

BRB No. 89-1075

PATRICIA L. SEWELL)
)
 Claimant-Petitioner)
)
 v.)
)
 NONCOMMISSIONED OFFICERS')
 OPEN MESS, McCHORD AIR)
 FORCE BASE)
)
 and)
)
 AIR FORCE CENTRAL WELFARE) DATE ISSUED:
 FUND)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Patricia L. Sewell, Gig Harbor, Washington, *pro se*.

Roy H. Leonard, Office of Legal Counsel Air Force, MWR & Services Agency, San Antonio, Texas, for employer/carrier.

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

PER CURIAM:

Claimant, representing herself, appeals the Decision and Order Denying Benefits (88-LHC-2166) of Administrative Law Judge Edward C. Burch 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 worked as a civilian bartender for the NonCommissioned Officers Open Mess Club at McChord Air Force Base in Tacoma, Washington from 1976 until May 15, 1986. In August 1985, Sgt. Padilla became claimant's supervisor. Sgt. Padilla, who had a more aggressive management style than claimant's former supervisor, found serious problems with claimant's job performance. Accordingly, in April 1986, Sgt. Padilla initiated termination proceedings against claimant. Claimant, who was ultimately terminated from her position effective May 15, 1986, filed a claim for temporary total disability compensation under the Act, contending that she suffered stress-related psychiatric problems as a result of poor working conditions, and in particular, stress associated with problems with her supervisor.

The administrative law judge denied the claim, noting that while there is medical evidence that claimant may have a psychological condition, she failed to establish her *prima facie* case under 33 U.S.C. §920(a) because employer's legitimate actions in disciplining and terminating claimant do not constitute working conditions which can form the basis for a compensable claim under the holding of *Marino v. Navy Exchange*, 20 BRBS 166 (1988).

Claimant, appearing without benefit of counsel, appeals the administrative law judge's denial of benefits. Employer responds, urging affirmance. As claimant is without benefit of counsel, we will review the administrative law judge's findings under our general standard to determine if they are rational, supported by substantial evidence, and in accordance with applicable law. See *O'Keefe*, 380 U.S. at 362.

It is well-settled that a psychological impairment which is work-related is compensable under the Act. See *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989). In establishing that an injury is causally related to employment, claimant is aided by the Section 20(a) presumption, which provides a presumed causal nexus between the injury and employment. 33 U.S.C. §920(a). In order to be entitled to the Section 20(a) presumption, however, claimant must establish a *prima facie* case by showing not only that she has a psychological condition but also that a work-related accident occurred or that working conditions existed which could have caused the condition. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

In *Marino*, 20 BRBS at 166, the Board first considered the issue of whether a psychological condition resulting from the termination of employment is compensable under the Act. The Board concluded that a legitimate personnel action, such as a reduction-in-force, is not a working condition that can form the basis for a compensable psychological injury. The Board reasoned that to hold otherwise would unfairly hinder an employer in making legitimate personnel decisions and in conducting its business.

In the present case, the administrative law judge found that because employer's actions in disciplining and terminating claimant were justified by her failure to follow published guidelines and closing procedures, careless handling and securing of the clubs' cash assets, repeated tardiness, and problems with cash shortages, overages and unauthorized absences, pursuant to *Marino* claimant

failed to establish her *prima facie* case. The administrative law judge properly determined that a legitimate personnel action does not provide a proper basis for finding a compensable psychological injury. We are unable to affirm his determination that *Marino* is controlling, however, because in finding that employer's actions were justified, the administrative law judge did not explicitly weigh and consider relevant evidence submitted by claimant, in violation of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A) (the APA). See *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). Although the administrative law judge considered that claimant had been disciplined previous to Sgt. Padilla's arrival, he failed to consider other relevant evidence. Specifically, the administrative law judge did not discuss the testimony of the Reverend Oscar Tillman, a former patron of the bar, who also served as a member of the advisory board for the club, and that of Donald Burrell, a former duty manager at the club. Rev. Tillman testified that claimant was a rigid bartender and a hard worker, but that after Sgt. Padilla became her supervisor, she became moody and had moments of depression and crying. Tr. at 10 - 12. He also testified that he saw Sgt. Padilla speak to and treat claimant inappropriately on several occasions. *Id.* at 13. Mr. Burrell testified that claimant was an outstanding employee when they worked together, but that he noticed that after Sgt. Padilla started, the whole tenor of the club changed dramatically for the worse. *Id.* at 29, 32. The administrative law judge also failed to discuss claimant's testimony that Sgt. Padilla harassed and intimidated her, yelled at her, and even struck her. *Id.* at 59, 70. Because the APA requires the administrative law judge to independently weigh and analyze all relevant evidence in rendering a decision, we vacate the administrative law judge's decision and remand the case for reconsideration of whether the presumption at Section 20(a) was established in light of all the evidence of record.

On remand, the administrative law judge also should consider whether, irrespective of the disciplinary and termination procedures, the cumulative stress of claimant's general working conditions could have caused claimant's psychological injury. This theory was raised below but was not addressed by the administrative law judge in his Decision and Order. See Claimant's Pre-hearing Statement at 1; Employer's Exhibit 2; see also *Konno*, 28 BRBS at 60-61; *Marino*, 20 BRBS at 168.¹ If, on remand, the administrative law judge finds the Section 20(a) presumption invoked, he must determine whether employer rebutted the presumption, and if so, whether a causal relationship is established based on the record as a whole. See *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995).

Accordingly, we vacate the administrative law judge's Decision and Order Denying Benefits. The case is remanded for reconsideration in accordance with this opinion.

SO ORDERED.

¹Our decision to remand on this basis is consistent with the decision in *Marino v. Navy Exchange*, 20 BRBS 166 (1988). While the Board held in *Marino* that an injury due to a reduction-in-force was not compensable, it also remanded the case for the administrative law judge to address claimant's allegations that his injury was due as well to cumulative stress.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge