BRB No. 02-0536

DONALD DURANT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BAYOU FLEET, INCORPORATED	)	DATE ISSUED:APR 24, 2003
	)	
and	)	
	)	
LOUISIANA WORKERS= COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Donald W. Durant, Jr., Slidell, Louisiana, *pro se*.

Ted Williams (Egan, Johnson & Stiltner), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, without assistance of counsel, appeals the Decision and Order on Remand (00-LHC-1827, 3034, 3035, 3036, 3037, 3038) of Administrative Law Judge C. Richard Avery 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). In an appeal by a claimant without representation 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. 33 U.S.C. '921(b)(3); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed.

This case is before the Board for the second time. To reiterate, claimant, who was employed as a port engineer by employer, filed a claim under the Act, based on a series of injuries which he alleged aggravated his underlying back condition, and which culminated on August 16, 1999, the day employer terminated him because he was no longer physically able to perform his job duties. *See* CX 1. As a result of his alleged work-related condition, claimant sought temporary total disability compensation and medical benefits.

In his original Decision and Order, the administrative law judge, after noting that claimant provided no evidence that his work for employer caused, aggravated or accelerated his pre-existing back condition, stated that claimant blamed unwitnessed, undocumented and unmentioned accidents at work for his present medical condition and declined to accept claimant=s testimony without corroboration. The administrative law judge thus concluded that claimant failed to establish his *prima facie* case and consequently was not entitled to invocation of the Section 20(a) presumption, 33 U.S.C. '920(a). Accordingly, the administrative law judge denied claimant benefits. Claimant appealed to the Board without the assistance of counsel, and employer responded, urging affirmance.

The Board held the administrative law judge erred in concluding that claimant presented insufficient evidence to establish his *prima facie* case, and, therefore, erred by not invoking the Section 20(a) presumption. Specifically, the Board held that, although the administrative law judge found that claimant established a harm, a chronic back condition, the administrative law judge erred in finding claimant did not establish the existence of working conditions which could have aggravated this back condition. With respect to the working conditions element of claimant=s *prima facie* case, the Board stated that claimant=s testimony that he performed heavy labor and regularly experienced back pain and discomfort while working for employer is indeed corroborated by other evidence regarding claimant=s work activities. *Durant v. Bayou Fleet, Inc.*, BRB No. 01-0455 (Jan.11, 2002)(unpub.). Thus, the Board held

---

[1]Employer did not dispute that claimant established the harm element of his *prima facie* case, *i.e.*, chronic back pain, disc degeneration at L4-5, spinal stenosis of L4-5 with bilateral foraminal narrowing, and bilateral L4-5 spondyloslisthesis. In this regard, the administrative law judge specifically stated that A[c]laimant=s long standing back discomfort is well documented both by his testimony at trial and the medical records and testimony received into evidence.@ Decision and Order at 11.

[2]The parties are in agreement that claimant=s work for employer was physically strenuous, requiring him to move pipe, pull chain, build blocks and tackles,

that this evidence is sufficient to establish that working conditions existed which could have caused, aggravated or accelerated claimant=s back pain, in that claimant need not prove that a specific accident occurred or relate his harm to a specific event or time, but may base his claim upon general working conditions over a period of time. *Id.,* slip op. at 4. Moreover, the Board held that the administrative law judge erred in requiring claimant to affirmatively establish that his working conditions aggravated or accelerated his chronic back condition. Specifically, the Board stated that once claimant establishes a harm and the existence of working conditions which *could* have caused it, Section 20(a) applies to link the harm to the work activities. *Id.* Therefore, the Board held that the Section 20(a) presumption is invoked as a matter of law. Accordingly, the Board remanded the case the case to the administrative law judge to consider whether employer rebutted the presumption with substantial evidence that claimant=s back condition is not related to his employment.

On remand, the administrative law judge found that employer rebutted the Section 20(a) presumption with negative, circumstantial evidence. The administrative law judge noted that in June 1999, claimant reported to Dr. Salone that his pain was not work-related. EX 5 at 25. The administrative law judge determined that claimant presented the same symptoms before and after his employment with employer. In this regard the administrative law judge relied on Dr. Kaufman=s report that he saw no objective change in claimant=s condition after his employment with employer. EX 3 at 22. The administrative law judge found that claimant=s testimony that his work increased or aggravated his symptomotology is not credible, and the administrative law judge therefore declined to rely on the deposition testimony of Dr. Bourgeois that claimant=s work aggravated claimant=s condition, as Dr. Bourgeois=s opinion was based on the history claimant provided. Decision and Order on Remand at 3-4; CX 5, 6. The administrative law judge also relied on the testimony of claimant=s co-workers that claimant never reported an accident until after his employment was terminated, and a surveillance videotape of claimant depicting him allegedly engaged in activities beyond his stated capabilities.

---

set up cranes, rig buckets, generally, without assistance. Tr. at 93-95, 99-100; EX 6, 7. Mr. Toups, employer=s controller, testified that claimant consistently complained of back pain while he was at work and that he had Ano doubt@ that working aggravated claimant=s back condition, Tr. at 33, 40-42, that employer had offered claimant light-duty work at approximately half his salary, Tr. at 34, and that claimant would start the work day, work for two hours, lay down for four hours, then work for two hours. Tr. at 36. Employer terminated claimant because the physical demands of his position were beyond claimant=s abilities. *Id. ;* CX 1 at 9.

EX 8. On weighing the evidence as a whole, the administrative law judge concluded that claimant did not meet his burden of establishing that he sustained a work-related injury. Accordingly, the administrative law judge again denied claimant benefits. *See* Decision and Order on Remand at 2. Claimant, without the assistance of counsel, appeals the denial of benefits. Employer responds, urging affirmance.

Once, as here, claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998). Under the aggravation rule, if a work-related injury contributes to, combines with, or aggravates a pre-existing condition, the entire resulting condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir.1986)(*en banc*). Thus, employer must present evidence addressing aggravation or contribution in order to rebut the Section 20(a) presumption. *See Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982). The presumption may be overcome by circumstantial evidence Aspecific and comprehensive enough@ to sever the potential connection between the injury and the employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.) *cert. denied*, 429 U.S.820 (1976). The type of the negative evidence on which employer relies, however, must be specifically tailored to the facts that gave rise to the presumption in the first instance. *Id.,* 554 F.2d at 1083-1085, 4 BRBS at 477-479.

We hold that the negative evidence relied on by the administrative law judge is insufficient to rebut the Section 20(a) presumption on the facts of this case. The overriding flaw in the administrative law judge=s analysis is his insistence on framing the issue in terms of the occurrence of a discrete accident at work, rather than in terms of whether claimant=s overall employment aggravated his back condition or symptomotology. *See generally Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981) (increase in symptoms constitutes an injury under the Act). Thus, the fact that claimant did not report the occurrence of an injury at work until after his termination cannot be grounds for finding the presumption rebutted in the face of the co-workers= testimony that claimant=s work was heavy and likely aggravated his back pain and the fact that claimant was terminated because he was physically unable to work. *See generally Swinton*, 554 F.2d at 1083-1084, 4 BRBS

[3]Employer=s termination notice specified that claimant=s discharge was based

at 476-477. Moreover, Dr. Kaufman admitted in his testimony that claimant on occasion would complain that his work would aggravate his discomfort, EX 3 at 20, and he placed claimant on light duty work restrictions in February 1999, while claimant was employed with employer. *Id.* at 12-13. In addition, claimant=s remark to Dr. Salone in June 1999 that his pain was not work-related does not negate the presumed causal relationship between claimant=s employment after that date and claimant=s back pain. Finally, the videotape evidence does not establish that claimant=s pain was not related to his employment. This evidence relates to claimant=s ability to work, which is properly addressed in the context of the extent, if any, of claimant=s disability.

In sum, we hold that, as a matter of law, the negative evidence relied on by the administrative law judge does not constitute substantial evidence sufficient to rebut the Section 20(a) presumption, in light of the facts that gave rise to the presumption in the first instance. *Swinton,* 554 F.2d at 1083-1085, 4 BRBS at 477-479*; see also Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). Employer has not offered any affirmative evidence that claimant=s work did not aggravate his back condition, which may have bolstered the negative evidence*, see, e.g., Holmes v. Noble Drilling Corp.*, 29 BRBS 22 (1995), and thus claimant=s condition is work-related as a matter of law. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Consequently, we vacate the denial of benefits, and we remand the case for the administrative law judge to consider the remaining issues raised by the parties.

Accordingly, we vacate the denial of benefits, hold that claimant=s back condition is work-related as a matter of law, and remand the case to the administrative law judge for consideration of the remaining issues.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

---

on his physical inability to perform his duties as port operator for employer. CX 1 at 9.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge