BRB No. 99-1012

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

Appeal of the Decision and Order on Reremand of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston, Bunnell & Stone, LLP), Portland, Oregon, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, SMITH , Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Reremand (93-LHC-3080, 93-LHC-3081) of Administrative Law Judge John C. Holmes 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 case is on appeal to the Board for the third time. To recapitulate the facts,

claimant, who worked for employer for over 30 years in various capacities related to painting, 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 weekly loss of over $600 in his wage-earning capacity due to his neck injury.

In a Decision and Order issued on December 15, 1995, Administrative Law Judge Mahony found that the disability claims filed by claimant on December 1, 1992, were untimely. On appeal, the Board held that both claims were 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, Judge Mahony 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 and that claimant is currently performing the same job duties that he had performed with employer, albeit with a different employer, Oregon Iron Works. In reaching this decision, the administrative law judge relied on medical opinions relating claimant's neck condition to aging rather than the work injury. As he found that claimant's symptoms are not related to his work injury he concluded that claimant does not have a compensable disability. Thus, Judge Mahony determined that claimant is not entitled to an award of permanent partial disability compensation under Section 8(c)(21) of the Act. He further found that claimant did not sustain any permanent impairment 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 of that decision, the Board vacated Judge Mahony's denial of permanent partial disability compensation under Section 8(c)(21), and once again remanded the case. The Board found that Judge Mahony's denial of benefits rested on evidence regarding the cause of claimant's disability. As the Section 20(a) presumption, 33 U.S.C. §920(a), applies to the issue of the cause of claimant's allegedly disabling neck condition and Judge Mahony did not apply Section 20(a), the Board remanded the case for its application. The Board stated that if the administrative law judge found a causal relationship between claimant's neck condition and his employment on remand, then the administrative law judge must

address the nature and extent of claimant's disability, specifically considering his testimony that his post-injury employment at Oregon Iron Works required very little of the physical type of work which he had performed while working for employer, 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 is entitled to permanent partial disability compensation pursuant to Section 8(c)(21). *Coury v. Northwest Marine, Inc.*, BRB No. 97-1675 (Aug. 25, 1998) (unpublished). The Board affirmed the administrative law judge's denial of benefits for the toe injury under Section 8(c)(4). The Board also remanded the case for consideration of claimant's entitlement to medical benefits under Section 7 for both the neck and toe injuries.

On the second remand, Administrative Law Judge Holmes (the administrative law judge) found that the Board mischaracterized Judge Mahony's decision, because although Judge Mahony did not apply the Section 20(a) presumption, he specifically found that the parties stipulated that claimant's neck injury arose out of and in the course of his employment. The administrative law judge reasoned that a stipulation serves the same purpose as application of the Section 20(a) presumption. He further determined that as Judge Mahony found claimant was not disabled by any cause, it was irrelevant whether the cervical condition was work- or age- related and, therefore, it was unnecessary to discuss the opinion of Dr. Calhoun as to causation. The administrative law judge reasoned that as the Board vacated Judge Mahony's decision only on the basis of causation, a finding that a causal connection existed renders the Board's command to address the nature and extent of disability unnecessary. The administrative law judge nevertheless adopted Judge Mahony's finding that claimant is capable of performing his previous work and was thus not disabled, noting that the Board found no error in Judge Mahony's opinion that claimant is capable of performing his previous work and that therefore this finding constitutes the rule of the case. The administrative law judge also denied claimant a nominal award. Finally, the administrative law judge awarded claimant medical benefits for his work-related neck and toe treatment.

In the current appeal, claimant appeals the denial of benefits related to his cervical condition. Claimant argues that the administrative law judge erred in refusing to follow the Board's order to determine whether his alleged cervical disability is work-related pursuant to the Section 20(a) presumption, in failing to discuss Dr. Calhoun's opinion, in finding that claimant is capable of performing his usual work, and in denying a nominal award. Employer responds, urging affirmance. Claimant replies, reiterating his arguments.

We agree with claimant that the case must be remanded once again. Section 802.405(a) of the regulations, 20 C.F.R. §802.405(a), governing the operations of the Benefits Review 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." *See generally Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). Judge Holmes stated that he need not address the causation issue as the parties stipulated that claimant's neck injury is work-related. Nevertheless, an issue herein is whether claimant's disabling cervical condition is related to the work injury.

While Section 20(a) does not aid claimant in establishing the degree of disability, it is applicable in analyzing the cause of a disabling condition. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). Contrary to the administrative law judge's decision, the parties' stipulation that claimant initially sustained a work-related neck injury does not answer the question as to the cause of his continuing cervical condition. As this issue was raised by Judge Mahony's decision, the administrative law judge's determination that the instant case does not present a causation issue cannot be affirmed.

In this case, claimant is entitled to invocation of the Section 20(a) presumption as a matter of law, as it is undisputed that he sustained a harm, a cervical sprain, and that an incident occurred on May 11, 1991, while he was inspecting a ship, which could have caused the harm or aggravated an existing condition. *See, e.g.*, *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998). 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 American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT) (7th Cir. 1999)(*en banc).* The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). In this case, Drs. Tesar and Platt in their February 24, 1994, report concluded that claimant has degenerative disk disease of the cervical spine on the basis of aging, that a minor injury would neither cause the degenerative disk disease nor accelerate or aggravate it, and that claimant's disease and symptoms are totally unrelated to his work injuries or activities. Emp. Ex. 4 at 18. Contrary to claimant's contention, we hold that this report constitutes substantial evidence to support a finding that claimant's cervical condition was not caused or aggravated by the work injury.[1] Therefore, this evidence is sufficient to rebut the Section 20(a) presumption as a matter of law. *Duhagon*, 169 F.3d at 615, 33 BRBS at 1 (CRT).

[1]Claimant alleges that it was patently unreasonable to credit the opinions of Drs. Tesar and Platt as Dr. Tesar previously testified in another case that heavy work activity can affect degenerative disk disease. Employer's burden on rebuttal is one of production, and this argument, which goes to the weighing of the evidence, does not affect the fact that employer produced medical evidence sufficient to rebut the presumed causal relationship.

Once the Section 20(a) presumption is rebutted, however, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). Claimant correctly contends that in assessing the cause of claimant's condition, neither Judge Mahony nor Judge Holmes discussed the opinion of Dr. Calhoun.[2] The administrative law judge found it unnecessary to discuss this opinion, based on his conclusion that causation was not at issue. He noted, however, that Dr. Calhoun's October 21, 1993 opinion that claimant's bulging disk is work-related was a vague diagnosis which does not comport with an earlier, January 6, 1992, report finding degenerative disk disease but no other abnormalities. However, neither judge fully weighed all of the relevant evidence of record, addressing whether claimant's ongoing neck problems are work-related. This issue also requires that the evidence be weighed consistent with the aggravation rule, under which it is well-settled that where a work injury aggravates, accelerates or combines with a pre-existing condition, the entire resultant disability is compensable. *See Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999). Thus, the administrative law judge must consider whether claimant's work injury aggravated his degenerative disk disease to result in his continuing symptomatology. The case is therefore remanded for weighing of the evidence related to the cause of claimant's cervical condition based on the record as a whole.

Claimant's argument that the administrative law judge did not follow the Board's instructions to address the issue of the extent of claimant's disability, including whether claimant has suffered a post-injury loss in wage-earning capacity and thus is entitled to permanent partial disability compensation pursuant to Section 8(c)(21), has merit as well. The administrative law judge, in declining to analyze the issue of extent of disability, stated

[2]Claimant's argument that Judge Holmes could not assess Dr. Calhoun's opinion because he did not observe him is without merit, as weighing the medical opinions has nothing to do with observing demeanor or determining veracity. Dr. Calhoun provided his opinion by way of reports; he did not testify. Judge Mahony did not observe him personally either, and there is no requirement that an administrative law judge must observe a medical expert in order to weigh his or her medical opinion.

that as the "Board has found no error in Judge Mahony's opinion in this regard [ability to perform usual job] I must accept [his] analysis as the rule of the case." Decision and Order On Reremand at 4. The administrative law judge noted that the Board focused on only one of the grounds on the basis of which Judge Mahony found claimant could perform his usual work, *i.e.*, the testimony of Drs. Tesor and Platt that claimant does not have a work-related disability, without specifically addressing the administrative law judge's finding that claimant can perform his usual employment.

Contrary to Judge Holmes's decision, the Board's prior decision recognized that, in addition to the cause of claimant's disabling condition, Judge Mahony's denial of benefits was also premised on claimant's ability to perform his usual work. In this regard, the Board did address this issue in stating that, on remand, "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." *Coury*, slip op. at 4 (Aug. 25, 1998).[3] Claimant has the burden of establishing his inability to perform his usual work because of his injury. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197, 201 (1998). Claimant testified that he could not return to his painting trade if he had to perform its physical aspect. Tr. at 72. He testified that as a paint supervisor with employer prior to the injury, he was not doing the physical painting or handling the tools, but still had to crawl through small spaces holding his neck in hyperextended position for extended periods while inspecting paint jobs. Tr. at 56-57. Claimant said that after the accident he tried to avoid crawling through tight areas and going down vertical ladders. In his post-injury job as a paint superintendent with a different employer, claimant testified that he did not have to do any of the physical work that he did at his job prior to the injury; moreover, in his new job, he supervised three employees, whereas in his former job he supervised up to 300. Tr. at 82. On remand, the administrative law judge must determine if claimant is capable of performing all of the duties of his former employment with employer. *See Delay*, 31 BRBS at 197. If he cannot, claimant has established a *prima facie* case of total disability. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). The administrative law judge then must consider whether claimant has a loss in wage-earning capacity in his post-injury job considering relevant factors. If after considering this evidence the administrative law judge finds that claimant cannot return to his usual work, he is instructed to render findings as to claimant's residual wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

[3]Judge Mahony framed the issue of disability as "whether claimant is capable of performing the duties required of a paint supervisor." Decision and Order on Remand at 14. However, the fact that a claimant has the same job title pre- and post-injury is irrelevant if the duties of the two positions are not the same. *See Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70, 72-73 and n.5 (1997). Thus, the administrative law judge must address whether claimant is capable of performing the duties of his pre-injury job.

Claimant next challenges the administrative law judge's denial of a nominal award in the event he finds that claimant has no current loss in wage-earning capacity. A claimant is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity, but there is a significant potential of future economic harm due to the injury. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997). In this case, the administrative law judge, although citing *Rambo*, erroneously based his denial partly on the premise that such awards "are frowned upon by the Board." Decision and Order on Reremand at 4. As the United States Supreme Court in *Rambo* has spoken on this issue, its determination of course supersedes any prior statement by the Board in this regard. Moreover, prior to *Rambo*, the Board acquiesced in the holdings of the several circuits to endorse nominal awards. *See Ward v. Cascade Gen'l, Inc.*, 31 BRBS 65 (1995). In addition, the administrative law judge applied an erroneous standard in denying a nominal award on the reasoning that: "[a]ny *significant* loss of wage-earning capacity under the circumstances of this case would be purely speculative." Decision and Order on Reremand at 4 (emphasis added). Contrary to the administrative law judge's statement, in order to receive a nominal award, claimant does not need a significant loss in wage-earning capacity, but rather must show a significant possibility of a future loss in earning capacity. Claimant argues that he is entitled to a nominal award based on his physical impairments, a currently beneficent employer, and employer's recognition that claimant must now delegate certain physical tasks required in his work. *See Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT) (D.C. Cir. 1984). If, on remand, the administrative law judge again determines that claimant has no current loss in wage-earning capacity, he must reconsider claimant's entitlement to a nominal award in accordance with the correct standard.

Claimant's counsel has submitted an application for an attorney's fee for work performed before the Board between January 8, 1996, and August 31, 1998, in connection with the two previous appeals. BRB Nos. 96-0535, 97-1675. He requests a fee of $6,126.75, representing 3.125 hours at $225 per hour for Attorney Hytowitz, 19 hours at $225 per hour for Attorney Udziela, and 8.5 hours at $135 per hour for Attorney Flynn. Employer responds, alleging the request is premature, as claimant has not obtained any economic benefits and that, although claimant obtained medical benefits, the exact amount has not been ascertained by the district director.[4] In the alternative, employer contends that the fee requested should be reduced to not more than $1,000, based on claimant's limited success, citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Employer also argues that the

[4]Employer asserts that claimant has thus far presented bills totaling $1,420.40. Emp. Response to Attorney Fee Application at 5.

hourly rate should be reduced to $175 per hour from $225. Claimant replies, alleging he is entitled to an attorney's fee based on the award of medical benefits by the administrative law judge, as a result of the Board's second remand, which employer has not appealed, and which has therefore become final. Claimant reasserts his entitlement to the requested hourly rate.

Since as a result of the first appeal the Board determined that claimant's claims were timely filed, and claimant prevailed as a result of the second appeal in obtaining medical benefits related to work-related cervical and toe problems, claimant's attorney is entitled to a fee to be assessed against employer pursuant to Section 28 of the Act, 33 U.S.C. §928. *See generally Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987); *Morgan v. General Dynamics Corp.*, 16 BRBS 336, 339 (1984). As we are again remanding the case for causation and disability findings, however, and it is uncertain whether and to what degree claimant will prevail on these issues, claimant's ultimate success is at present unknown. We therefore decline to award claimant's counsel an attorney's fee at this time, as the basis upon which we would determine the amount of such a fee is uncertain. We direct claimant's counsel to resubmit a fee petition at the conclusion of the proceedings on remand. *See* 20 C.F.R. §802.203(c).

Accordingly, the Decision and Order on Reremand denying disability benefits is vacated, and the case is again remanded for further consideration consistent with this opinion. The award of medical benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge