BRB No. 08-0561

D.R.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: 11/25/2008
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Janmarie Toker (McTeague, Higbee, Case, Cohen, Whitney & Toker, P.A.), Topsham, Maine, for claimant.

John King, Jr. and C. Lindsay Morrill (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2007-LHC-0923) of Administrative Law Judge Jeffrey Tureck 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 sustained a fracture of his right heel in 1987. Claimant commenced employment with employer in January 1988. In January 2006, claimant reported to employer that his working conditions aggravated his underlying degenerative joint disease. Claimant underwent surgery on his subtalar joint on August 18, 2006, and August 10, 2007. Claimant sought temporary total disability from August 18, 2006, to

January 2, 2007, and from August 10, 2007 to August 26, 2007, as well as medical benefits.

In his Decision and Order, the administrative law judge found claimant entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), that his foot condition is related to his employment. Finding that employer failed to establish rebuttal of the Section 20(a) presumption, the administrative law judge awarded claimant disability compensation and medical benefits.

On appeal, employer contends the administrative law judge erred in finding that claimant established his *prima facie* case for invocation of the Section 20(a) presumption and that it did not produce substantial evidence to rebut the presumption. Claimant responds, urging affirmance of the award of benefits.

In establishing that an injury is work-related, claimant is aided by Section 20(a) of the Act which provides a presumed causal nexus between the injury and the employment. In order to be entitled to the Section 20(a) presumption, however, claimant must establish a *prima facie* case by proving the existence of a harm and that a work-related accident occurred or that working conditions existed which could have caused the harm alleged. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

In this case, as employer concedes, claimant satisfied the "harm" element of his *prima facie* case, as the administrative law judge found claimant credibly testified to foot pain and has been diagnosed with severe degenerative disease of the right subtalar joint which required surgery. Tr. at 19-21; CX 11. Employer contends that claimant failed to invoke Section 20(a) as, pursuant to *U.S. Industries*, harm alone is insufficient to invoke the presumption. Employer's argument must be rejected; the administrative law judge did not rely on the existence of harm alone to invoke Section 20(a), but properly addressed the conditions of claimant's employment. Moreover, substantial evidence supports the finding that claimant demonstrated the existence of working conditions which could have caused his harm. The administrative law judge credited claimant's testimony that his job duties require lifting heavy objects, climbing ladders, and working on uneven surfaces, all of which, the administrative law judge concluded, could have caused claimant foot pain, particularly when considered in combination with claimant's pre-existing condition. Decision and Order at 3. Tr. at 17-19. The administrative law judge found that Dr. Pavlak stated that claimant's work accelerated claimant's arthritis and his need for surgery. CX 11 at 52. Thus, as claimant has established that his work environment could have aggravated his physical condition, the administrative law judge

properly invoked the Section 20(a) presumption. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT).

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 due to his working conditions. *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998). As claimant had a pre-existing foot condition, employer must produce substantial evidence that claimant's working conditions did not aggravate or render symptomatic claimant's condition in order to rebut the Section 20(a) presumption. *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). Employer contends the administrative law judge erred in finding the opinion of Dr. Flanigan insufficient to rebut the Section 20(a) presumption.

Dr. Flanigan opined that claimant's condition could not be related to his employment with certainty. He stated that any ambulation has the potential to render symptomatic an arthritic subtalar joint, and that, without proof that claimant's only weight-bearing activities occurred at work, he could not state that claimant's work accelerated or aggravated his condition. EX 24 at 242. Dr. Flanigan also noted the absence of any traumatic injury to claimant's foot and stated that claimant's current symptoms likely would be the same notwithstanding his work. *Id.*

We affirm the administrative law judge's finding that Dr. Flanigan's opinion does not rebut the Section 20(a) presumption. The administrative law judge found it insufficient to rebut because the absence of a traumatic injury is not relevant to this claim, which is based on a gradual aggravation of an underlying condition. *See Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). The administrative law judge also found that as Dr. Flanigan stated that ambulation accelerates a condition such as claimant's and as claimant's job entails this activity, Dr. Flanigan's opinion is not substantial evidence of the absence of a work-related condition. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). While Dr. Flanigan was unable to affirmatively find a causal connection between claimant's condition and his employment duties, it is employer's burden on rebuttal to produce substantial evidence of the absence of such a connection. *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982). The administrative law judge's finding that Dr. Flanigan's opinion does not rebut the Section 20(a) presumption is rational, supported by substantial evidence, and in accordance with law. *Shorette*, 109 F.3d 53, 31 BRBS 19(CRT). Therefore, the award of benefits is affirmed. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge