received stitches. The following day, March 12, 1997, claimant returned to work for employer whereupon claimant once again cut himself while operating a saw. This time, claimant cut his left ring and small fingers. Claimant testified that while traveling to the hospital following this second incident he began to experience chest pain, for which he took a nitoglycerin pill. This second injury ultimately resulted in the amputation of a part of claimant left ring finger. Claimant testified that he subsequently began to experience instances of chest pain and depression for which he sought medical care. On May 30, 1997, claimant underwent cardiac catheterization which revealed a re-stenosis in claimant's left coronary artery. On June 1, 1997, coronary artery by-pass surgery was performed on claimant in order to correct the identified re-stenosis.

At the formal hearing before the administrative law judge, the parties agreed to bifurcate claimant's claim. As employer conceded that claimant had sustained work-related injuries to his left hand, the only issues adjudicated at that time involved the alleged causal relationship between claimant's employment and his cardiac condition and the presence of a work-related psychological condition. Following this hearing, the record was held open solely for the purpose of submitting the *curriculum vitae* of Dr. Sayfie. Claimant thereafter submitted a post-trial brief in which he cited, for the first time, various medical journal articles for the dual purposes of supporting his medical witnesses and impeaching employer's medical witness. Employer responded to this brief by filing a motion to strike all references to the medical articles cited by claimant. The administrative law judge granted employer's motion, thereby striking the disputed references to articles from claimant's brief.

In his Decision and Order, the administrative law judge found, based upon the medical opinion of Dr. Jarrett, that claimant is not suffering from a disabling depression arising from his work-related hand injuries. Additionally, the administrative law judge concluded that the record did not support a finding that claimant's hand injuries caused or accelerated the subsequent re-stenosois of his left coronary artery. Accordingly, the administrative law judge denied claimant's request for disability benefits. Claimant's motion for reconsideration was denied by the administrative law judge.

On appeal, claimant challenges the administrative law judge's denial of his claim. Additionally, claimant avers that the administrative law judge erred in striking from his brief the references to the medical articles to which employer objected. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant initially contends that the administrative law judge erred when, in his Order Granting Motion to Strike, he struck references to various medical articles cited in claimant's brief. We disagree. The administrative law judge rendered this decision based upon his findings that, as claimant conceded that the articles in question were easily ascertained, those articles could have been located prior to the hearing and that claimant failed to properly introduce the disputed medical articles into the record. Thereafter, in his Order on Reconsideration, the administrative law judge reaffirmed this evidentiary ruling, stating that the medical articles relied upon by claimant could not be considered as they had not been formally admitted into the record.

An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). In the instant case, the administrative law judge's reasons for excluding from consideration the medical articles cited by claimant after the record had been closed are rational. Specifically, while claimant contends that the medical articles are supportive of its medical witnesses, claimant thereafter asserts that those same articles impeach the credibility of employer's chief medical witness. Claimant, however, at no time requested that the record be reopened for the admission of these articles nor did claimant provide these articles in their entirety. Rather, claimant provided in his brief his summary of the articles' contents. In rejecting claimant's argument that his summaries should be considered, the administrative law judge determined that claimant had been afforded ample opportunity to be heard and that to consider evidence presented in a closing brief would violate employer's due process rights. *See* Order on Reconsideration. Thus, the administrative law judge's decision to strike the citations to medical articles from claimant's post-hearing brief is not arbitrary, capricious or an abuse of discretion, and claimant has not met his burden in this regard. *See Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989)(party seeking to admit evidence must exercise due diligence in developing its claim prior to hearing).

Claimant next avers that the administrative law judge erred in concluding that claimant did not sustain a work-related psychiatric injury as a result of the two

injuries that he sustained to his hand on March 11 and 12, 1997. It is well-settled that a psychological impairment which is work-related is compensable under the Act. *See, e.g., American Nat'l Red Cross v. Hagen,* 327 F.2d 559 (7th Cir. 1967); *Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base,* 32 BRBS 134 (1998)(*en banc*)(Brown and McGranery, JJ., dissenting), *aff'g on recon. en banc* 32 BRBS 127 (1997)(McGranery, J., dissenting); *see also Pietrunti v. Director, OWCP,* 119 F.3d 1035, 31 BRBS 89 (CRT)(2d Cir. 1997). Furthermore, the Section 20(a), 33 U.S.C. §920(a), presumption is applicable in psychological injury cases. *Sewell,* 32 BRBS at 135. In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm.[1] *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982)*; Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Sewell*, 32 BRBS at 135. Although 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), claimant is not required to affirmatively prove that his working conditions in fact caused the harm. Rather, claimant need only establish that the working conditions or work-related accident could have caused the harm alleged. *See generally U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT)(11th Cir. 1990); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996). It is employer's burden on rebuttal to present substantial evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the

[1]A harm has been defined as something that has unexpectedly gone wrong with the human frame. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968)(*en* banc); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT).

In the instant case, the administrative law judge concluded that claimant did not sustain any disabling psychological injury as a result of his work-related March 11 and 12, 1997, hand injuries. In rendering this determination, the administrative law judge relied upon the testimony of Dr. Jarrett who, after examining claimant on February 9, 1999, opined that claimant was not suffering from a disabling depression. *See* Emp. Ex. 17. Dr. Jarrett conceded, however, that claimant might have experienced transient feelings of depression and concern following his March 1987 work-injuries, conditions which Dr. Jarrett described as an adjustment disorder, but he determined that those feelings were "a passing thing" and not a "long-term trait." *See* Tr. at 95. In contrast to the opinion of Dr. Jarrett, Dr. Ojeda noted, on March 12, 1998, that claimant demonstrated evidence of moderate depression, *see* Cl. Ex. 14, while Dr. Hernandez, who presently provides claimant with psychiatric care, has since March 26, 1998, diagnosed claimant with depression. *See* Cl. Exs. 11-12.

Based upon this evidence, we hold that the administrative law judge erred in failing to invoke the Section 20(a) presumption in addressing the issue of whether claimant sustained a work-related psychological injury. While the testimony of Dr. Jarrett may support a determination that claimant, as of the date of his examination in February 1999, was not disabled by depression, that opinion is insufficient to establish that claimant did not suffer from a psychological condition immediately following his work-injuries. Rather, Dr. Jarrett acknowledged that claimant may have suffered from an adjustment disorder following his multiple hand injuries in March 1997. Thus, as the three physicians who addressed the issue of claimant's psychological condition following his March 1997 work-injuries either opined that claimant sustained a psychiatric injury or could have done so, we hold that claimant has established the existence of a harm under the Act for purposes of establishing his *prima facie* case. Accordingly, as it is uncontroverted that claimant sustained work-related injuries which could have caused claimant's harm, *i.e.,* the "working conditions" element of his *prima facie* case, claimant is entitled to invocation of the Section 20(a) presumption as a matter of law. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *James v. Pate Stevedoring Co.,* 22 BRBS 271 (1989). We thus remand this case to the administrative law judge for consideration of whether claimant's post-injury psychological condition is work-related consistent with the Section 20(a) presumption. If the administrative law judge finds a casual relationship between claimant's psychological condition and his March 1997 work-injuries, he must then consider the nature and extent of this disability.

Claimant additionally challenges the administrative law judge's determination that claimant's post-injury coronary problems and subsequent treatment were not related to his March 1997 work-related hand injuries. In the instant case, it is undisputed that work accidents occurred on March 11 and 12, 1997, and that claimant subsequently experienced chest pain, underwent cardiac catheterization which revealed re-stenosis in his left coronary artery, and thereafter had coronary artery bypass surgery to correct this condition. Thus, claimant has established his *prima facie* case and is entitled to the Section 20(a) presumption that these conditions are casually related to his employment.[2] *See James,* 22 BRBS 271. In analyzing the issue of causation as it relates to claimant's coronary conditions, however, the administrative did not apply the Section 20(a) presumption. Rather, without reference to the Section 20(a) presumption, the administrative law judge relied solely on the opinion of Dr. Sayfie to find that claimant's re-stenosis was unrelated to his work-related hand injuries. As the administrative law judge did not apply the Section 20(a) presumption when addressing this issue, we vacate his finding on this issue, and remand the case for the administrative law judge to consider whether employer has rebutted the invoked presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment.[3] *See Brown,* 893 F.2d 294, 23 BRBS 22(CRT); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). On remand, the administrative law judge must consider the application of the aggravation rule and specifically determine whether employer established that work events neither directly caused claimant's harm nor aggravated the pre-existing condition resulting in injury.[4] *See, e.g., Cairns v. Matson*

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[2]It is well-established that chest pains constitute an injury under the Act. *See Volpe v. Northeast Marine Terminal Corp.*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982).

[3]The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction the instant claim arises, has espoused a "ruling out" standard when addressing the issue of rebuttal of the Section 20(a) presumption. *Brown v. Jacksonville Shipyards, Inc.,* 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990). The Board has recently explained that this standard does not require a physician to rule out all possibilities, as absolute certainties do not exist in the medical profession and such a requirement would raise the standard regarding rebuttal of the presumption to an unreachable level. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). The Board held that an unequivocal opinion, given to a reasonable degree of medical certainty, that the employee's injury is not work-related is sufficient to rebut the Section 20(a) presumption. *Id.*

[4]The aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *Independent*

Terminals, 21 BRBS 252 (1988). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must then weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine*, 23 BRBS 279; *see also Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43(CRT). Lastly, if the administrative law judge finds a causal relationship between claimant's coronary conditions and his work injuries, he must then consider the nature and extent of claimant's disability.

Accordingly, the administrative law judge's denial of disability benefits is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

Stevedore Co., v. O'Leary, 357 F.2d 812 (9th Cir. 1966); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). This rule applies not only where the underlying condition itself is affected but also where the injury "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Thus, if claimant's employment played any role in the manifestation of his harm, the entire resulting disability is compensable. *See Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49 (CRT)(D.C. Cir. 1987).