

BRB Nos. 07-0349
and 07-0349A

T.C.)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 SUPERIOR BOAT WORKS,) DATE ISSUED:
 INCORPORATED) 11/21/20072007
)
 and)
)
 LEGION INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents)
 Cross-Petitioners)

DECISION and ORDER

Appeals of the Decision and Order on Remand Awarding Benefits and Order Denying Employer's Petition for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

T.C., Greenville, Mississippi, *pro se*.

R. Brittain Virden (Campbell Delong, LLP), Greenville, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant, representing himself, appeals and employer cross-appeals the Decision and Order on Remand Awarding Benefits and Order Denying Employer's Petition for Reconsideration (2004-LHC-1382) of Administrative Law Judge Richard D. Mills 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). In an appeal by a claimant without legal representation, we will review the findings of fact and

conclusions of law of the administrative law judge to determine if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed. This case has been before the Board previously.

Claimant alleged that he injured his back in a fall at work on August 3, 1998.¹ [*T.C.*] *v. Superior Boat Works, Inc.*, BRB Nos. 05-0519, 05-0868 (July 24, 2006) (unpub.). Claimant sought total disability compensation and medical benefits. Employer contended that claimant’s current back condition is due to the natural progression of his pre-existing degenerative disc disease; claimant injured his back in a car accident in 1997. In its prior decision, the Board affirmed the administrative law judge’s finding that claimant’s current back condition was not caused by his fall at work, but remanded the case for the administrative law judge to determine the type of back condition from which claimant suffers and whether employer produced substantial evidence that the work accident did not aggravate claimant’s pre-existing back condition.²

In his Decision and Order on Remand, the administrative law judge found that employer failed to rebut the Section 20(a) presumption, 33 U.S.C. §920(a), because it presented no evidence that the work accident did not aggravate claimant’s sacroiliac joint disease. The administrative law judge further found that claimant is entitled to temporary total disability compensation only for the period of August 3 to August 29, 1998, the date claimant left the light-duty work provided by employer for reasons unrelated to his injury, as well as medical benefits. The administrative law judge denied employer’s motion for reconsideration

Claimant, representing himself, appeals the decision denying further disability compensation. Employer cross-appeals, arguing that the administrative law judge erred in finding that it did not establish rebuttal of the Section 20(a) presumption.

Initially, we address employer’s contention that the administrative law judge erred in finding that it did not rebut the Section 20(a) presumption. 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.*

¹ Immediately after his fall at work, claimant was treated for a leg wound and released; he did not seek medical treatment for his back until September 11, 1998.

² Claimant was involved in a car accident in 1997 and received treatment for central disc protrusions at L4-5, L5-S1, CX 4(a)-(e), from the date of that accident through May 19, 1998, two and one-half months prior to the work accident. CX 4(b).

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., *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), cert. denied, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). When, as here, it is alleged that a prior injury is the cause of claimant's current condition, the aggravation rule is implicated. The aggravation rule states that if an employment-related injury contributes to, combines with, or aggravates a pre-existing condition, employer is liable for the entire resulting disability. See, e.g., *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). In order to rebut the Section 20(a) presumption in such a case, employer must introduce substantial evidence that the pre-existing condition was not aggravated by claimant's work-injury. *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT). The mere existence of a prior back injury condition does not establish that the current condition is due to that injury or that the pre-existing condition was not aggravated by the work accident. *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). If claimant's work injury 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 found that employer did not offer any direct evidence that claimant's current back condition was not aggravated as a result of the fall at work. Employer contends that it established rebuttal based on MRIs taken before and after the work accident, which showed no change in claimant's physical condition and on claimant's failure to complain of any back pain until several weeks after the incident. This circumstantial and lay evidence, however, is insufficient to rebut the Section 20(a) presumption in this case. The Board held in its prior decision that the existence of comparable MRIs before and after the injury is not determinative of whether the work accident aggravated claimant's condition, in view of the different diagnoses, *i.e.*, sacroiliac joint disease following the injury and discogenic pain prior. [*T.C.*], slip op. at 6. Moreover, the MRIs do not address whether the accident caused claimant's condition to become symptomatic, irrespective of the lack of worsening in the underlying condition. *Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005) (aggravation rule does not require that a later injury fundamentally alter a prior condition; sufficient if symptoms worsen). In addition, claimant's failure to complain of back pain until several weeks after the incident is not substantial evidence of the lack of aggravation, in light of the fact that claimant continued taking pain medication for his previous injury until one month after the fall.

Employer's reliance upon *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 259, 31 BRBS 119, 123(CRT) (4th Cir. 1997), in support of its contention that this evidence is sufficient to "cast doubt" upon the link between the fall and the subsequent back pain is misplaced. In *Moore*, the issue was whether the evidence presented was sufficient to rebut the Section 20(a) presumption that the work accident caused the claimant's resulting condition, not whether it aggravated an underlying condition. Therefore, the case is not instructive on what is substantial evidence to rebut when aggravation of a prior condition is at issue. We also reject employer's reliance on the unpublished decision of the United States Court of Appeals for the Fifth Circuit in *Bayou Fleet, Inc. v. Durant*, 158 Fed.Appx. 611 (5th Cir. 2005), as the facts are not wholly analogous.³ While the employer in *Durant* relied on some of the same type of circumstantial evidence as employer here relies on,⁴ the employer in *Durant* offered additional substantial evidence in the form of the claimant's testimony and reports to physicians and a company official that his injuries were not work-related. In addition, the court's opinion states that at least one physician stated that claimant's condition was not worse after the accident than it was before. *Id.* at 613. As each case is fact-specific, we reject employer's contention that this unpublished case establishes as a matter of law that it rebutted the Section 20(a) presumption in the present case.⁵

In this case, the administrative law judge properly found that employer did not produce substantial evidence that claimant's underlying back condition was not aggravated by the fall at work. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). We, therefore, affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption as it is in accordance with law. Therefore, we affirm the administrative law judge's finding that claimant's back condition is work-related. *Id.*

³ Although the present case arises within the jurisdiction of the Fifth Circuit, we note, in addition, that pursuant to U.S.Ct. of App. 5th Cir. Rule 47.5.4, "opinions issued on or after January 1, 1996 are not precedent, . . ."

⁴ For example, claimant's delayed reporting of the harm after a termination.

⁵ The other unpublished decision referenced by employer, *Flood v. NAF Billeting Branch*, 134 F.3d 363, 1998 WL 27145 (4th Cir. 1998) and *Forster v. Director, OWCP*, 122 F.3d 1070, 1997 WL 559663 (9th Cir. 1997), do not arise in the same circuit as the instant case. Moreover, unpublished decisions are not precedent even within the circuits in which the cases arise. *See* U.S.Ct. of App. 4th Cir. Rule 32.1; U.S.Ct. of App. 9th Cir. Rule 36-3. Therefore, we decline to address employer's contentions in this regard.

In his appeal, claimant contends that the administrative law judge erred in awarding benefits only until August 29, 1998. We disagree. Claimant was released to return to light-duty work on the same day as his injury. CX 3(i). Claimant returned to work on August 31, 1998, when he performed light-duty office work. HT at 59. On September 1, 1998, claimant returned to work and became involved in a dispute over his parking his truck in a restricted area; claimant believed that the request that he move his truck was paramount to his termination, HT at 60, and did not return to work after that date. Claimant was terminated on September 9, 1998, for failure to report to work. HT at 164.

In a case such as this one in which claimant cannot perform his usual job duties, the burden shifts to employer to demonstrate the availability of suitable alternate employment which claimant is capable of performing given his age, physical restrictions, and educational and vocational background. See *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981) see also *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (5th Cir. 1986), cert. denied, 497 U.S. 826 (1986). An employer may establish suitable alternate employment by offering claimant an appropriate job within its own facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

The administrative law judge found that employer established the availability of suitable alternate employment within its facility based upon the testimony of Collins Brent, president of the company, who testified that injured workers are typically offered light-duty work at their regular wages. HT at 165, 167. Moreover, claimant did not contend that he was physically unable to perform the work offered on August 31 or September 1, or offer evidence that his termination was related to his injury. Where a claimant loses a post-injury position because of his failure to follow company procedures or policies, any resulting loss of wage-earning capacity is not compensable since it was not due to claimant's work-related injury. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), aff'd sub nom. *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). Therefore, as substantial evidence supports the administrative law judge's finding that claimant was offered a suitable job at employer's facility with no loss in wage-earning capacity, and that claimant was terminated for reasons unrelated to his injury, we affirm the denial of benefits after August 29, 1998.⁶ *Id.*

⁶ Moreover, claimant presented no evidence of an inability to perform any work until July 21, 2004, when Dr. Adam Smith stated that claimant is "100 percent disabled." In its prior decision, the Board affirmed the administrative law judge's rejection of this opinion as it is conclusory and devoid of any underlying documentation. [*T.C.*], slip op. at 6.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits and Order Denying Employer's Petition for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge