BRB No. 05-0479

LARRY L. SHANNON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
I. M. C. GLOBAL	)	DATE ISSUED: 01/31/2006
	)	
and	)	
	)	
TRAVELERS PROPERTY CASUALTY CORPORATION, d/b/a CONSTITUTION STATE SERVICE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and the Order Granting Motion for Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Anthony V. Cortese, Tampa, Florida, for claimant.

William C. Cruse and Jennifer Cortes (Blue Williams, L.L.P.), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand and the Order Granting Motion for Reconsideration (2002-LHC-0429) of Administrative Law Judge Daniel F. Solomon 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 that this case is before the Board.

To briefly reiterate the facts of this case, claimant suffered a number of physical and psychological injuries, including a cerebral concussion, chronic cervical, thoracic and lumbosacral strain, broken ribs, and anxiety, depression and panic disorders, while working for employer on September 28, 1999.[1] CXs. 1 at 10; 3 at 6; 14; EX 9. Employer paid temporary total disability benefits from the date of injury and medical benefits for claimant's various injuries. 33 U.S.C. §§908(b), 907. Prior to the hearing, employer accepted claimant as being permanently totally disabled. ALJ EX 9. Also prior to the hearing, claimant developed increasing problems with ambulation and mobility, and he averred that this problem was work-related. Thus, the sole issues before the administrative law judge were the cause of claimant's ambulatory problems and, if those problems were found to be work-related, the extent of claimant's entitlement to medical benefits.

In his Decision and Order, the administrative law judge found that claimant's work injury caused both physical and mental injuries, but it did not cause claimant's current problems with ambulation and mobility. Rather, the administrative law judge found that claimant's ambulation problems were caused by his pre-existing peripheral vascular disease and pulmonary condition and not by the back, neck or psychological injuries caused by the work injury. Next, the administrative law judge awarded claimant medical benefits for family and marital counseling, an abdominal brace, and a back brace, and he denied the remaining items sought by claimant, concluding that the denied items were either to alleviate claimant's mobility problems or were not necessary or reasonable for the treatment of his work-related injuries. Claimant appealed this decision to the Board.

In its Decision and Order, the Board held that as there is no dispute that claimant sustained work-related injuries, including back, neck, and psychological injuries, and that he also had trouble ambulating, claimant has established a number of harms and an accident that could have caused them, and the Section 20(a) presumption should have been invoked by the administrative law judge. The Board determined, however, that the administrative law judge's failure to invoke the Section 20(a) presumption or discuss rebuttal was harmless with regard to the issue of the causal connection between claimant's employment and his back, neck and psychological injuries since substantial evidence supported the administrative law judge's conclusion that those injuries are work-related, and no party challenged the administrative law judge's findings in this regard. Accordingly, the Board affirmed the administrative law judge's award of a back brace, abdominal brace, and family and marital counseling to claimant. With regard to claimant's ambulatory problems, the Board affirmed the administrative law judge's

[1] Claimant also suffers from a number of pre-existing conditions, including coronary arteriosclerosis, hypertension, chronic obstructive pulmonary disease, obesity, and peripheral vascular disease. EX 1 at exh. 2.

determination that claimant's problems with ambulation and mobility were not directly caused by his work accident. However, as claimant also argued that his work-injury and its sequela aggravated and accelerated his vascular disease and cardiac condition, and that his work-related musculoskeletal conditions aggravated, accelerated or combined with his pre-existing conditions to limit his mobility, and the administrative law judge did not address these issues, the Board vacated his determination that claimant's ambulation and mobility problems are not work-related. The case was therefore remanded for further consideration consistent with Section 20(a) and the aggravation rule. Lastly, in light of its decision to vacate the administrative law judge's finding that claimant's ambulation problems are not related to his work injury, the Board also vacated the administrative law judge's denial of the medical recommendations that he found were related to those ambulation problems, and it instructed the administrative law judge that if, on remand, he determined that claimant's work injury and/or its sequela aggravated, accelerated or contributed to claimant's current ambulation problems, then he must reconsider the need for each requested item that he denied solely because it related to claimant's ambulation problems. *Shannon v. I.M.C. Global*, BRB No. 03-0259 (Nov. 25, 2003)(unpub.).

On remand, the administrative law judge determined that employer failed to rebut the Section 20(a) presumption with regard to the alleged aggravation. Accordingly, the administrative law judge found that claimant's work-related accident aggravated his vascular and ambulation difficulties. Next, the administrative law judge awarded claimant medical care and treatment for his present conditions. In an Order granting claimant's motion for reconsideration, the administrative law judge amended his award of medical benefits to reflect claimant's entitlement to two hours of attendant care per day, seven days a week, as well as reimbursement for the installation of an electric rear lift for claimant's van.

On appeal, employer challenges the administrative law judge's finding that claimant is entitled to invocation of the Section 20(a) presumption with regard to his vascular and ambulatory problems; alternatively, employer asserts that the administrative law judge erred in determining that it failed to present evidence sufficient to rebut that presumption. Lastly, employer asserts that the administrative law judge erred in awarding claimant medical benefits associated with his vascular and ambulatory conditions. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

In order to be entitled to the Section 20(a), 33 U.S.C. 920(a), presumption, claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *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); *Stevens v. Tacoma Boatbuilding Co.,* 23 BRBS 191 (1993). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest,* 22 BRBS 142 (1989); *see also*

Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In presenting his case, claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, claimant must show the existence of an accident or working conditions which could potentially cause the harm alleged. *See generally U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631; *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

In the instant case, employer initially challenges the administrative law judge's determination that claimant has established his *prima facie* case and is thus entitled to the benefit of the Section 20(a) presumption. The issue of whether claimant is entitled to invocation of the Section 20(a) presumption, however, was thoroughly considered and addressed by the Board in its previous decision and its prior determination that claimant established a number of harms, including ambulation and mobility problems, as well as the occurrence of an accident that could have caused those harms constitutes the law of the case.[2] *See Lewis v. Sunnen Crane Service, Inc.*, 34 BRBS 57 (2000); *Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000); *Ricks v. Temporary Employment Services*, 33 BRBS 81 (1999). Employer has raised no basis for the Board to depart from this doctrine, which holds that an appellate tribunal generally will adhere to its initial decision on an issue when a case is on appeal for the second time, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first result was clearly erroneous and allowing it to stand would result in manifest injustice. *See Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999). Employer's contention is therefore rejected and the administrative law judge's determination on remand that claimant is entitled to invocation of the Section 20(a) presumption is affirmed.

Upon invocation of the Section 20(a) presumption, the burden shifts to the employer to rebut the presumption with substantial evidence demonstrating that the claimant's condition was not caused or aggravated by his employment. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000), *petition for review denied*, No. 02-12758 (11th Cir. Feb. 5, 2003). Where aggravation of a pre-existing condition is at issue, the employer must establish that the work events neither directly caused the injury nor aggravated the pre-existing condition, resulting in the injury. *O'Kelley*, 34 BRBS at 41; *see also Cairns v. Matson Terminals*, 21 BRBS 262 (1988). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing

[2] As the Board stated in its previous decision, the parties agree that claimant sustained work-related injuries when the golf cart in which he was riding crashed into a steel beam. Moreover, employer did not dispute that claimant has back, neck, and psychological injuries, and that claimant post-injury has experienced trouble ambulating. Accordingly, the Board held that as claimant established a number of harms and an accident that could have caused them, the Section 20(a) presumption should have been invoked by the administrative law judge. *See Shannon*, slip op. at 4.

condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). 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 Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT).

The administrative law judge found that employer submitted no evidence sufficient to sever the presumed causal link between claimant's present vascular condition and ambulatory problems and his work-accident. Specifically, the administrative law judge stated that employer "has not presented affirmative proof from a medical witness to state unequivocally that aggravation, acceleration or exacerbation of [claimant's] underlying vascular problem is contraindicated." Decision and Order on Remand at 6. In arriving at this conclusion, the administrative law judge, after acknowledging his authority as factfinder to draw reasonable inferences from the evidence of record, determined that Dr. Nagamia's testimony that the symptoms associated with claimant's vascular problems usually occur only after direct trauma to an artery did not preclude a finding of aggravation or exacerbation since that physician was not questioned in that regard.[3] *Id.* at 7. The administrative law judge further found that the testimony of Dr. Martinez, claimant's neurologist, and Dr. Eichberg did not establish rebuttal since the former did not consider claimant's vascular condition, while the latter only related claimant's ambulatory difficulties primarily to his cardiovascular and pulmonary capacity. *Id.* at 7-8.

We affirm the administrative law judge's finding that employer did not establish rebuttal in this case. While employer argues that the evidence of record establishes that claimant has sought treatment for his vascular condition since 1990, and that claimant sustained multiple heart attacks prior to his work-injury, evidence of a pre-existing condition alone cannot rebut the presumption, in view of the aggravation rule. S*ee*

[3] In its prior decision, the Board held that the opinion of Dr. Nagamia was sufficient to rebut the Section 20(a) presumption with regard to a direct causal connection between claimant's injury and his ambulatory problems. Decision and Order at 5. Dr. Nagamia additionally testified, however, that claimant's post-injury inability to exercise could have contributed to an accumulation of plaque in his leg arteries, and that claimant's stress, anxiety, panic attacks and severe depression could play a role in contributing to the development of plaque. In remanding the case for reconsideration of the issue of whether, in light of the aggravation rule, claimant's ambulation and mobility problems are work-related, the Board acknowledged claimant's position that his pre-existing conditions were aggravated by his post-injury, stress, anxiety, and inability to exercise, and stated that Dr. Nagamia's testimony, if credited on remand, could support a finding that claimant's work injury and its sequela aggravated or exacerbated claimant's pre-existing vascular condition, resulting in his ambulation problems. *Id.* at 6-7.

Strachan Shipping Co., 782 F.2d 513, 18 BRBS 45(CRT). Moreover, as found by the administrative law judge, none of the physicians relied upon by employer in support of its contentions on appeal stated that claimant's work injury and its sequela did not aggravate claimant's pre-existing condition. Accordingly, as the medical evidence relied upon by employer does not sever the presumed causal connection between claimant's pre-existing vascular condition and consequent ambulatory problems and his employment with employer, we affirm the administrative law judge's determination that the Section 20(a) presumption was not rebutted with regard to that condition and his consequent finding of a causal relationship between claimant's employment and his mobility and ambulatory problems. *See Swinton*, 554 F.2d 1075, 4 BRBS 466; *Jones*, 35 BRBS 37; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

Lastly, employer challenges the administrative law judge's award of those medical expenses related to claimant's vascular condition and ambulatory problems. Specifically, employer contends that, as these conditions are not work-related, the administrative law judge erred in ordering it to reimburse claimant for the cost of a motorized wheelchair and other items resulting from those conditions. Alternatively, employer avers that the medical items awarded to claimant by the administrative law judge are not reasonable and necessary. We affirm the administrative law judge's award of medical benefits to claimant.

Section 7(a) of the Act, 33 U.S.C. §907(a), states:

> The employer shall furnish such medical, surgical, and other attendance or treatment ... medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

The phrase "other attendance" in Section 7(a) has been held to encompass certain essential domestic services that the claimant, due to his injury, can no longer perform. *Carroll v. M. Cutter Co.*, 37 BRBS 134 (2003)(Smith, J., concurring and dissenting on other grounds), *aff'g on recon. en* banc, 38 BRBS 53 (2004)(Dolder, C.J., and Smith, J., dissenting on other grounds); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978). In order for a medical expense to be assessed against employer, however, the expense must be both reasonable and necessary, and must be related to the injury at hand. *See Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

The administrative law judge determined that employer was liable for the cost of a motorized wheelchair for claimant since that apparatus was prescribed by claimant's physicians as being medically necessary as a result of claimant's ambulatory difficulties. Decision and Order on Remand at 9-11. In this regard, Dr. DeVine, who initially prescribed a motorized wheelchair for claimant in 2001, opined that such a device was medically necessary based upon claimant's lack of mobility; without such an apparatus,

Dr. DeVine testified that claimant could travel only very small distances with a cane. Dr. DeVine's prescription was endorsed by Drs. Kabaria and Eichberg, both of whom opined that a motorized scooter was required as a result of claimant's present ambulatory problems. The administrative law judge also accepted the opinion of claimant's treating physicians that claimant needed assistance with his daily care, meal preparation and grooming. *Id.* at 12. Lastly, the administrative law judge ordered employer to reimburse claimant for the cost of installing an electric rear lift for his van. In addressing this cost, the administrative law judge concluded that without such a device claimant's mobility would be largely limited, and the benefit of having an electric wheelchair significantly decreased, since claimant would be unable to transport his wheelchair to any other place. Order Granting Motion for Recon. at 2. In this case, the administrative law judge's findings regarding claimant's need for a motorized wheelchair, electric rear lift, and other independent living needs associated with his present vascular condition and ambulatory problems are rational, supported by substantial evidence, and will not be disturbed.[4] *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997); *Day v. Ship Shape Main. Co.*, 16 BRBS 38 (1983)(cost of a van with an automatic lift covered under Section 7(a)). We therefore affirm the administrative law judge's award of medical benefits associated with claimant's vascular condition and ambulatory problems.

[4] In addition to a motorized wheelchair, attendant care, and electric rear lift, the administrative law judge awarded claimant reimbursement for a reacher, adaptive utensils, a jar opener, a clipboard, and a lift chair.

Accordingly, the administrative law judge's Decision and Order on Remand and Order Granting Motion for Reconsideration are affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge