BRB No. 12-0024

JOSEPH MEEKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIS SALAMIS, INCORPORATED	)	DATE ISSUED: 09/27/2012
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMTED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Harold Eisenman, Houston, Texas, for claimant.

Thomas J. Smith, Mary Lou Summerville and James T. Bailey (Galloway, Johnson, Tompkins, Burr & Smith), Houston, Texas, for employer/carrier.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

HALL, Administrative Appeals Judge:

Claimant appeals the Decision and Order (2010-LHC-1263) 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On April 10, 2009, claimant allegedly sustained back, neck and dental injuries when he fell out of a personnel basket during a transfer from an offshore oil rig onto a vessel. The basket flipped over onto the deck of the vessel in rough seas; several men, including claimant, were dumped from the basket onto the deck. Claimant was taken ashore by helicopter and examined at Terrebone General Medical Center where he was diagnosed with a neck and back strain, provided medication, and discharged with instructions to limit activity, apply heat and ice and follow up with his provider.[1] In follow-up, claimant was taken by employer to the Acadiana Center for Orthopedic and Occupational Medicine for treatment with Dr. Gidman. On April 13, 2009, Dr. Gidman diagnosed lumbar spondylosis from L3 to S1 and cervical spondylosis from C3 to T1, provided claimant with medication and recommended physical therapy, and released claimant to light-duty work. Claimant returned to light-duty work in employer's office. On April 15, 2009, Dr. Gidman noted that a physical examination of claimant's lower back and neck were essentially unremarkable, that straight leg raising "was negative for symptoms of low back pain, sciatica or radiculopathy," and that claimant had full range of motion and sensation in the upper extremities. EX 10. Dr. Gidman, therefore, released claimant to return to regular duty work, following his regularly scheduled seven-day break.[2]

Claimant stated that after four or five days of light-duty work he returned home to Texas as part of a regularly scheduled seven-day break. At the conclusion of his break, claimant stated that he returned first to light-duty, and then to regular-duty, work, but he continued to experience significant back pain. On May 19, 2009, claimant began treating with Dr. Esses in Houston. CX 18. Based on the results of an MRI, Dr. Esses diagnosed cervical spondylosis and lumbar stenosis. CXs 17-18. Dr. Esses treated claimant conservatively, but ultimately recommended lumbar surgery, which employer would not authorize. Therefore, Dr. Esses referred claimant for pain management treatment with Dr. Dent. On December 2, 2009, Dr. Dent assessed claimant as having lumbago, cervical facet syndrome, cervicalgia, and cervical and lumbar neuritis, which, he opined, are a result of his work injury. CX 21. Dr. Dent prescribed pain medications and restricted claimant from any work. Dr. Esses performed surgery on claimant's lower back on September 17, 2010. CX 18 at 10. As of the date of the June 17, 2011 hearing, claimant

[1]Testing conducted at Terrebone included an x-ray, which revealed "extensive degenerative changes, but an otherwise normal lumbar spine," and a CT scan of the cervical spine which indicated "extensive degenerative changes and multi-level cervical spondylosis." CX 14; EX 9.

[2]The record establishes that claimant worked a fourteen days on, seven days off schedule, working 84 hours during the weeks he was on.

stated he was waiting for the scheduling of neck surgery and that he continued to treat with Drs. Esses and Dent, as well as with Dr. Dorsett.

Claimant also was examined, at employer's behest, by orthopedic surgeons Drs. Vanderweide and Likover. After his July 28, 2010 examination of claimant, Dr. Vanderweide concluded that claimant suffers from cervical spondylosis and lumbar stenosis with severe degenerative disc disease, that claimant's accident at work accelerated and aggravated the stenosis originally caused by the degenerative disease, and that surgical decompression was reasonable. He, however, saw no reason for operative attention to claimant's neck. EX 14. Dr. Vanderweide examined claimant again on March 2, 2011. Claimant continued to complain of pain. Dr. Vanderweide stated he was unable to explain the basis for claimant's pain, but believed it was likely due to his significant pre-existing, multi-level degenerative disc disease. He did not believe neck surgery was necessary. In addition, he opined that claimant was addicted to narcotic medication. EX 17. Dr. Likover evaluated claimant on March 3, 2011, and, after reviewing claimant's MRIs, concluded that it would be several months before claimant reached maximum medical improvement following his September 2010 operation. Dr. Likover also concluded that, if the neck pain increased, claimant would be a surgical candidate, although at present he felt more conservative treatment would not be unreasonable. EX 15.

Meanwhile, claimant averred that he sustained dental injuries in the work accident, consisting of two or three broken top teeth and the loosening of one bottom tooth. Claimant stated that after his bottom tooth fell out, he sought treatment with Dr. Um, also in Houston, on May 20, 2009. Dr. Um observed that claimant had knocked out tooth #25 and chipped #8 and #9. Dr. Um made a partial denture for the bottom tooth and capped the upper teeth. CXs 29-30.

Claimant filed a claim seeking ongoing temporary total disability benefits from May 19, 2009, as well as past and ongoing medical benefits, for the back, neck and dental injuries he allegedly sustained on April 10, 2009. Employer controverted the claim, contending claimant was able to return to his usual work no later than April 15, 2009, and thus, suffered no disability and required no medical care beyond April 15, 2009.

In his decision, the administrative law judge found that "there is little doubt" that the work incident occurred on April 10, 2009. The administrative law judge also found that claimant has extensive degenerative changes, spondylosis, and herniations in his neck and back. The administrative law judge also acknowledged the damage to claimant's teeth. In addition, the administrative law judge observed that Dr. Vanderweide opined that claimant's work accident aggravated claimant's underlying

degenerative condition and that Dr. Dent opined that claimant's lumbar and cervical pain is a direct result of the work accident. Decision and Order at 17-18.

Nonetheless, the administrative law judge denied the claim because he found that the medical opinions were based "in large part" on claimant's subjective reports to the physicians. The administrative law judge found that claimant's subjective complaints could not be relied upon because claimant is not a credible witness. In this regard, the administrative law found that a surveillance video "significantly contradicted" claimant's testimony concerning his physical limitations; that claimant filed false tax returns for a number of years; that claimant withheld information from employer and the physicians; and that claimant's most credible statement was immediately after the work accident when he initially said he was "OK." *Id.* at 18-19. The administrative law judge concluded that claimant demonstrated a history of exaggerating or fabricating for personal gain, and that therefore the medical opinions are unreliable and insufficient to establish a new injury or aggravation due to the work incident. With regard to the dental injuries, the administrative law judge found that the absence of evidence of facial bleeding, swelling or bruising belies claimant's claim that he broke his teeth in the fall. The administrative law judge therefore concluded that claimant suffered only the transient strain that was initially diagnosed, and that claimant is not entitled to disability benefits or to medical treatment beyond that provided initially by employer. *Id.* at 19.

On appeal, claimant contends that the administrative law judge erred in finding that he is not entitled to disability and medical benefits for injuries related to the work accident. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

We first address claimant's contention that the administrative law judge erred in denying medical treatment for his dental injuries. Claimant contends that he is entitled to medical benefits for the dental treatment provided by Dr. Um since employer did not present any evidence to rebut the Section 20(a) presumption that he sustained work-related dental injuries. 33 U.S.C. §920(a). Claimant's entitlement to medical benefits must be predicated on the existence of a work injury for which medical treatment is necessary. 33 U.S.C. §907(a); *see, e.g., Schoen v. U.S. Chamber of Commerce,* 30 BRBS 112 (1996); *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981). Whether a specific condition for which claimant has been treated is work-related is an issue to which the Section 20(a) presumption applies. However, the presumption does not aid claimant in establishing entitlement to medical benefits pursuant to Section 7. *See Schoen*, 30 BRBS 112. Claimant must establish that treatment is reasonable and necessary for his work-related condition. *See, e.g., Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

In order to be entitled to the benefit of the Section 20(a) presumption, claimant must establish a prima facie case by showing that he sustained a harm and that an accident occurred that could have caused the harm. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is undisputed that an accident occurred at work in which claimant was dumped out of a basket onto the deck of a vessel. *See* CX 4; EX 20 at 40-44; 21, 22. The administrative law judge found that claimant's dental injuries could not have been caused by this incident because there were no notations of dental injuries in the contemporaneous medical reports. *See* Decision and Order at 17, 19. Claimant did not see Dr. Um until about a month after the accident. CXs 29-30. The administrative law judge inferred that a force strong enough to not only loosen, but to break teeth as well, likely would be accompanied by "bleeding, swelling or bruising," none of which was indicated in the medical records.[3] Therefore, the administrative law judge concluded that the dental injuries are not compensable.

We cannot affirm the administrative law judge's denial of benefits for all the claimed dental injuries, as he did not discuss the evidence and his findings in terms of the Section 20(a) presumption. Claimant does not have to prove that his dental injuries in fact were caused by the accident in order to be entitled to the Section 20(a) presumption, but only that they could have been caused thereby. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998). In this regard, the administrative law judge acknowledged that claimant complained contemporaneously with the accident of a loose tooth. Decision and Order at 19. Specifically, in a statement to employer's investigator the day after the incident, claimant stated, that "I think I got a loose tooth" in the accident. CX 34 at 235. The administrative law found claimant would have mentioned broken teeth at that time as well had he actually broken them at this time. Decision and Order at 19. While the administrative law judge's inferences regarding the broken teeth are rational, *see Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995), he did not address the work-relatedness of the loose tooth of which claimant complained right after the accident, consistent with Section 20(a). We, therefore, must vacate the administrative law judge's finding that claimant did not sustain any dental harm as a result of the April 10, 2009 work incident and the denial of medical benefits for any such injury. We remand the case for the administrative law judge to address the compensability of this dental injury consistent with Section 20(a) and Section 7. *See generally Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979).

[3]The ambulance records note "injury back, pain neck, injury face and/or neck." EX 8. The emergency room chart from claimant's visit at Terrebone on April 10, 2009, lists claimant's complaints only as "back pain (lower back and neck pain)." CX 14.

Claimant also contends the administrative law judge's denial of benefits for his alleged work-related back and neck injuries is not supported by substantial evidence. Claimant contends that the administrative law judge failed to give proper weight to the medical evidence of record. Claimant further avers that he is entitled to medical benefits because the treatment was necessary and employer failed to authorize it.

We agree with claimant that the administrative law judge's denial of benefits for claimant's back and neck conditions cannot be affirmed. While we are mindful of the great discretion afforded an administrative law judge in making determinations concerning the credibility of witnesses, *see, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), in this instance the administrative law judge failed to provide any legal framework for his finding that claimant is not entitled to additional benefits. As discussed above, Section 20(a) of the Act provides a claimant with a presumption that his physical harm is related to the work accident provided claimant establishes the elements of a prima facie case: a harm and the occurrence of an accident that could have caused his harm. *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT). Claimant need not establish an actual causal relationship between the two in order for Section 20(a) to apply. *Ceres Gulf, Inc. v. Director, OWCP*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). If invoked, Section 20(a) applies as well to presume that claimant's work injury aggravated a pre-existing condition. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

In this case, the administrative law judge did not explicitly discuss the Section 20(a) presumption, although he seemingly found the presumption invoked because he acknowledged that claimant sustained a "transient strain" in the work accident. Decision and Order at 19. Because the administrative law judge did not address the applicability of Section 20(a) with respect to claimant's ongoing complaints of back and neck pain, we must vacate the denial of benefits and remand the case for him to do so. The administrative law judge cannot place on claimant the burden of establishing that the work accident actually caused or aggravated his physical complaints; Section 20(a) provides this link if claimant establishes that the work accident could have caused or aggravated his harm.[4] *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986). Claimant's claim need only go "beyond mere fancy." *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982); *Wheatley v. Adler*, 407

[4]The work accident unquestionably occurred, as the administrative law judge found. There are several contemporaneous accounts of the accident from all those involved in it -- claimant, his co-workers, the captain of the vessel -- as well as from claimant's supervisor. *See* CX 4; EXs 20-22. In addition, claimant unquestionably has physical harm beyond the transient strain as demonstrated by objective medical tests and for which he underwent back surgery. *See* CXs 17-18; EX 14 at 4.

F.2d 307 (D.C. Cir. 1968). Therefore, we remand the case for the administrative law judge to address whether the Section 20(a) presumption applies to claimant's continuing back and neck conditions.

Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See, e.g., Ceres Gulf*, 683 F.3d 225, 46 BRBS 25(CRT); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003). When, as here, it is alleged that a prior injury is the cause of claimant's current condition, the aggravation rule is implicated. The aggravation rule states that if an employment-related injury contributes to, combines with, or aggravates a pre-existing condition, employer is liable for the entire resulting disability. *See, e.g., Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc). In order to rebut the Section 20(a) presumption in such a case, employer must produce substantial evidence that the pre-existing condition was not aggravated by claimant's work-injury. *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT). The mere existence of a prior back injury does not establish that the current condition is due to that injury or that the pre-existing condition was not aggravated by the work accident. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

As the administrative law judge did not specifically address the applicability of the Section 20(a) presumption in the first instance, he did not address whether employer produced substantial evidence that claimant's condition was not caused or aggravated by the work accident. We, therefore, remand this case for the administrative law judge to do so should he find the Section 20(a) presumption invoked. It is for the administrative law judge to make this assessment in the first instance. *Ceres Gulf*, 683 F.3d 225, 46 BRBS 25(CRT); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994). If the presumption is rebutted, the administrative law judge must determine the work-relatedness of claimant's condition on the record as a whole, an issue on which claimant bears the burden of persuasion. *Ceres Gulf*, 683 F.3d 225, 46 BRBS 25(CRT).

If, on remand, the administrative law judge finds that claimant's back and neck injuries are work-related, either because employer did not produce substantial evidence to rebut the Section 20(a) presumption or because claimant established the work-relatedness of his conditions based on the record as a whole, the administrative law judge must address claimant's entitlement to medical benefits pursuant to Section 7 of the Act. The record indicates that at least by the time of the informal conference in March 2010, if not earlier, claimant requested authorization for treatment and/or surgery and that employer refused to grant authorization. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). The

administrative law judge must make a finding on claimant's entitlement to medical benefits consistent with law. *See Jenkins,* 594 F.2d 404, 10 BRBS 1. We note in this regard that there is no evidence that the back surgery was unnecessary and that there is conflicting evidence on the necessity of proposed neck surgery. *See* CX 10; EXs 14, 15, 17. In addition, the administrative law judge must resolve any other issues raised by the parties. *See* Decision and Order at 19 n. 56.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL
Administrative Appeals Judge

I concur:

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JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's determination that the administrative law judge erred in failing to apply the Section 20(a) presumption to claimant's allegation of a loose tooth. I dissent, however, from the majority's determination to remand the case for the administrative law judge to reconsider the applicability of the Section 20(a) presumption to claimant's allegation of a back/neck injury. I would hold that the administrative law judge erred in finding rebuttal established as of the conclusion of claimant's back treatment by employer's doctor. I would remand for the administrative law judge to reconsider rebuttal, medical benefits and disability compensation.

There is no dispute that the administrative law judge invoked the Section 20(a) presumption to find that the work accident on April 10, 2009 had aggravated a pre-existing condition and that employer had rebutted the presumption that those complaints of claimant which continued after treatment by employer's doctor ended on April 15,

2009, were related to the work accident. Decision and Order at 19.[5] The administrative law judge concluded that the presumption fell out of the case and the credible evidence failed to establish that claimant's medical condition after April 15, 2009 was related to his work accident.

On appeal, claimant argues that the administrative law judge erred in substituting his interpretation of the evidence for that of claimant's treating physician and employer/carrier's independent medical examiner. Brief for Claimant at 5. I agree with claimant. Substantial evidence does not support the administrative law judge's determination that claimant's back injury required only the medical treatment provided by employer. When employer's physician, Dr. Gidman, last saw claimant on April 15, 2009, he told claimant to continue taking extra-strength Tylenol for pain and Ecotrin coated aspirin twice a day for anti-inflammatory effect; he ordered formal physical therapy for the following two days (Thursday and Friday); and, he authorized claimant, after taking the following week off in accordance with his schedule, to return to his regular work. EX 10 at 27. Dr. Gidman scheduled a follow-up appointment for May 12, 2009. By that time, claimant had returned home to Houston and scheduled an appointment for May 19, 2009 with Dr. Esses, an orthopedic surgeon.

Dr. Gidman's treatment record does not establish that claimant's work-aggravated injury had resolved by April 15, 2009, but that the doctor hoped and expected it would resolve before claimant was due to resume regular work, eleven days later. Because Dr. Gidman's records do not show that the aggravation of claimant's pre-existing injury had fully resolved when he last saw claimant, the administrative law judge erred in finding that the aggravation had ended with claimant's treatment by employer's doctor. Accordingly, I would hold as a matter of law that the administrative law judge erred in finding that employer established that claimant's continuing complaints after treatment with employer's physician were unrelated to the work accident.

The administrative law judge acknowledged that one of employer's experts, Dr. Vanderweide, an orthopedic surgeon who saw claimant before and after his back surgery, opined that claimant's work accident accelerated and aggravated the stenosis originally

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[5]The administrative law judge concluded:

> I find the credible evidence of the record insufficient to find that Claimant sustained any new injuries or aggravated any preexisting conditions beyond the transient strain that was initially diagnosed, and required only that medical treatment provided by Employer, and resulted in no loss of wages.

Decision and Order at 19.

caused by claimant's degenerative disk disease, and that his symptoms and injuries were a direct result of the work accident. Decision and Order at 18. The doctor considered surgical decompression to be reasonable. After examining claimant post-surgery, Dr. Vanderweide opined that claimant's continuing lumbar symptoms were due to claimant's pre-existing condition and that his cervical complaints could not be explained physically. Decision and Order at 14.

The administrative law judge also acknowledged that Dr. Dent, a pain management specialist, attributed claimant's symptoms, both before and after surgery, to his work accident. The administrative law judge stated that Dr. Dent "noted that the objective findings were consistent with the subjective complaints and concluded that claimant would have low back pain for the rest of his life because of the delay in obtaining the surgery." Decision and Order at 13.

The administrative law judge discredited the medical opinions relating claimant's complaints to his work injury because they were "based on the history and subjective reports of increased pain given by claimant, who appears to be so inclined to exaggerate, fabricate, and omit for personal gain that he is essentially totally unreliable." Decision and Order at 19. The administrative law judge did not discuss the specific account of the work injury contained in each medical opinion, nor the other bases the doctors cited as supporting their opinions. I believe that before the administrative law judge could properly discredit the doctors' opinions as based on erroneous information, the administrative law judge was obliged to review all of the evidence in the record regarding the work accident, which was described by claimant's co-workers and employer's representative, as well as by claimant; make a determination of what happened to claimant; and then compare what is known about the accident with the accounts on which the doctors relied in formulating their opinions. E.g., EX 14 at 1 (Dr. Vanderweide); CX 21 at 156 (Dr. Dent). If the administrative law judge determines that a doctor's opinion was partially based upon erroneous information, the administrative law judge must determine the extent to which the doctor's opinion was based upon the erroneous information, as opposed to objective medical evidence cited in the opinion. Only then could the administrative law judge properly reject a medical opinion associating claimant's condition with his work accident.

On remand, the administrative law judge should reconsider the evidence to determine whether employer has presented sufficient evidence to establish that claimant's back-related complaints ceased to be related to his work accident at any point in time after April 15, 2009. Since claimant is entitled to obtain payment of medical benefits for treatment related to his work injury, if payment is properly requested, the administrative law judge must reconsider the relevant evidence pursuant to Section 7 of the Act.

Finally, the administrative law judge must reconsider the evidence in light of claimant's request for disability compensation.

In sum, I agree with the majority that the case must be remanded for the administrative law judge to apply the Section 20(a) presumption to the claim of a loose tooth. I also agree with the majority that the administrative law judge invoked the Section 20(a) presumption regarding claimant's back/neck condition, but I would hold that the administrative law judge erred in finding the evidence sufficient to rebut the presumption as of April 15, 2009. I would remand the case for the administrative law judge to determine whether there is sufficient evidence at any time after April 15, 2009, to rebut the presumption as to claimant's continuing complaints of back/neck pain, and to resolve all remaining issues. In addition, I note that crediting or discrediting a medical opinion which links claimant condition to a work injury requires careful analysis of all the bases of the opinion stated therein, as well as factual findings regarding the other relevant evidence of record.

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REGINA C. McGRANERY
Administrative Appeals Judge