BRB No. 00-0758

JUDITH MERRITT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. NAVY EXCHANGE	)	DATE ISSUED: April 23, 2001
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	
	)	
Employer/Administrator-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order After Remand of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Judith Merritt Hand, Oak Harbor, Washington, *pro se*.

Russell A. Metz (Metz & Associate, P.S.), Seattle, Washington, for employer/ administrator.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order After Remand (97-LHC-2864) of Administrative Law Judge Edward C. Burch 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant who is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law; if they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e). 802.220.

This case is before the Board for the second time. Claimant was working at an

espresso stand at the Navy Exchange on March 25, 1995, when her right hand became numb and she dropped a pitcher of steaming milk. Claimant was subsequently diagnosed with carpal tunnel syndrome. She underwent a carpal tunnel release on each hand in the summer of 1995, and she returned to work. Claimant alleges that her condition improved until February 1996, when she was assigned to work at the "Classic Six" snack bar in Hangar 6, where she had to do lifting, stocking and putting supplies away. EX 11 (Claimant's Deposition) at 27-28. She developed numbness going up her arm, which she initially attributed to the aftermath of the carpal tunnel surgery and which gradually got worse and went up into her shoulder. EX 2 at 9. Claimant sought treatment from various doctors to whom she complained of pain in her wrists, forearms, neck and shoulders. Employer laid claimant off on November 21, 1996, because of prolonged absence due to extended disability.

Claimant filed a notice of injury on February 21, 1997, listing pain to her right hand, right arm, shoulder and neck, and giving the date of injury as "approx. March 1996." EX 1 at 5. Claimant filed a claim on April 2, 1997, stating, "Still having problems in 1996 from original problem in 1995." EX 1 at 1. At the hearing, the parties agreed that all benefits related to the carpal tunnel syndrome have been paid. In a Decision and Order - Denying Benefits dated November 20, 1998 (Decision and Order 1), the administrative law judge found that claimant became aware of a work-related injury to her neck and back in July 1996, and thus that her claim was timely filed under Section 13(a), 33 U.S.C. §913(a). He found, however, that claimant failed to give timely notice to employer under Section 12(a), 33 U.S.C. §912(a), and that the failure was not excused under Section 12(d), 33 U.S.C. §912(d). The administrative law judge then determined, that even if claimant gave timely notice, she failed to establish a *prima facie* case under Section 20(a) of the Act, 33 U.S.C. §920, that her neck and back problems are causally related to her employment. He further found that if claimant established a *prima facie* case, there was sufficient evidence to rebut the Section 20(a) presumption. He concluded, upon weighing the evidence as a whole, that claimant failed to prove by a preponderance of the evidence that any alleged pain in her neck or back constituted a compensable injury, and therefore he denied benefits.

Claimant, representing herself, appealed to the Board. The Board reversed the administrative law judge's finding that Section 12 barred claimant's claim, and held that claimant was entitled to invocation of the Section 20(a) presumption linking her neck and back problems to her employment, as a matter of law. *Merritt v. U.S. Navy Exch.*, BRB No. 99-0353 (Dec. 17, 1999) (unpublished). The Board stated that the administrative law judge's conclusions that even if claimant established a *prima facie* case, the evidence is sufficient to establish rebuttal and that upon weighing the evidence as a whole claimant failed to prove by a preponderance of the evidence that any pain in her neck or back constituted a compensable injury, were conclusory and unexplained. Accordingly, the Board remanded the case for the administrative law judge to clearly explain his findings on this issue.

On remand, the administrative law judge again found that claimant's neck and back conditions are not compensable, as claimant failed to prove that any pain in her neck or back constituted a compensable injury. In her present appeal to the Board, claimant, representing herself, again challenges the administrative law judge's denial of her claim. Employer responds, urging affirmance of the denial.

Once claimant presents sufficient evidence to invoke the Section 20(a) presumption, as is the case here, the burden shifts to employer to rebut the presumption with substantial evidence that the injury was not caused by the employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), *aff'g* 31 BRBS 98 (1997); *see also Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence, with claimant bearing the burden of persuasion. *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In his first Decision and Order, the administrative law judge found that there was sufficient evidence to establish that in July 1996, by reason of medical advice, claimant became aware of a new, allegedly work-related, injury to her neck and back that was distinct from the initial carpal tunnel injury. Decision and Order 1 at 10. Claimant then filed new claims distinct from the claims she had filed following the March 15, 1995, incident based on numbness in her hands. EX 1 at 6, 7. It was on the basis of this new condition involving her neck and back, and the conditions of employment to which she returned after her carpal tunnel releases, that the Board held that claimant invoked the Section 20(a) presumption. *Merritt*, slip op. at 5.

On remand, however, the administrative law judge did not consider whether the record contains substantial evidence severing the connection between claimant's back and neck pain and these employment duties. Rather, he found that claimant failed to prove by a preponderance of the evidence that any back or neck pain claimant is experiencing constitutes a compensable injury. Decision on Remand at 3-4. In reaching this conclusion, the administrative law judge noted that claimant's initial notice of injury for the carpal tunnel syndrome filed in April 1995 made no mention of a neck or back injury, an x-ray of her cervical spine was normal, three physicians originally diagnosed carpal tunnel syndrome rather than a neck or back injury, and according to claimant's own testimony, she did not begin to experience pain in her neck and back until February or March 1996, a year after the initial incident at the espresso stand. The administrative law judge further found that because claimant's physicians were unable to uniformly diagnose a specific industrial injury, claimant

has not proven that her pain is work-related.

We reverse the administrative law judge's finding that claimant's neck and back pain is not work-related. The administrative law judge erred in placing on claimant the burden of affirmatively establishing "by clear medical evidence" that her pain is work-related. *See, e.g., Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon.*, 32 BRBS 224 (1998). Once, as here, claimant establishes a *prima facie* case, Section 20(a) applies to link claimant's pain to her employment. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The burden then shifts to employer to produce substantial evidence that claimant's injury is *not* work-related. *See Duhagon,* 169 F.3d 615, 33 BRBS 1(CRT).

Moreover, the evidence cited by the administrative law judge is not sufficient to rebut the Section 20(a) presumption. The administrative law judge incorrectly focused on whether claimant's neck and back condition is related to her initial injury involving carpal tunnel syndrome, rather than on the pertinent inquiry of whether it is related to the working conditions to which she returned in 1996 after her carpal tunnel releases. The evidence cited by the administrative law judge does not sever the relationship between claimant's neck/back condition and her working conditions. None of the physicians who examined claimant stated that her pain is not related to her employment. *See Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). Furthermore, the fact that the physicians are unable to definitively diagnose the reasons for claimant's pain does not constitute substantial evidence that claimant's condition is not work-related.[1] The opinions, therefore, do not rebut the Section 20(a) presumption, as a matter of law. *See Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). There also is no other evidence of record which could rebut the Section 20(a) presumption.[2] Thus, we hold that claimant's neck

[1]Dr. Lycksell stated, at different times, that claimant could have spinners arthritis, possible cervical impingement, cervical degenerative arthritis, peripheral neuropathy, and low back strain. EX 3. Dr. Wilhelm stated there is no definite electrophysiologic evidence of ulnar entrapment, cervical radiculopathy, or brachial plexus. EX 4. Dr. McCutheon stated that claimant might have fibromyalgia or a cervical disc problem. EX 6 . Dr. Haller stated claimant has right-sided radiculopathy symptoms of unclear etiology, possibly stemming from a subtle cervical radicular problem, shoulder tendinitis, or thoracic outlet syndrome. EX 2. Dr. Houston stated claimant may have cervical and arm problems. CX 8-7.

[2]The fact that claimant did not begin to experience back or neck pain until February or March 1996, a year after the initial incident, is simply not relevant given that the claim was based on work in March 1996.

and back pain is work-related as a matter of law, *id.*, and we remand this case for findings on any remaining issues.

Accordingly, the administrative law judge's Decision and Order After Remand is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge