BRB No. 99-1210

CHARLES E. FAIRLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
I.T.O. CORPORATION	)	) DATE ISSUED: 08/23/2000
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Charles E. Fairley, Gulfport, Mississippi, *pro se.*

Phillip W. Jarrell (Dukes, Dukes, Keating & Faneca, P.A.), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (98-LHC-0709) of Administrative Law Judge Richard D. Mills 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b); 20 C.F.R. §§802.211(e), 802.220. If they are, they must be affirmed.

Claimant worked at the Gulfport docks beginning in January 1997. He worked in ship holds, unhooking the crane cable from pallets of frozen food. He alleged that his back injury

occurred while he was unhooking a load from the crane and throwing chicken boxes.[1] He was uncertain of the exact date of the incident, Emp. Ex. 4 at 10, but he thought it was February 17, 1997. Emp. Ex. 6 at 6. Claimant arrived at this date because he went to see Dr. Thompson on February 18, 1997, for back pain, and because he said that at the time he was talking about going to New Orleans for Mardi Gras. Tr. at 57. He alleges that he did not tell anyone about his injury the day he was hurt because he thought his pain was caused by his kidneys. Claimant did not inform any supervisors about an injury until he saw a doctor and returned to work. Claimant last worked in April or May 1997. Tr. at 42-43, 77. Dr. Danielson diagnosed claimant with herniated discs, Cl. Ex. 2 at 13, and performed surgery on March 25, 1998. Cl. Ex. 2 at 16-17; Cl. Ex. 3. Employer did not pay compensation or medical benefits. Claimant sought temporary total disability, permanent total disability, and medical benefits under the Act.

In his decision, the administrative law judge found that claimant did not establish a *prima facie* case that his back condition is related to his employment. He therefore denied benefits. On appeal, claimant, representing himself, challenges the administrative law judge's denial of his claim for disability and medical benefits. Employer responds, urging affirmance of the administrative law judge's decision.

As claimant is proceeding without the assistance of counsel, the Board will review any findings of fact and conclusions of law adverse to claimant to ascertain whether they accord with law and are supported by substantial evidence in the record. In order to be entitled to the Section 20(a) presumption that his condition arose out of employment, claimant must establish a *prima facie* case by showing that he suffered a harm and either that a work-related accident occurred or that working conditions existed which could have caused the harm. 33 U.S.C. §920(a); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Konno v. Young Bros.*, Ltd., 28 BRBS 57 (1994); *Cairns v. Mason Terminals, Inc.*, 21 BRBS 252 (1988). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *Gooden v. Director, OWCP*, 135

[1]Although the administrative law judge stated that claimant alleged that the injury occurred while he was unhooking a load from a crane and the crane operator "jerked" the load up unexpectedly, he later commented that claimant has not always been certain how he hurt himself. Decision and Order at 4. It appears from claimant's testimony that he had to do some pushing and pulling on the load to guide it, at the same time as the crane operator was lifting the load. *See* Emp. Ex. 4 at 16.

F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998)*; Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71, 72 (1996). The administrative law judge found that claimant established the "harm" element of his *prima facie* case, herniated lumbar discs, but did not establish that an accident occurred on the date and in the manner specified, and he was unpersuaded that "conditions existed" at work which could have caused the harm.

In determining that claimant did not establish the second prong of his *prima facie* case, the administrative law judge reasoned that there was no witness to an alleged accident, that claimant could not establish the date an accident occurred, that claimant admitted that he did not complain about his pain to anyone at work for several days, and that the only source of the allegation is the testimony of claimant, whose credibility the administrative law judge characterized as "non-existent." In this regard, the administrative law judge relied on claimant's conviction for forgery, which he described as "a crime involving dishonesty and false representations," as well as on the inconsistent symptoms claimant reported to his doctors. Decision and Order at 14-15.

We reverse the administrative law judge's determination that claimant did not establish a *prima facie* case under Section 20(a). Although the administrative law judge is entitled to find claimant's credibility lacking, and we will not disturb this determination, there is independent evidence of record establishing working conditions which could have caused a back injury. Specifically, employer's foreman, Rodell Williams, testified that, in February 1997, claimant was loading boxes of chicken weighing 30-40 pounds.[2] Tr. at 85. This evidence, independent of claimant's testimony, establishes that claimant was engaged in "working conditions" which could have caused a back injury. *See Conoco,* 194 F.3d at 691, 33 BRBS at 191 (CRT).

Moreover, medical evidence of record supports the conclusion that claimant's working conditions could have caused his injury. Employer argues that claimant told Dr. Partridge that his back had been bothering him for a year, and that therefore any injury occurred prior to his employment with employer. Contrary to employer's implication, however, rather than absolving it of liability, this allegation simply indicates that the aggravation rule must be considered in this case. *See Conoco,* 194 F.3d at 691, 33 BRBS at 192 (CRT); *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991). Dr. Seymour's opinion that "moving chickens and doing lifting can cause wear and tear on a back and aggravate an arthritic condition," Jt. Ex.19 at 11-12, and could cause a disk herniation, *id.* at 4-5, 13, 16-19,

[2]Although dependent on claimant's recitation of the events, Dr. Seymour referred to claimant's "moving chickens and doing lifting" in his reports. Jt. Ex. 19 at 4-5, 13, 16-19. Dr. Danielson reported that claimant felt back pain upon loading chicken. Cl. Ex. 2 at 12.

supports such an aggravation theory. Further, the administrative law judge's comment that he is unpersuaded that the harm is work-related, Decision and Order at 17, and that the "[t]estimony of physicians is also uncertain regarding any relationship between the injury and work," Decision and Order at 18, evinces the application of an incorrect standard. Claimant is not required to introduce affirmative evidence establishing that his work-related activities actually caused the harm alleged in order to invoke Section 20(a); he need only introduce evidence that it could have done so, and Dr. Seymour's opinion is sufficient to support claimant's claim. *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT)(D.C. Cir. 1990); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). A claimant does not have to establish affirmatively that his injury arose out of employment to establish a *prima facie* case, as the Section 20(a) presumption acts to link the harm to employment once he establishes both prongs of his *prima facie* case. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 155 (1989).

Employer further contends that its records reflect that claimant did not work on February 17, 1997. Emp. Ex. 5; Tr. at 102. The administrative law judge stated that claimant has been uncertain about when his injury occurred, but that it occurred sometime around February 1997. Decision and Order at 4. *See* Jt. Ex. 3. Also, claimant consulted Dr. Thompson on February 18, 1997, for left knee and low back pain. Cl. Ex. 5 at 55.[3] The fact that claimant may have been mistaken about the specific date his injury occurred is not dispositive under the facts of this case, inasmuch as there is evidence independent of claimant's testimony regarding working conditions that could have caused claimant's back condition. We therefore hold that as the record contains uncontradicted evidence that claimant was moving boxes of frozen chicken weighing 30-40 pounds in the time frame alleged, and medical evidence of record states that this work can cause wear and tear and aggravate a back condition, claimant has established the "working conditions" element of his *prima facie* case. As the administrative law judge found claimant established a harm to his back, as a matter of law, claimant has proven the elements of a *prima facie* case under Section 20(a) that his back condition is work-related.

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Conoco,* 194 F.3d at 684, 33 BRBS at 187 (CRT); *O'Kelley v. Dep't of the Army/NAF*, BRBS , No. 99-0810 (May 2, 2000). *See also Del*

[3]Dr. Thompson's notes reflect that claimant told her that he does a lot of unloading of 120 pound sacks. Cl. Ex. 5 at 55.

Vecchio v. Bowers, 296 U.S. 280 (1935); *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *See, e.g., Conoco*, 194 F.3d at 684, 33 BRBS at 187 (CRT). 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. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). We, therefore, remand the case for the administrative law judge to consider whether employer established rebuttal of the Section 20(a) presumption. On remand, if the administrative law judge finds that claimant established that his back condition is work-related, he must address the remaining issues.

Claimant's attorney, who represented him before the administrative law judge, has filed an attorney's fee petition with the Board requesting $16,948, for 141.6 hours at $120 per hour, plus $996.19 in costs, for representing claimant from August 1997 to January 1998. Claimant filed his appeal with the Board on August 25, 1999. The Board can award an attorney's fee only for services rendered before it. *See Smith v. Alter Barge Line, Inc.*, 30 BRBS 87; *Dygert v. Manufacturer's Packaging Co.*, 10 BRBS 1036 (1979); 20 C.F.R. §802.203(d). As an attorney's fee petition must be filed with the forum in which the services were performed, the Board cannot consider a fee for services performed before the administrative law judge. 33 U.S.C. §928(c).

Accordingly, the administrative law judge's finding that claimant did not meet his burden of establishing a *prima facie* case under Section 20(a) is reversed, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge