BRB No. 01-0686

KURT ROBINSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHRISTINA SERVICE COMPANY	)	DATE ISSUED: MAY 20, 2002
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Picard Losier, Philadelphia, Pennsylvania, for claimant.

Michael D. Schaff (Naulty, Scaricamazza & McDevitt), Philadelphia, Pennsylvania, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-LHC-1659) of Administrative Law Judge Ralph A. Romano 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).

Claimant, a laborer, sustained a work-related injury on September 25, 1997, when steel coils struck his left ankle. Employer voluntarily paid claimant compensation for temporary total disability and medical benefits from September 26, 1997, through December 15, 1997. Claimant returned to his usual employment on January 4, 1998, without restrictions, but stopped working on October 5, 1998, allegedly due to an inability to work due to the 1997 injury. Dr. Sharps performed surgery on claimant's left ankle on August 16, 1999. Claimant filed a claim, seeking continuing temporary total disability benefits from

October 1998, and payment of medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

In his decision, the administrative law judge found that claimant did not establish that his 1997 work injury necessitated surgery in August 1999, or caused any disability after December 15, 1997. On appeal, claimant contends that the administrative law judge erred in finding that he is not entitled to compensation or medical benefits after December 15, 1997. Employer responds, urging affirmance.

We first address claimant's contention that he is entitled to continuing total disability benefits since leaving work on October 5, 1998. Claimant bears the burden of establishing the nature and extent of his disability without the aid of the Section 20(a) presumption, 33 U.S.C. §920(a). *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994). Thus, we reject claimant's contention that the administrative law judge erred in placing the burden on him to establish his inability to perform his usual work. *See generally Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT)(2d Cir. 1991). Moreover, substantial evidence supports the administrative law judge's finding that claimant was able to work without restrictions from December 15, 1997, through August 16, 1999, and from February 2000 forward.[1] The administrative law judge was not required to credit Dr. Sharps's opinion that claimant was unable to work due to the work injury beginning in October 1998, in view of the contrary medical evidence of record. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Thus, we affirm the denial of benefits for these periods.

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[1]On December 15, 1997, Dr. Hershey returned claimant to full duty work. EX 12. On January 19, 1999, Dr. Okereke, retained by the Department of Labor, stated that claimant had no residual impairment in his ankle that would preclude his return to his normal duties. EX 17. Claimant underwent surgery in August 1999. In February 2000, Dr. Lee, also retained by the Department of Labor, stated that claimant could return to any occupation, including that of longshoreman, and that claimant did not have any residual impairment. EX 25, 29. Similarly, in October 2000, Dr. Lefkoe opined that claimant has a zero percent permanent partial disability. EX 28.

We must remand this case, however, for reconsideration of claimant's entitlement to medical benefits, including the surgery performed by Dr. Sharps, as well as claimant's entitlement to disability benefits for his period of recovery following the surgery. Section 7 does not require that an injury be economically disabling in order for a claimant to be entitled to medical expenses, but only that the injury be work-related. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994)(decision on recon. *en banc*); *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); 20 C.F.R. §702.402. Dr. Sharps performed surgery on claimant's ankle on August 16, 1999; he decompressed both peroneal tendons on the outer side of the ankle, as well as the posterior tendon on the medial aspect of the ankle. Dr. Sharps also performed a neurolysis of the posterior tibial nerve. CX 1 at 14. He opined that the surgery was necessary and causally related to the work injury of September 1997. *Id.* In finding that claimant was not entitled to additional medical benefits, the administrative law judge found that claimant "has not provided preponderant, rational medical evidence to explain how the injury he sustained in September 1997 resulted in his need for surgery . . . Even Dr. Sharps . . . failed to explain how the Claimant's present complaints were a result of the September, 1997, work-related injury and not from his numerous other accidents that predated the work-related accident." Decision and Order at 6.

The administrative law judge applied erroneous legal standards to the issue of claimant's entitlement to medical benefits. By virtue of the Section 20(a) presumption, which is applicable to the causation issue presented,[2] it is employer's burden to introduce

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[2]Claimant is entitled to invocation of the Section 20(a) presumption with regard to whether his ankle condition, a harm, is related to his work. His claim thus goes beyond "mere fancy;" indeed, Dr. Sharps related claimant's condition and the need for surgery to the work accident. *See generally Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

substantial evidence that claimant's condition is not due to the work injury. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). Thus, the mere fact that claimant sustained prior injuries does not establish that claimant's current condition is not due to the work injury.[3] On remand, the administrative law judge should discuss whether employer rebutted the Section 20(a) presumption that the condition which necessitated surgery was due to the work injury.

[3]In this regard, we note that claimant does not contend on appeal that his work injury aggravated any prior conditions, as he did not injure his ankle previously. Cl. Brief at 3, 5.

Moreover, a claimant establishes a *prima facie* case for compensable medical treatment, including surgery, where a qualified physician states that the treatment was necessary for a work-related condition. *See Romeike v. Kaiser Shipyards*, 22 BRBS 271 (1989); *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1988); *see also Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). The administrative law judge did not discuss Dr. Sharps's opinion that claimant's 1999 surgery was necessary and causally related to claimant's work injury, despite having referenced this statement elsewhere in his decision. *See* Decision and Order at 4; CX 1 at 14, 19-20.[4] Dr. Lee, who examined claimant after the surgery, stated in this deposition that he had no personal opinion regarding the need for surgery. EX 29 at 40. He did state that he was not convinced that claimant had tarsal tunnel syndrome as diagnosed by Dr. Sharps. *Id.* Consequently, as the administrative law judge did not evaluate claimant's entitlement to medical benefits under the proper standards, we vacate the administrative law judge's denial of medical benefits after December 15, 1997, and remand this case to the administrative law judge for consideration consistent with this opinion. *See generally Rogers Terminal & Shipping Co. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *see also* 5 U.S.C. §557(c)(3)(A). If the administrative law judge finds that the surgery was necessary for claimant's work injury, he must also consider claimant's entitlement to disability benefits for his period of recovery.

Accordingly, we affirm the administrative law judge's denial of disability benefits from October 5, 1998 to August 16, 1999, and from February 2000 and continuing. We vacate the denial of medical benefits, and disability benefits from August 16, 1999 to February 2000, and we remand the case for further findings consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[4]X-rays of claimant's left ankle and foot were negative. An October 9, 1997, bone scan was normal, as were EMG and nerve conduction studies. Nevertheless, Dr. Sharps diagnosed claimant as suffering from a nerve compression as a result of his work accident, and performed surgery to correct the condition after conservative measures, such as injections, failed. Additionally, Dr. Sharps testified that even with a normal EMG and nerve conduction study, it is possible for claimant to have suffered a compressed nerve condition.

PETER A. GABAUER, Jr.
Administrative Appeals Judge