BRB No. 00-1091

IVORY WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ANR PIPELINE COMPANY	)	DATE ISSUED: Aug. 15, 2001
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Billy Wright Hilleren (Hilleren & Hilleren, L.L.P.), Covington, Louisiana, for claimant.

Darryl J. Foster and Thomas W. Thorne, Jr. (Lemle & Kelleher, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (99-LHC-0989) of Administrative Law Judge Clement J. Kennington 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 findings of fact and conclusions of law of the administrative law judge which 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)(3).

Claimant, a Level 5 Mechanic, suffered injuries to his buttocks and back when he fell

during the course of his employment on July 24, 1996. Although claimant attempted to return to his usual job with employer several times following this injury, claimant last worked on September 6, 1996, when he was demoted to a Level 4 Mechanic. Subsequently, claimant alleges that he was restricted from performing his work duties by his treating physician, Dr. Chua.

In his decision, the administrative law judge determined that although claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), based upon his injury and the accident, claimant's complaints of low back pain were less than credible, unsupported by diagnostic tests, and unrelated to his work injury.[1] The administrative law judge concluded that claimant had reached maximum medical improvement as of July 24, 1997, one year after his accident, and has been capable of returning to his former employment duties since that date. Finally, the administrative law judge concluded that as claimant's continuing complaints of pain, even if legitimate, are related to his underlying and unrelated degenerative condition, employer is not responsible for providing medical treatment beyond that already provided. Accordingly, the administrative law judge denied claimant's claim for ongoing compensation and medical benefits.

Claimant now appeals, challenging the administrative law judge's denial of his claim for ongoing compensation and medical benefits. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant initially contends that the administrative law judge erred in failing to find that his current back condition and disabling pain are related to his work injury. While the administrative law judge found claimant entitled to invocation of the Section 20(a) presumption, he concluded that claimant failed to establish any work-related condition that would prevent his return to his usual job duties. Without discussing rebuttal or completing the necessary analysis of causation , the administrative law judge denied benefits to claimant based upon a finding that claimant failed to establish the nature and extent of a work- related disability which prevented his return to his usual job duties, thus convoluting the issues of causation and the nature and extent of any disability which require separate analysis.

In order to be entitled to the Section 20(a), 33 U.S.C. §920(a), presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that an accident occurred or working conditions existed which could have caused the injury or harm. *See*

[1]Claimant suffers from degenerative changes in his back and rotary scoliosis of the lumbar spine.

U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused, aggravated, nor rendered symptomatic by his employment. *See Port Cooper/T. Smith Stevedoring Co., Inc. 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); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert denied*, 429 U.S. 820 (1976); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935). In this regard, the aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). This rule applies not only where the underlying condition itself is affected but also where the injury "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must then weigh all of the evidence and resolve the issue of causation based on the record as a whole. *See Port Cooper*, 227 F.3d 284, 34 BRBS 96(CRT); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994).

In the instant case, after invoking the Section 20(a) presumption, the administrative law judge failed to determine whether employer had established rebuttal, as the presumption operates to link claimant's current back condition and his work injury.[2] In this regard, the physicians of record stated, and the administrative law judge acknowledged, that claimant suffers from numerous conditions which could be the source of his debilitating pain, *see* Decision and Order at 22-23, CXS 22, 23, 25; the administrative law judge did not, however, address whether employer produced substantial evidence that these underlying conditions were not aggravated or rendered symptomatic by claimant's work injury to result in his pain.

[2]In this regard, the physicians of record consistently note that claimant suffers from various back conditions. Dr. Chua, claimant's treating physician, diagnosed a soft tissue injury along with low back pain with possible radiculopathy and degenerative changes. CX 5. Dr. Jackson, a board-certified neurosurgeon, found that claimant suffered from narrowed discs with slight bulging at both the L4-5 and L5-S1 levels, as well as rotary scoliosis, CX 10; he opined that if claimant had had no prior back problems he would attribute claimant's bulging discs to his work accident. CX 22. Dr. Kemal diagnosed low back pain secondary to annular tearing and disc bulge. CX 8. Dr. Juneau testified by deposition that claimant suffers from chronic myofascial pain as well as scoliosis and degenerative changes. CX 23. Finally, Dr. Miller concluded that claimant's degenerative disc disease had been aggravated by his work injury. CX 11.

In fact, the administrative law judge engaged in no rebuttal analysis. Rather, after finding Section 20(a) invoked, he immediately commenced a discussion of the nature and extent of claimant's disability, stating that the presumption "does not establish entitlement to either compensation or benefits under the Act until claimant establishes the nature and extent of his disability." Decision and Order at 21. To the contrary, the administrative law judge must determine whether claimant's condition is work-related, properly applying Section 20(a), before he can rationally assess the degree of disability due to the work-related condition. Moreover, the administrative law judge compounded his error in discussing causation by the context of claimant's entitlement to medical treatment without applying Section 20(a). In this regard, the administrative law judge summarily stated he had previously found a lack of objective evidence relating claimant's subjective complaints of pain to the work accident and that "any present disability in claimant's back is due to an unrelated and underlying mild degenerative condition." Decision and Order at 24. As neither of these conclusions rests on analysis of the medical evidence under Section 20(a), they cannot be affirmed. In light of the administrative law judge's failure to properly consider the issue of causation, allocating the burden of production in accordance with Section 20(a), we must vacate his finding that claimant's post-injury medical condition is not causally related to his work accident. Upon remand the administrative law judge must analyze the evidence relative to the cause of claimant's disability in light of the aggravation rule, and employer has the burden to introduce substantial evidence that claimant's condition was not caused or aggravated by the work accident. *See Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT)(5th Cir. 1994); *Hensley v. Eckerhart*, 461 U.S. 424 (1983). If he finds that employer rebutted the presumption, the administrative law judge must then weigh the evidence on the record as a whole.

Claimant further argues that the administrative law judge erred in finding, based upon the opinion of Dr. Chua that muscular pain alone should heal in a maximum of one year, that claimant reached maximum medical improvement as of July 24, 1997. CX 6. Claimant contends that he did not reach maximum medical improvement until April 24, 2000, the date on which Dr. Jackson interpreted his myelogram and CT scan and advised continued conservative treatment without surgery. CX 25. The determination of maximum medical improvement is primarily a question of fact based upon the medical evidence. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1985). In the instant case, the administrative law judge relied upon Dr. Chua's opinion that claimant's condition *should* have healed within one year of the work accident; this, however, is not a finding by Dr. Chua that claimant's condition did, in fact, reach maximum medical improvement as of that date. To the contrary, Dr. Chua subsequently opined that as of his September 15,1999, deposition, he could not state that claimant had reached maximum medical improvement until the completion of further tests recommended by Dr. Juneau. CX 6. Thus, as the medical opinion relied upon by the administrative law judge does not support his conclusion on this issue, the administrative law judge's finding of maximum medical improvement must be vacated. On remand, the

administrative law judge must reconsider the date of maximum medical improvement, taking into consideration the totality of the evidence of record.

Next, the administrative law judge found that claimant could return to his usual employment duties as of July 24, 1997. Claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Louisiana Ins. Guaranty Ass'n v. Bunol,* 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 2000); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In the instant case, the administrative law judge, based upon the negative diagnostic tests which indicated that claimant no longer suffers from a nerve impingement arising out of his work accident, found that claimant is capable of performing his prior job. Thus, the administrative law judge's conclusion is based upon his determination that any symptoms experienced by claimant should have resolved as of this date. However, despite this negative test, the conclusion that claimant can return to work is unsupported by the medical evidence of record as no physician has released claimant to return to his usual job duties. To the contrary, Dr. Chua limited claimant to part-time work, CX 6, Dr. Jackson opined that claimant was disabled from work, CX 22, and Dr. Juneau assigned a 10 percent impairment to claimant. CX 23. Although the administrative law judge found claimant to be less than a credible witness based upon the negative impingement studies, each of the physicians of record respected claimant's complaints of pain and noted underlying degenerative conditions which impair claimant's ability to perform his usual job duties. *See, e.g.*, CX 6. Therefore, on remand, after the administrative law judge properly analyzes the question of causation, he must fully address the nature and extent of claimant's disability based on a complete evaluation of the medical evidence.

Finally, claimant argues that the administrative law judge erred in denying claimant reimbursement for medical expenses after July 24, 1997, the date the administrative law judge determined claimant reached maximum medical improvement. An award of medical benefits is contingent upon a finding of a causal relationship between the condition for which medical benefits are being sought and the employment. *See Wendler v. American National Red Cross,* 23 BRBS 408 (1990)(McGranery, J., dissenting on other grounds); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). Upon establishing such a relationship, claimant is entitled to medical benefits for a work-related injury even if that injury is not economically disabling if the treatment is necessary for the work-related injury. *See Romeike*, 22 BRBS 57. Thus, the Section 20(a) presumption applies to the issue of whether the condition for which medical benefits are sought arose out of and in the course of employment. In the instant case, as the administrative law judge's reasoning does not comport with Section 20(a), as we have discussed, it is necessary to remand this case to the administrative law judge to reconsider the issue of causation. As a finding of claimant's entitlement to medical benefits is contingent upon the administrative law judge's determinations on remand, we vacate his determination that claimant is not entitled to medical benefits after July 24, 1997, the date of alleged maximum medical improvement. Accordingly, on remand, the administrative law

judge must address the issue of claimant's entitlement to medical benefits consistent with his findings on causation. *See, e.g., Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge