BRB No. 05-0816

DENNIS T. DEDMON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 06/12/2006
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Charlene Parker Brown (Montagna Klein & Camden, LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-2204, 2004-LHC-2205) of Administrative Law Judge Daniel A. Sarno, 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.* (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).

Claimant sustained a work-related left knee injury on September 10, 1998. Claimant had knee surgery and employer paid temporary total disability benefits. Claimant returned to work in March 1999 with permanent restrictions prohibiting crawling, kneeling or using incline ladders and limiting his walking. EX 8. Between

1999 and April 2004 claimant worked within his restrictions.[1] HT at 11-19. On April 27, 2004, claimant began experiencing left knee pain and swelling during the course of his job duties. He underwent surgery for his condition on May 27, 2004. EX 8. His original attempt to return to work was unsuccessful as employer had no jobs available within his physical restrictions. On July 26, 2004, Dr. Trieshmann, claimant's treating physician, released claimant to return to work under the less restrictive limitations in place prior to April 2004 and claimant returned to work shortly thereafter. Claimant sought temporary total disability compensation from April 28 through May 3, 2004, and from May 27 through August 9, 2004, alleging that his employment aggravated his pre-existing knee condition.

The administrative law judge found that claimant is entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that his knee condition was aggravated by his employment. The administrative law judge found that Dr. Trieshmann's opinion is sufficient to rebut the presumption, and that, based on the record as a whole, claimant did not establish that his employment aggravated his pre-existing knee condition. He therefore denied benefits.[2]

Claimant appeals, contending that the administrative law judge erred in finding that employer established rebuttal of the Section 20(a) presumption and in finding insufficient evidence to establish a relationship between claimant's condition and his employment. Employer responds, urging affirmance.

Once, as here, claimant establishes his *prima facie* case, he is entitled to the Section 20(a) presumption that his injury is causally related to his employment. 33 U.S.C. §920(a); *see Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The burden then shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See, e.g., American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). In a claim such as this one based on an aggravation theory, employer must introduce substantial evidence that claimant's pre-existing condition was not

[1] Claimant filed a claim for continuing temporary total disability benefits, alleging that his work for employer was sheltered employment. The administrative law judge denied the claim, and the Board affirmed this decision. *Dedmon v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 01-0359 (Dec. 5, 2001).

[2] Claimant conceded that any claim based solely on the natural deterioration of his prior condition would be time-barred. *See* 33 U.S.C. §922.

aggravated by his employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the administrative law judge finds the presumption rebutted, he must weigh all of the evidence and resolve the causation issue based upon the record as a whole, with claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

Claimant contends the administrative law judge erred in finding that Dr. Trieshmann's opinion is sufficient to rebut the Section 20(a) presumption. Claimant notes that the administrative law judge found the opinion to be "ambivalent" and moreover avers that Dr. Trieshmann opined that claimant's knee condition is the result of both the natural progression of his prior knee injury and a work-related aggravation thereof. We agree with claimant that the administrative law judge erred in finding the Section 20(a) presumption rebutted.

Dr. Trieshmann treated claimant for his 1998 knee injury, as well as for the 2004 injury. On June 8, 2004, in response to an inquiry from claimant's counsel, Dr. Trieshmann checked the "yes" box when asked if claimant's knee condition was aggravated by his job causing the need for surgery. CX 2. On December 8, 2004, Dr. Trieshmann stated that claimant's left knee condition is due to the "deterioration and/or aggravation of his work-related knee condition. . . [I]t is appropriate to conclude that his current work duties aggravated the condition of his knee." CX 1. The parties subsequently deposed Dr. Trieshmann. He stated that the condition of claimant's knee is due to both the natural deterioration of claimant's prior knee condition and a work-related aggravation of that condition. EX 8 at 16 -19. Although he found Dr. Trieshmann's opinion to be "ambivalent" as to the cause of claimant's current condition, the administrative law judge found rebuttal based on that portion of Dr. Trieshmann's opinion wherein he stated that the 2004 medical treatment was "as a result of the 1998 condition." Decision and Order at 8, citing EX 8 at 17.

We hold that this portion of Dr. Trieshmann's opinion is legally insufficient to rebut the Section 20(a) presumption because it does not address claimant's aggravation claim. *See Burley v. Tidewater Temps*, 35 BRBS 185 (2002). Dr. Trieshmann opined that claimant's left knee condition is due to both the natural deterioration of claimant's knee due to the 1998 injury and to an aggravation of that condition due to claimant's work. CXs 1, 2; EX 8 at 16-19. If a physician states that claimant's condition is due in part to his work, his opinion does not constitute substantial evidence sufficient to rebut the Section 20(a) presumption. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Bridier v. Alabama Dry Dock & Shipbuilding Co.*, 29 BRBS 84 (1995); *see also Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

Nor, as employer suggests, does the fact that claimant did not allege a specific traumatic injury sever the connection between the work duties and the injury. Claimant testified that his knee became swollen and "locked up" at work and that his work required a lot of stair climbing. Tr. at 17. Dr. Trieshmann stated that "just the everyday getting around the [ship]yard" could aggravate claimant's condition. EX 8 at 18. If claimant's work caused his underlying condition to become symptomatic or otherwise worsened his symptoms, claimant has sustained a work-related injury. *See Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986); *see also Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

The administrative law judge, therefore, erred in finding that employer established rebuttal of the Section 20(a) presumption. As employer presented no evidence that claimant's 2004 knee condition was not aggravated by his work, claimant's condition is work-related as a matter of law. *Jones v. Aluminum Co. of North America*, 35 BRBS 37 (2001); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). Consequently, the administrative law judge's denial of benefits must be vacated. The case is remanded for the administrative law judge to address any other issues raised by the parties.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated. The case is remanded for the administrative law judge to address any remaining issues raised by the parties and to enter a compensation order if appropriate.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge