BRB No. 11-0322

CHARLES M. LAMON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
A-Z CORPORATION	)	DATE ISSUED: 12/15/2011
	)	
and	)	
	)	
HARTFORD INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Decision and Order on Reconsideration Confirming Award of Benefits, and Order Denying Respondents' Second Motion for Reconsideration of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Gerald R. Rucci (Law Office of Gerald R. Rucci, LLC), New London, Connecticut, for claimant.

Lucas D. Strunk (Pomeranz Drayton & Stabnick, LLC), Glastonbury, Connecticut, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, Decision and Order on Reconsideration Confirming Award of Benefits, and Order Denying Respondents' Second Motion for Reconsideration (2009-LHC-00604) of Administrative Law Judge Daniel F. Sutton 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S.

359 (1965). The Board held oral argument in this case in Providence, Rhode Island, on October 25, 2011.

Claimant, who worked as a welder for several employers and most recently for A-Z Corporation (A-Z) until he stopped working in September 2007, was diagnosed with severe, disabling chronic obstructive pulmonary disease (COPD). He filed a claim against his last employer, A-Z, and his prior employer, Electric Boat Corporation, alleging that his disabling COPD was caused or aggravated by his occupational exposure to irritants such as welding fumes and smoke. In his Decision and Order, the administrative law judge found that claimant was a "maritime employee" for A-Z,[1] that claimant was entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his disabling COPD is related to his employment, and that employer did not establish rebuttal thereof. Consequently, the administrative law judge found that claimant's pulmonary condition is work-related as a matter of law and he thus awarded claimant temporary total disability benefits commencing on July 8, 2008. 33 U.S.C. §908(b).

A-Z (employer) moved for reconsideration, alleging that the administrative law judge had mischaracterized the opinion of Dr. Tudor, and that he erred in finding that the opinions of Drs. Tudor and Gerardi, that there is no permanent, work-related contribution to claimant's COPD, are insufficient to rebut the Section 20(a) presumption. The administrative law judge granted employer's motion, noting that he had made an error in his factual findings relating to Dr. Tudor's medical opinions, but nonetheless found, upon reconsideration, that claimant is entitled to temporary total disability benefits despite the error, as employer's evidence remained insufficient to rebut the Section 20(a) presumption. Employer's second motion for reconsideration was denied.

On appeal, employer argues that the administrative law judge erred in finding that claimant sustained a compensable injury related to his work for employer. Specifically, employer avers that the evidence establishes that claimant's total disability is due only to COPD caused by smoking. Claimant responds, urging affirmance of the administrative law judge's award of benefits.

Employer initially argues that since the claim made by claimant is for totally disabling COPD, claimant failed to make out a *prima facie* case that any temporary exacerbations he experienced in the past are sufficient to invoke the Section 20(a) presumption relating the current disability to his employment.

[1]The administrative law judge granted Electric Boat Corporation's motion for summary decision, finding that A-Z was the last maritime employer to expose claimant to injurious stimuli.

An injury occurs within the meaning of the Act "if something unexpectedly goes wrong within the human frame," *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (*en banc*), and the work-related manifestation of symptoms constitutes an "injury" even if the underlying disease process is not affected. *Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Crum v. Gen. Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Under the aggravation rule, where an employment-related injury aggravates, accelerates or combines with an underlying condition, employer is liable for the entire resultant disability. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). It also is well established that a claimant is entitled to benefits where his work-related condition subsides when he is removed from work, but would recur if he were to return to work. *Marinette Marine Corp.*, 431 F.3d 1032, 39 BRBS 82(CRT); *Crum*, 738 F.2d 474, 16 BRBS 115(CRT); *Gardner*, 640 F.2d 1385, 13 BRBS 101; *Pittman*, 18 BRBS 212; *see* discussion *infra*.

Pursuant to Section 20(a) of the Act, it is presumed, in the absence of substantial evidence to the contrary, that claimant's disabling injury is work-related. *See U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In order to establish his *prima facie* case, and thus, his entitlement to invocation of the Section 20(a) presumption, claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631. Claimant is not required to introduce affirmative medical evidence that his employment in fact contributed to or accelerated his COPD; claimant need show only the existence of working conditions which could have contributed to, aggravated, or accelerated his disabling condition. *See Wheatley*, 407 F.2d at 313; *see also Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

We reject employer's contention that claimant is not entitled to the benefit of the Section 20(a) presumption. As the administrative law judge found, it is undisputed that claimant has a harm, COPD, and that this condition is due to his cigarette smoking and not caused by his employment. It also is undisputed that claimant is disabled by his COPD. The question of invocation of the Section 20(a) presumption, therefore, turns on whether claimant's disabling COPD or its symptoms could have been aggravated by his working conditions with employer. Claimant described his work environment as being dusty and filled with metal and sand particulates. HT at 30-39. He also worked with, and thus had airborne exposures to, welding fumes, stainless steel, iron, carbon steel pipe, insulation, concrete, cutting oils, fiberglass, sanding disks, tungsten, paints, diesel fuel

and gasoline.[2] HT 44-59, 177. The administrative law judge also credited the opinion of Dr. Tudor which provides evidence that claimant's occupational inhalation of dust and fumes could have aggravated his underlying COPD.

In a letter dated July 8, 2008, Dr. Tudor, who diagnosed claimant with "severe COPD," opined that claimant "has damages related to exposure to welding fumes," adding that she felt at least "part of [his] progressive respiratory symptoms and lung function decline could be attributed to this occupational exposure." CX 2. Dr. Tudor subsequently clarified her position stating that claimant's occupational exposures did not result in "a permanent worsening of his COPD." EX 36, Dep. at 27, 38-39. Nonetheless, Dr. Tudor acknowledged that claimant's occupational exposure to welding fumes "absolutely" increased and produced, in combination with claimant's smoking history, symptomology of claimant's repeated flare-ups of bronchitis, *Id*. at 20-21, 30-31, 42, 53-54, since exposure to welding fumes "induces a temporary decrease in lung function, probably related to the exacerbation." *Id*. at 25-26. In particular, Dr. Tudor articulated that her findings indicated that "sometimes she would get [claimant] out of the hospital after a flare-up and he would go back to work and he will flare-up again," such that the physician "cannot stop thinking that it has to be a direct connection between the symptoms and flare-ups with that [work] exposure." *Id*. at 22, 30-31.

The administrative law judge found that claimant's testimony, in conjunction with the opinion of Dr. Tudor, that claimant's exposures could result in temporary exacerbations of his COPD,[3] entitled claimant to the Section 20(a) presumption. This finding is supported by substantial evidence and in accordance with law. *See Fortier v. General Dynamics Corp.*, 15 BRBS 4 (1982), *aff'd mem.* 729 F.2d 1444 (2nd Cir. 1983). We, therefore, affirm the administrative law judge's invocation of the Section 20(a) presumption. *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988).

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[2]Claimant's testimony regarding these exposures is supported by statements from employer's mechanical operations manager, David Bernardinelli, who testified that welding was done where fiberglass was removed and that the removing of metal from pipes would result in airborne metal particulates such as stainless steel. HT at 247-48. Similarly, Mark Maulucci, a senior project manager, testified that claimant was exposed to concrete dust. *Id*. at 272, 288.

[3]The opinion of Dr. Tudor is supported by documentation of claimant's hospitalizations for treatment of acute exacerbations of his COPD while claimant was employed by employer. *See* EX 1-14.

Employer next contends that the administrative law judge erred in finding that it did not rebut the Section 20(a) presumption based on the opinions of Drs. Tudor and Gerardi. Employer proffers that Drs. Tudor and Gerardi repeatedly stated that claimant's COPD was caused by his cigarette smoking and that his occupational exposures did not permanently worsen his COPD or cause it to progress; employer avers that the work exposure caused nothing more than temporary or transient exacerbations.

It is employer's burden on rebuttal to produce substantial evidence that the work accident did not aggravate claimant's pre-existing condition, including the symptoms of that condition. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *see also Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *C & C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). Drs. Tudor and Gerardi opined that there was no permanent worsening of claimant's underlying disease due to claimant's work exposure. The administrative law judge properly found, however, that these opinions are insufficient to rebut the Section 20(a) presumption because both doctors attributed exacerbations of the COPD to claimant's work exposures. The administrative law judge found that Dr. Tudor stated that the temporal association between claimant's symptoms and his work led her to believe that claimant's flare-ups of chronic bronchitis, a component of claimant's disabling COPD, were probably due to a combination of smoking and occupational exposure. Decision and Order at 17; Decision and Order on Reconsideration at 6. *See* n.3, *supra.* Dr. Tudor stated "absolutely, yes," that the repeated flare-ups in claimant's COPD could be attributable to his exposure to welding fumes. EX 36, Dep. at 21-22, 53-54. Dr. Gerardi likewise opined that "workplace dust and fumes are a potential cause of COPD," EX 37, Dep. at 40-41, and that claimant's general work exposures "could be an exacerbating contributor." *Id*. at 61, 71. The administrative law judge properly recognized that the courts have held that a disabling work-related aggravation of a pre-existing condition is compensable regardless of whether the employment exposure actually altered the underlying disease process or whether it merely induced the manifestation of symptoms. *Crum*, 738 F.2d 474, 16 BRBS 115(CRT); *Gardner*, 640 F.2d 1385, 13 BRBS 101. For example, in *Crum*, the United States Court of Appeals for the District of Columbia Circuit stated that a disabling aggravation of the claimant's angina, a symptom of his underlying heart disease, as a result of stress and working conditions was compensable. *Crum*, 738 F.2d 474, 16 BRBS 115 (CRT). In *Gardner*, the United States Court of Appeals for the First Circuit stated that:

> Whether circumstances of [claimant's] employment combined with his disease so to induce an attack of symptoms severe enough to incapacitate him or whether they actually altered the underlying disease process is not

> significant. In either event his disability would result from the aggravation of his preexisting condition.

Id., 640 F.2d at 1389, 13 BRBS at 106. Thus, in this case, as neither physician opined that claimant's working conditions did not aggravate the symptoms of claimant's COPD, and, in fact, stated that it did, the administrative law judge properly concluded that employer did not meet its burden of producing substantial evidence sufficient to rebut the Section 20(a) presumption. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 55, 31 BRBS 19, 21(CRT) (1st Cir. 1997); *Care*, 21 BRBS 248. We therefore affirm the administrative law judge's finding that claimant's COPD is related to his work for employer. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

Employer next contends that the administrative law judge erred in awarding claimant disability benefits since any temporary work-related exacerbations sustained by claimant did not cause his current total disability, nor has claimant established that his totally disabling COPD is the natural and unavoidable progression of those earlier exacerbations. Employer argues that since Drs. Tudor and Gerardi opined that workplace exposures played no permanent role with respect to claimant's totally disabling COPD, which they each tied exclusively to his cigarette use, claimant did not establish a nexus between his temporary work-related exacerbation and his subsequent total disability.

In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. *See, e.g., Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). In *Crum v. General Adjustment Bureau*, 12 BRBS 458 (1980) (Miller, J., dissenting), the Board held that a claimant was limited to temporary disability benefits because his cardiac symptoms subsided when he was removed from the workplace. *See also Crum v. General Adjustment Bureau*, 16 BRBS 101 (1983) (Miller, J., concurring). The United States Court of Appeals for the District of Columbia Circuit reversed this holding, stating that although the claimant's condition improved with the cessation of his workplace exposure, his underlying angina remained indefinite and his disability was likely to be permanent. *Crum*, 738 F.2d at 480, 16 BRBS at 124(CRT). Thus, the fact that a claimant's symptoms may be alleviated by a departure from the workplace does not support a finding that the work-related aspect of the condition has resolved. *Id.*, 738 F.2d at 480, 16 BRBS at 125(CRT). Nor is it material that claimant's underlying condition was not caused or permanently worsened by claimant's workplace exposures. *Id*. In *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 815 (9th Cir. 1966), the employer contended that,

> the natural progression of the employee's arthritis would have resulted in total disability even if the accident (and fusion) had not occurred at all; and

> therefore, appellant's (sic) contend, the accident and fusion cannot be said to be related to the employee's permanent disability.

The United States Court of Appeals for the Ninth Circuit responded,

> If an employee is incapacitated from earning wages by an employment injury which accelerates a condition which would ultimately have become incapacitating in any event, the employee is incapacitated "because of" the employment injury, and the resulting "disability" is compensable under the Act.

Id.

In this case, the administrative law judge correctly recognized that the severity of claimant's underlying disease and the likelihood that it would have disabled claimant by itself are not determinative of whether claimant is disabled by his work exposures. *Id.* The administrative law judge's finding that claimant is totally disabled due to the work-related aggravation of his symptoms is supported by substantial evidence and in accordance with law. Medical opinions that a claimant's return to work is contraindicated due to the likely exacerbation of an underlying condition will support a *prima facie* case of total disability, even if the underlying disease is not permanently worsened by the exposures.[4] *Gardner*, 640 F.2d at 1389, 13 BRBS at 106; *Bath Iron Works Corp, v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978); *Care*, 21 BRBS 248; *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 1 (1988); *Lobue v. Army & Air Force Exchange Serv.*, 15 BRBS 407 (1983); *Sweitzer v. Lockheed Shipbuilding & Constr. Co.*, 8 BRBS 257 (1978); *see also Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010).[5]

The parties in this case agree that claimant is totally disabled. The administrative law judge credited the opinions of Drs. Tudor and Gerardi, who both stated that claimant should not return to work for employer because exposure to welding fumes would increase the risk of aggravating his symptoms. In this regard, Dr. Tudor recommended that claimant not go back to welding because "his lung function is very low," such that he could "have life-threatening exacerbations" prompted, in part, by continued occupational exposure to fumes. EX 36, Dep. at 66-69. Dr. Gerardi opined that claimant does not have the capacity to continue to perform any work due to his COPD," EX 37, Dep. at 17,

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[4]Thus, there is no basis in case precedent for employer's contention that the disability must follow immediately from the temporary exacerbation.

[5]Contrary to employer's contention, the Board's decision in *Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010), is consistent with this principle and supports the result herein.

38-39, 72, and that he would not recommend claimant's going back to work in the welding field because "if you have a chronic lung disease, it just makes common sense to stay away from dust or fumes or something that might cause a greater degree of symptoms," as "there are potential irritants. . . which could exacerbate his illness." *Id*. at 72, 76. The administrative law judge thus rationally found that this medical evidence demonstrates claimant's inability to return to his usual work due to his work injury. *See generally Mijangos v. Avondale Shipyards, Inc*., 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Substantial evidence of record therefore establishes that claimant's workplace exposures are "a cause" of claimant's present inability to work. *Director, OWCP v. Vessel Repair, Inc*., 168 F.3d 190, 193, 33 BRBS 65, 67(CRT) (5th Cir. 1999) ("the only legally relevant question is whether the [work] injury is *a cause* of that disability"). Thus, given that Drs. Tudor and Gerardi agree that claimant is incapable of performing his usual employment because of his work injury, EX 36, Dep. at 66-69; EX 37, Dep. at 17, 38-39, 72, and employer has not presented any evidence of suitable alternate employment, the administrative law judge's award of temporary total disability compensation is affirmed. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Crum*, 738 F.2d 474, 16 BRBS 115(CRT).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Decision and Order on Reconsideration Confirming Award of Benefits, and Order Denying Respondents' Second Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge