BRB No. 99-0881

DOUGLAS L. BURCH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

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

Janmarie Toker (McTeague, Higbee, Macadam, Case, Cohen & Whitney), Topsham, Maine, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (98-LHC-1902) 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 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, a laborer/painter, injured his left knee and allegedly his left hip at work after falling down a flight of stairs on a ship on February 27, 1995. Employer voluntarily paid claimant temporary total disability benefits from July 3, 1995, through August 6, 1995 under the state of Maine's workers' compensation act. Claimant sought temporary total disability benefits under the Act from May 14, 1996, through January 2, 1997, the time he was off work recuperating from left hip replacement surgery, as well as medical benefits for his left

hip problems. The administrative law judge awarded these benefits, finding that the presumption pursuant to Section 20(a), 33 U.S.C. §920(a), was invoked with respect to claimant's left hip injury, but not rebutted based on the opinions of Drs. Furman and Wickenden. Claimant had pre-existing problems with his left hip, which was diagnosed as a slipped capital femoral epiphysis. Claimant alleged this condition was aggravated by the work accident.

On appeal, employer challenges the administrative law judge's award of benefits. Claimant responds in support of the administrative law judge's award.

Employer initially contends that the administrative law judge erred in finding that it did not establish rebuttal of the Section 20(a) presumption based on the opinions of Drs. Furman and Wickenden. Employer asserts that administrative law judge erred in requiring that employer's evidence "rule out the possibility" that the work injury caused or aggravated claimant's hip condition, and that this error requires remand for re-evaluation of these medical opinions under the proper standard enunciated in *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997). We agree that the case must be remanded.

In *Shorette*, the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. *Id.*, 109 F.3d at 56, 31 BRBS at 21 (CRT); *see also Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). *See Shorette,* 109 F.3d at 56, 31 BRBS at 21 (CRT).[1] The "ruling out" standard was recently addressed and rejected by the Courts of Appeals for the Fifth and Seventh Circuits as well. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain*

[1]Despite rejecting the "ruling out" standard applied by the administrative law judge in *Shorette*, the First Circuit affirmed the administrative law judge's finding that the opinions of employer's experts, Drs. Kanwit and Harder, were insufficient to establish rebuttal of the Section 20(a) presumption, as they did not establish that the lung disease noted on Shorette's 1989 chest x-ray was not related to Shorette's 1981 asbestos exposures. In other words, the court held that employer did not establish that Shorette's lung condition was not caused or aggravated by his employment.

Trimmers, Inc. v. OWCP, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999); *see also O'Kelley v. Dep't of the Army/NAF*, BRBS , BRB No. 99-0810 (May 2, 2000); *but see Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

In the instant case, the administrative law judge applied a "rule out" standard and found that the opinions of Drs. Furman and Wickenden are insufficient to establish rebuttal under this standard. Despite the application of the "rule out" standard, we affirm the administrative law judge's finding that Dr. Furman's opinion is insufficient to establish rebuttal as a matter of law because it does not establish that claimant's hip condition was not aggravated by his employment.[2] *See Shorette*, 109 F.3d at 53, 31 BRBS at 19 (CRT); Decision and Order at 5, 15; Cl. Ex. 14 at 72; Emp. Exs. 27, 33 at 15.

[2]Dr. Furman stated that, "Any damage we find in the left knee I would attribute to his work related injury but any problems at the left hip I would consider predated that injury. It's certainly possible that with his underlying hip disease that a work injury could aggravate his hip pathology but I think his symptoms are *primarily* due to a knee injury." Cl. Ex. 14 at 72; Emp. Exs. 27, 33 at 15 (emphasis added).

We, however, vacate the administrative law judge's finding that Dr. Wickenden's opinion is insufficient to establish rebuttal and remand this case to the administrative law judge to determine if it is sufficient to establish rebuttal under the proper legal standard, *i.e.*, whether his opinion constitutes substantial evidence that claimant's left hip problems were not caused or aggravated by his employment. The administrative law judge did discuss the earlier opinions of Dr. Wickenden dated July 11, 1995, August 18, 1995, November 2, 1995, and January 16, 1996, which appear to establish a causal relationship between claimant's left hip injury and his employment.[3] Decision and Order at 5-6; Cl. Ex. 14 at 74, 79, 81, 83; Emp. Exs. 27, 33 at 16-18. Additionally, the administrative law judge alluded to Dr. Wickenden's report dated October 17, 1995, which related claimant's knee problems, but not his left hip problems, to his work injury. Decision and Order at 6; Cl. Ex. 14 at 82; Emp. Ex. 27.

The administrative law judge also discussed Dr. Wickenden's opinion of May 2, 1996, wherein Dr. Wickenden stated,

> [Claimant] is calling today questioning whether or not his hip symptoms are secondary to his knee injury. I very clearly do not feel that they are as I have stated on previous occasions. His knee (sic) symptoms are of longstanding duration and are not the result of his knee symptoms. Much more likely is the fact that his knee symptoms are more related to his hip with referred pain into the knee. [Claimant] clearly disagrees with this but that is his opinion. It is my understanding that [he] is being scheduled for a total hip replacement by Dr. Phelps. I would certainly feel strongly that this total hip expenditure should not be taken on by Bath Iron Works.

---

[3]On July 11, 1995, Dr. Wickenden stated that, "[Claimant] understands that some of his medial thigh and medial knee pain may well still be related to his slipped femoral capital epiphysis but this has clearly been aggravated by his fall and he is more symptomatic now than he was prior to the fall. . . ." Cl. Ex. 14 at 74; Emp. Ex. 33 at 16. In Practitioner's Reports dated July 11, 1995, August 18, 1995, and January 16, 1996, Dr. Wickenden diagnoses knee and hip problems and answers "yes" to the question of whether the injury is due to work activity. Cl. Ex. 14 at 79, 81, 83; Emp. Ex. 27. On November 2, 1995, Dr. Wickenden stated, "I do not feel that [claimant's] slipped femoral epiphysis is a work related problem. This is of longstanding duration and is not caused by his work but certainly has been somewhat aggravated by his employment. I feel that the weakness in his leg is the reason for the need for ongoing exercises at a health club. This weakness is caused both by his slipped femoral epiphysis but also the slip and twisting fall that he sustained in February of 1995. I feel the fall aggravated both the knee and the underlying pre-existing problem with his hip." Emp. Exs. 27, 33 at 17-18.

Decision and Order at 5; Cl. Ex. 14 at 76; Emp. Ex. 33 at 17-18. However, the administrative law judge did not discuss Dr. Wickenden's May 14, 1996, opinion wherein he stated,

> As I have indicated in prior communications to you, specifically in my letter of 11/2/95, I feel that [claimant's] left hip pain is of longstanding duration and is secondary to a slipped capital femoral epiphysis on this lower extremity. I do not feel that this injury, nor his present need for total hip replacement are secondary to his work related injury. There is no question that heavy work, heavy climbing may have aggravated his underlying problem but it certainly is not the etiology of his problem nor is it the cause of his present need for total hip replacement. This deformity dates back to his injury at age thirteen and should not be the responsibility of Bath Iron Works. . . . I continue to feel that this is not a work related problem.

Emp. Ex. 27. Moreover, the administrative law judge did not discuss Dr. Wickenden's deposition testimony of November 30, 1998, wherein he reported abnormal MRI findings on the left hip which were directly related to claimant's slipped capital femoral epiphysis and opined that it would have been physically possible for these findings to have occurred from February 1995 to June 1995 only if claimant had a rampant infection in his hip, which the evidence did not establish that he had. Emp. Ex. 33 at 13-14. Dr. Wickenden answered "yes" to the question of whether claimant's symptoms in his left hip were the natural progression of his underlying hip problems as a teenager. Emp. Ex. 33 at 18. Dr. Wickenden also stated that he was no longer claimant's treating physician because claimant disagreed with his opinion that claimant's hip problems were not the result of his fall at work. Emp. Ex. 33 at 19. Also, Dr. Wickenden answered "no" to the question of whether the work injury accelerated claimant's need for a total hip replacement. Emp. Ex. 33 at 20. With regard to the question of whether the work injury played any role in claimant's hip symptoms, Dr. Wickenden answered,

> I think that it caused some temporary hip symptoms. I think clearly that fall could have caused a transient synovitis lasting for a period of days to weeks. I think that whether or not he had ever had a fall, he would have needed a total . . . hip replacement . . . and I think that he had no ongoing symptoms in his hip on the basis of that fall after a period of a few weeks.

Emp. Ex. 33 at 20-21. Dr. Wickenden answered "yes" to the question that claimant's hip problems were ongoing and degenerative and were likely to lead to the need for a total hip replacement. Emp. Ex. 33 at 21.

On remand, the administrative law judge must discuss all of Dr. Wickenden's reports and testimony, and evaluate them under the proper rebuttal standard. *Shorette*, 109 F.3d at 56, 31 BRBS at 21 (CRT); *see also American Grain Trimmers*, 181 F.3d at 810, 33 BRBS at 71 (CRT). If the administrative law judge finds that Dr. Wickenden's opinion is sufficient to establish rebuttal of the Section 20(a) presumption, he must then weigh the evidence as a whole to determine if claimant's hip condition, and consequent surgery, are work-related. *See, e.g., Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114 (CRT)(8th Cir. 1997), *cert. denied*, 118 S.Ct. 1301 (1998)*; 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).

Employer also argues that the administrative law judge erred in awarding claimant total disability benefits from May 14, 1996, through January 2, 1997, for claimant's left hip problems. This contention rests on its argument that there is no causal relationship between claimant's hip condition and the accident at work. Because we vacate the administrative law judge's finding that Dr. Wickenden's opinions are insufficient to establish rebuttal, we also must vacate the administrative law judge's award of total disability benefits. If the administrative law judge on remand finds that employer has not established rebuttal of the Section 20(a) presumption, or upon a weighing of the evidence, that a causal relationship is established, he may again award benefits from May 14, 1996, through January 2, 1997. However, if the administrative law judge finds that rebuttal is established, and upon a weighing of the evidence, that a causal relationship is not established, claimant is not entitled to disability compensation for his left hip condition.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed with respect to the administrative law judge's finding that Dr. Furman's opinion is insufficient to establish rebuttal. With respect to the administrative law judge's findings that Dr. Wickenden's opinions are insufficient to establish rebuttal and that claimant is entitled to temporary total disability benefits from May 14, 1996, through January 2, 1997, the administrative law judge's decision is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge