BRB No. 02-0859

LEON BOLDEN	)	
	)	DATE ISSUED: 09/16/2003
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Ellen T. Turner, Mobile, Alabama, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (98-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 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).

This is the third time this case has come before the Board. Claimant, an electrician and material runner, filed a claim for benefits in May 1995, following receipt of his diagnosis with a ruptured/bulging disc and degenerative disc disease and undergoing an unsuccessful discography and percutaneous discetomy in February 1995. In his first decision, the administrative law judge denied the claim, finding 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), and that claimant's failure was not excused under Section 12(d), 33 U.S.C. §912(d); claimant's motion for reconsideration was summarily denied.

On appeal, the Board held that the administrative law judge erred in his consideration of the timeliness issue by failing to determine the date on which claimant became aware of the relationship between his injury, his disability, and his employment. The case was remanded for the administrative law judge to consider these issues, granting claimant the benefit of the Section 20(b), 33 U.S.C. §920(b), presumption that notice had been timely filed. *Bolden v. Ingalls Shipbuilding, Inc.*, BRB No. 00-0456 (Jan. 26, 2001)(unpublished).

On remand, the administrative law judge again denied the claim, finding both that claimant's notice of injury was untimely and that claimant failed to establish that his injury is related to his employment, thereby negating his entitlement to medical benefits. Decision and Order on Remand at 4, 7. Claimant again appealed to the Board.

The Board determined that the administrative law judge erred in finding that employer established rebuttal of the Section 20(a) presumption, and held that claimant's condition is work-related as a matter of law. Additionally, the Board reversed the administrative law judge's finding that this claim was barred for lack of compliance with Section 12(a), holding that that finding was not supported by the evidence of record. Accordingly, the case was remanded for consideration of the merits of the claim. *Bolden v. Ingalls Shipbuilding, Inc.*, BRB No. 01-0693 (May 16, 2002)(unpublished).

On remand for a second time, the administrative law judge addressed the merits of the claim and found that claimant established his *prima facie* case of total disability which employer failed to counter. Accordingly, he awarded claimant compensation for temporary total disability from May 9, 1995 until November 29, 1995, the date on which the parties agree maximum medical improvement was reached, and permanent total disability thereafter. He also found that employer is liable for all medical expenses incurred by claimant's treatment with Dr. Fontana except for those expenses incurred prior to the date employer was notified of the injury, September 11, 1995. Finally, the administrative law judge found that employer is not entitled to relief under Section 8(f), 33 U.S.C. §908(f), because it failed to establish that claimant suffered a serious and lasting prior disability which, when coupled with his back condition, contributed to claimant's present total disability.

Employer appeals, contending that claimant not only failed to file a timely notice of injury pursuant to Section 12, but also failed to establish causation under the Act and that therefore claimant is entitled to neither compensation nor medical benefits. Employer also contends that claimant's disability is not due to his back condition, but to his non-work-related neuropathy and vascular disease. Moreover, employer contends the administrative law judge erred in denying it relief under Section 8(f) of the Act. Claimant responds, urging affirmance of the administrative law judge's latest decision. The Director, Office of Workers' Compensation Programs, has not responded to this appeal.

Initially, employer argues that claimant failed to establish a *prima facie* case for invocation of the Section 20(a) presumption. In his second decision, the administrative law judge found, *inter alia*, that claimant made out his *prima facie* case, and the Board stated in its second decision that this finding was proper.[1] *Bolden*, BRB No. 01-0693, slip op. at 4. Employer contends the Section 20(a) presumption should not have been invoked because claimant "has not met his burden of proving that he sustained an injury in the course and scope of his employment." Emp. Brief at 12. Contrary to employer's contention, claimant does not bear the burden of establishing an actual causal relationship in order to invoke the Section 20(a) presumption. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Rather, claimant's burden on invocation is to establish that he has a physical harm and that an accident occurred or conditions existed at work that *could have* caused the harm or aggravated a pre-existing condition. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

Employer also contends that the Section 20(a) presumption is not invoked because claimant did not credibly testify that conditions at work existed that could have caused his back pain. This contention misses the mark. Claimant never contended that his injury occurred on a specific day so his failure to consistently report a date of accident is irrelevant. Moreover, that claimant's job required the lifting of heavy objects is not in dispute, and claimant's credibility is thus not relevant to the existence of these working conditions. That claimant was unsure of a relationship between his back pain and his employment also is not dispositive in light of the medical evidence that claimant's work *could have* aggravated his degenerative disc disease. Dr. Semon stated that claimant's work, which involved heavy lifting, could have contributed to claimant's injury. CX 4; CX 6 at 43. Dr. Fontana stated that claimant's work activities could have contributed to a

[1]We note that employer did not cross-appeal the administrative law judge's finding that the Section 20(a) presumption is invoked or raise the issue in its response brief as a potentially alternative method of affirming the administrative law judge's decision. *See Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283, *vacating in pert. part* 32 BRBS 118 (1998).

degenerative disk condition. EX 15 at 16-18. The evidence is thus sufficient to establish claimant's *prima facie* case, and therefore we affirm the administrative law judge's invocation of the Section 20(a) presumption. *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990).

Employer next contends that the Board erred in finding the Section 20(a) presumption is not rebutted as a matter of law and in holding that claimant's notice of injury was timely pursuant to Section 12. The Board=s decision on these issues constitutes the law of the case, and, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice, the Board will adhere to its decision. *See, e.g., Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992). We hold that employer has not established a basis for departure from the law of the case doctrine, as there has been no change in the factual situation and employer has failed to demonstrate any error in the Board=s decision.[2] *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002), *denying recon. of* 36 BRBS 47 (2002). Thus, as claimant's condition is work-related, the administrative law judge properly held employer liable for claimant's medical benefits. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

Employer next contends that claimant's inability to work is due not to his back condition, but to his non-work-related neuropathy and vascular disease. A claimant establishes his *prima facie* case of total disability if his work injury prevents his return to his usual employment. *See, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The burden then shifts to employer to show that claimant

[2]We reiterate that, contrary to employer's contention, Dr. Fontana's opinion does not constitute substantial evidence of the absence of a work-related condition, as he does not state that claimant's work did not cause or aggravate claimant's back condition. *Cf. Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003) (where claimant's heart attack began prior to work and medical evidence stated it would have continued regardless of claimant's activities, substantial evidence rebuts the Section 20(a) presumption). Indeed, Dr. Fontana stated that all of claimant's life activities, including his work activities, can contribute to a degenerative disk condition. *See, e.g.*, EX 15 at 16. The fact that claimant did not tell Dr. Fontana of a specific work accident is immaterial in that claimant's claim was based on his general working conditions. Furthermore, that Dr. Fontana did not specifically relate claimant's condition to his employment misperceives employer's burden on rebuttal, which is to produce substantial evidence of the absence of a work-related cause of claimant's injury. As we noted in our second decision, Dr. Fontana's opinion does not meet this burden because he could not give an opinion to a reasonable degree of medical certainty either in favor of or against a causal nexus between claimant's injury and his work.

is at most partially disabled, by demonstrating the availability of realistic job opportunities that are suitable for claimant given his age, education, vocational history, and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

We affirm the administrative law judge's finding that claimant established his inability to perform his usual work as a result of his back injury. Claimant's work in his last years for employer was as a material runner, which required that he lift and carry onto ships cables, lights, and foundations of various weights. Dr. Semon stated that claimant cannot return to his usual work due to his back condition. CX 6 at 26. Dr. Fontana stated that claimant has disabling back pain, as well as disabling vascular disease and peripheral neuropathy. EX 15 at 31, 34-35, 49-50. The administrative law judge also relied on claimant's testimony that he is unable to work due to his back injury. Tr. at 60, 78; Decision and Order on Second Remand at 5. Substantial evidence, therefore, supports the administrative law judge's finding that claimant is unable to return to his work due to his back injury. *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). The fact that claimant also may be disabled by other conditions does not affect his entitlement to total disability benefits since the work injury is ***a*** cause of claimant's disability. *See Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999). As it is uncontested that employer did not present evidence of suitable alternate employment, the award of total disability benefits is affirmed.

Employer lastly contends that the administrative law judge erred in denying it relief under Section 8(f). Section 8(f) shifts the liability to pay compensation for permanent disability from an employer after 104 weeks to the Special Fund established in Section 44 of the Act, 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT)(2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990). Thus, a claimant's total disability must have been caused by both the work injury and the pre-existing condition; unless employer can demonstrate this, it may not receive Section 8(f) relief. *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). It is not sufficient for employer to demonstrate only the existence of a pre-existing disability that created a greater physical impairment; rather, employer must demonstrate that the second injury did not in and of itself render claimant totally disabled. *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996).

Employer contends that claimant's prior injuries to his left ankle, right shoulder, and right wrist, as well as his pre-existing degenerative disc disease, peripheral neuropathy and vascular problems, establish that claimant's current disability is "not due

solely" to his most recent injury, citing *Director, OWCP v. Ingalls Shipbuilding, Inc.[Ladner]*, 125 F.3d 303, 31 BRBS 146(CRT)(5th Cir. 1997).[3] The administrative law judge found that claimant returned to full duty after each of his orthopedic injuries and that there is no medical or other evidence to establish that the effects of claimant's prior injuries combined with the effects of his most recent injury to create a greater disability. Therefore, he concluded that claimant is solely disabled due to his back condition. Accordingly, the administrative law judge denied employer relief under Section 8(f).

On appeal, employer contends that it must only establish that the pre-existing manifest conditions rendered claimant's disability "materially and substantially greater than that which would have resulted from the subsequent injury alone." *Ladner*,125 F.3d at 306, 31 BRBS at 149(CRT). Employer is in error as that is the standard in a case in which Section 8(f) relief is sought when the claimant is permanently ***partially*** disabled. In the instant case, the administrative law judge found that claimant is permanently ***totally*** disabled. Thus, employer must establish that the administrative law judge erred in finding that claimant's current total disability is not due solely to his work related back injury.

The existence of multiple injuries that combine to increase claimant's disability from partial to total may satisfy the contribution requirement when the pre-existing injuries cause an otherwise partially disabled claimant to become totally disabled. *Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 31 BRBS 91 (CRT)(5th Cir. 1997). However, it is still employer's burden to establish that claimant's most recent injury would not have rendered him totally disabled. *Abbott v. Louisiana Guaranty Ass'n*, 27 BRBS 192(1993), *aff'd* 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994). In the instant case, employer points to no evidence, medical or other, that establishes that claimant was not totally disabled as a result of his work-related back condition. Although employer relies upon the opinion of Dr. Fontana that claimant's back condition is not the most disabling thing he has, EX 15 at 35, he did not state that claimant's work injury alone was not totally disabling. There is no other medical testimony addressing the extent of claimant's disability resulting solely from the work injury. Thus, employer has not presented evidence that claimant's work injury did not render him totally disabled regardless of the residual effects, if any, of his prior injuries. The administrative law judge's denial of Section 8(f) relief is, therefore, affirmed as it is supported by substantial evidence and in accordance with law. *Id.*

[3]In reaching his decision, the administrative law judge considered only the effect of claimant's injuries to his left ankle, right wrist and shoulder. Although employer attempts to include claimant's other conditions in its argument, it concedes that only the orthopedic injuries were manifest to employer prior to the current injury. Emp. Brief at 25. Accordingly, those other conditions cannot form the basis for Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order on Second Remand is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge