BRB No. 01-0907

MARK A. ROBINSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: August 22, 2002
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Mark W. Oberlatz and Peter D. Quay (Murphy & Beane), New London, Connecticut, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2000-LHC-2342) of Administrative Law Judge David W. Di Nardi 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 worked as an outside machinist for employer at both its Groton, Connecticut, and its Quonset Point, Rhode Island, facilities between 1979 and 1999 except for a three-year period in the early 1980s. In approximately 1985 or 1986, claimant was diagnosed with diabetes. Over the next 13 years, claimant's diabetic condition worsened significantly, as he developed, among other things, peripheral vascular disease, Meniere's disease, retinopathy, polyneuropathy, and loss of feeling in his upper and lower extremities, and he had a full mouth extraction. Cl. Ex. 13. As of August 21, 1999, claimant could no longer perform his duties, having been diagnosed as being industrially blind. Cl. Ex. 3.

Claimant filed a claim for benefits, contending his working conditions aggravated his diabetic condition, rendering him permanently totally disabled. Specifically, he argues that the varying degrees of physical activity of his job and his frequent inability to take the allotted breaks during the course of his shift made it difficult for him to monitor and regulate his diabetic condition.

The administrative law judge found that claimant established a *prima facie* case for invocation of, and employer presented substantial evidence rebutting, the Section 20(a), 33 U.S.C. §920(a), presumption connecting claimant's condition and his employment. Decision and Order at 14. After evaluating the evidence as a whole, the administrative law judge credited claimant and his treating physician and found that claimant's work aggravated his diabetic condition. *Id.* at 23-24. He awarded claimant temporary total disability benefits, medical benefits and interest, and he granted employer a credit for benefits paid to claimant for his other work-related injuries.[1] *Id.* at 33-34. Employer appeals the decision. Claimant has not responded.

Employer contends the administrative law judge erred in finding that claimant's working conditions aggravated his diabetic condition.[2] Specifically, it argues that the administrative law judge improperly introduced evidence on his own motion, relied on evidence not admitted into the record, failed to independently review the evidence by adopting a portion of claimant's brief into his decision, gave an invalid reason for giving greater weight to claimant's treating physician over its expert, and set forth an incorrect statement of law regarding Section 20(a) rebuttal. For the following reasons, we must vacate the administrative law judge's decision and remanded the case for reconsideration.

Initially, we reject employer's argument that the administrative law judge erred in reciting the standard for rebutting the Section 20(a) presumption and that this error called

[1]Employer paid claimant compensation for work-related hearing loss and work-related injuries to his hands and right shoulder. Emp. Exs. 9-11.

[2]Employer also contends that claimant's diabetes is not an occupational disease. As the administrative law judge specifically agreed that diabetes is non-occupational, Decision and Order at 21, there is no dispute on this point.

into question his evaluation of the record as a whole. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, as here, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not caused or aggravated by the employment. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *see also American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *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).

In this case, the administrative law judge set forth the appropriate law for invoking and rebutting the presumption and for reviewing the evidence as a whole. However, he also misstated the law by stating at one point in his discussion of various legal authorities that employer was required to "rule out" any connection between claimant's work and his disability in order to rebut the Section 20(a) presumption. This error is harmless for two reasons. Decision and Order at 12. First, the administrative law judge also discussed at length *Shorette*, 109 F.3d 53, 31 BRBS 19(CRT), a decision issued by the United States Court of Appeals for the First Circuit which held that employer need not "rule out" any possible connection but need only present substantial evidence that claimant's condition is not work-related. The administrative law judge clearly stated that the law makes it unnecessary for an employer to "rule out any possible causal relationship[.]" Decision and Order at 11. Further, in determining that employer "introduced substantial evidence severing the connection" between claimant's condition and his employment, the administrative law judge applied the proper standard, correctly finding that employer rebutted the Section 20(a) presumption and that the presumption fell out of the case. *Id.* at 14. As the presumption was rebutted, any errors the administrative law judge made in his general statements regarding legal precedents, or in stating he rejected employer's arguments on rebuttal, were harmless. *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000). Moreover, we reject employer's assertion that the administrative law judge's statements of law regarding rebuttal of the presumption somehow affected his evaluation of the record evidence as a whole, as this allegation is not supported by the administrative law judge's discussion of the evidence.

Next, employer contends the administrative law judge's decision gives the appearance of bias for claimant. It argues he erred in relying on evidence not submitted into the record,

and on evidence admitted on his own volition, to create negative inferences as to employer's motives. In particular, employer challenges the administrative law judge's interpretation of its Safety Award Program, questioning the relevance of the program to the case, and his reliance upon testimony heard in other cases. For the reasons that follow, employer's contentions have merit, and we will therefore remand the case for further consideration.

It is axiomatic that all evidence must be formally admitted into the record at the hearing before the administrative law judge and that he may not issue a decision based on evidence not formally admitted. 5 U.S.C. §556(e); *see, e.g., Williams v. Hunt Shipyards, Geosources, Inc.*, 17 BRBS 20 (1985); 20 C.F.R. §702.338. The administrative law judge also may permit the submission of evidence not previously presented to him; however, he must afford the parties a reasonable chance to respond to such submission. 20 C.F.R. §§702.336, 702.338, 702.339. In this case, the administrative law judge twice stated he heard testimony in recent proceedings which confirmed for him the verity of claimant's claims regarding his inability to attend to his diabetic condition while at work. The administrative law judge also admitted evidence *sua sponte* to employer's Safety Award Program, whereby employees without work injuries would receive a safety bonus of $175. ALJ Ex. 1. Relying on this evidence, the administrative law judge inferred that employer discouraged visits to the yard hospital by emphasizing the requisite recording of the event with the appropriate government agency and/or the derogatory labels attached to those employees who feel the need to go to the yard hospital. Thus, he concluded, employer's safety incentive program and its work tactics were concerted efforts to discourage the proper reporting and treatment of injuries. Decision and Order at 24. Based on this perception of employer's motives, the administrative law judge discredited the testimony of three of employer's witnesses who all testified that claimant could have taken a medical break without any repercussions but that claimant had not requested accommodations to treat his illness. *Id.* at 24; *see* Emp. Exs. 18 at 14-16, 18, 25 at 6-7; Tr. at 151-152, 159.

Initially, it is unclear whether the parties were given an opportunity to respond to the introduction of evidence of employer's Safety Award Program after it was submitted. While claimant did not address the evidence in his post-hearing brief, employer questioned the relevance of it to the case at bar in light of the absence of evidence establishing that claimant knew of, and was affected by, the program, or that the program affected the general desire of employees to go to the yard hospital. As the administrative law judge's decision to discredit employer's witnesses was based at least in part on the testimony he recalled from other hearings, in conjunction with his interpretation of employer's motives behind the institution of the Safety Award Program, his decision was affected by evidence not properly admitted into the case and therefore must be vacated. On remand, the administrative law judge must confine his evaluation to, and base his reasons on, only the evidence of record. Where the administrative law judge introduces evidence on his own, it must be served on the parties and they must be permitted an opportunity to respond. While the administrative law judge is

permitted to draw his own inferences and conclusions, they must be based on substantial evidence properly admitted into the record. 5 U.S.C. §556(e); *Williams*, 17 BRBS 32; *Ross v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 224 (1984); 20 C.F.R. §702.338.

Employer also argues that the administrative law judge erred by adopting a portion of claimant's post-hearing brief as his explanation for giving less weight to employer's expert, Dr. Hare. As employer alleges, from the bottom of page 21 to the top of page 23 of the administrative law judge's Decision and Order, the administrative law judge inserted, nearly word for word, that part of claimant's brief discussing reasons for finding Dr. Hare's opinion deserving of little weight. *Compare* Decision and Order at 21-23 *with* Cl's Post-Hearing Brief at 4-6. Although it is not *per se* error for an administrative law judge to adopt or incorporate verbatim language from a party's pleading, incorporation of factual or legal assertions from a party's brief is impermissible to the extent it indicates a lack of independent review of the evidence by the adjudicator. *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). In this case, while the administrative law judge did discuss both expert medical opinions and the testimony as to claimant's duties, the portion of the brief adopted by the administrative law judge gave less weight to Dr. Hare's opinion on the basis that he was less familiar with the duties of claimant's job as described by claimant and Mr. Doucette, his foreman at Groton, whose testimony was described as "almost exactly on point with that of Mr. Robinson . . . ." Decision and Order at 21. As we have discussed, however, the administrative law judge's credibility determinations regarding claimant's work are undermined by his reliance on facts not in evidence in this case. In addition, he did not consider relevant distinctions between Mr. Doucette's and claimant's testimony. On these facts, we cannot affirm the administrative law judge's decision to give less weight to Dr. Hare's opinion.

Claimant worked the second shift, and his supervisor testified that was a 3:30 p.m. to midnight shift, and that there were two breaks plus lunch during that time. Emp. Ex. 18. Further, claimant's job was described as very strenuous at times, but that depended on the daily assignments. Emp. Ex. 25. Claimant's job could entail duties such as filling out paperwork, installing or repairing machinery on new submarines, repairing machinery on completed submarines at different work sites, and working with hand tools or large machines. Claimant testified that these jobs could continue for weeks or change hourly, resulting in changes in his level of physical activity. Tr. at 32, 51, 61. Claimant testified that it was against work rules for him to bring food or equipment for insulin injections on board the submarines and that he had to leave the work site to go to snack machines for food or to his locker or the yard hospital to take his insulin injections. Claimant testified that after Mr. Doucette or another foreman raised an issue regarding how to charge the time he spent on trips to the yard hospital, he started taking care of his sugar "on the side" at his locker instead of "creating a problem" by specifically asking for time to go to the yard hospital. Tr. at 47-48. In contrast, three supervisors for employer, including Mr. Doucette, stated that

employees in general received breaks, that it was not a problem for claimant to take a break for food or to check his blood sugar, and that the company worked with individuals who were diabetic. Emp. Ex. 18, 25; Tr. at 119-159.

Dr. Hare, the Director of the Joslin Diabetes Center in Massachusetts and an associate clinical professor of medicine at Harvard University, understood claimant's job to be a second shift position where he was entitled to two breaks plus lunch during the shift, which the doctor said should be sufficient to regulate his blood sugar level. Dr. Hare knew that claimant worked with heavy machinery and that claimant's physical activity in his job could be inconsistent, and he also understood claimant to have worked long hours at two jobs. Emp. Exs. 20, 23 at 20, 28, 32, 38; *see also* Emp. Exs. 18 at 7-8, 25 at 4; Tr. at 132 (statements from supervisors). Although Dr. Hare also stated that he thought claimant worked in a machine shop, Dr. Hare's description is very close to claimant's work situation as described by employer's witnesses. Dr. Hare believed that claimant's job did not contribute to the deterioration of his condition. Rather, Dr. Hare stated that claimant should have considered controlling his diabetic condition as his first job and that working the second shift is in itself not detrimental to his health.[3] Dr. Hare acknowledged that claimant's level of physical activity could change on the job and that this could cause a potential problem, but he stated that the breaks allowed claimant sufficient opportunity to adjust his intake of food and medication and that he could adjust either before or after the physical exertion, as it is the average over a period of time that is most important. Emp. Ex. 23.

[3]Dr. Hare stated that shift work is more of a concern when the employee seeks to participate in both day and nighttime activities and is not on a regular schedule. Emp. Ex. 28 at 50.

Dr. Allessandro, a general practitioner and claimant's treating physician since 1997, whose opinion the administrative law judge gave greater weight, Decision and Order at 23,[4] was under the impression that claimant worked the third shift, but his opinion did not change when he was told it was the second shift. He also stated that claimant mentioned outside work with hand-powered tools, that claimant worked more than one job, and that claimant was not making the necessary adjustments to regulate his blood sugar level when he was at work. Cl. Exs. 2, 13 at 13, 31, 40, 60, 68, 75-77. Dr. Allessandro felt that claimant's job played a role in claimant's deteriorated condition, in part because claimant allowed it too, but also because the changing activity levels of the job made it difficult for claimant to control his blood sugar level. He said that being on a schedule that is different than the body expects, *i.e.*, working until late at night and having differing levels of activity, made monitoring his blood sugar and making the necessary adjustments difficult. Cl. Ex. 13.

Drs. Allessandro and Hare had a similar knowledge of claimant's duties but differing views of the flexibility he was accorded for food and insulin intake and divergent opinions on the effect the varying activity levels of his work had on his condition.[5] Moreover, while claimant's testimony and that of employer's supervisors is in agreement on many points, this evidence presents different views of claimant's ability to leave his work site to manage his diabetes. Thus, while the administrative law judge could find Mr. Doucette's testimony was in accord with claimant in describing the nature of the work, his testimony contrasted with claimant's view of the flexibility accorded him in taking breaks. In addition, Mr. Doucette denied raising claimant's work breaks to go for snacks or to the yard hospital as a timekeeping issue. It is clear that the administrative law judge's evaluation of the credibility of employer's witnesses and the weight to be given the medical experts was affected by the administrative law judge's reliance on information about employer which was not in the record. Decision and Order at 23-24. This case must therefore be remanded for reconsideration of the credibility of witnesses and the weight accorded the evidence based solely on the record.

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[4]Contrary to employer's contention, the administrative law judge did not credit Dr. Allessandro by applying a rule favoring the treating physician. Thus, the issue of "blind application of the treating physician rule" is not before us here.

[5]The administrative law judge also stated he was relying on the opinion of Dr. Browning, an orthopedic surgeon who saw claimant for orthopedic problems. Dr. Browning diagnosed claimant with hand-arm vibration syndrome related to his use of power tools and opined that this impairment was made worse by his pre-existing diabetes. Cl. Ex. 11. He did not believe claimant's hand-arm vibration syndrome worsened his diabetes, *Id.* at 25-26, and his opinion thus does not support the administrative law judge's conclusion regarding aggravation.

Finally, employer requests that the case be assigned to a new administrative law judge on remand. In view of our specific instructions to the administrative law judge regarding review of the evidence of record, we decline to take this action.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I Concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, J., concurring and dissenting:

I concur in the majority's determination that the administrative law judge's Decision and Order - Awarding Benefits must be vacated because of his reliance on evidence he has received in other cases to discredit employer's witnesses. *See In re Boston's Children First,* 244 F.3d 164 (1st Cir. 2001); *United States v. Chantal,* 902 F.2d 1018 (1st Cir. 1990). I also concur in the majority's determination that the administrative law judge properly applied the applicable law.

I respectfully dissent from the majority's implication that the administrative law judge erred in quoting at length from claimant's brief, because the record does not support a finding that he failed to exercise independent judgment in his review of the record. *See Williams v. Newport News Shipbuilding & Dry Dock Co.,* 17 BRBS 61 (1985). The extensive use of quotation did not result in the omission of any relevant fact in Dr. Hare's testimony. I also dissent from the majority's assertion that the administrative law judge did not discuss the relevant distinctions between Mr. Doucette's testimony and claimant's. I believe, however, that because the administrative law judge has perceived the evidence in the instant case through a lens colored by evidence presented in other cases, his decision is fatally tainted. Accordingly, I join in the majority's order to vacate the administrative law judge's decision.

REGINA C. McGRANERY
Administrative Appeals Judge