

MAXINE PETTY)	
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Claimant-Petitioner))
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v.)	
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ARMY & AIR FORCE EXCHANGE SERVICE)	DATE ISSUED:JUN 26, 2003
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Self-Insured Employer-)	
Respondent)) DECISION and ORDER
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Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Maxine Petty, Montgomery, Alabama, *pro se*.

Paul B. Howell (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2001-LHC-1944) of Administrative Law Judge Lee J. Romero, Jr., 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant who is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law; if they are they must be affirmed. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was employed at Maxwell Air Force Base in November and December 1993 as a sales area manger. In November 1993, claimant was asked to

help unload boxes from an “eighteen-wheeler” truck over a period of several days, and on December 2, she was asked to lift furniture and a rug. She began to suffer back pain which extended into her legs. She was seen at the emergency room on December 2, 1993, where she was diagnosed with a strained back muscle. She attempted to return to work beginning on December 13, 1993, but was either sent home or to the emergency room due to complaints of back pain. Claimant returned to work in February 1994, working the same number of hours as before her December injury. Hearing Transcript (Tr.) at 91. Claimant was seen in the emergency room for low back pain in March, April and June 1994. Dr. Babb, claimant’s treating physician at that time, recommended that claimant be restricted to sedentary work, but stated that there had been no cause identified for claimant’s chronic back pain. Employer’s Exhibit (Emp. Ex.) 25. On July 21, 1994, claimant was involved in a motor vehicle accident. She was seen by Dr. Babb on July 25, 1994, at which time she complained of back pain since the July 21 accident, as well as severe pain in her right shoulder and legs. Claimant began treatment with Dr. Pinchback on January 4, 1995. After a course of treatment including facet joint injections and immobilization with a fiberglass body jacket, Dr. Pinchback recommended and performed a posterolateral lumbar arthrodesis on September 5, 1995. Claimant has not returned to work and sought compensation and medical benefits under the Act.

In his decision, the administrative law judge found that employer concedes that claimant sustained a work injury on December 2, 1993, for which temporary total and temporary partial disability benefits have been paid. Emp. Ex. 7. However, the administrative law judge found that claimant eventually returned to her full and regular duties and was on vacation leave at the time of her automobile accident in July 1994. After reviewing the medical evidence and testimony of record, the administrative law judge concluded that claimant’s current injuries and disability can be attributed to the July 1994 auto accident, and thus found that employer is not liable for any further compensation or medical benefits.

Claimant, without legal representation, appeals this decision. Employer responds, urging affirmance of the administrative law judge’s decision.

In establishing that an injury arises out of her employment, a claimant is aided by the presumption under Section 20(a) of the Act, 33 U.S.C. §920(a), which applies to the issue of whether an injury is causally related to the employment activities. See, e.g., *O’Kelly v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). The administrative law judge accepted the parties’ stipulation that claimant was injured on December 2, 1993, during the course and scope of her employment. Therefore, claimant has invoked the Section 20(a) presumption that her disabling back condition is work-related. Upon invocation of the presumption, the burden shifts to the employer to

present substantial evidence that claimant's employment did not cause her condition. See *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Kelley*, 34 BRBS at 41; see also *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). 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 record as a whole. See *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

In a case involving a subsequent injury, an employer can rebut the Section 20(a) presumption by showing that the claimant's disabling condition was caused by a subsequent event, provided the employer also proves that the subsequent event was not caused by the claimant's work-related injury. See *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). The employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury; however, where the second injury is the result of an intervening cause, the employer is relieved of liability for the portion of the disability attributable to the second injury. See generally *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992).

In reviewing the medical evidence of record, the administrative law judge found that the diagnostic testing and neurological exams ordered and performed before the July 1994 auto accident were negative. In addition, he found that Dr. Miller released claimant to return to full duty by February 1994, Emp. Ex. 22, and that Dr. Canedo opined that claimant reached maximum medical improvement without permanent impairment about February 16, 1994. Emp. Ex. 24. The administrative law judge also found that claimant returned to work prior to July 1994, and that she had been working ten to twelve hours a day in her usual position as a sales area manager.¹ Tr. at 91. The administrative law judge thus rationally concluded that any injury sustained as a result of the December 1993 work-related accident had stabilized before July 1994. See generally *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp.*

¹ Claimant testified in the present case that she was on vacation leave at the time of the car accident in July because employer refused to grant her sick leave. Tr. at 91. However, in a previous deposition, claimant stated that she was on vacation because she planned to go to Cincinnati for a week. Tr. at 95.

v. Hughes, 289 F.2d 403 (2nd Cir. 1961).

The administrative law judge also reviewed the medical evidence regarding the cause of claimant's physical condition after the motor vehicle accident in July 1994. He found that Dr. Canedo opined that the auto accident permanently aggravated her back condition and led to the surgery performed in September 1995, and that claimant's present condition is not due to her injury in December 1993. Emp. Ex. 24. In addition, Dr. Pinchback, claimant's treating physician, opined that the motor vehicle accident of July 21, 1994, "aggravated [claimant's] underlying back condition to the point that she was no longer able to continue performing her employment and required surgery." Emp. Ex. 32. Dr. Pinchback also opined that prior to the auto accident, claimant had no identifiable disability. *Id.* In addition to the medical evidence, the record contains the testimony of claimant and her husband in a civil case involving the July 1994 auto accident, in which they stated that claimant's pain and symptoms increased following the accident. See Emp. Exs. 28-29.

The administrative law judge thoroughly reviewed the evidence of record, and his finding that the July 1994 auto accident, which was not a natural or unavoidable result of the initial work accident, was the supervening cause of claimant's disability thereafter is supported by substantial evidence. Thus, we affirm the administrative law judge's finding that claimant's current back condition is due solely to the injuries suffered in the motor vehicle accident of July 21, 1994, see *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed. Appx. 126 (5th Cir. 2002)(table), and that employer is not liable for any further compensation or medical benefits under the Act.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge

