BRB No. 04-0915

GLENN A. HILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION)	DATE ISSUED: 08/30/2005	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Claim in Part and Denying Claim in Part and the Supplemental Decision and Order Denying Attorney Fees of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (Marcia J. Cleveland, L.L.C.), Topsham, Maine, for claimant.

Stephen Hessert and C. Lindsey Morrill (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Claim in Part and Denying Claim in Part and the Supplemental Decision and Order Denying Attorney Fees (2003-LHC-01832, 2003-LHC-01938, 2003-LHC-01939) of Administrative Law Judge Colleen A. Geraghty 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 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 left-handed spray painter, injured his right hand and wrist while grinding

at work on December 21, 2000. Claimant continued in his usual work until June 28, 2001, the day Dr. Scott, his orthopedic hand surgeon, performed carpal tunnel syndrome surgery on his right wrist. After the surgery, claimant performed modified duty from May 30, 2002, through January 8, 2003, as a parking lot attendant and silk screener at employer's facility. Employer voluntarily paid claimant temporary total disability benefits from June 28, 2001, through May 30, 2002, temporary partial disability benefits from May 30 through December 16, 2002, and permanent partial disability benefits for a six percent impairment to claimant's right arm. 33 U.S.C. §908(b), (c)(1), (e).

On October 8, 2002, claimant filed a claim for injuries to his right hand, arm and shoulder. He alleged that the injuries occurred on December 21, 2000, while he was grinding in an overhead position and the grinder kicked back. CX 1 at 6. Claimant subsequently amended this claim to allege that his right shoulder condition was an "overuse" injury. *See, e.g.*, Tr. at 17-18; Cl. post-hearing brief at 7. On January 22, 2003, claimant filed a claim for an "overuse" injury to his left hand, wrist, arm, and shoulder. CX 2 at 10. He alleged that these injuries were cumulative conditions caused by his grinding employment. Tr. at 18, 34. On January 22, 2003, claimant also filed a claim for bilateral knee injuries. CX 3 at 15. He claimed these were "overuse" injuries due to ladder climbing, walking, prolonged standing, and crouching. *Id.* Although the latter two claim forms state that June 7, 2001, was the date of injury, claimant's counsel explained that claimant was not alleging that a specific accident occurred on that date, but that claimant was making claims for cumulative trauma. Tr. at 18. Claimant sought ongoing permanent total disability benefits from June 28, 2002, due to all his conditions.

The administrative law judge rejected employer's contention that the latter two claims are barred due to claimant's failure to file timely notices of injury, finding that employer was not prejudiced by such failure. 33 U.S.C. §912(a), (d). The administrative law judge found, however, that other than the right hand and wrist injuries, none of the other conditions claimed is work-related. With regard to the right hand and wrist, the administrative law judge found that claimant established his *prima facie* case of total disability, but that employer established the availability of suitable alternate employment on the open market. Thus, she concluded that claimant is not totally disabled and is limited to a scheduled award for his right arm, which employer had voluntarily paid. Consequently, she denied claimant additional benefits. Claimant's counsel subsequently filed a petition seeking an attorney's fee of $6,226.15. Employer objected to the fee petition in its entirety because of claimant's lack of success before the administrative law judge. The administrative law judge denied claimant's counsel's fee petition on that basis.

On appeal, claimant challenges the administrative law judge's denial of additional

benefits. Employer responds in support of the administrative law judge's decision. Claimant also appeals the administrative law judge's denial of an attorney's fee.

Claimant first argues that the administrative law judge did not properly apply the Section 20(a) presumption, 33 U.S.C. §920(a), in finding that claimant's injuries to his right shoulder, left wrist and shoulder, and both knees are not work-related. We agree with claimant that the case must be remanded in part. While the administrative law judge purported to apply the analysis required by Section 20(a) of the Act, her reasoning demonstrates that she did not do so but placed the burden on claimant to establish the work-relatedness of his conditions.

In determining whether an injury is work-related, claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. There are two elements of claimant's *prima facie* case, both of which he must establish without benefit of the Section 20(a) presumption. *U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). In this case, based on the injuries alleged, claimant must establish that he has an actual harm or injury to each of the body parts he claims is injured. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969). In addition, claimant must establish that an accident actually occurred as alleged, or, in a cumulative trauma case, that the conditions of employment alleged actually existed. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). Cumulative trauma injuries, which claimant was alleging with regard to his left arm, both shoulders, and both knees, occur over a period of time and thus do not relate solely to a specific date listed on claimant's claim form. *See Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981), *aff'g* 11 BRBS 556 (1979); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Moreover, claimant need not establish that the accident or working conditions in fact caused his injury. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT). He need establish only that the accident or working conditions could have caused his injury. *Id.* Once claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment. *Id*.

Employer can rebut this presumption by producing substantial evidence that the injury was not caused by the employment. *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). If claimant has alleged that his employment aggravated a pre-existing condition, employer must produce substantial evidence that the injury was not aggravated by the employment. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT). If employer rebuts the Section 20(a) presumption, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the ultimate 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).

With this background in mind, we turn to the administrative law judge's findings regarding each of claimant's alleged injuries. The administrative law judge properly noted that claimant claimed his right shoulder condition was due to both the traumatic incident on December 21, 2000, as well as the conditions of his employment generally. Decision and Order at 8. The administrative law judge discussed Dr. Brigham's examinations of claimant. On April 23, 2002, Dr. Brigham noted claimant's complaints of shoulder pain. He stated that there was no tenderness in the area and that impingement tests were negative. Cl. Ex. 10 at 42. At his examination in December 2002, however, he diagnosed rotator cuff disease and degenerative arthritis of the AC joint. *Id*. at 70. The administrative law judge also discussed Dr. Fallon's diagnosis of rotator cuff tendonitis, bursitis and AC joint arthritis in January 2003. Dr. Fallon treated claimant's right shoulder for five months, and, by June 2003, noted that claimant was "completely asymptomatic." Decision and Order at 9; Cl. Ex. 14 at 89-92.

The administrative law judge found that claimant did not establish a *prima facie* case with regard to his right shoulder condition. The administrative law judge based this finding on the fact that claimant did not seek treatment for a shoulder condition until the fall of 2002, almost two years after the December 2000 incident at work, and some 16 months after claimant last worked as a spray painter. The administrative law judge also relied on the fact that claimant's shoulder condition apparently resolved and on the absence of any medical evidence stating that the condition is work-related.

We cannot affirm this finding. The administrative law judge erred in denying this claim because claimant did not establish that his right shoulder condition is work-related. As discussed above, proof of an actual causal nexus is not an element of claimant's *prima facie* case. Rather, the Section 20(a) presumption, if invoked by evidence of a harm and employment conditions which could have caused it, provides this causative link. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT). With regard to the "harm" element, two doctors diagnosed a rotator cuff condition, and there is no evidence that claimant did not have something wrong with his right shoulder. The fact that it may have resolved does not obviate the existence of the condition. Thus, the harm element of claimant's *prima facie* case is satisfied, as something has gone wrong with the human frame. *Wheatley*, 407 F.2d at 313. With regard to the accident/working conditions element, it is uncontested that an accident occurred on December 21, 2000. Moreover, the administrative law judge did not address the general working conditions claimant alleges could have caused his shoulder condition, which include claimant's employment before June 7, 2001, as well as the silk screening job employer provided claimant post-injury. Tr. at 17-18. Therefore, we must remand this case to the administrative law judge. On remand, the administrative law judge must discuss the accident and the conditions of claimant's employment that he alleges could have caused his

shoulder condition, and make a finding as to whether they *could have* caused it. In this regard the evidence concerning the temporal relationship between the employment and the shoulder complaints is relevant, but latent traumatic injuries are compensable under the Act. *See Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991). If the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that claimant's right shoulder injury was not caused by his employment. *Harford*, 137 F.3d 673, 32 BRBS 45(CRT); *Shorette*, 109 F.3d 53, 31 BRBS 19(CRT).

We next address the administrative law judge's findings regarding claimant's claim of an overuse injury to his left hand, arm and shoulder. The administrative law judge found that claimant does not have any injuries to his left extremity. With regard to claimant's alleged left wrist injury, the administrative law judge discussed the opinion of Dr. Scott that claimant has a left wrist injury. She discounted it because no objective testing, diagnosis, or treatment was made with respect to a left wrist injury, as compared with the diagnosis and treatment of the right wrist injury, and Dr. Scott's physical examination of claimant's left wrist was essentially normal. Decision and Order at 10-11; Cl. Ex. 11 at 74, 79; 16 at 116-117, 125-126. The administrative law judge considered that Dr. Brigham had reported claimant's left wrist to be normal in both his April and December 2002 reports and noted that claimant's calluses on his left hand were inconsistent with his reported sedentary activities. Decision and Order at 11; Cl. Ex. 10 at 41, 44, 62. With respect to the alleged left shoulder injury, the administrative law judge discussed and weighed the relevant evidence and found no treatment records for a left shoulder injury. Decision and Order at 11; Cl. Exs. 11 at 81; 14 at 89-92. As the administrative law judge fully evaluated the evidence and her finding that claimant failed to establish an essential element of his claim, *i.e.*, the harm element, is supported by substantial evidence, we affirm the administrative law judge's finding that claimant does not have a work-related injury to his left hand, arm or shoulder. *See generally Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

With regard to claimant's bilateral knee injuries, claimant alleged that he sustained "overuse" injuries due to ladder climbing, walking, prolonged standing, and crouching. In addition, he alleged that the light-duty employment as a parking lot attendant to which he was assigned in May 2002 aggravated his knee condition. Claimant had pre-existing knee problems, resulting in permanent restrictions since at least 1995. The administrative law judge found that claimant worked within these restrictions until he left employment to have his carpal tunnel surgery in June 2001, and that there is no evidence of increased knee pain or treatment immediately prior to June 2001. The administrative law judge also discussed claimant's employment with employer as a parking lot attendant in May 2002. Claimant alleged that this employment aggravated his condition and that his knees became swollen. The administrative law judge found that there is no evidence that claimant sustained a "new or different" knee injury as a result of this employment. Decision and Order at 12; Tr. at

50-51. She discussed the one-page form report of Dr. Fairchild dated January 20, 2003, which indicated that claimant had an exacerbation of work-related bilateral knee pain. Cl. Ex. 7 at 28. She did not credit this report because it did not include any objective examination findings, results, or treatment notes. Decision and Order at 12. The administrative law judge concluded that claimant failed to show that he sustained knee injuries as a result of his shipyard duties on June 7, 2001, or thereafter, and that therefore he did not establish his *prima facie* case.

We also cannot affirm this finding and must remand the case for reconsideration of this issue. Again, claimant is not required to prove the work-relatedness of his condition in order to be entitled to the Section 20(a) presumption. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT). Moreover, there is no discussion of the aggravation rule in the administrative law judge's decision.[1] As it is uncontested that claimant has pre-existing knee problems, his claim for an overuse injury must be viewed in the context of the aggravation rule, which provides that if a work injury aggravates a pre-existing condition, the entire resulting condition is compensable. *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998).

From the administrative law judge's discussion of claimant's claim for knee injuries, it is unclear as to which elements of claimant's *prima facie* case she found are unsatisfied. The administrative law judge did not discuss the conditions of claimant's employment prior to June 2001, but merely observed that claimant did not complain of knee pain prior to that time. This fact is not dispositive, as claimant's employment could have aggravated his knee condition resulting in a latent condition. In addition, we cannot infer that the administrative law judge found that the harm element is not satisfied. While the administrative law judge's decision to disregard the summary form of Dr. Fairchild is rational, *see generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961),

the administrative law judge did not discuss the April 23 and December 18, 2002, reports of Dr. Brigham, wherein claimant reported problems with his knees and Dr. Brigham diagnosed probable patellofemoral dysfunction. CX 10 at 49, 70. Claimant also testified that his knees became swollen when he worked as a parking lot attendant. Tr. at 50-51. Credible complaints of pain may be sufficient to establish the harm element. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). In this regard, the administrative law judge's finding that nothing "new or different" occurred to claimant's knees is immaterial if there was an aggravation of claimant's symptoms. The occurrence of symptoms constitutes a work injury within the meaning of the Act, even if the underlying disease process is unaffected. *Gardner*, 640 F.2d

[1] Claimant injured his knees at work in 1986, subsequently had left knee surgery in the 1990s, and permanent restrictions have been imposed on claimant's knees since 1995. Emp. Exs. 35 at 92, 93; 39 at 109; 46 at 202.

at 1389, 13 BRBS at 106. Therefore, we vacate the administrative law judge's finding that claimant's knee condition is not work-related and we remand the case for the administrative law judge to re-evaluate the evidence of record with regard to invocation of the Section 20(a) presumption in view of the proper application of the law.

Claimant next argues that the administrative law judge improperly placed the burden on him to establish the suitability of the available jobs identified by employer. Claimant asserts that the jobs are not suitable because he lacks the reading and mathematical skills required of the jobs. Claimant also asserts that Mr. Abraham, employer's vocational expert, could not determine the suitability of available jobs on the open market because he had not met or interviewed claimant and had no information concerning claimant's ability to read and perform basic mathematical computations. Once, as here, claimant establishes his inability to return to his usual work because of his work injury,[2] the burden shifts to employer to demonstrate the availability of realistic opportunities for employment within the geographic area where claimant resides, which he, by virtue of his age, education, work experience, and physical restrictions, is capable of performing and for which he can compete and reasonably expect to secure. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991).

In concluding that employer established the availability of suitable alternate employment on the open market, the administrative law judge credited the restrictions imposed by Drs. Brigham and Caldwell.[3] Decision and Order at 14-16. Based on those restrictions, she rejected the security guard position as beyond claimant's physical restrictions and two other jobs as sales representative and cashier because they required a high school diploma which claimant does not possess. Decision and Order at 17; Emp. Ex. 33 at 51-54. The administrative law judge found that the three remaining jobs as cashiers and sales associate are suitable given claimant's education, experience, age, and physical limitations. Decision and Order at 17; Emp. Ex. 33 at 51-53. Contrary to claimant's contention, the administrative law judge did not require claimant to establish his illiteracy and therefore the unsuitability of these jobs. Rather, the administrative law judge did not credit claimant's testimony that he is illiterate, and thus unable to perform the reading and mathematical skills required of these jobs, since he has an eleventh grade education and testified he was passing his courses at the time he left school. Decision and Order at 17; Tr. at 78-80. Moreover, a vocational expert need not meet with claimant or interview him as long as the expert knows of the relevant factors affecting claimant's employability. *See*

[2] The administrative law judge found that claimant cannot return to his usual work because of the prohibition on the use of pneumatic tools. Decision and Order at 16.

[3] These physicians took into account all of claimant's physical conditions in assessing claimant's restrictions. *See* Emp. Exs. 41, 51.

Hogan v. Schiavone Terminal, Inc., 23 BRBS 290 (1990). Mr. Abraham testified that he took into account Dr. Caldwell's restrictions, and claimant's education and transferable skills. Tr. at 120-122; Emp. Ex. 33. Claimant therefore, has not established that the administrative law judge erred in relying on the labor market survey that Mr. Abraham prepared. As claimant does not otherwise challenge the administrative law judge's finding, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment as it is rational and supported by substantial evidence. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). If on remand the administrative law judge finds that claimant's right shoulder condition is work-related, the administrative law judge should address claimant's entitlement to disability benefits based on a loss in wage-earning capacity. 33 U.S.C. §908(c)(21), (e), (h); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994)*; see also Green v. I.T.O. Corp. of Baltimore*, 32 BRBS 67 (1998), *modified in part*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999).

Lastly, we address claimant's appeal of the administrative law judge's denial of an attorney's fee. The administrative law judge denied claimant's counsel an attorney's fee because of claimant's lack of success. *See* Supplemental Decision and Order Denying Attorney Fees. Claimant argues that because the administrative law judge erred in denying additional benefits, she also erred in denying claimant's counsel an attorney's fee. In light of our decision to remand this case, we vacate the administrative law judge's order denying an attorney's fee. On remand the administrative law judge should reconsider claimant's counsel's fee request based upon any success claimant obtains. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983)*; General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 997 (1988).

Accordingly, the administrative law judge's findings with regard to claimant's injuries to his right shoulder and both knees are vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Claim in Part and Denying Claim in Part are affirmed. Additionally, the administrative law judge's Supplemental Decision and Order Denying Attorney Fees is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge