BRB No. 97-1675

RAYMOND J. COURY	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
NORTHWEST MARINE, INCORPORATED	)	
	)	
and	)	
	)	
LEGION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

David A. Hytowitz and Meagan A. Flynn (Pozzi, Wilson & Atchison), Portland, Oregon, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (93-LHC-3080, 93-LHC-3081) of Administrative Law Judge Robert G. Mahony 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 second time that this case is before the Board. To recapitulate the

facts, claimant, who worked for employer for over 30 years in various capacities, sustained a cervical sprain when he hit his head on a beam while inspecting a ship on May 11, 1991. On October 26, 1991, claimant sustained another work-related injury to the great toe of his left foot. Claimant continued to work at his usual job following both injuries and lost no time from work until he was laid off when employer closed its shipyard on October 30, 1992. At that time, claimant alleged that he attempted to secure other work but was precluded from accepting a number of jobs that demanded a great deal of physical activity because of the effects of his work-related injuries. At the time of the hearing, claimant was employed as a supervisor for a barge painting project earning $3,700 per month. On December 1, 1992, claimant filed separate claims under the Act for his neck and foot injuries, seeking permanent partial disability compensation under Section 8(c)(4) of the Act, 33 U.S.C. §908(c)(4), for his foot injury, and permanent partial disability compensation under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), based on a loss of over $600 in his wage-earning capacity due to his neck injury.

In his initial decision, the administrative law judge found that the disability claims filed by claimant on December 1, 1992, were untimely. On appeal, the Board held that the claim filed on December 1, 1992, was timely as a matter of law. The Board further held that since claimant's toe injury was not correctly diagnosed as being related to his employment until December 10, 1991, when blood tests conclusively ruled out gout as the cause of claimant's toe problems, claimant's December 1, 1992 claim for his left toe injury also was timely as a matter of law. Thus, the Board remanded the case for further proceedings. *Coury v. Northwest Marine, Inc.*, BRB No. 96-0535 (Dec. 23, 1996)(unpublished).

On remand, the administrative law judge found that, with regard to claimant's neck injury, claimant is capable of performing the duties of his former job with employer as a painter/supervisor. In rendering his decision in this regard, the administrative law judge relied on the opinions of Drs. Tesar and Platt that claimant's present neck condition is not due to claimant's May 11, 1991 work-related neck injury. Additionally, the administrative law judge found that claimant is currently performing the same job duties that he had performed with employer, albeit with a different employer, Oregon Iron Works. Thus, the administrative law judge determined that claimant is not entitled to an award of permanent partial disability compensation under Section 8(c)(21) of the Act. The administrative law judge further found that claimant did not sustain any permanent partial disability to his left toe, and therefore denied claimant's claim for permanent partial disability compensation under Section 8(c)(4) of the Act.

On appeal, claimant contends that, with regard to his cervical and toe injuries,

he is entitled to an award of medical benefits under Section 7 of the Act, 33 U.S.C. §907, and that the administrative law judge erred in failing to address this issue. Claimant further argues that the administrative law judge erred in finding that he is not entitled to an award of permanent partial disability compensation under Section 8(c)(21), based on his loss in wage-earning capacity due to his work-related neck injury. Claimant lastly requests that the administrative law judge's conclusion that claimant suffered no permanent partial disability as a result of his toe injury be reversed. Employer responds, urging affirmance of the administrative law judge's decision. Claimant has filed a reply brief, wherein claimant reiterates his arguments that he is entitled to medical benefits and awards of permanent partial disability for his cervical and toe injuries.

Initially, we will address the issues raised in claimant's appeal concerning the administrative law judge's denial of benefits under Section 8(c)(21) for his May 11, 1991 injury. Specifically, claimant argues that it was irrational for the administrative law judge to base the denial of benefits on the opinions of Drs. Tesar and Platt that claimant's neck symptoms are not related to his employment, as this goes to the issue of causation, not disability. In addition, claimant asserts that the administrative law judge's finding that he is capable of performing his usual employment with employer is in error.[1]

In the instant case, the administrative law judge, in considering whether claimant is capable of performing his previous employment with employer, credited the opinions of Drs. Tesar and Platt that claimant's cervical symptoms are due to aging and are unrelated to his May 11, 1991, work injury, *see* Emp. Ex. 4, as support for his finding that claimant does not have a compensable disability. The administrative law judge's finding thus is supported by evidence relevant to the cause of claimant's allegedly disabling neck condition. In addressing this causation issue *sua sponte,* the administrative law judge did not consider the Section 20(a)

[1]As claimant has raised the issue of a *de minimis* award for the first time on appeal, we decline to consider this issue. *See Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990). Claimant may raise this issue before the administrative law judge on remand. *Metropolitan Stevedore Co. v. Rambo,* 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997).

presumption, 33 U.S.C. §920(a), of causation.

The Section 20(a) presumption applies to whether a claimant's condition arises out of his employment. While it does not apply to the question of whether a condition is disabling, *i.e,* whether it impairs claimant's employability, the administrative law judge here addressed the cause of claimant's disabling condition. Since this issue involves the causal nexus, the administrative law judge erred in not addressing Section 20(a). In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition is not caused or aggravated by his employment. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Sam v. Loffland Bros.*, 19 BRBS 288 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See 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). 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).

In his Decision and Order on Remand, the administrative law judge credited the February 24, 1994, report of Drs. Tesar and Platt, wherein the physicians opined that claimant's degenerative disc disease was due to the aging process and was unrelated to his May 11, 1991, work injury. However, claimant is not required to prove that his condition is work-related in order to establish a *prima facie* case and invoke the Section 20(a) presumption. *See Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989). Moreover, the administrative law judge did not discuss the opinion of Dr. Calhoun, who stated that claimant's disc disease and bulging disc were accelerated by his work environment and his May 11, 1991, work-related neck injury. *See* Cl. Ex. 34. For these reasons, we vacate the administrative law judge's denial of permanent partial disability compensation under Section 8(c)(21), and remand the case for reconsideration of whether claimant's condition is work-related consistent with the Section 20(a) presumption. If the administrative law judge finds a causal relationship between claimant's neck condition and his employment, the administrative law judge must then consider the nature and extent

of this disability. Regarding this issue, we note that the administrative law judge must specifically consider the testimony of claimant that his post-injury employment required very little of the physical type of work which he had performed while working for employer. *See* Tr. at 82. The administrative law judge must address this and other relevant evidence in order to determine whether claimant has suffered a post-injury loss in wage-earning capacity, *see* 33 U.S.C. §908(h), and therefore, whether he is entitled to permanent partial disability compensation pursuant to Section 8(c)(21).

With regard to claimant's toe injury, claimant, on appeal, contends that he is entitled to an award of permanent partial disability compensation under Section 8(c)(4) of the Act since the administrative law judge mischaracterized Dr. Amato's opinion. In rendering his decision, the administrative law judge credited the opinions of Drs. Tesar and Platt that claimant suffers from no residual permanent impairment to his left toe, *see* Emp. Ex. 4, as supported by the opinions of Drs. McNeill and Amato. In their February 24, 1994 report, Drs. Tesar and Platt, after reviewing a prior bone scan, noted a previous diagnosis of synovitis of the MP joint of the left big toe, but found no evidence of synovitis upon examination. The physicians concluded that there was no residual permanent partial impairment to claimant's left big toe. Emp. Ex. 4. Dr. Tesar further deposed that he saw no findings indicating an inflamed joint, and that the examination of claimant's left big toe was totally normal. *See* Emp. Ex. 13 at 15. Dr. McNeill diagnosed acute inflammatory process in claimant's left toe, without offering an impairment rating to claimant's left foot, *see* Cl. Ex. 12. Lastly, the administrative law judge cited the opinion of Dr. Amato that the left foot problem would subside.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, we hold that the administrative law judge's decision to credit the opinions of Drs. Tesar and Platt is rational*, see generally O'Keeffe*, 380 U.S. at 359, and therefore affirm the administrative law judge's determination that claimant failed to establish that he suffers from a permanent partial disability to his left foot as a result of his October 26, 1991 work-related injury.

Lastly, we agree with claimant that the administrative law judge erred in not addressing the issue of claimant's entitlement to medical benefits under Section 7 of

the Act, with regard to both his neck and toe conditions, as that issue was raised before the administrative law judge. *See* Cl. Exs. 4, 7-8; Tr. at 18. Entitlement to medical benefits is contingent upon a finding of a causal relationship between the injury and employment. *See generally Wendler v. American National Red Cross,* 23 BRBS 408 (1990)(McGranery, J., dissenting on other grounds). Upon establishing such a relationship, claimant is entitled to medical benefits for a work-related injury even if that injury is not economically disabling if the treatment is necessary for the work-related injury. *See Romeike v. Kaiser Shipyards,* 22 BRBS 57 (1989). Accordingly, on remand, the administrative law judge must rule on the issue of claimant's entitlement to medical benefits. *See, e.g., Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

Accordingly, the administrative law judge's denial of compensation under Section 8(c)(21) is vacated, and the case is remanded for further consideration of this issue and claimant's entitlement to medical benefits in accordance with this opinion. In all other respects, the Decision and Order on Remand of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge