

BRB Nos. 92-2217  
and 92-2217A

EDWIN CAIRNS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
MATSON TERMINALS,	)	DATE ISSUED:
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order After Second Remand of James J. Butler, Administrative Law Judge, United States Department of Labor.

William Patrick Muldoon (Pranin & Muldoon), Wilmington, California, for claimant.

Jack Williams, Glendale, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order After Second Remand (83-LHC-1488) of Administrative Law Judge James J. Butler denying benefits 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).

This is the third time that this case has been appealed to the Board. To briefly recapitulate, claimant, on September 16, 1981, suffered chest pains, and allegedly a heart attack, while in the course of his employment for employer. Claimant did not return to work following this incident. In his first Decision and Order denying benefits dated October 2, 1984, the administrative law judge found that any heart attack occurring on September 16, 1981 did not arise out of claimant's employment, and denied benefits. Claimant then appealed the administrative law judge's decision to the Board. *See Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). The Board reversed the

administrative law judge's determination that causation with regard to claimant's chest pains had not been established, holding that claimant established that his chest pains arose out of and in the course of his employment with employer as a matter of law. The Board therefore remanded the case for the administrative law judge to determine the nature and extent of disability caused by claimant's work-related chest pains. Additionally, the administrative law judge was instructed on remand to specifically determine whether claimant sustained a myocardial infarction on September 16, 1981 and, if he did, to determine whether that infarction was related to claimant's employment considering the applicability of the Section 20(a), 33 U.S.C. §920(a), presumption. 21 BRBS at 254-257.

On remand, the administrative law judge reopened the record to accept medical reports from Drs. Goldfarb and Dolan. In a Decision and Order After Remand dated July 27, 1989, the administrative law judge determined that claimant did not sustain either a myocardial infarction as a result of work activity on September 16, 1981, or a disability as a result of chest pains "allegedly" experienced on that date; claimant's claim for benefits was thus denied. Claimant again appealed to the Board. *See Cairns v. Matson Terminals, Inc.*, BRB No. 89-2843 (Jan. 28, 1992)(unpublished). In its second decision, the Board first held that the administrative law judge's failure to address all the record evidence regarding claimant's inability to return to work due to his work-related chest pains compelled remand. Noting that its prior holding that claimant's chest pains were employment-related constituted the law of the case, the Board additionally held that an award to claimant of total disability compensation for at least the period of his initial hospitalization for chest pains is justified. The Board further held that the administrative law judge's mischaracterization of the relevant medical evidence regarding the alleged occurrence of a work-related myocardial infarction also compelled remand. The Board therefore vacated the administrative law judge's denial of benefits and remanded the case for consideration of the evidence relevant to the issue of nature and extent of disability caused by claimant's chest pains, for consideration of the evidence as to whether claimant sustained a myocardial infarction, and, if necessary, a determination, pursuant to Section 20(a), as to whether that infarction was caused by claimant's employment. Additionally, the administrative law judge was instructed to consider claimant's entitlement to Section 7, 33 U.S.C. §907, medical benefits and to a Section 14(e), 33 U.S.C. §914(e), assessment. *See Cairns, supra*, slip op. at 4-6.

In his Decision and Order After Second Remand dated June 30, 1992, the administrative law judge, without adhering to the Board's previous rulings in this case or following the Board's instructions on remand, denied claimant's claim for benefits solely on his determination that claimant's underlying coronary heart disease is unrelated to his employment.

On appeal, claimant first assigns error to the administrative law judge's failure to find claimant to be permanently totally disabled due to his chest pains, noting that the Board remanded this case only for the administrative law judge to determine nature and extent of disability, not to determine whether the chest pains were work-related. Claimant also contends that the administrative law judge erred in failing to find that claimant sustained an employment-related myocardial infarction. In its cross-appeal, employer urges affirmance of the administrative law judge's Decision and Order After Second Remand in its entirety. Specifically, employer challenges the Board's prior two decisions holding as a matter of law that claimant established a causal relationship between his

chest pains and his employment, contending that it has rebutted the Section 20(a) presumption that claimant's injury, whether or not a myocardial infarction, arose out of his employment.

As an initial matter, we hold that the administrative law judge erred when he once again failed to comply with the Board's remand order. Section 802.405(a) of the regulations governing the operations of the Board provides that "[w]here a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board." 20 C.F.R. §802.405(a). See *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990); *Randolph v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 443 (1989). The Board's January 28, 1992 decision remanding this case to the administrative law judge explicitly stated that the holding in our first decision, that claimant established a causal relationship between his chest pains and his employment, constitutes the law of the case. See slip op at 5. See also *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986). Thus, in reconsidering the issue of the causation of claimant's chest pain, the administrative law judge ignored the Board's directive to consider only the nature and extent of disability caused by claimant's work-related chest pain. Moreover, the administrative law judge failed to follow the Board's dictate to specifically address all of the record evidence in determining whether claimant did, in fact, sustain a myocardial infarction, and if he did, to apply the Section 20(a) presumption in determining whether that myocardial infarction was employment-related. Finally, the administrative law judge denied medical benefits and a Section 14(e) assessment on the basis that claimant's chest pains are not employment-related, a finding directly counter to the Board's previous holdings that claimant's chest pains are employment-related as a matter of law. Thus, we are compelled by the administrative law judge's failure to follow the directives set forth in the Board's January 28, 1992 decision to vacate the administrative law judge's Decision and Order After Second Remand and remand the case once again for proper consideration of the record evidence in accordance with the Board's previous directives. See *Obert*, 23 BRBS at 157; *Randolph*, 22 BRBS at 443.<sup>1</sup>

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<sup>1</sup>We would order the case assigned to another administrative law judge on remand given Administrative Law Judge Butler's repeated failure to comply with the Board's remand instructions in this case; we note, however, that the necessity for such an order is obviated by Administrative Law Judge Butler's retirement from service as an administrative law judge.

In its January 28, 1992 decision remanding the case for the administrative law judge to determine the nature and extent of disability caused by claimant's work-related chest pains, the Board expressly instructed the administrative law judge to discuss the relevant medical evidence of record not previously addressed by the administrative law judge; specifically, the administrative law judge was to analyze and discuss the opinions of Drs. Fawell, Magnusson and Scott, and the records of claimant's hospitalization for chest pains. Moreover, the Board specifically instructed the administrative law judge to consider the applicability to the instant case of the rationale of *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115 (CRT)(D.C. Cir. 1984). See Board's January 28, 1992 Decision, slip op. at 4-5. On remand, however, the administrative law judge failed to discuss either this medical evidence or the applicability of the circuit court's decision in *Crum* that if work-related chest pains are determined to be of an indefinite duration, an award of permanent disability may be appropriate.<sup>2</sup>

Thus, on remand, the administrative law judge is to consider the issue of the nature and extent of disability caused by claimant's work-related chest pains; the administrative law judge must consider all the medical evidence relevant to this issue as specified in the Board's January 28, 1992 decision and, additionally, the administrative law judge must consider the applicability of the ruling in *Crum* to the case at bar.

In its January 28, 1992 decision, the Board further held that the administrative law judge mischaracterized the cardiac conference report and hospital records in his discussion of the evidence regarding the alleged occurrence of a myocardial infarction; accordingly, the case was remanded for reconsideration of whether an infarction was sustained, whether any infarction was related to claimant's employment pursuant to the Section 20(a) presumption, and the nature and extent of any resulting disability. See slip op. at 2-4. On remand, the administrative law judge failed to make a definitive finding as to whether a myocardial infarction did, in fact, occur; rather, the administrative law judge characterized claimant's condition as an "unconfirmed" infarction. See Decision and Order After Second Remand at 1, 2. This failure by the administrative law judge to follow the Board's specific and unequivocal directives on remand requires the Board to once again instruct the administrative law judge on remand to definitively consider the issue of the occurrence of a myocardial infarction. If the administrative law judge finds an infarction occurred, he must consider the relevant aggravation principles in analyzing causation under Section 20(a). Finally, if he finds that the occurrence of a work-related myocardial infarction is established, he must determine the nature and extent of any resulting disability.

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<sup>2</sup>It is noted that, pursuant to the Board's January 28, 1992 decision, the administrative law judge should have awarded, at a minimum, temporary total disability benefits for the period claimant was initially hospitalized for his chest pains. See Board's January 28, 1992 Decision, slip op. at 5.

Claimant also challenges the administrative law judge's failure to award medical benefits commencing with claimant's September 16, 1991 hospital admission for work-related chest pains and the administrative law judge's denial of a Section 14(e) assessment. In its January 28, 1992 decision, the Board held that claimant had established a *prima facie* case for compensable medical treatment based on his hospitalization for work-related chest pains and remanded the case for a determination of whether claimant has complied with the requirements of Section 7. The Board further remanded for a determination of whether employer is liable for a Section 14(e) assessment. *See* Board's January 28, 1992 Decision, slip op at 5-6. In light of our previous discussion regarding claimant's chest pains, we hold that the administrative law judge erred in basing his summary denial of both medical benefits and a Section 14(e) assessment on his conclusion that claimant's chest pains are solely related to his non-industrial coronary condition. Accordingly, on remand, the administrative law judge must reconsider claimant's entitlement to medical benefits and a Section 14(e) assessment pursuant to the directives set forth in our January 28, 1992 decision; in this regard, the administrative law judge's findings must be consistent with the Board's previous rulings that claimant has established a *prima facie* case for medical benefits and has established entitlement, at minimum, to temporary disability benefits for the period of his initial hospitalization for chest pains.

Lastly, we note that employer, in its cross-appeal, provides no persuasive argument for overturning the Board's January 28, 1992 ruling that its August 31, 1988 holding that claimant's chest pains are employment-related constitutes the law of the case. *See* January 28, 1992 Decision, slip op. at 5. We therefore reaffirm our previous two decisions ruling that claimant has established that his chest pains are employment-related as a matter of law.<sup>3</sup> *See Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 101 (1986).

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<sup>3</sup>While we need not revisit our previous causation determination, we note that the administrative law judge's analysis is contrary to the well-established rule that the underlying condition need not have been caused by the employment; rather, aggravation of a pre-existing condition or of symptoms of the underlying condition constitutes an injury. *See, e.g., Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248, 250 (1988); *Crum v. General Adjustment Bureau*, 783 F.2d 474, 16 BRBS 115 (CRT)(D.C. Cir. 1984). Moreover, contrary to the administrative law judge's expressed concern that employer not be burdened with the residuals of a non-industrial condition, it is well-established that employers accept their employees with the frailties that predispose them to injury. *See, e.g., Vandenberg v. Leicht Material Handling Co.*, 11 BRBS 164, 169 (1979).

Accordingly, the administrative law judge's Decision and Order After Second Remand is vacated and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge