

CHARLES M. LAMON)	
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Claimant-Respondent)	
)	
v.)	
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A-Z CORPORATION)	DATE ISSUED: 07/26/2012
)	
and)	
)	
HARTFORD INSURANCE COMPANY)	
)	
Employer/Carrier-)	ORDER on MOTION
Petitioners)	FOR RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board’s Decision and Order in *Lamon v. A-Z Corp.*, 45 BRBS 73 (2011). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer avers that the Board erred in affirming the administrative law judge’s award of total disability benefits. Claimant responds that employer’s motion should be denied. For the reasons set forth below, we grant employer’s motion, vacate the award of total disability benefits, and remand this case for the administrative law judge to more fully discuss the cause of claimant’s disability.

Claimant, who last worked in covered employment as a welder for employer, filed a claim alleging that his severe, disabling chronic obstructive pulmonary disease (COPD), though directly caused by smoking and obesity, was aggravated by his occupational exposure to irritants such as welding fumes and smoke. The administrative law judge found 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. Accordingly, 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 from July 8, 2008.

The Board affirmed the administrative law judge’s findings that claimant is entitled to the Section 20(a) presumption and that employer did not rebut the presumption as Drs. Tudor and Gerardi both stated that claimant’s work aggravated or exacerbated claimant’s COPD. *Lamon*, 45 BRBS at 75. Noting that medical opinions that a claimant’s return to work is contraindicated due to the likely exacerbation of a work-

related condition will support a prima facie case of total disability, even if the underlying disease is not permanently worsened by the exposures, the Board affirmed the administrative law judge's finding that the credible 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, demonstrates claimant's inability to return to his usual work due to his work injury. *Id.* at 76-77. Thus, as Drs. Tudor and Gerardi agreed that claimant is incapable of performing his usual employment because of his COPD, and as employer did not present any evidence of suitable alternate employment, the Board affirmed the administrative law judge's award of temporary total disability compensation. *Id.* at 77.

On reconsideration, employer contends that, notwithstanding the work aggravations, claimant's condition was subsequently aggravated temporarily in non-covered employment (with employer). Employer contends that claimant's occupational exposure to injurious substances thereafter ended but he nevertheless continued to experience exacerbations of his COPD, demonstrating that claimant's condition after he voluntarily left covered employment is due to the natural progression of his underlying disease. Employer avers that since Drs. Tudor and Gerardi stated that no permanent effects resulted from the work aggravations, claimant's disabling condition is not related to those work-related aggravations. Moreover, employer contends that since claimant voluntarily stopped working for reasons unrelated to his occupational exposures and, thus, did not leave work because of his symptoms, the acknowledged contraindication of employment is due to the underlying disease and is not compensable.

While substantial evidence supports the administrative law judge's finding that claimant sustained a work-related injury, i.e., the opinions of Drs. Tudor and Gerardi establish that claimant had temporary exacerbations of his COPD caused by occupational exposure to deleterious substances,¹ upon further reflection we find that the administrative law judge did not adequately address the cause of claimant's present total disability in terms of the relevant evidence of record. Employer is correct to note that in the cases cited in support of the administrative law judge's award of total disability benefits, e.g., *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 1 (1988); *see also Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010), each claimant's departure from the work place had a temporal nexus to the work exacerbations, i.e., the claimant experienced symptoms and stopped working because of the symptoms. Thereafter, physicians stated that each claimant should not go back to work because the symptoms would likely recur. *Id.*

¹Accordingly, we shall not reconsider the administrative law judge's finding that claimant sustained a work-related injury. *Lamon*, 45 BRBS at 74.

In this case, claimant sustained temporary exacerbations of his COPD symptoms related to his workplace exposures. Claimant last worked in covered employment in February 2006, but continued to work for employer until September 2007. The administrative law judge found claimant stopped working in September 2007 for financial reasons, and not because of his COPD.² Decision and Order at 6. Claimant, however, continued to experience exacerbations of his COPD as evidenced by hospital admissions for treatment of that condition in April, May, September and October of 2008 and again in March of 2009. CX 6 at 1-7, 28-29; CX 5 at 94, 12-64. Dr. Tudor, in her letter dated July 8, 2008, and Dr. Gerardi, in his report dated August 6, 2008, both deemed claimant incapable of gainful employment because of the severity of his illness. CX 2; EX 25. Each physician subsequently stated, at their respective depositions, that any return to welding work might involve exposures that would be harmful to claimant's COPD. EX 36, Dep. at 61, 68-69; EX 37, Dep. at 76-77. Employer contends that claimant's continued exacerbations following his voluntary removal from work establish that claimant's total disability is the result of the natural progression of his COPD due to his cigarette smoking and obesity, rather than his occupational exposures. Employer contends the administrative law judge did not adequately address the cause of claimant's present disability.

Upon reconsidering this issue, we agree that the administrative law judge did not sufficiently address the cause of claimant's disabling COPD. While the administrative law judge found that Drs. Tudor and Gerardi each opined that claimant should not return to his usual work with employer because exposure to welding fumes would increase the risk of aggravating his underlying COPD, the administrative law judge summarily awarded benefits as of July 8, 2008, without regard for the cause of claimant's total disability. See Decision and Order at 17-18. The administrative law judge did not address: that claimant last worked in non-covered employment; his earlier finding that claimant had voluntarily removed himself from the workforce in September 2007; or the medical evidence as to the cause of claimant's COPD at the time he became totally disabled.

Additionally, we agree with employer that the Board's decision in *Rice*, 44 BRBS 63, does not mandate affirmance of the administrative law judge's decision. *Rice* is similar to this case in that both involve the potential exacerbation of a condition should

²The administrative law judge found that claimant severed his employment relationship with employer in September 2007 in order to gain access to funds in his 401(k) retirement plan for the purpose of buying a vehicle. Decision and Order at 5. As a result, the administrative law judge found that claimant was not entitled to total disability benefits for the period from September 2007 until July 8, 2008, the date upon which Dr. Tudor first opined that claimant was incapable of working due to his COPD.

the claimant return to work. *Rice*, however, did not concern whether the claimant was disabled by a work injury or by something else.³ This case, instead, concerns whether the claimant is disabled by an aggravating work injury or solely by his underlying disease. Moreover, *Rice* involved the factual situation where an employer withdrew the usual work from the claimant, whereas in this case, the administrative law judge found that claimant voluntarily withdrew himself from his job for reasons unrelated to his injury. Thus, the Board's decision in *Rice* does not compel the finding that claimant's disability is compensable even in the absence of evidence that the work-related injury altered or permanently aggravated claimant's underlying COPD.

Consequently, we vacate the Board's affirmance of the administrative law judge's award of total disability benefits. We remand this case for the administrative law judge to make findings regarding the cause of claimant's total disability. In this regard, the administrative law judge should determine whether the doctors gave any opinion as to the cause of claimant disability, i.e., is claimant's total disability due, even in part, to the work exacerbations or is it due solely to the natural progression of his non-work-related COPD. 33 U.S.C. §902(2); *see generally Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

³In *Rice*, 44 BRBS 63, the claimant alleged a psychological injury resulting from her work in Iraq. Employer sent her back to the United States for a psychological evaluation and did not offer claimant her job back. The administrative law judge found that claimant was disabled from the time she was sent home and for the next three months, at which point the administrative law judge determined that claimant's symptoms had abated and that she was no longer disabled by her work injury. The Board held that as employer sent claimant home, both doctors stated that claimant should not return to work in a war zone because claimant might suffer a relapse, and because there was no evidence that employer offered claimant her job back, claimant established her prima facie case of total disability which extended until employer established suitable alternate employment, beyond the three months found by the administrative law judge. *Rice*, 44 BRBS at 65.

Accordingly, employer's motion for reconsideration is granted. The Board's affirmance of the administrative law judge's award of total disability benefits is vacated, and the case is remanded for further consideration consistent with this opinion. 20 C.F.R. §802.409.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge