BRB No. 08-0830

C.L. Claimant-Respondent v. SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA c/o AMERICAN INTERNATIONAL UNDERWRITERS Employer/Carrier-Petitioners	)	DATE ISSUED: 04/27/2009 DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

John Schouest and Limor Ben-Maier (Wilson, Elser, Moskowitz, Edelman & Dicker LLP), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2007-LDA-00006) of Administrative Law Judge Daniel A. Sarno, Jr., awarding benefits 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 Defense Base Act, 42 U.S.C. §1651 *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 began working for employer as a laundry foreman on November 14, 2004. After completing training in Texas, claimant was deployed overseas. On February 3, 2005, while stationed at Camp Caldwell, Iraq, claimant began experiencing swelling and other symptoms, which ultimately led to a diagnosis of congestive heart failure. He was sent first to the Army Regional Medical Center in Landstuhl, Germany, and then to the United States for treatment. Claimant's general practitioner, Dr. Astin, concurred with the diagnosis of congestive heart failure, noted that claimant also suffered from asthma and chronic obstructive pulmonary disease (COPD), secondary to long term exposure to toxins at work, and referred claimant to a cardiologist, Dr. Rouse. Dr. Rouse diagnosed congestive heart failure, hypertension, atrial fibrillation, and elevated cholesterol. Both Dr. Rouse and Dr. Astin opined that the stressful atmosphere surrounding claimant's work for employer in Iraq contributed to his congestive heart failure. CXs 19, 6. Moreover, both physicians placed restrictions on any return to work for claimant. *Id.* Claimant has not worked since the February 3, 2005, incident.

In his decision, the administrative law judge initially determined that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer could not establish rebuttal thereof. The administrative law judge therefore concluded that claimant's cardiac condition is work-related. The administrative law judge next found that claimant cannot return to his usual employment, and that employer did not present any evidence regarding the availability of suitable alternate employment. He thus found claimant entitled to an ongoing award of temporary total disability benefits from February 4, 2005.

On appeal, employer challenges the administrative law judge's findings that claimant's cardiac condition is work-related and that claimant is totally disabled. Claimant responds, urging affirmance.

Employer argues that the administrative law judge erred in finding that claimant's congestive heart failure is a work-related condition, as the record establishes that this condition was brought on entirely by his pre-existing asthma, hypertension, COPD and other physical impairments. Employer also maintains that claimant should be precluded from obtaining any benefits under the Act because he intentionally and negligently misrepresented his pre-existing conditions and his ability to work overseas. Employer also contends that the administrative law judge ignored Dr. Astin's pre-deployment opinion that claimant should not work in Iraq, as well as evidence that claimant actually filed a Social Security disability application seeking total disability benefits based on his pre-existing asthma, COPD and other physical impairments, and thus, is not disabled by

the work injury. Employer further argues that claimant did not establish that his cardiac disease is work-related because the physicians' opinions upon which the administrative law judge relied were premised on claimant's subjective and unsubstantiated complaints regarding his work in Iraq.

As an initial matter, we reject employer's allegation that claimant's intentional and negligent behavior in failing to disclose pertinent information potentially affecting his ability to work for employer prior to his hiring precludes his entitlement to benefits in this case. The United States Court of Appeals for the Fourth Circuit and the Board have previously rejected the argument that a claimant who knowingly and willfully misrepresents his physical condition prior to being hired and then sustains an injury related to his undisclosed prior condition is precluded from receiving benefits under the Act. *Newport News Shipbuilding & Dry Dock Co. v. Hall*, 674 F.2d 248, 14 BRBS 641 (4th Cir. 1982), *aff'g* 13 BRBS 873 (1981); *Hallford v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 15 BRBS 112 (1982) (Ramsey, C.J., dissenting). Moreover, Section 4(b) of the Act, 33 U.S.C. §904(b), provides that "compensation shall be payable irrespective of fault as a cause for the injury."[1] Thus, the Board has held that Section 4(b) eliminates negligence or fault as a consideration with respect to the work event which caused the primary injury.[2] *Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998)(Smith, J., concurring & dissenting). Thus, claimant's alleged misrepresentations are not relevant to the resolution of claimant's claim under the Act. *Id.*

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). In order to establish his *prima facie*

[1] Section 3(c), 33 U.S.C. §903(c), contains the only provision under the Act for barring benefits due to an employee's misconduct. It specifically states: "[n]o compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." 33 U.S.C. §903(c).

[2] The Board observed that the case law pertaining to intervening cause rests on an interpretation of the Section 2(2), 33 U.S.C. §902(2), phrase "or as naturally or unavoidably results from such accidental injury," and requires that an employee show a degree of due care in regard to his work injury and take reasonable precautions to guard against re-injury. The duty of care required of an employee to guard against a subsequent injury, however, does not apply to the initial work injury. *Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998)(Smith, J., concurring & dissenting).

case for invocation of the statutory presumption, claimant is not required to prove that his working conditions in fact caused the harm; under Section 20(a), it is presumed in the absence of substantial evidence to the contrary that the harm demonstrated is related to the proven work events. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). An employment injury need not be the sole cause of a disability; rather, if the employment injury aggravates, accelerates or combines with an underlying condition, the entire resultant condition is compensable. *See, e.g., Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc); Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition is not caused or aggravated by his employment. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

As the administrative law judge found, it is undisputed that claimant suffered a harm for purposes of the Section 20(a) presumption, as on February 3, 2005, he began experiencing shortness of breath, edema, and atrial fibrillation, which prompted a diagnosis of congestive heart failure. Additionally, the administrative law judge found that the obligations and conditions of claimant's work for employer in Iraq created a stressful environment in which to work and live. Based on these findings and the opinions of claimant's treating physicians, Drs. Rouse and Astin, that claimant's experiences in Iraq contributed to his cardiac problems,[3] the administrative law judge determined that claimant also established the working conditions element, and thus, is entitled to invocation of the Section 20(a) presumption. As substantial evidence supports the administrative law judge's conclusion that claimant established both elements of his *prima facie* case, his finding that claimant is entitled to invocation of the Section 20(a) presumption is affirmed. *See Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *aff'd in pert. part, rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *see generally Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Harrison v. Todd*

[3] In particular, the administrative law judge found that Dr. Rouse proffered a reasoned medical opinion that the major factors that could have caused claimant's cardiac condition were the stressful atmosphere in which he found himself in Iraq, his high blood pressure, and his obesity. CX 8. He found that Dr. Astin similarly opined, on May 30, 2006, that claimant's overall situation in Iraq "pushed [claimant] into the CHF [congestive heart failure] state," and that claimant's long hours of physical labor and the emotional toll of constant danger contributed to the development and worsening of claimant's cardiac condition. CX 6.

Pacific Shipyards Corp., 21 BRBS 339 (1988). Moreover, since the administrative law judge properly found that there is no medical evidence in the record stating that claimant's cardiac condition was not related, at least in part, to his work environment in Iraq, his findings that employer did not rebut the Section 20(a) presumption, and thus, that claimant's cardiac condition is work-related are affirmed.[4] *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

Employer also argues that the administrative law judge erred in finding that claimant is totally disabled, as the record establishes that as of April 12, 2005, claimant was no longer in congestive heart failure, that by February 2006, claimant was at his base line functional capacity and that as of August 1, 2006, claimant was at maximum medical improvement.[5] Employer also asserts that claimant was unable to return to his usual work as a dry cleaner/launderer before he ever worked for employer, and the fact that he remains unable to work in that field should not attach lifetime liability to employer.[6]

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[4] While employer has put forth evidence of pre-existing conditions which indicate that claimant may have been predisposed to cardiac problems, *i.e.*, claimant's hypertension and obesity as documented by Dr. Rouse, this evidence is, as the administrative law judge found, insufficient to rebut the Section 20(a) presumption because it fails to account for the aggravation rule. *See, e.g., Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc)*.

[5] This statement is contrary to the parties' stipulation, as articulated by the administrative law judge, that claimant's overall cardiac condition has not yet reached maximum medical improvement, a determination the administrative law judge found was otherwise supported by the evidence of record. Decision and Order at 2, 22.

[6] Contrary to employer's assertion, the administrative law judge specifically considered evidence that claimant filed, with the assistance of Dr. Astin, a disability claim with the Social Security Administration in 2003, and that Dr. Astin was uncertain whether claimant would be able to do the overseas job with employer due solely to his pre-existing lung disease. Decision and Order at 9-19. The administrative law judge determined that the 2003 Social Security Administration claim involved disability related entirely to claimant's respiratory disease and chronic pain resulting from degenerative arthritis and bursitis of the knees. Decision and Order at 10. The administrative law judge thus inferred that claimant's disability relating to the 2003 claim did not involve any cardiac complaints, symptoms, or conditions. *Id.* Moreover, as accurately documented by the administrative law judge in his decision, Dr. Astin's statement that he is "not sure if [claimant is] able to do job as offered due to lung disease??," falls short of a recommendation by the physician that claimant should not work in Iraq. EX 9.

To be entitled to total disability benefits, the claimant bears the initial burden of establishing his inability to perform his usual work as a result of his work injury. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). We reject, as meritless, employer's assertion that claimant was unable to work as a dry cleaner even before his hiring by employer and that such should preclude his entitlement to total disability benefits. Claimant's usual employment here is as a laundry foreman and thus the relevant focus is on his regular duties at the time he was injured. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 689 (1998); *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). Moreover, the fact, as noted by the administrative law judge, that claimant successfully performed his work for employer as a laundry foreman for approximately two and one half months prior to the date of his injury demonstrates that claimant was capable of performing such work. *See* Decision and Order at 5, 15.

In order to determine whether a claimant can return to his usual work, the administrative law judge must compare the claimant's medical restrictions with the physical requirements of his former job. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985). If claimant's disability is due, even in part, to the work-related injury, claimant may be entitled to compensation under the Act. *See generally Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999). The administrative law judge rationally found that both of claimant's treating physicians, Drs. Rouse and Astin, opined that claimant is, at the present time, incapable of returning to his usual employment due, at least in part, to his cardiac condition and that there is no medical evidence to contradict those opinions.[7] CXs 6, 8, 21. He thus concluded that claimant cannot perform his usual employment and has established a *prima facie* case of total disability. The administrative law judge's finding is affirmed as it is rational, supported by substantial evidence, and in accordance with the law. *See generally Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

[7] Dr. Astin opined that claimant could not engage in any gainful employment that requires a 40 hour work week, that he could not lift any heavy equipment or perform any physical activity, or "be employed where there are multiple stress which could place a strain on the already poor cardiac status." CX 6. As such, Dr. Astin opined that claimant was, at present, totally disabled. *Id.* Dr. Rouse stated that he thought it would be fairly challenging for claimant to presently work in even a part-time capacity, given that claimant would require frequent breaks, but the physician agreed that if an employer would permit claimant to work within the restrictions he recommended, *i.e.*, avoid heavy lifting, pushing, pulling, tugging and to stay out of stressful environments, he would encourage claimant to try and work and "see how well he could perform under those circumstances." CX 21, Dep. at 25.

Once, as here, claimant establishes that he is unable to return to his usual employment, the burden shifts to employer to establish the availability of suitable alternate employment. Employer can meet its burden by demonstrating the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). As the administrative law judge found, employer has not presented any evidence as to the availability of suitable alternate employment in this case. Decision and Order at 22. We, therefore, affirm the administrative law judge's award of compensation for temporary total disability from the date of injury. *See generally Turner*, 661 F.2d 1031, 14 BRBS 156; *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

Accordingly, the administrative law judge's Decision and Order is 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