BRB No. 01-0693

LEON BOLDEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: May 10, 2002
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Ellen Turner, Mobile, Alabama, for claimant.

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (1998-LHC-1373) of Administrative Law Judge C. Richard Avery 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 is the second time this case has come before the Board. To reiterate, claimant worked as an electrician and material runner for employer for over 19 years, excluding layoffs. He testified that in early 1995 he began suffering from tightness, numbness and pain in his feet and legs. In February 1995, he was evaluated by a chiropractor who considered the problem to be caused by a back condition and referred claimant to an orthopedic surgeon. The surgeon, Dr. Semon, diagnosed a ruptured or bulging disc and performed a discography

and percutaneous discectomy in May 1995. The procedure was unsuccessful, so Dr. Semon recommended an open laminectomy. Cl. Ex. 1. In August 1995, claimant declined further invasive procedures, and he changed doctors. Dr. Fontana, his treating orthopedic surgeon, confirmed the previous diagnosis and also diagnosed degenerative disc disease. Emp. Ex. 15 at 11-12. Claimant, who has not worked since May 1995, filed a claim for benefits in September 1995.[1]

The administrative law judge found that claimant failed to give timely notice of the injury to employer under Section 12(a) of the Act, 33 U.S.C. §912(a). Decision and Order at 8. He then found that Section 12(d), 33 U.S.C. §912(d), did not apply to excuse claimant's failure to give timely notice because employer had no knowledge of the work-relatedness of the injury due to claimant's certification on his health insurance forms that the injury was non-industrial and that it was due to a non-work-related 1988 injury. He also found that employer was prejudiced by the late notice, as employer was prevented from effectively investigating the claim, obtaining a second opinion regarding the origin of the back condition prior to surgery or participating in claimant's medical care. *Id.* at 9-10. Consequently, the administrative law judge denied the claim, *id.* at 10-11, and summarily denied claimant's motion for reconsideration. Claimant appealed the decision.

The Board held that the administrative law judge erred in failing to ascertain whether claimant's back injury constituted a traumatic injury or an occupational disease so as to determine which limitations period under Section 12(a) is applicable to this situation. The Board also held that the administrative law judge should have made a finding as to the date on which claimant became aware of the relationship between his injury, his disability and his employment. Specifically, the Board stated it was necessary to know the date on which claimant had reason to know of a likely impairment to his earning capacity, as it is impossible to assess whether claimant's claim was timely without this date. The Board vacated the administrative law judge's decision, and remanded the case for him to consider these issues, granting claimant the benefit of the Section 20(b), 33 U.S.C. §920(b), presumption that his notice was timely filed. Although the Board remanded for reconsideration of the Section 12(a) timeliness issue, it affirmed the administrative law judge's finding that Section 12(d)(1), 33 U.S.C. §912(d)(1), does not apply to excuse an untimely notice under Section 12(a), and that Section 12(d)(2), 33 U.S.C. §912(d)(2), also

[1]Doctors agree claimant cannot return to his usual work due to his back condition and vascular disease in both legs. Claimant also has a three percent pre-existing permanent partial disability due to a work-related wrist injury. Cl. Ex. 1; Emp. Ex. 15 at 34, 46, 49.

would not apply if the administrative law judge found a date of awareness prior to claimant's undergoing surgery. The Board also remanded the case for the administrative law judge to consider whether claimant is entitled to medical benefits, as those benefits are never time-barred. *Bolden v. Ingalls Shipbuilding, Inc.*, BRB No. 00-465 (Jan. 26, 2001).

On remand, the administrative law judge found that claimant's back injury is a traumatic injury, not an occupational disease, and that such a classification requires a notice of injury to be filed within 30 days of the date of awareness under Section 12(a). With regard to the date of awareness, the administrative law judge concluded that claimant was aware of the relationship between his injury, his disability and his employment when he first treated with Dr. Wetzel, his chiropractor, in February 1995, and, if not then, certainly by May 1995, when he ceased work and was under the care of Dr. Semon. Decision and Order on Remand at 3. The administrative law judge applied the Section 20(b) presumption, but found it rebutted by statements on claimant's insurance forms certifying that the injury was not work-related. Therefore, he found that the filing of a notice of injury in September 1995, more than 30 days after either February or May 1995, made the notice untimely. Accordingly, he denied the claim for disability benefits. Decision and Order on Remand at 4, 7.

In addressing the claim for medical benefits, the administrative law judge found that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption relating his injury to his employment, but that employer rebutted the presumption. On the record as a whole, the administrative law judge found that claimant failed to satisfy his burden of proof, giving greatest weight to claimant's assertions on his insurance forms and to his doctors' opinions, based on the history given by claimant, that the injury was not related to his work. Thus, the administrative law judge concluded that claimant's injury was not caused by or related to his employment, and he denied medical benefits.[2] *Id.* at 4-6. Claimant appeals, and employer responds, urging affirmance.

Claimant first challenges the administrative law judge's findings with regard to the cause of claimant's injury. Specifically, claimant contends he is entitled to the Section 20(a) presumption and that employer has not presented substantial evidence to rebut that presumption. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or

[2]In a footnote, the administrative law judge stated that, had claimant's claim been timely, he would have denied disability benefits as well because the injury is not related to claimant's employment. *Id.* at n.1.

pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not caused or aggravated by the employment. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *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).

In this case, the administrative law judge properly invoked the Section 20(a) presumption, as claimant testified that he performed heavy labor at work and these work activities could have caused the uncontested harm to his back. Decision and Order on Remand at 4. As claimant established a *prima facie* case, the burden shifted to employer to produce substantial evidence that claimant's condition is not related to his work. The administrative law judge found that employer rebutted the presumption based on the following evidence: a) claimant's and Dr. Semon's statements on claimant's group health insurance forms relating the injury to a non-industrial fall in 1988; b) claimant's statements to his doctors that the injury was caused by that 1988 fall; c) claimant's admission that he did not know the cause of his injury; and d) the doctors' opinions that everyday living activities can cause claimant's condition. *Id.* at 4-5.

As the administrative law judge stated, the record contains copies of claimant's group health insurance forms dated between June 23 and September 25, 1995, all of which certify, by the checking of a box, that claimant's injury was not due to his employment and some of which indicate that claimant had this condition since 1988. The forms were signed by either claimant or by Dr. Semon. Emp. Ex. 7. There also is evidence of record establishing that claimant told both Drs. Semon and Fontana that the injury was related to a fall in 1988, and testimony from the doctors that neither had reason to doubt claimant's assertions. Cl. Ex. 6; Emp. Exs. 10, 12, 15. Further, the record contains evidence establishing that because claimant was unsure of the cause of his back problems, he did not want to lie and tell the doctors or the insurance company that the condition was work-related if it was not and apparently he believed he would have to lie to file a workers' compensation claim because employer had advised him that in order to file a claim he would have to provide the exact date of the injury. Emp. Ex. 14 at 64; Decision and Order at 4. Emp. Ex. 14 at 73; Tr. at 93.

Finally, both doctors testified that claimant's back condition could have been caused by regular wear and tear from everyday activities. Cl. Ex. 6 at 26, 43; Emp. Ex. 15 at 59. The issue before the Board, therefore, is whether the evidence cited by the administrative law judge constitutes substantial evidence rebutting the Section 20(a) presumption. We hold that it does not.

In order to rebut the Section 20(a) presumption, an employer is required to present:

> *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption – the kind of evidence a reasonable mind might accept as adequate to support a conclusion – only then is the presumption overcome. . . .

Prewitt, 194 F.3d at 690, 33 BRBS at 191(CRT) (quoting *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481, 19 BRBS 6, 8(CRT) (5th Cir. 1986)); *see also Gooden*, 135 F.3d at 1068, 32 BRBS at 61(CRT). An opinion that is equivocal as to etiology is insufficient to rebut the Section 20(a) presumption. *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). Moreover, the evidence must be more than mere speculation. *Smith v. Sealand Terminal, Inc.*, 14 BRBS 844 (1982); *Williams v. Chevron U.S.A., Inc.*, 12 BRBS 95 (1980). In this case, the administrative law judge provided four bases for rebuttal; turning to the last two reasons first, we hold neither is sufficient. Clearly, the fact that claimant was unsure of the etiology of his back condition cannot meet employer's burden of producing substantial evidence that claimant's condition was not caused or aggravated by claimant's employment. Moreover, that both doctors agreed the condition could be related to everyday activities does not constitute sufficient evidence to rebut the presumption, particularly as claimant's everyday activities would include the heavy work asserted as at least an aggravating factor in his condition.

The remaining bases for rebuttal involve claimant's relating his condition to a fall outside work in 1988. Claimant's statements to his doctors, while providing insight as to what he thought might be the reason for his condition, are not substantial evidence that his condition is not in fact work-related. Claimant is not a medical expert, and he cannot be expected to be aware of all the possible manners in which his condition could arise, become symptomatic or worsen. Thus, claimant's beliefs regarding medical causality do not satisfy employer's burden to produce evidence. While it was certainly rational for claimant's doctors to rely on his history in forming an opinion, neither his statements, nor the doctors' reliance thereon, are sufficient to overcome the presumption that claimant's injury is related to his employment, as neither doctor ever stated with any degree of medical certainty that claimant's work did not aggravate or exacerbate his condition.[3] *Janich*, 181 F.3d at 818-819,

[3]In stating claimant's condition was not caused by a work event, both Drs.

33 BRBS at 77(CRT); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981). The absence of medical evidence stating that claimant's back condition was not aggravated by claimant's work is especially significant in this case. If indeed claimant initially injured his back in 1988, it is employer's burden to produce substantial evidence that claimant's continued work until 1995 did not aggravate the prior condition, *see Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982), as employer is liable for claimant's entire disability if claimant's work aggravated a prior condition. *See generally Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986)*(en banc*). Employer produced no such medical evidence in this case.

Fontana and Semon stated that their opinions were based solely on claimant's history relating his condition to a 1988 fall and his not mentioning his work as a factor. Cl. Ex. 6; Emp. Ex. 15. Both also acknowledged claimant's heavy work could aggravate a degenerative condition, and neither stated to a reasonable degree of medical certainty a belief that claimant's condition was not aggravated or exacerbated by his work.

Similarly, Dr. Semon's checking the box on the insurance forms, indicating that the condition was not work-related, is not sufficient evidence of rebuttal in light of his testimony. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting). Standing alone, none of the forms constitutes a reasoned medical opinion. In explaining his opinion, although he did not have a history from claimant of a specific injury at work that could have caused claimant's back condition, and he presumed the cause was something other than claimant's work, Dr. Semon testified that claimant's work could have caused, aggravated or exacerbated claimant's condition. Cl. Ex. 6 at 20, 36-37, 43, 45. This testimony makes any "opinion" rendered on the insurance forms equivocal at best. Similarly, Dr. Fontana, who also stated that claimant's injury was not work-related based on claimant's history, could not say with any degree of medical certainty that claimant's condition was or was not related to his employment. Emp. Ex. 15 at 55-56.[4] Thus, the evidence cited by the administrative law judge does not rebut the Section 20(a) presumption relating claimant's back condition to his employment. *See Taylor*, 14 BRBS 489. As employer has failed to produce evidence to overcome the presumption that claimant's back condition is related to his employment, we hold that claimant's condition is work-related as a matter of law. *Janich*, 181 F.3d at 818, 33 BRBS at 77(CRT). Accordingly, we reverse the administrative law judge's denial of medical benefits, and we remand the case for further consideration.

Claimant next contends the administrative law judge erred in finding the claim for disability benefits barred by Section 12(a) of the Act. Specifically, claimant argues that he first became aware of the full effect the injury would have on his ability to earn wages sometime after August 21, 1995, when Dr. Semon scheduled claimant for a lumbar myelogram and contrast CT scan, or August 28, 1995, when he declined further invasive procedures.[5] As those dates are within 30 days of the date on which claimant filed his claim

[4]When asked what would be "more likely than not the etiology of [claimant's] complaints to his low back," Dr. Fontana responded "from the history I have it's basically just wear and tear and degenerative disk disease." *Id.* at 15-16. For the remainder of the deposition, both lawyers tried to get a definitive answer as to the role claimant's work played. Dr. Fontana clearly could not relate claimant's back problems to an accident at work, nor would he affirmatively state the condition was related to claimant's usual heavy labor. On the other hand, he never affirmatively stated it was not related to heavy labor or that claimant's degenerative disk disease was not aggravated by his work. Perhaps Dr. Fontana's most definitive statement was "there is no way to say what caused his back problem." *Id.* at 18-19. Given the absence of any statement that, to a reasonable degree of probability claimant's work did not aggravate his back, Dr. Fontana's opinion cannot meet employer's burden of production.

[5]Claimant testified that he returned to work sometime between August 28 and

for compensation, he asserts that the notice to employer was timely. Alternatively, claimant argues that his condition is an occupational disease and that, therefore, he had one year within which to notify employer of his condition.

On remand, the administrative law judge specifically found that claimant's condition is the result of a traumatic injury, as the record contains no evidence that claimant's condition is "peculiar to his particular line of work. . . ." Decision and Order on Remand at 3. *See LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989). Accordingly, he found that claimant had 30 days within which to notify employer of his work-related injury. We hold that the administrative law judge's finding on this point is supported by the evidence and comports with law. *Id.* Claimant suffered a back injury, and the administrative law judge's conclusion that claimant did not establish that a back injury of this type is "peculiar to" claimant's employment or to a specific class of employees is rational.

November 30, 1995, but he could not continue because of the pain and that it was only after that failed attempt that he learned he should not return to his usual work. Tr. at 74.

Under Section 12(a) of the Act, a claimant who sustains a traumatic injury is required to file a notice of injury within 30 days of the date on which he became aware, or should have become aware, of the relationship between his injury and his employment. 33 U.S.C. §912(a); *see Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987); 20 C.F.R. §702.212(a). The claimant is entitled to the presumption that the notice was timely filed, and the burden of establishing that his notice was untimely is on the employer. 33 U.S.C. §920(b); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). If the employer establishes that the notice was not filed in a timely manner, the late filing may be excused pursuant to Section 12(d) of the Act, 33 U.S.C. §912(d).[6] In order to determine whether a notice of injury was timely filed, the administrative law judge must make a specific determination as to the date on which claimant became aware, or should have become aware of the true nature of his condition, *i.e.*, awareness of the relationship between his injury, his employment, and the likely impairment of his wage-earning capacity. *See, e.g., Marathon Oil Co. v. Lunsford*, 733 F.3d 1139, 16 BRBS 100(CRT) (5th Cir. 1984); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990).

On remand, the administrative law judge stated that he believed there were two

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[6]Section 12(d) of the Act, 33 U.S.C. §912(d), provides in pertinent part:

> Failure to give such notice shall not bar any claim under this chapter (1) if the employer . . . or the carrier had knowledge of the injury or death, (2) the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (3) if the deputy commissioner excuses such failure. . . .

The promulgating regulation permits an administrative law judge to determine whether an employer has been prejudiced, and it states that "actual knowledge" of the injury is deemed to exist if the claimant's immediate supervisor is aware of the injury. 20 C.F.R. §702.216.

possible scenarios regarding claimant's date of awareness: either claimant's condition was not work-related, which is why he continued to report that it was not due to his work, or it was work-related and claimant knew this by February 1995 when he sought treatment or at the latest by May 1995 when he stopped working and was under Dr. Semon's care; in either event, his filing in September 1995 was untimely. Decision and Order on Remand at 3-4. The administrative law judge also summarily stated that the Section 20(b) presumption was rebutted, and he found that when the evidence was weighed as a whole, claimant should have known his condition was work-related "months before" he gave employer notice. *Id.* at 4. The administrative law judge gave great weight to the following facts: a) claimant was unable to continue work because of his pain; b) claimant was unsure of the true source of his injury; c) doctors relied on claimant's statements regarding the cause of his condition; and d) claimant and Dr. Semon certified on health insurance forms that the condition was not work-related. Further, after having filed a claim for compensation on September 11, 1995, claimant filed another health insurance claim form on September 25, 1995, certifying that his back condition was not related to his employment, and he told Dr. Fontana in November 1995 that the condition was related to a fall in 1988. Cl. Ex. 7; Emp. Ex. 12.

We agree with claimant that the administrative law judge's finding that his notice of injury was untimely cannot be affirmed. Rather than supporting the administrative law judge's conclusion that claimant knew his condition was work-related at the latest by May 1995, but did not act on that knowledge until September 1995, the facts the administrative law judge gave greatest weight to support only the opposite conclusion: claimant did not know his condition was work-related prior to September 11, 1995. Indeed, claimant continued to relate the injury to a 1988 fall rather than to his work, thereby establishing his continued *un*awareness of the relationship between his injury and his employment. Moreover, there is no medical evidence of record suggesting claimant should have been aware of the relationship of his injury and his employment prior to the time claimant gave employer notice of his injury. In particular, the evidence cited by the administrative law judge involving claimant's continued certification on insurance forms that his condition was not work-related is insufficient to rebut the Section 20(b) presumption.[7] Under Section 20(b) employer was required to produce evidence that claimant was aware more than 30 days prior

[7]The administrative law judge erred in relying on the Board's holding that claimant's certification on his health insurance forms rebutted Section 20(b) with regard to employer's knowledge of an injury under Section 12(d)(1) and transferring this conclusion to Section 12(a). When the issue is employer's knowledge, claimant's statements that an injury is not work-related prevents employer from knowing of a work-related injury and thus such evidence rebuts Section 20(b) with regard to Section 12(d)(1). Under Section 12(a), however, the issue is claimant's awareness, and the fact that claimant attributed his condition to non-work causes simply is not evidence he knew or should have known it was work-related.

to his providing notice. As employer did not produce even a scintilla of evidence demonstrating claimant's awareness that his back problems were work-related at that time, we must reverse the administrative law judge's finding that claimant's claim for compensation is barred for lack of compliance with Section 12(a). As claimant's notice was timely, the case must be remanded for consideration of the merits of the claim.

Accordingly, the administrative law judge's Decision and Order on Remand is reversed. The case is remanded for the administrative law judge to address any remaining issues raised by the parties.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge