

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 24-0398

MICHAEL LEMIEUX

Claimant-Respondent

v.

ELECTRIC BOAT CORPORATION

Self-Insured

Employer-Petitioner

NOT-PUBLISHED

DATE ISSUED: 08/06/2026

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jerry R. DeMaio,
Administrative Law Judge, United States Department of Labor.

Scott N. Roberts (The Law Office of Scott Roberts, LLC), Groton,
Connecticut, for Claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for
Self-Insured Employer.

Before: GRESH, JONES and ULMER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jerry R. DeMaio's Decision and Order Awarding Benefits (2022-LHC-01192; 2023-LHC-00095) rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with

applicable law.¹ 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was employed by Employer from May 2013 until June 28, 2022. He initially worked as an electrician and in 2015 transferred to nuclear quality control where he worked as an inspector. Hearing Transcript (TR) at 17, 34; Claimant Exhibit (CX) 10 at 27-29. Claimant performed inspections in various locations throughout Employer’s entire facility. He had to walk to each inspection site, frequently climbing stairs to get to the vault room and his office on the second floor. TR at 17-18, 22-23; CX 8 at 3-4. In May 2016, he began experiencing pain in his right knee that progressively worsened, particularly on workdays requiring significant walking. TR at 14; CX 10 at 34-35. On May 19, 2016, Claimant went to his primary care physician reporting right knee pain over the prior year that was constant and aggravated by weather changes. CX 7 at 1-4. Subsequently, in June 2017, Dr. Thomas Bliss treated Claimant for right knee pain that had “been going on for months but [was] slowly getting steadily worse.” CX 6 at 5-6. Dr. Bliss noted “nothing specific started [it] off” and that Claimant reported “no recent injuries or problems” with his knee. *Id.* at 5. Right knee x-rays revealed “moderately advanced osteoarthritis.” *Id.* at 6. Dr. Bliss was concerned about Claimant’s weight and advised Claimant “if he needs a knee replacement surgery it will be short-lived because of his size.” *Id.* Claimant received a right knee injection and was referred to physical therapy “for quad strength.” *Id.*

In 2021, Claimant began experiencing left ankle pain. CX 10 at 50-51. He testified his continuing right knee and left ankle pain became so “excruciating” he could “barely walk” and had to start using a cane. *Id.* at 34-36, 47. On October 25, 2021, Claimant was treated by Dr. William Brennan for right knee pain that Claimant described as “10/10,” “constant,” and “worse with squatting, kneeling, sitting, stairs, walking and standing.” CX 6 at 10. X-rays showed severe arthritis. Dr. Brennan reported Claimant had osteoarthritis with severe pain that did not improve with injections and therapy. He wrote Claimant out of work because Claimant had “gotten to the point where he is unable to do to [sic] work he has difficulty with stairs,” and referred Claimant to Dr. David Vegari to discuss a knee replacement. *Id.* at 10-11. On October 27, 2021, Claimant stopped working due to his right knee and left ankle pain. TR at 24, 30; CX 10 at 23, 34.

¹ This case arises within the jurisdiction of the United States Court of Appeals for the First Circuit because Claimant sustained the injuries at issue in this case in Rhode Island. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff’d*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

On November 3, 2021, Dr. Vegari diagnosed “end-stage arthritis right knee refractory to conservative treatment” and opined Claimant could not undergo a knee replacement until he lost weight. CX 6 at 13-14. On January 6, 2022, Claimant returned to Dr. Brennan reporting 7/10 knee pain that was worse with weightbearing activity. *Id.* at 18. A right knee MRI taken on January 3, 2022, showed osteoarthritis with significant medial and lateral meniscal tearing. *Id.* at 16-19. On April 12, 2022, Claimant reported moderate to severe pain to Dr. Vegari that was “[a]ggravated with activities but improve[d] with rest.” Dr. Vegari referred Claimant to Dr. McCormick because there were “significant degenerative changes in his left ankle.” *Id.* at 20-23. On May 26, 2022, Claimant followed up with Dr. Brennan, reporting 8-9/10 right knee pain and his using a cane because “any kind of weightbearing activities cause increased pain.” *Id.* at 25-26. Dr. Brennan opined Claimant remained disabled and predicted he would be out of work for ten months pending gastric sleeve surgery and total knee replacement (TKR). *Id.* at 26.

On June 28, 2022, Employer administratively terminated Claimant because his Family Medical Leave Act leave had run out and his accommodation request for more time out of work was denied. TR at 14; CX 3. On July 11, 2022, Claimant underwent a gastric sleeve procedure. Employer Exhibit (EX) 7 at 2. On July 22, 2022, he reported to Dr. Brennan that his knee pain had improved to 3/10 following weight loss surgery. CX 6 at 28. On October 19, 2022, Dr. Vegari opined x-rays confirmed bone-on-bone wear, advanced changes, as well as sclerosis and osteophyte formation. *Id.* at 29-30. On December 9, 2022, Claimant underwent right TKR surgery. *Id.* at 34-35. In 2023, he underwent total left ankle replacement surgery. TR at 26-27.

On June 6, 2022, Claimant filed claims under the Act for his right knee (date of injury: October 25, 2021) and left ankle (date of injury: October 27, 2021), alleging his work activities (repetitive walking, kneeling, squatting, bending, crawling, and stair climbing) aggravated symptoms of his preexisting osteoarthritis. CXs 1-2. Employer controverted the claims, disputing the work-relatedness of Claimant’s right knee and left ankle symptoms. ALJ Exhibit (ALJX) 5 at 1. The Office of Workers’ Compensation Programs (OWCP) referred both claims to the Office of Administrative Law Judges (OALJ), where they were consolidated and set for a formal evidentiary hearing. ALJX 4 at 1.

Following the formal hearing on May 4, 2023, the ALJ issued his Decision and Order Awarding Benefits (D&O) on July 11, 2024. He found Claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), linking his right knee and left ankle pain to his work activities and Employer failed to rebut the presumption. D&O at 18-20. The ALJ therefore

found Claimant entitled to disability and medical benefits under the Act for his disabling work-related right knee and left ankle pain.² *Id.* at 20.

On appeal, Employer raises only one issue: it contends the ALJ erred in finding it failed to rebut the Section 20(a) presumption of causation. Claimant responds, urging affirmance.³

When, as here, a claimant invokes the Section 20(a) presumption by showing a harm and working conditions that could have caused, aggravated, or accelerated the harm, the burden shifts to the employer to rebut the presumption with substantial evidence that the harm was not caused, aggravated, or accelerated by work. *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 55 (1st Cir. 2010); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 605 (1st Cir. 2004); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 675 (1st Cir. 1998); *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a finding that workplace conditions did not cause the accident or injury.” *Fields*, 599 F.3d at 55 (quoting *Rainey v. Director, OWCP*, 517 F.3d 632, 637 (2d Cir. 2008)); *Harford*, 137 F.3d at 675; *Sprague*, 688 F.2d at 865. The employer’s burden is one of production, not persuasion, and does not depend on credibility. *Truczinskas v. Director, OWCP*, 699 F.3d 672, 678 (1st Cir. 2012); *Harford*, 137 F.3d at 675.

A claim under the Act “can be based on a work-related activation or aggravation of the employee’s symptoms, even if the disease itself is not work-related.” *Fields*, 599 F.3d at 55; *Preston*, 380 F.3d at 605; *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248, 250-251 (1988); *see also Gardner v. Bath Iron Works Corp.*, 11 BRBS 556, 565 (1979) (“It is sufficient for purposes of causation if [the] claimant’s employment ‘aggravates the symptoms of the process.’”), *aff’d*, 640 F.2d 1385 (1st Cir. 1981). Thus,

² Regarding the nature and extent of Claimant’s disability, the ALJ found Claimant’s right knee and left ankle conditions had not reached maximum medical improvement. D&O at 20-21. He further found Claimant has been unable to return to his usual employment, and Employer identified available suitable alternate employment during certain time periods after Claimant stopped working. *Id.* at 21-25. The ALJ awarded Claimant temporary partial disability benefits for those periods but awarded Claimant temporary total disability benefits during the other periods and on a continuing basis. *Id.* at 25-26, 28. None of these findings have been challenged on appeal.

³ We affirm as unchallenged on appeal the ALJ’s determination that Claimant invoked the Section 20(a) presumption with respect to both his right knee and left ankle symptoms. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

where aggravation of a preexisting condition is at issue, the employer's evidence must address not only the etiology of the underlying condition but also the connection between the claimant's work and the disabling symptoms. *Fields*, 599 F.3d at 61-62; *Carswell v. E. Pihl & Sons*, 999 F.3d 18, 30-31 (1st Cir. 2021); *O'Kelley v. Dep't of Army*, 34 BRBS 39, 41 (2000); *Gardner*, 11 BRBS at 566 (The presumption "places the burden on employer to introduce substantial evidence that claimant's symptoms are *not* the result of an employment related aggravation.").

Employer contends the ALJ erred in finding it failed to rebut the Section 20(a) presumption as to Claimant's disabling right knee and left ankle pain. It asserts the opinion of its expert orthopedic surgeon, Dr. Daniel R. Gaccione, considered in its totality, constitutes substantial evidence of non-causation because Dr. Gaccione opined to a reasonable degree of medical certainty that Claimant's osteoarthritis, disabling pain, and need for TKR and total ankle replacement surgeries were caused by non-work factors, i.e., Claimant's morbid obesity, prior meniscal surgery, and chronic synovitis, and would have progressed regardless of his work activities. Emp. Br. at 5-9. Employer maintains the ALJ focused too narrowly on Dr. Gaccione's admissions that Claimant experienced pain at work and that work was "one of the activities" causing pain, when Claimant also experienced pain during non-work activities such as climbing stairs at home, playing golf, and weather changes. *Id.* at 6, 10-11.

There is no dispute that Claimant's preexisting osteoarthritis is not work-related. As in *Fields*⁴ and *Gardner*,⁵ Claimant's disability claim is based not merely on

⁴ The claimant in *Fields* suffered from morbid obesity and osteoarthritis and alleged his repetitive bending and kneeling at work aggravated his disabling back pain. The employer's physician opined the claimant's work did not physiologically cause or contribute to his underlying osteoarthritis but did not address whether the claimant's pain was related to his work. The First Circuit held the physician's opinion was insufficient to rebut the presumption because a reasonable mind could not conclude from it that the claimant's disabling pain was unrelated to his work activities. *Fields*, 599 F.3d at 56.

⁵ The claimant in *Gardner* had a preexisting and progressive disease in his legs that caused symptoms such as ulcers, swelling, and dermatitis. He filed a claim alleging his work activities (standing on wood, steel, and concrete floors all day) aggravated his preexisting condition and associated symptoms. The employer's physician opined the claimant's work aggravated his symptoms but was not sure whether it caused any change in the disease process. The Board held the physician's opinion could not be considered substantial evidence of non-causation because the physician also testified the claimant's symptoms "would be made worse" if he continued working. *Gardner*, 11 BRBS at 566.

experiencing pain at work but on work activities gradually aggravating the symptoms of his preexisting osteoarthritis, resulting in his inability to work and the need for right knee and left ankle replacement surgeries. CXs 1-2; D&O at 17-18.

Dr. Gaccione examined Claimant on September 27, 2022, and expressed his opinion in his report (EX 7) and at his April 6, 2023 deposition (EX 9). Dr. Gaccione addressed three causal questions: (1) the etiology of the underlying osteoarthritis in Claimant's right knee and left ankle; (2) the medical necessity of the TKR; and (3) the source of the disabling pain that led Claimant to stop working in October 2021. Dr. Gaccione diagnosed osteoarthritis in both Claimant's left ankle and right knee and opined his "ongoing right knee issues" are due to "prior arthroscopic surgery, involving meniscal excision and debridement as well as his obesity resulting in his current level of osteoarthritis." EX 7 at 4. He acknowledged Claimant's work activities "to some degree have resulted in symptomatic flare-ups," but he concluded those activities "have not caused, aggravated, or accelerated the osteoarthritis process" in either Claimant's right knee or his left ankle. *Id.* Dr. Gaccione testified Claimant's need for a TKR was not caused, hastened, or accelerated by his work activities. EX 9 at 25. Rather, he explained Claimant's 2013 surgical findings "already showed Grade 4 level or end-stage changes in the outside part of his knee, damage to his meniscus on the inside and outside of his knee, [and] chronic inflammation," so Claimant's right knee "was going to go on to be a chronic issue regardless of his activity level" and the need for a TKR was likely.⁶ *Id.* at 25-26. Additionally, Dr. Gaccione testified Claimant's pain "is from his arthritis or the actual disease process in both the right knee and the left ankle." EX 9 at 26. He noted Claimant experienced pain using stairs at home, with weather changes, and had given up golf due to pain. Thus, Dr. Gaccione did not have any doubts Claimant also experienced pain while working. Because Claimant "was pretty much [in] pain all the time in his life," Dr. Gaccione testified he was "unable to associate that with *just* his work at Electric Boat." *Id.* (emphasis added). On cross-examination, Dr. Gaccione clarified: "[T]he disease process itself causes the pain. But he had pain at E[lectric] B[oa]t and home and he was having pain all the time and that's what led to the knee replacement." *Id.* at 41-42. He conceded he "wouldn't doubt" Claimant experienced pain when walking, kneeling, and using stairs at work. *Id.* at 42. On re-direct, he reiterated that the disease process, not "necessarily one particular element of his life," was the cause of Claimant's pain because Claimant experienced pain at rest and with minimal activity. *Id.* at 43. In response to Claimant's counsel's question whether work

⁶ Dr. Gaccione agreed that when determining whether a patient should undergo a TKR, he considers the radiological findings, how the condition affects the patient's quality of life and daily activities, and the patient's pain complaints. EX 9 at 32. He confirmed Claimant opted to have a TKR because his right knee was painful. *Id.* at 33.

“was a cause of the pain,” Dr. Gaccione answered: “It was one of the parts of his life where he had pain because of his activity, yes.” *Id.* at 43-44.

The ALJ found Dr. Gaccione’s opinion insufficient to rebut the presumption because Dr. Gaccione acknowledged in his report that Claimant’s “work activities resulted in ‘symptomatic flare ups,’” D&O at 19 (quoting EX 7 at 4), and because Dr. Gaccione “fail[ed] to deny the connection between [Claimant’s] ongoing, increasing pain and his employment with Electric Boat” when he agreed that Claimant’s work “was one of the activities that caused him pain.” *Id.* The ALJ rejected Employer’s asserted distinction between the progression of Claimant’s osteoarthritis and the pain caused by symptomatic flare-ups. He found the First Circuit’s precedent in *Fields* controlling and the facts in that case to be analogous because, like the expert in *Fields*, Dr. Gaccione “failed to opine that the claimant’s disabling pain was unrelated to his employment.” *Id.* at 19-20.⁷

We affirm the ALJ’s determination that Dr. Gaccione’s opinion was insufficient to rebut the Section 20(a) presumption. While Dr. Gaccione was unequivocal in his opinion that Claimant’s osteoarthritis was not caused, aggravated, or accelerated by Claimant’s work activities, he did not say Claimant’s pain and symptom flare-ups were unrelated to Claimant’s work activities or that such a connection was unlikely. *Fields*, 599 F.3d at 61-62; *Harford*, 137 F.3d at 675; *Carswell*, 999 F.3d at 30-31; *O’Kelley*, 34 BRBS at 41. To the contrary, Dr. Gaccione agreed Claimant’s work activities were “one of the parts of his life where he had pain because of his activity.” EX 9 at 43-44. That Dr. Gaccione may have viewed Claimant’s work as one of several sources of Claimant’s pain, rather than its sole source, does not establish his opinion constitutes substantial evidence of non-causation. The question on rebuttal is whether his opinion could support the conclusion that Claimant’s work activities did *not* cause or aggravate Claimant’s pain, and an opinion agreeing that work was a source of that pain cannot. *Gardner*, 11 BRBS at 565-566; *Care*, 21 BRBS at 251; *cf. Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 193 (5th Cir. 1999) (Unequivocal testimony that work injury was not the sole cause of the claimant’s disability could not support non-causation because “[t]he only legally relevant question” is whether the injury “is *a cause* of that disability.”). Because a reasonable mind could

⁷ Employer relies on the Board’s decisions in *Calabrese v. BAE Sys. Haw. Shipyards*, BRB No. 18-0155 (Sep. 13, 2018), *aff’d mem.*, 794 F. App’x 565 (9th Cir. 2020), and *Tomminello v. Electric Boat Corp.*, BRB Nos. 11-0659/A, slip op. (May 15, 2012), to support its position. The ALJ rejected Employer’s reliance on *Calabrese*, finding it neither binding nor analogous and noting it arose within the jurisdiction of a different circuit. D&O at 19-20. The ALJ is correct – unpublished decisions are not binding precedent. *Lopez v. S. Stevedores*, 23 BRBS 295, 300 n.2 (1990) (The Board regards its unpublished decisions “as lacking precedential value.”).

conclude from Dr. Gaccione's opinion that Claimant's work activities aggravated Claimant's pain, *Fields*, 599 F.3d at 56, his opinion does not constitute substantial evidence sufficient to rebut the Section 20(a) presumption. Therefore, we affirm the ALJ's determination that Employer failed to rebut the Section 20(a) presumption. As Employer presents no other challenges, we affirm the ALJ's award of benefits.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge