BRB No. 97-1283

DOUGLAS J. PASCUAL, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FIRST MARINE CONTRACTORS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

J. Paul Demarest (Favret, Demarest, Russo, & Lutkewitte), New Orleans, Louisiana, for claimant.

Maurice E. Bostick and Robert P. McCleskey, Jr. (Phelps Dunbar, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (96-LHC-0282) of Administrative Law Judge James W. Kerr, Jr., 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a longshoreman, suffered an injury on August 16, 1995, during the course

of his employment when a load of railroad ties fell off the opposite end of the track causing him to be thrown into the air. Claimant was hospitalized for five days following this incident, and he has not returned to work since the date of his injury. Employer has paid no compensation or medical benefits on this claim.

In his decision, the administrative law judge found that claimant established his *prima facie* case based on his current back and neck conditions and the occurrence of the work incident on August 16, 1995. After invoking the Section 20(a) presumption of causation, 33 U.S.C. §920(a), the administrative law judge found that employer established rebuttal based upon the opinion of Dr. Laborde and his finding that claimant's subjective complaints of pain are not credible. He then weighed all the evidence of record and concluded that any incident which took place did not cause or aggravate claimant's condition. Accordingly, he denied all disability and medical benefits.

On appeal, claimant alleges that the administrative law judge erred in denying all disability and medical benefits, contending that he is at least entitled to such benefits on a temporary basis. Employer responds, urging affirmance of the administrative law judge's decision.

We agree with claimant that the administrative law judge's denial of all benefits cannot be affirmed as it is not supported by substantial evidence.[1] Initially, the administrative law judge addressed this case as involving causation, when in fact it involves both questions of causation and the extent of disability. As it is uncontested that claimant spent five days in the hospital due to the injury at work, at a minimum claimant is entitled to disability and medical benefits for this initial period. The administrative law judge's total denial of benefits, moreover, is inconsistent with his finding that "it is uncontested that Claimant suffered *some disabling* pain resulting from the accident." Decision and Order at 13 (emphasis added). These uncontested facts and the administrative law judge's finding thus establishes entitlement to some period of disability benefits and compensable medical care; the denial of all benefits, hence, is inconsistent with the record. The issues to be addressed involve the cause of claimant's continuing back and neck complaints and the duration of claimant's disability due to the work injury.

The first issue to be addressed is the cause of claimant's continuing neck and back complaints. Claimant is entitled to reimbursement for all reasonable and necessary medical

[1]The administrative law judge's decision states that employer paid no disability or medical benefits. Decision and Order at 2.

treatment related to the work injury. 33 U.S.C. §907(a); *See, e.g., Kelley v. Bureau of National Affairs*, 20 BRBS 169 (1988). He need not be economically disabled in order to be entitled to medical benefits. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). In establishing the work-relatedness of his condition, claimant is aided by the Section 20(a) presumption, which applies generally to the issue of whether claimant's injury or disability is work-related, *see Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995), and is applicable in this case inasmuch as it is uncontested that claimant sustained physical harm and that the accident at work could have caused the harm. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986). The burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's condition was not caused by the work accident or that the work accident did not aggravate claimant's underlying condition. *Gooden v. Director, OWCP*, 135 F.2d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).

We hold that the administrative law judge, in relying upon Dr. Laborde's opinion to deny benefits, did not properly apply the aggravation rule and additionally drew some irrational conclusions from the doctors' opinions. The aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). This rule applies not only where the underlying condition itself is affected but also where the injury "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.* 18 BRBS 212, 214 (1986). Whether the circumstances of a claimant's employment combine with the pre-existing condition so as to increase his symptoms to such a degree as to incapacitate him for any period of time or whether they actually alter the underlying process is not significant. *Gooden*, 135 F.3d at 1066, 32 BRBS at 59 (CRT); *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981), *aff'g* 11 BRBS 561 (1971). Moreover, the severity of a claimant's injury is not determinative of whether an aggravation occurred since even a minor incident can aggravate a pre-existing condition and impair a claimant's ability to work. *See, e.g., Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991). Thus, in a case such as this one where claimant asserts that the work accident aggravated an underlying condition, it is incumbent upon employer to introduce evidence affirmatively establishing that the work accident did not aggravate or accelerate the underlying condition in order to rebut the Section 20(a) presumption. *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).

In the instant case, the administrative law judge relied on the opinion of Dr. Laborde, a Board-certified orthopedic surgeon, to conclude that claimant's condition is not work-related. He specifically credited Dr. Laborde's interpretations of claimant's pre- and post-injury MRI's that claimant's pre-existing lumbar condition was unchanged by the work accident and that claimant's cervical changes are due to the aging process. In this regard,

however, the administrative law judge did not discuss Dr. Laborde's testimony that there was "no *significant* change" in claimant's lumbar MRI after the injury, Tr. at 168-169 (emphasis added), and that "it's possible" that the accident could have been a contributing factor in the differences evidenced on the cervical films. More importantly, the administrative law judge did not consider Dr. Laborde's opinion with an eye toward determining whether the incident caused at least a temporary disability or aggravation of claimant's condition which would entitle him to some compensation and medical benefits. In this regard, we note that Dr. Laborde examined claimant in October 1996, more than one year after the accident, and stated that there is no way to objectively determine the presence of a sprain or rule out the possibility of a muscular injury from the work incident. Tr. at 160-163. He stated that such a sprain likely would have healed within two months. Dr. Laborde's opinion therefore does not establish that the work accident had no causal relation to claimant's disability thereafter. Tr. at 162. Indeed, Dr. Laborde testified that he was unable to make a determination as to whether claimant suffered a back sprain after his injury. Tr. at 163.

In weighing the evidence, the administrative law judge credited the opinion of Dr. Laborde, a Board-certified orthopedic surgeon, over the opinion of Dr. Pearce, a Board-certified radiologist, who stated that the MRI's taken of both the cervical and lumbar regions before and after the injury showed that changes occurred after the injury and that the changes are not normally associated with the aging process and are most likely due to trauma. Tr. at 61. The administrative law judge gave less weight to Dr. Pearce's testimony because the administrative law judge discredited claimant's subjective complaints of pain. Decision and Order at 13. This finding, however, is irrational inasmuch as Dr. Pearce's opinion regarding the changes on the MRI's is based solely on her reading of the films and not on claimant's complaints of pain; thus, the credibility of claimant's complaints is irrelevant to Dr. Pearce's opinion. As an expert in radiology, Dr. Pearce was well qualified to interpret the MRI evidence, and the administrative law judge gave no valid reason for preferring Dr. Laborde's differing interpretation of these films.

In addition, in attributing claimant's symptoms to the aging process based on Dr. Laborde's testimony, the administrative law judge erroneously discounted the opinion of Dr. Watermeier, a board-certified orthopedic surgeon, who opined that claimant's pre-existing condition was aggravated by the trauma. The administrative law judge found it significant that Dr. Watermeier's opinion was based on claimant's subjective complaints of pain. The record reflects, however, that although Dr. Watermeier stated it was his opinion that claimant's subjective back complaints were consistent with the history of trauma, Tr. at 124-125, he also opined that claimant's neck complaints correlate with objective evidence. Tr. at 145. Furthermore, the administrative law judge also erred in stating that Dr. Watermeier's opinion is supportive of that of Dr. Laborde because Dr. Watermeier could not state with a reasonable degree of medical certainty that the deterioration in claimant's lumbar condition was caused from trauma as opposed to by the aging process. Tr. at 137. Even if that were an

accurate statement of Dr. Watermeier's opinion, it would not in fact support Dr. Laborde's opinion; it would simply be neutral. The record shows, however, that Dr. Watermeier's opinion was not neutral; he disputed Dr. Laborde's opinion of causation. Decision and Order at 12-13. Dr. Watermeier stated that claimant's cervical condition was more likely than not due to trauma, and not the aging process. Tr. at 130.

In sum, we must vacate the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption and the finding that claimant has no medical conditions causally related to the work accident. On these facts, Dr. Laborde's opinion is insufficient to rule out the work accident as the cause of a condition which was to some degree disabling thereafter. On remand, the administrative law judge must reconsider the evidence relative to the cause of claimant's disability in light of the aggravation rule, bearing in mind that it is employer's burden to sever the connection between claimant's disabling condition and the work accident. *Hensley*, 655 F.2d at 264, 13 BRBS at 182. In addition, if claimant's back and neck conditions are in any way work-related, the administrative law judge must award benefits for medical treatment reasonable and necessary for the treatment of the conditions.

The other issue presented is related to the foregoing, as the same evidence is at issue in determining the extent of claimant's work-related disability. Claimant is entitled to disability benefits for any period his work injury causes a total or partial loss of wage-earning capacity. *Shell Offshore, Inc. v. Director, OWCP*, 112 F.3d 321, 31 BRBS 129 (CRT) (5th Cir. 1997); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). In the instant case, it is undisputed that claimant, on August 16, 1995, sustained an injury at work of such severity that he was immediately transported to the hospital where he remained for five days. Dr. Correa, who treated claimant during his hospitalization following the accident, stated that claimant demonstrated objective and subjective signs of injury. On September 19, 1995, Dr. Correa stated claimant was still unable to return to full unrestricted work. CX 1. Drs. Watermeier and O'Keefe, who examined claimant in the period after his release from the hospital, considered claimant temporarily totally disabled from any employment. Tr. at 130. The record thus reflects that all the physicians who examined claimant soon after the accident opined that the injury rendered him incapable of returning to work for at least some period of time.

In determining that claimant is not entitled to disability benefits, the administrative law judge relied upon the opinion of Dr. Laborde that, as of the date of his examination, October 26, 1996, more than one year after the work accident, claimant exhibited no objective evidence that his pre-injury condition had worsened as a result of the work accident or that it prevented his return to his usual employment. Tr. at 160-161. Dr. Laborde opined that, while there is no objective evidence of a physical injury precluding claimant's return to work at the time of his examination in October 1996, there is no way to objectively determine

the presence of a sprain or rule out the possibility of a muscular injury as of the date of the work incident. Tr. at 160-163. He stated that such a sprain likely would have healed within two months. Dr. Laborde's opinion thus does not in fact support the conclusion that claimant was not at all disabled after the injury. Thus, while this opinion may establish that at some point claimant was no longer disabled by his back and neck condition, it cannot establish that claimant did not suffer any disability in the period immediately following the accident. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 383 (1990). Moreover, with regard to claimant's continuing disability, in light of our prior discussion of the administrative law judge's errors in addressing the opinions of Drs. Laborde, Pearce and Watermeier, *supra* at 5-6, we cannot affirm the conclusion that claimant has no ongoing disability due to the work accident. We therefore must vacate the administrative law judge's denial of disability benefits. On remand, the administrative law judge must determine the duration of claimant's disability due to the work accident considering all relevant evidence of record.

Accordingly, the administrative law judge's denial of disability and medical benefits is vacated, and the case is remanded for reconsideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge