BRB No. 00-0246

LESTER DELAHOUSSAYE, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEUVILLE BOATWORKS, INCORPORATED	)	DATE ISSUED: Nov. 14, 2000
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Aaron W. Guidry (Porter, Denton & Guidry), Lafayette, Louisiana, for claimant.

Ted Williams (Egan, Johnson & Stiltner), Baton Rouge, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (99-LHC-0159) 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*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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 welder, experienced muscular chest pain while lifting scaffolding on September 1, 1997, during the course of his employment; he was subsequently diagnosed with having suffered a fractured sternum. Claimant attempted to return to work in April 1998 for six and a half days, but ceased working due to debilitating pain and has not worked since that time.

In his decision, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer failed to rebut the presumption. Next, the administrative law judge determined that claimant cannot return to his usual employment duties with employer and that employer failed to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from September 17, 1997, to June 15, 1998, the date of maximum medical improvement, and permanent total disability compensation thereafter. 33 U.S.C. §908(a), (b).

Employer now appeals, arguing that the administrative law judge erred both in finding claimant had established his *prima facie* case, *i.e.*, the existence of an injury or harm and work-related conditions or an accident which could have caused or aggravated the harm, and that it failed to establish rebuttal of the Section 20(a) presumption. Claimant responds, urging affirmance.

Employer initially contends that the administrative law judge erred in invoking the Section 20(a), 33 U.S.C. §902(a), presumption. We disagree. In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish his *prima facie* case by showing that he suffered a harm or pain and that an accident occurred or working conditions existed which could have caused that harm or pain. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). In establishing his *prima facie* case, claimant is not required to introduce affirmative medical evidence proving that the accident or working conditions in fact caused the harm or pain; rather, claimant must show only that working conditions existed which could have caused the harm alleged. *See U.S. Industries*, 445 U.S. at 608, 14 BRBS at 631; *Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989).

In the instant case, the administrative law judge accepted claimant's testimony that he suffered pain while at work on September 1, 1997, which he reported to his supervisor, HT at 23, 52, 137-38, and that he immediately sought medical attention.[1] HT at 25. Moreover, employer does not contest the physicians' subsequent finding that claimant sustained a fractured sternum. Similarly,

[1]In rendering this determination, the administrative law judge noted employer's evidence that claimant had previously complained of chest pain; the administrative law judge concluded, however, that the credible testimony of claimant and his wife, as well as claimant's subsequent medical treatment in which he reported an injury as occurring at the beginning of September or September 1, 1997, corroborated claimant's date of injury as September 1, 1997.

no party contests that on September 1, 1997, claimant was carrying scaffold boards measuring approximately twelve feet in length and weighing approximately 45 pounds. HT at 21-22, 100, 103. Based on our review of the record, we hold that the administrative law judge properly invoked the Section 20(a) presumption, as he found that claimant suffered a harm, *i.e.*, pain and a subsequently diagnosed fractured sternum, and that working conditions, *i.e.*, repetitive heavy overhead lifting of scaffold boards, existed which could have caused or aggravated those conditions. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). We therefore affirm the administrative law judge's invocation of the Section 20(a) presumption.

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 Gooden v. Director,* OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994); *see also Swinton v. J. Frank Kelly, Inc*., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). Accordingly, employer must produce substantial evidence that claimant's condition was neither caused by the working conditions nor aggravated, accelerated, or rendered symptomatic by them.[2] *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999); *Gooden*, 135 F.2d at 1066, 32 BRBS at 59 (CRT); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). Thus, if claimant's working conditions could have aggravated a pre-existing condition, employer must establish that claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. *See, e.g., Cairns v. Matson Terminals* 21 BRBS 252 (1988). In establishing rebuttal of the presumption, however, proof of another agency of causation is not necessary. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982)(Kalaris, J., concurring and dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984). Rather, the testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). 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 Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

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[2]The aggravation rule, providing that where working conditions aggravate, accelerate or combine with a prior condition, the entire resultant disability is compensable, *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966), 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). Whether claimant's employment duties increase his symptoms to such a degree as to incapacitate him for any period of time or whether they actually alter the underlying process is not significant. *Gooden*, 135 F.3d at 1066, 32 BRBS at 59 (CRT); *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981), *aff'g* 11 BRBS 561 (1971).

In the instant case, employer contends that the administrative law judge erred in concluding that the testimony of Drs. Gidman and Cenac is insufficient to establish rebuttal of the Section 20(a) presumption. Employer argues, in essence, that claimant did not sustain the injury forming the basis of his claim for compensation, *i.e.*, the fracture to his sternum, through the course of his work activities. We affirm the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption as that finding is rational and is supported by the record.

Dr. Gidman opined that the fractured sternum sustained by claimant was rare and that he could not explain how claimant fractured his sternum by lifting scaffold boards, as such an activity is "not a mechanism for fracturing the sternum" and such injuries are related to direct trauma to the sternal area. JX 8. Dr. Cenac similarly stated that sternal fractures are very rare and opined that repetitive stress is not a mechanism for such an injury. JX 7. In considering these opinions, the administrative law judge determined that neither Dr. Gidman nor Dr. Cenac specifically opined that claimant's working conditions were not the cause of claimant's injury and, moreover, neither physician addressed the issue of whether claimant's working conditions on September 1, 1997, aggravated, accelerated, or combined with an underlying condition. Thus, having found that the reporting physicians offered a general opinion that lifting is not a mechanism that will cause a sternal fracture, the administrative law judge found that neither physician concluded that the injury did not occur as reported and neither addressed the issue of whether claimant's employment aggravated, accelerated, or combined with an underlying condition. Accordingly, the administrative law judge concluded that employer failed to rebut the Section 20(a) presumption.

The administrative law judge's decision accurately reflects the evidence of record and evinces a correct application of law.[3] We, therefore, affirm the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption and that claimant's condition is work-related.

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

SO ORDERED.

[3]Although the administrative law judge may have improperly required employer to establish an alternative theory of injury, which employer is not required to do, *see O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000), any error is harmless as we affirm his finding that employer failed to establish rebuttal based upon the medical opinions of record.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge