BRB No. 08-0749

J.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 04/29/2009
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Ralph P. King, II, Ocean Springs, Mississippi, for claimant.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2007-LHC-02135) of Administrative Law Judge Lee J. Romero, Jr., 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).

Claimant, who had pre-existing back problems, worked for employer as an electrician on its night shift. He filed a claim alleging that in the early morning of June 19, 2007, he injured his low back. Claimant testified that he sustained the injury while he was standing on a ladder and placing cable overhead. HT at 19-20. Claimant testified that because he was near the end of his shift, he went home, "cleaned up," and went directly to his family physician, Dr. Fineburg, without an appointment. *Id*. at 21-22; EX

5. Subsequently, the June 21, 2007, MRI ordered by Dr. Fineburg showed that claimant had a central disc herniation at L3-L4, and thus the doctor referred claimant to Dr. Kesterson, a neurosurgeon. EX 5 at 12. Dr. Kesterson first evaluated claimant's condition on July 31, 2007, noted the disc herniations and prescribed physical therapy. EX 7 at 8-9. Dr. Kesterson subsequently advised claimant that his problems were degenerative in nature, and if he did not pursue physical therapy, he could potentially be referred to a pain management clinic.[1] *Id.* Claimant then saw Dr. Bazzone, a neurosurgeon, who reviewed claimant's MRI and diagnosed his condition as "extruded disc fragments at L3-4 and L4-5, undoubtedly acute and undoubtedly caused by his accident of 6/19/07." EX 9 at 3-4. On September 20, 2007, Dr. Bazzone performed spinal surgery on claimant. Employer controverted the claim on the ground, *inter alia*, that the work incident did not occur, and it has not paid any disability or medical benefits. Claimant has not worked anywhere since June 19, 2007.

The administrative law judge found that claimant presented insufficient evidence to establish his *prima facie* case and therefore is not entitled to the Section 20(a) presumption of causation. Alternatively the administrative law judge found that if claimant invoked the Section 20(a) presumption, employer established rebuttal thereof, and on weighing the evidence as a whole, claimant did not meet his burden to establish that his back injury is work-related. Accordingly, the administrative law judge denied the claim.

On appeal, claimant challenges the administrative law judge's finding that he did not establish his *prima facie* case for invocation of the Section 20(a) presumption, and also contends that the administrative law judge erred in finding, alternatively, that employer established rebuttal of the Section 20(a) presumption. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant has the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish a *prima facie* case. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). It is claimant's burden to establish each of these two elements of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). If claimant establishes these

[1] Claimant testified that he was already under a pain management doctor's care as a result of an unrelated knee injury for which he had undergone several operations. HT at 24.

elements of his *prima facie* case, then Section 20(a) applies to presume that the established harm is due to the accident at work. *Port Cooper/T. Smith Stevedoring Co.*, 227 F.3d 285, 34 BRBS 96(CRT).

In this case, the administrative law judge found that claimant's credibility "is severely lacking" due to the many discrepancies between his general testimony and the information contained in the medical record.[2] Decision and Order at 22. Therefore, the administrative law judge stated that he would credit claimant's testimony with regard to the element of physical harm only to the extent that it is corroborated by other credible evidence. *Id.* at 22-23. The administrative law judge did not credit the statements of claimant's co-workers because the information contained therein is based on claimant's subjective complaints. Similarly, the administrative law judge declined to credit Dr. Bazzone's opinion that claimant's injury is work-related because it, too, is based on claimant's inaccurate "history." The administrative law judge thus concluded that the evidence "submitted by Claimant is insufficient to establish he sustained a physical harm or pain on June 19, 2007, as claimant's complaints are incredible and his corroborating evidence is derived from his own incredible statements." *Id.* at 23-24. As claimant did not establish the "harm" element of his *prima facie* case, the administrative law judge found that the Section 20(a) presumption is not invoked.

We cannot affirm this finding, as, on the facts of this case, the element of physical harm is established by the medical evidence, irrespective of claimant's lack of credibility.[3] On June 19, 2007, Dr. Fineburg stated claimant had "mechanical low back

[2] For example, although claimant visited Dr. Fineburg on June 19, 2007, some six hours after his alleged injury, the doctor's chart note of that date makes no mention of any incident, work or otherwise. Dr. Fineburg's chart note of June 19, 2007, merely reflects that claimant wanted an "answer to his back problem." Claimant testified that he showed up at Dr. Fineburg's office without an appointment and told Dr. Fineburg about the work incident, but that the doctor did not write it down. Dr. Fineburg's records indicate that claimant did not keep an appointment he had on the previous day, June 18, 2007. EX 5 at 10.

[3] In this regard, the administrative law judge also rejected the opinion of Dr. Bazzone for an erroneous reason. The administrative law judge rejected Dr. Bazzone's opinion that claimant's back condition is related to his employment. In determining whether the Section 20(a) presumption is invoked, claimant is not required to prove that his injury is, in fact, related to his employment. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Thus, the portions of Dr. Bazzone's opinion relevant to the invocation inquiry are those concerning the "harm" and "accident" elements of claimant's *prima facie* case.

pain" for which an MRI was required. EX 5 at 12. The MRI revealed a central L3-L4 disc herniation associated with mild spinal stenosis as well as a small central herniation at L4-L5 with minimal stenosis. *Id.* This objective finding is not dependent upon claimant's complaints of back pain. Dr. Fineburg referred claimant to Dr. Kesterson. Dr. Kesterson prescribed physical therapy for claimant's pain, although he questioned the validity of the degree of claimant's pain. EX 7 at 16. On September 20, 2007, Dr. Bazzone performed laminectomies at L3 and L4, discectomies at L3 and L4, a lateral mass fusion at L3, L4 and L5, and inserted pedicular screws and rods at L3, L4 and L5. EX 9 at 8-10. There is no evidence in the record that there is nothing wrong with claimant's back against which this evidence can be weighed. Based on this record, it is apparent that "something has gone wrong within the human frame" such that the "harm" element of claimant's *prima facie* case is satisfied. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968)(*en banc*); *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (5th Cir. 1949).

Rather, the issue left unresolved by the administrative law judge's decision is whether claimant established that the accident occurred at work as claimant alleged. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989); *Jones v. J.F. Shea Co., Inc.*, 14 BRBS 207 (1981). It is this issue to which claimant's testimony and the statements of claimant's co-workers are most relevant. *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989). The administrative law judge's decision to discredit claimant's testimony unless corroborated independently and other evidence reliant on statements claimant made is affirmed as it is rational and within his discretion. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). However, as the administrative law judge did not specifically address the "accident" issue in his decision, we must remand the case for him to do so. If the administrative law judge finds that the accident did not occur as alleged, the claim must be denied. *Bolden*, 30 BRBS 71. If the administrative law judge finds that the accident did occur, the Section 20(a) presumption applies to link claimant's back condition to the accident. *Port Cooper/T. Smith Stevedoring Co,* 227 F.3d 285, 34 BRBS 96(CRT).

We also cannot affirm the administrative law judge's alternate finding that employer rebutted the Section 20(a) presumption. The administrative law judge found the presumption rebutted based on the opinions of Drs. Fineburg and Kesterson that claimant's back complaints are not due to his work for employer. If the Section 20(a) presumption is invoked, employer must produce "substantial evidence to the contrary" in order to rebut the presumed causal nexus between the injury and the employment. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003). Employer contended below that claimant had a long-

standing back problem that pre-existed the alleged work incident. This raises application of the aggravation rule, pursuant to which employer is liable for claimant's entire disability if the work accident aggravated a pre-existing condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). Thus, in order to rebut the Section 20(a) presumption, employer must produce substantial evidence that the work accident neither caused claimant's harm nor aggravated his pre-existing condition. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Although the administrative law judge recited this law, he did not address whether employer produced substantial evidence that claimant's back condition was not aggravated by his work accident. Thus, as claimant correctly contends, if the administrative law judge finds the Section 20(a) presumption invoked, he must address rebuttal of the presumption in terms of aggravation.

If the Section 20(a) presumption is invoked and rebutted, it drops from the case, and claimant bears the burden of establishing the work-relatedness of his condition based on the record as a whole. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge found that claimant did not meet this burden, as he rejected claimant's testimony and relied on the opinions of Drs. Fineburg and Kesterson that claimant's condition is not work-related. The administrative law judge fully addressed the contentions claimant raises on appeal and claimant has not established any error in this regard. The Board is not empowered to reweigh the evidence, *see Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), and the denial of benefits based on the record as whole is supported by substantial evidence. Thus, in the event that the administrative law judge properly finds the Section 20(a) presumption invoked and rebutted, benefits may be denied. *O'Keeffe*, 380 U.S. 359.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further findings in accordance with this decision.

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