BRB No. 97-0774
and 97-0774A

LARRY POWELL	)	
	)	
Claimant-Respondent Cross-Petitioner	)	
	)	
v.	)	
	)	
FLUOR DANIEL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, C/O AIU NORTH AMERICA, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

J. Myers Morton (Morton & Morton), Knoxville, Tennesee, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (95-LHC-1330) of Administrative Law Judge Daniel J. Roketenetz awarding benefits 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 Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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).

In the spring of 1993, claimant accepted an assignment to work for employer as a warehouse material supervisor on the United States Embassy renovation project in Kiev, Ukraine.[1] Claimant, who began working in Kiev on April 19, 1993, soon began to experience gastrointestinal problems, including stomach cramps, vomiting and diarrhea. Three or four days after first experiencing problems in early May 1993, he requested employer's authorization to see a physician, but was advised instead to take an over-the-counter medication. Claimant's problems persisted, and after continued requests by claimant to see a physician, employer arranged for claimant to be examined at a medical clinic in Kiev on May 17, 1993. Claimant took the two medications prescribed by the Ukrainian physician for three or four days but felt sicker, so he discontinued the medication. Thereafter, claimant asked employer if he could see a physician in Western Europe, but was advised to wait. During this entire period, claimant continued to work. Finally, claimant informed employer that he needed to return to the United States for medical attention and, on June 11, 1993, claimant left Kiev. Employer voluntarily paid temporary total disability compensation to claimant from June 17, 1993 to September 30, 1994. 33 U.S.C. §908(b). Claimant continued to experience gastrointestinal problems and developed depression secondary to his physical condition; he has not returned to work since returning to the United States.[2]

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[1]Immediately prior to working for employer in Kiev, claimant worked as an electrician for Southern Industrial from approximately December 1991 to April 1992 and from July 1992 to February 1993. During the 14 years preceding his work for Southern Industrial, claimant worked as an electrician for employer and its predecessor company.

[2]Claimant had been taking an immunosuppressive medication, Imuran, for vasculitis, an eye condition, for some time prior to going to Kiev and took Imuran continuously up to

In his Decision and Order, the administrative law judge found the Section 20(a), 33 U.S.C. §920(a), presumption invoked by evidence that claimant contracted a gastrointestinal infection in Kiev; next, the administrative law judge found that employer failed to rebut the presumption that claimant's current physical and psychological problems are related to his employment. The administrative law judge further determined that the combination of claimant's continuing gastrointestinal and psychological problems render him totally disabled. The administrative law judge determined that claimant failed to establish that he has reached maximum medical improvement and, thus, claimant was awarded continuing temporary total disability compensation pursuant to Section 8(b) of the Act, 33 U.S.C. §908(b). Next, the administrative law judge found that claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), was $688.19. Finally, the administrative law judge determined that his finding of temporary total disability precludes the award of Section 8(f), 33 U.S.C. §908(f), relief to employer.

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the date of the hearing. All the medical experts of record agree that claimant's immunosuppressed status increased his susceptibility to gastrointestinal infection.

On appeal, employer contends that it has rebutted the Section 20(a) presumption[3] with medical evidence sufficient to sever the causal link between the infectious diarrhea claimant contracted in Kiev and the fecal incontinence and psychiatric problems that developed several months later. Employer further argues that, having rebutted the presumption, the burden shifts to claimant to prove that his continuing disability is related to his employment, and that claimant has failed to sustain this burden. Next, employer contends that the administrative law judge erred in failing to find that claimant's gastrointestinal problems and psychiatric condition are permanent in nature. Finally, employer argues that if the Board affirms the administrative law judge's finding that claimant's present conditions are employment-related, employer is entitled to Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's finding that claimant's present conditions are employment-related.

In his cross-appeal, claimant contends, first, that the administrative law judge erred in calculating his average weekly wage pursuant to Section 10(c) instead of Section 10(a), and, second, that the administrative law judge erred by failing to include the value of housing provided by employer in calculating his average weekly wage. Employer responds that the administrative law judge properly utilized Section 10(c) and that the cost of lodging should not be included in the determination of claimant's average weekly wage.

In the instant case, as the Section 20(a) presumption was properly invoked, the burden shifted to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Brown v. Jacksonville Shipyards, Inc.,* 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993); *see also Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C.Cir.), *cert. denied*, 429 U.S. 820 (1976). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *See, e.g., Cairns v. Matson Terminals,* 21 BRBS 252 (1988). In establishing rebuttal of the presumption, however, proof of another agency of causation is not necessary. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982)(Kalaris, J., concurring and dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984). Rather, the testimony of a physician that no relationship exists between an

[3]Employer concedes that the Section 20(a) presumption was properly invoked, and that claimant was entitled to temporary total disability benefits for the duration of his infectious diarrhea contracted in Kiev.

injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 270 (1990).

We affirm the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption. The administrative law judge's finding is supported by the record, as he rationally found that neither Dr. Mertz, upon whom employer relies in support of its contention of error, nor any testifying physician stated that claimant's entire current physical and psychological condition was unrelated to the illness he contracted in Kiev. Regarding the testimony of Dr. Mertz, the administrative law judge acknowledged that physician's testimony that claimant's sphincter weakness was unrelated to his work-related diarrhetic condition, but thereafter determined that claimant's present multiple conditions included additional factors such as recurrent diarrhea, fecal incontinence, and psychological trauma. In this regard, a review of the record indicates that Dr. Mertz opined that the infectious diarrhea claimant contracted in Kiev has "improved, although it has not resolved" and that "it is certainly possible that the patient has suffered from a post infectious syndrome of chronic inflammation that is in part due to the infection he suffered, complicated by immunosuppression from Imuran." *See* Emp. Ex. 8; Tr. at 374-375. Thus, having found that the reporting physicians, including Dr. Mertz, affirmatively stated that claimant's work-related diarrhea condition is directly responsible for his continuing physical symptoms and psychological problems, the administrative law judge concluded that employer had failed to rebut the Section 20(a) presumption. As the administrative law judge's decision accurately reflects the evidence of record, the administrative law judge acted within his authority as trier-of-fact in finding that employer failed to rebut the presumed causal link between claimant's multiple physical and psychological conditions and his employment with employer in Kiev. We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption. In the absence of other evidence of record severing the connection between claimant's present conditions and his employment, claimant has established that his current physical and psychological conditions are work-related.[4] *See Clophus v. Amoco Production Co.,* 21 BRBS 261 (1988).

Employer next contends that the administrative law judge's finding that claimant's disability related to his fecal incontinence and depression is not permanent is not supported by substantial evidence and is not in accord with the criteria set forth in *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). In *Watson,* the court stated that a disability may be considered permanent if it has lasted for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from

[4]Assuming, *arguendo*, that Dr. Mertz's opinion is sufficient to rebut the Section 20(a) presumption, the administrative law judge's finding that causation is established is in any event supported by substantial evidence, specifically the credited opinions of Drs. McElligott and Spiegelman. *See* Decision and Order at 18.

one in which recovery merely awaits a normal healing period. Moreover, it is well-established that an employee may be considered to be permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence. *See Trask v. Lockheed Shipbuilding & Const. Co.,* 17 BRBS 56, 60 (1985). An employee has reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition. *See Louisiana Ins. Guaranty Ass'n v. Abbott,* 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994). A prognosis that chances for improvement are remote is sufficient to support permanency. *See Walsh v. Vappi Construction Co.,* 13 BRBS 442 (1981).

In concluding that claimant's conditions are temporary in nature, the administrative law judge determined that the preponderance of the medical evidence fails to fully address the issue of maximum medical improvement. Specifically, the administrative law judge found that, as the etiology of claimant's physical condition is unknown and as continuing psychological treatment is necessary, a finding of temporary total disability is appropriate at the present time. We agree with employer that the examining physicians' inability to establish the etiology of claimant's present condition with exactitude is not dispositive of the issue of permanency. We further agree that the administrative law judge's discussion of the permanency issue fails to comport with the standard set forth in *Watson* regarding the question of when an employee's disability is considered permanent. As the record contains considerable medical evidence relevant to the issue of permanency,[5] we vacate the administrative law judge's finding that claimant's disability is not permanent and remand the case for the administrative law judge to fully discuss the relevant medical evidence in accordance with the applicable legal standards. *See Louisiana Ins. Guaranty Ass'n,* 40 F.3d at 122, 29 BRBS at 22 (CRT); *Watson*, 400 F.2d at 649; *Trask,* 17 BRBS at 60; *Walsh,* 13 BRBS at 442.

Lastly, employer asserts that it is entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge denied employer's request for such relief on the basis that Section 8(f) does not apply where an employee's disability is temporary in nature. *See Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.,* 17 BRBS 183 (1985). In light of our decision to vacate the administrative law judge's determination that claimant's disability is temporary, we must also vacate the administrative law judge's denial of Section 8(f) relief. If, on remand, the administrative law judge finds that claimant's disability is permanent, he must reconsider employer's possible entitlement to Section 8(f) relief.

We now address the issues raised by claimant in his cross-appeal. Claimant challenges the administrative law judge's average weekly wage determination contending, first, that the administrative law judge erred by failing to calculate claimant's average

[5]As noted by employer, the opinions of Drs. McElligott, Stewart, Mertz, Spiegelman, and Houser, if credited, could support a finding of permanency.

weekly wage under Section 10(a), 33 U.S.C. §910(a), and, second, that the administrative law judge erred in failing to include the value of the lodging provided to him by employer in Kiev in the calculation of his average weekly wage.

Section 10, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average annual wage, which is then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. Sections 10(a) and (b), 33 U.S.C. §910(a), (b), are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is regular and continuous. The computation of average annual earnings must be made pursuant to Section 10(c), 33 U.S.C. §910(c), if subsections (a) or (b) cannot be reasonably and fairly applied. Section 10(a) is applicable where the employee has worked "substantially the whole of the year" preceding the injury; a substantial part of the year may be composed of work for two different employers where the skills used in the two jobs were highly comparable. *See Hole v. Miami Shipyards Corp.*, 12 BRBS 38 (1980), *rev'd and remanded on other grounds,* 640 F.2d 769, 12 BRBS 237 (5th Cir. 1981).

In considering whether Section 10(a) applies in determining claimant's average weekly wage, the administrative law judge found that claimant's work for employer and for his previous employer, Southern Daniel, were highly comparable and that, because claimant worked full-time for these two employers for approximately ten months of the year preceding his injury, claimant satisfied the requirement in Section 10(a) that he have worked for "substantially the whole of the year." The administrative law judge found, however, that he could not apply Section 10(a) because he could not discern from the record the actual number of days claimant worked in the year prior to his injury and, thus, could not determine claimant's average daily wage. The administrative law judge accordingly applied Section 10(c) to determine claimant's average weekly wage, arriving at an average weekly wage of $688.19.

In challenging the administrative law judge's determination that Section 10(a) could not be applied to calculate claimant's average weekly wage, claimant avers that the record contains clear evidence as to the number of days claimant worked in the preceding year. Specifically, claimant contends that record evidence establishes that claimant worked a total of 48 days for employer in Kiev in the time period from April 19, 1993 to June 10, 1993, *see* Cl. Exs. 4, 5, 6, 7, 15; Tr. at 29, 20-41, 56, and that claimant worked a total of 165 days for his prior employer, Southern industrial, in the year prior to his injury. *See* Emp. Ex. 30; Cl. Exs. 1, 15; Tr. at 53-54.

We agree with claimant that the administrative law judge erred by summarily concluding that he was unable to discern the actual number of days claimant worked from the employment records, as the record in this case contains detailed payroll records and other employment information regarding the dates of claimant's employment. *Cf., Story v. Navy Exchange Service Center,* 30 BRBS 225 (1997)(wherein the Board affirmed the administrative law judge's determination that Section 10(a) could not be applied since the record revealed no payroll information or dates of claimant's employment with a prior employer). We therefore vacate the administrative law judge's average weekly wage determination and remand the case for the administrative law judge to reconsider the issue of whether Section 10(a) may be applied to determine claimant's average weekly wage. In reconsidering the applicability of Section 10(a), the administrative law judge must consider employer's contention that Section 10(a) is not applicable because claimant's work was not regular and continuous.

Claimant next contends that, in calculating his average weekly wage, the administrative law judge must include the value of the lodging provided by employer to claimant in Kiev.[6] Specifically, claimant argues that the lodging provided by employer should be considered part of his "wages," as defined at Section 2(13) of the Act, 33 U.S.C. §902(13), averring that his uncontested testimony that employer paid $65 per night for claimant's lodging in a Kiev hotel for 54 days is sufficient to establish that this amount be included in his wages. In support of his contention, claimant cites the Board's decision in *Guthrie v. Holmes & Narver, Inc.,* 30 BRBS 48 (1996), *rev'd sub nom. Wausau Ins. Cos. v. Director, OWCP,* 114 F.3d 120, 31 BRBS 41 (CRT)(9th Cir. 1997), wherein the Board held that lodging provided by an employer, the value of which is readily ascertainable and, thus, not a fringe benefit, satisfies the Section 2(13) definition of "wages" and is includable in the employee's average weekly wage. Employer, relying in part on the decision of the United States Court of Appeals for the Ninth Circuit in *Wausau* reversing *Guthrie*, responds that the lodging provided by employer is not includable in the Section 2(13) definition of wages.[7]

[6]We note that, although the administrative law judge included in claimant's income the *per diem* expenses paid by employer while claimant worked in Kiev, he did not address the issue of whether claimant's lodging costs also are properly includable in claimant's average weekly wage.

[7]We note that this case does not arise within the jurisdiction of the Ninth Circuit. *See Pearce v. Director, OWCP,* 603 F.2d 763, 10 BRBS 867 (9th Cir. 1979)(Ninth Circuit transferred case to the Seventh Circuit where claim was filed in Hawaii and file was transferred to district director's office in Illinois).

The Board has recently reaffirmed its holding in *Guthrie* in a case arising outside of the Ninth Circuit. *See Quinones v. H.B. Zachery, Inc.,* ___ BRBS ___, BRB No. 97-0688 (Feb. 10, 1998). In *Quinones,* the Board reaffirmed its holding in *Guthrie* that an employee's room and board may be included in a calculation of "wages," as such payments are not excluded fringe benefits; in so holding, the Board rejected the Ninth Circuit's interpretation of the Act in *Wausau* as limiting wages to actual money received or non-monetary compensation subject to tax withholding, stating that, pursuant to the plain language of the Act, the value of room and board provided by employer may be included in a calculation of "wages."[8] Inasmuch as the administrative law judge has not yet addressed this issue, he must, when reconsidering the issue of claimant's average weekly wage, further consider the evidence regarding the value of the lodging provided by employer, consistent with the Board's decision in *Quinones*.

[8] In addition, *Wausau* is distinguishable on its facts. In that case, employer provided meals and lodging at its facility on the remote Johnson Atoll in the South Pacific. The court found that, under the Internal Revenue Code, the value of meals and lodging provided by an employer is income unless "furnished. . . for the convenience of the employer" and "in the case of lodging, the employee is required to accept such lodging on the business premises of the employer as a condition of his employment." 26 U.S.C. §119(a). In *Guthrie,* it was undisputed that the meals and lodging met this criteria. Here, employer concedes that the lodging was not on its premises but was provided at a hotel. Thus, on its face, the value of the lodging is not within the exclusion provided by Section 119(a).

Accordingly, the administrative law judge's determination that claimant's present physical and mental conditions are causally related to his employment is affirmed. The administrative law judge's determinations with respect to the nature of claimant's disability, employer's entitlement to relief pursuant to Section 8(f), and claimant's average weekly wage are vacated, and the case is remanded for reconsideration consistent with this decision.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge