BRB No. 08-0715

R.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYERS INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 03/18/2009
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

R.B., New Llano, Louisiana, *pro se*.

Patricia A. Krebs and Megan Cole Misko (King, Krebs & Jurgens, P.L.L.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, without legal representation, appeals the Decision and Order on Remand (2005-LDA-00010) of Administrative Law Judge Patrick M. Rosenow 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). In an appeal by a claimant without representation by counsel we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law 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). If they are, they must be affirmed.

This is the second time this case has come before the Board, and a brief review of the facts is in order. Claimant worked as a cook for employer at Bagram Air Force Base in Afghanistan. He alleges he fell into a pothole and injured his back while walking back to his quarters after work sometime during late 2002.[1] Claimant testified he continued performing his regular duties, receiving help from co-workers when it was necessary to lift heavy items, until he returned to the United States in August 2003 for treatment of an unrelated gastrointestinal disorder. In November 2003, claimant saw Dr. Steiner for his back condition. Claimant has not worked since he departed Afghanistan, and he filed a claim for compensation and medical expenses for his back injury.

The administrative law judge found that claimant is entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that his back condition is related to his fall at work, that employer rebutted the presumption with evidence of a pre-existing back condition, and that, on the record as a whole, claimant did not establish that his back condition is related to his employment. The administrative law judge, therefore, denied benefits. Decision and Order at 17-19.

Claimant appealed, and the Board vacated the denial of benefits. Specifically, the Board instructed the administrative law judge to address whether employer rebutted the Section 20(a) presumption with substantial evidence that the fall at work did not aggravate claimant's pre-existing back condition. *[R.B.] v. Service Employers Int'l, Inc.*, BRB No. 06-0486 (Mar. 14, 2007). On remand, the administrative law judge permitted the parties to submit additional evidence and briefs. He found that Dr. Steiner's opinion rebuts the presumption that claimant's back condition was aggravated by the fall at work. Decision and Order on Remand at 3. On the record as a whole, in light of his findings regarding claimant's limited credibility and the diminished probative value of the opinions of Drs. Steiner and Velinker, the administrative law judge concluded that claimant does not suffer from a herniated nucleus pulposus and has not shown that his back condition was made symptomatic or was aggravated or accelerated by his 2002 fall at work. *Id.* at 4. Accordingly, the administrative law judge denied benefits. Claimant appeals, and employer responds, urging affirmance.

[1]Claimant is unclear as to the exact date of the incident but believes it was either the evening of Thanksgiving or Christmas. Jt. Ex. 1.

Where the claimant establishes a *prima facie* case and Section 20(a) applies to relate the disabling injury to the employment, as here, the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). When aggravation of a pre-existing condition is claimed, the employer must produce substantial evidence that work events neither directly caused the injury nor aggravated the pre-existing condition to result in injury. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If a work-related injury contributes to, combines with, or aggravates a pre-existing condition, the entire resultant condition is compensable. *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (5th Cir. 1949).

In this case, it is undisputed that claimant has had back pain since the late 1980s, that he has had previous back injuries in 1990 and 1994, and that the Veterans Administration (VA) rated him as having a 10 percent impairment to his back in 2000. *See* Cl. Rem. Ex. 2 at 15, 22; Emp. Rem. Exs. D-F; Jt. Ex. 3. After his 2002 fall, claimant testified that he went to the military clinic, and he took anti-inflammatory medication and pain relievers for his back pain. After returning to the United States in August 2003, claimant first saw Dr. Steiner, his treating physician, in November 2003. Upon examination, Dr. Steiner found some positive results, including tenderness at L2, and because x-rays revealed no abnormalities, he recommended an MRI and EMG. Jt. Ex. 12. The MRI revealed degenerative changes, and the EMG revealed a possible herniated disc; Dr. Steiner diagnosed a herniated nucleus pulposus, and gave claimant medications. Jt. Exs. 11-12; Cl. Rem. Ex. 2 at 44-47; *see* Decision and Order at 14. Dr. Steiner also stated that claimant may require surgery at some point and that he should be limited to light or sedentary work. *Id.* Following the December 2003 appointment, carrier told Dr. Steiner that it would not pay for claimant's treatment. Thereafter, claimant was treated at the VA, and subsequent x-ray and MRI studies revealed early changes related to degenerative disc disease but no herniations. Jt. Ex. 3. Because it is undisputed that claimant's back condition pre-existed his 2002 fall, claimant is entitled to the benefit of the Section 20(a) presumption that the 2002 fall aggravated his condition or combined with it, resulting in his current back condition. *See Nash*, 782 F.2d 513, 18 BRBS 45(CRT).

The administrative law judge found the opinion of Dr. Steiner sufficient to rebut the Section 20(a) presumption. Upon questioning in his deposition, Dr. Steiner stated that there could be "lots of different reasons" for a herniation,[2] two of which are injuries and degenerative changes. Cl. Rem. Ex. 2 at 41. He also stated that he did not believe any one of claimant's prior back injuries caused his current back condition, although he acknowledged that the injuries could have been additive in that heavy activity can lead to degenerative changes. *Id.* at 41-42. The administrative law judge found that Dr. Steiner's opinion that a herniation could be caused by accumulative degenerative changes and injuries rebuts the Section 20(a) presumption. He stated that this constituted "substantial evidence of an alternative to the presumption of aggravation by the fall." Decision and Order on Remand at 3.

We cannot affirm this finding. Dr. Steiner did not opine that claimant's 2002 fall did not aggravate claimant's pre-existing back condition. The doctor's suggestion of alternative ways in which claimant's current condition could have been caused, *i.e.,* by the degenerative condition or the prior injuries, cannot rebut Section 20(a) as it involves speculation on his part as to the cause of injury. *See Conoco*, 194 F.3d at 687-688, 33 BRBS at 188(CRT) (rebuttal requires facts, not mere speculation); *American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT) (opinion which is speculative is insufficient to meet burden of production); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976) (mere hypothetical probabilities cannot rebut Section 20(a)); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988) (statement that fibrosis was "perhaps" related to inflammatory disease not sufficient to rebut presumption). Moreover, Dr. Steiner also acknowledged that claimant's injuries could have been additive as heavy labor can lead to degenerative changes. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597 38 BRBS 60(CRT) (1st Cir. 2004) (in a claim based on workplace stress, doctor's opinion that stress could aggravate prior condition did not rebut). Dr. Steiner's opinion is thus not substantial evidence that claimant's work injury did not aggravate or combine with his pre-existing degenerative disease or prior injuries. As there is no other medical evidence of record which could rebut the presumed relationship between claimant's 2002 fall at work and his current back condition, his back condition is work-related as a matter of law and we reverse the administrative law judge's finding to the contrary. *See Conoco*, 194 F.3d 684, 33 BRBS 187(CRT); *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). Therefore,

[2]The administrative law judge ultimately found that claimant does not have a herniated nucleus pulposus. Claimant's specific diagnosis is not controlling here in determining whether employer submitted substantial evidence to rebut the presumption of aggravation. The presumption applies to relate claimant's current back condition to a work incident which could have aggravated, combined with or contributed to that condition.

we vacate the administrative law judge's denial of benefits, and we remand this case for consideration of any remaining disputed issues.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded for consideration of the remaining disputed issues.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge