BRB Nos. 09-0130
and 09-0130A

F.H.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
MPRI, INCORPORATED	)	DATE ISSUED: 08/13/2009
	)	
and	)	
	)	
ESIS, INCORPORATED	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Denying Compensation and Granting Medical Benefits and the Order Denying Motion for Reconsideration of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

F.H., Lincoln, Nebraska, *pro se*.

Keith L. Flicker and Brendan E. McKeon (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Denying Compensation and Granting Medical Benefits and the Order Denying Motion for Reconsideration (2008-LDA-00151) of Administrative Law Judge Paul C. Johnson, Jr., 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*., as extended by the

Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). The Board's scope of review is defined by statute. The Board 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). Where, as here, claimant appeals without representation by counsel, the Board will review findings adverse to claimant pursuant to this standard of review. 20 C.F.R. §802.301.

Claimant alleged that he developed a pulmonary condition during the course of his employment in Iraq from January 21, 2004, through April 25, 2005. Claimant returned to the United States to obtain treatment for a cough, shortness of breath, and a left arm and cervical injury. Employer voluntarily provided medical benefits and compensation under the Act for these conditions.[1] Employer stopped providing medical treatment for claimant's pulmonary condition based on the opinion of Dr. Hunninghake that claimant's pulmonary condition is due to recurrent pulmonary aspiration during sleep and is not related to his employment in Iraq.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his pulmonary condition to his employment in Iraq and that employer did not produce substantial evidence to rebut the presumption. Accordingly, the administrative law judge found that claimant's lung disease is work related. The administrative law judge found that claimant failed to establish that he is unable to return to his usual employment in Iraq; therefore, the administrative law judge found that claimant did not establish that his pulmonary condition is disabling. Accordingly, the administrative law judge awarded claimant medical benefits under Section 7 of the Act, 33 U.S.C. §907, but he found that claimant is not entitled to disability compensation.[2] Claimant filed a motion for reconsideration of the administrative law judge's finding that he is not entitled to compensation, which the administrative law judge denied.

On appeal, employer challenges the award of medical benefits based on the administrative law judge's findings that claimant is entitled to the Section 20(a) presumption with regard to his pulmonary condition and that employer did not submit substantial evidence to rebut the presumption. BRB No. 09-0130. On cross-appeal,

[1] Claims for claimant's arm and cervical injuries were not before the administrative law judge. Tr. at 6.

[2] The administrative law judge also found there is no evidence that claimant's pulmonary condition has reached maximum medical improvement.

claimant, without the assistance of counsel, challenges the administrative law judge's finding that he did not establish his entitlement to compensation under the Act. BRB No. 09-0130A. Employer responds, urging affirmance of the denial of compensation.

Employer first argues that, in the absence of any testimony by claimant, he did not establish that his working conditions in Iraq could have caused his lung disease.[3] 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. To establish his *prima facie* case, claimant must show that he sustained a harm and that conditions existed or an accident occurred at work which could have caused or aggravated the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). If claimant establishes his *prima facie* case, Section 20(a) applies to relate the harm to his employment. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.2d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

In his decision, the administrative law judge credited claimant's written responses on a post-deployment health assessment form in which he reported a chronic cough and difficulty breathing, and he checked the "yes" box regarding exposure overseas to insect repellant, vehicle exhaust, solvents, sand, and dust. CX 13 at 2-3. The administrative law judge also credited claimant's statements to a physician's assistant on May 3, 2005, that he was exposed to black mold when, after heavy rains, the walls and ceiling of his work area caved in. CX 14. The administrative law judge found there was evidence of mycobacterium chelonate in claimant's lungs three months after the ceiling collapse. EX 4 at 4. The administrative law judge credited claimant's statement to Dr. Hunninghake that he had a noticeable increase in reflux symptoms while he was working in Iraq, which claimant attributed in part to the stress of working in a war zone. EX 1 at 1. Finally, the administrative law judge found there is no evidence of pre-existing shortness of breath, chronic cough, or any pulmonary problem based on the written statement of Dr. Kilian, who reviewed claimant's medical records from May 1, 2001, to December 3, 2003. CX 7.

It is undisputed that claimant established the existence of a pulmonary condition that results in shortness of breath and a chronic cough. We reject employer's contention that claimant's testimony is required to establish that his working conditions could have caused this injury. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). The

[3] At the hearing, claimant, who was not represented by counsel, declined to testify and instead adopted his opening statement as his sworn testimony. Tr. at 27, 30-32.

administrative law judge credited substantial evidence in the medical reports to find that claimant established stress and exposures to substances at work that could have caused his pulmonary problems. Therefore, we affirm the administrative law judge's finding that the working conditions element of claimant's *prima facie* case is established, as well as the consequent finding that the Section 20(a) presumption is invoked. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *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).

Employer next challenges the administrative law judge's finding that it failed to rebut the Section 20(a) presumption. Once the presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's disabling condition was not caused or aggravated by his employment. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

The administrative law judge found the opinions of Drs. Hunninghake, Lieske, Gammel and Chakraborty insufficient to rebut the presumption. The administrative law judge noted that Dr. Hunninghake stated that claimant's lung condition is not related to his mold exposure in Iraq because it is due to nocturnal reflux aspiration. EXs 1, 2. The administrative law judge found, however, that claimant did not specifically limit his claim to mold exposure and that Dr. Hunninghake did not address claimant's lung condition in terms of claimant's other work exposures.[4] Thus, the administrative law judge did not err in finding Dr. Hunninghake's opinion insufficient to rebut the Section 20(a) presumption on this basis. *See, e.g., Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997).

The administrative law judge also properly noted that employer cannot rebut the Section 20(a) presumption only by suggesting a non-work-related cause of claimant's condition,[5] *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT), but he found that Dr.

[4] Similarly, in his October 29, 2007 report, Dr. Gammel opined only that claimant's lung condition is not due to black mold exposure. EX 4 at 7. Claimant's LS-18, Pre-hearing Statement asserted that he has a debilitating pulmonary condition from exposure to an unknown pathogen in Iraq.

[5] Based on our affirmance of the administrative law judge's finding that Dr. Hunninghake's opinion is insufficient to rebut the Section 20(a) presumption, there is no reversible error in the administrative law judge's statement that employer failed to rebut because it did not establish the cause of claimant's lung disease, as employer is not

Hunninghake's attribution of claimant's pulmonary condition to non work-related reflux fails on three counts. Decision and Order at 6-7. First, the treatment Dr. Hunninghake prescribed for reflux did not improve claimant's respiratory problems. Tr. at 8-9. Second, claimant subsequently underwent an endoscopy which was negative for gastro-esophageal reflux disease. CX 23. Third, claimant attributed the increase in his symptoms of reflux in part to the stress of his employment in a war zone, and Dr. Hunninghake did not address this aspect of claimant's condition.[6] *See* EXs, 1, 2. Based on the totality of these circumstances, the administrative law judge rationally found that Dr. Hunninghake's opinion does not constitute substantial evidence rebutting the presumed causal connection between claimant's respiratory condition and his employment. *Port Cooper/T. Smith Stevedoring Co.*, 227 F.3d 285, 34 BRBS 96(CRT). Therefore, we affirm the finding that Dr. Hunninghake's opinion does not rebut the Section 20(a) presumption.

Moreover, the administrative law judge rationally found that the opinions of Drs. Lieske and Chakraborty also do not constitute substantial evidence rebutting the presumed causal link between claimant's lung condition and his employment because these physicians did not appear to have considered anything more than Dr. Hunninghake's diagnosis. Decision and Order at 6-7. Specifically, Dr. Lieske responded to an April 16, 2006 letter from employer's claims adjuster asking him if he agreed with Dr. Hunninghake's assessment that claimant's lung condition is not related to mold exposure but is due to aspiration. Dr. Lieske stated that, "[A]t this time yes (and) will defer to dr. Hunninghake." EX 3. Dr. Chakraborty wrote in a January 23, 2006 progress note under "Impressions" that claimant has, "[C]hronic lung disease with restrictive features. Exact etiology unclear. It could be repeated aspiration as Dr. Hunninghake is suggesting." EX 5 at 2. As the administrative law judge's finding that employer did not rebut the Section 20(a) presumption is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's pulmonary condition is work-related and the finding that employer is liable for medical benefits. *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

In his appeal, claimant challenges the administrative law judge's denial of disability compensation. In order to establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual work due to the injury. *See,*

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required to do so in order to rebut the Section 20(a) presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

[6] Dr. Hunninghake also attributed claimant's reflux to his increased use of pain medications for other conditions. EX 1.

e.g., Gacki v. Sea-Land Serv., Inc., 33 BRBS 127 (1998); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). In his decision, the administrative law judge found that claimant established the existence of a lung impairment, as the physicians agreed that claimant's lungs are not functioning properly. The administrative law judge found that he was unable to determine the extent of claimant's impairment from Dr. Hunninghake's statement that claimant's lung functions were "in the 60s range." Decision and Order at 7; *see* EX 1 at 2. Moreover, the administrative law judge found that the record did not contain sufficient evidence of claimant's former work duties to permit him to determine whether claimant's lung impairment prevents him from performing those duties. The administrative law judge also found that claimant's inability to obtain overseas employment with other employers does not establish that claimant was physically unable to perform those jobs. Finally, the administrative law judge rejected claimant's request that he order employer to reinstate him as outside of his authority.

We affirm the administrative law judge's finding that claimant failed to establish that he is physically unable to return to his usual employment for employer. In order to determine whether claimant has shown total disability, the administrative law judge must compare the employee's medical restrictions with the specific physical requirements of his usual employment. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985). A mere diagnosis of a pulmonary condition does not establish a *prima facie* case of total disability. *See Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994). After reviewing the evidence of record, we hold that the administrative law judge rationally concluded that there is insufficient evidence on which a finding of disability could be based. Moreover, the administrative law judge properly found that claimant's inability to obtain similar work does not establish that claimant is unable to return to his usual employment. *See generally New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In addition, the administrative law judge properly stated that he has no authority to order employer to reinstate claimant to his job. Accordingly, we affirm the administrative law judge's denial of disability compensation on the present record.

We next address the administrative law judge's denial of claimant's motion for reconsideration. In this Order, the administrative law judge refused to admit into the record evidence claimant submitted with his motion for reconsideration.[7] Order at 1-2. In making this finding, the administrative law judge relied on cases decided by the United States Court of Appeals for the Eighth Circuit to find that a motion for reconsideration

[7] Claimant submitted an undated list of available positions overseas and a May 16, 2008 letter from Dr. Lieske addressing claimant's pulmonary fitness to work in Iraq. *See* Exhibits attached to Claimant's Motion for Reconsideration.

cannot be used to introduce evidence that could have been produced at the initial hearing. The administrative law judge also stated that a motion for reconsideration serves the limited functions of correcting manifest errors of law or fact or to present newly discovered evidence.

The administrative law judge erred in stating that existing documents cannot be submitted with a motion for reconsideration. Section 23(a) of the Act provides:

> In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board *shall not be bound by common law or statutory rules of evidence* or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

33 U.S.C. §923(a) (1982) (emphasis added); 20 C.F.R. §702.339; *see also* 33 U.S.C. §919(d) (transferring hearing authority from deputy commissioners to administrative law judges). Thus, the cases cited by the administrative law judge, which rely on the Federal Rules of Civil Procedure, are not applicable to proceedings under the Act.[8] Moreover, the administrative law judge has the implicit authority to admit new evidence by way of a motion for reconsideration, as he has the duty "to inquire fully into matters at issue and shall receive in evidence . . . any documents which are relevant and material to such matters." 20 C.F.R. §702.228; *see also* 29 C.F.R. §§18.55, 18.401, 18.402.

Because Section 23(a) provides that the administrative law judge is not bound by formal rules of evidence, he has greater latitude in admitting evidence than do the Federal

[8] The administrative law judge cited to *Concordia College Corp. v. W. R. Grace & Co.*, 999 F.2d 326 (8th Cir. 1993) (FRCP 59(e)), and *Hagerman v. Yukon Energy Co.*, 839 F.2d 407 (8th Cir. 1988) (new argument raised with motion to amend or alter judgment). Moreover, although claimant lives in Nebraska, it appears that this case arises within the jurisdiction of the Fifth Circuit. Pursuant to Section 3(b) of the Defense Base Act, 42 U.S.C. §1653(b), judicial proceedings under Sections 18 and 21 of the Act are to be instituted in the judicial district where the district director's office is located. *Hice v. Director, OWCP*, 156 F.3d 214, 32 BRBS 164(CRT) (D.C. Cir. 1998); *see also AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 24 BRBS 154(CRT) (5th Cir. 1991), *cert. denied*, 502 U.S. 906 (1991). In this case, the administrative law judge's decision was served by the district director's office in Houston, Texas.

courts. *Casey v. Georgetown Medical Center*, 31 BRBS 147 (1997); *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 68 (1986); *Brown v. Washington Metropolitan Area Transit Authority*, 16 BRBS 80 (1984), *aff'd mem.*, No. 84-1076 (D.C. Cir. May 17, 1985). Moreover, claimant would be entitled to introduce this evidence in a modification proceeding pursuant to Section 22 of the Act, 33 U.S.C. §922, as a party need not establish that the evidence on which it bases its modification request was unavailable at the initial hearing. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *see also Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002).

It is well established that an administrative law judge has great discretion concerning the admission or exclusion of evidence and his findings are reversible only if arbitrary, capricious, or an abuse of discretion. *See*, *e.g.*, *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988); 20 CFR §702.339. On the facts in this case, the administrative law judge erred by refusing to admit the new evidence claimant submitted with his motion for reconsideration. Dr. Lieske's May 16, 2008 letter addressing claimant's pulmonary fitness to work in Iraq is clearly relevant and material, as exemplified by the fact that, in his decision, the administrative law judge specifically determined "there is insufficient evidence to determine whether Claimant's lung disease prevents him from performing the duties of the position he held at the time he contracted it."[9] Decision and Order at 7. Moreover, the parties stipulated prior to the hearing that the sole issue was claimant's entitlement to medical benefits for his pulmonary condition. CX 6. At the hearing, the administrative law judge stated that claimant's entitlement to compensation needed to be addressed as well, and the parties assented to this. Tr. at 20-21. Given this posture of the case, the administrative law judge erred in not considering the new evidence submitted by claimant with his motion for reconsideration. Consequently, we must vacate the administrative law judge's refusal to admit claimant's evidence on reconsideration. *See Burley v. Tidewater Temps, Inc.*, 33 BRBS 185 (2002); *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992). On remand, the administrative law judge should admit claimant's evidence and provide employer an opportunity to respond to it. *E.B. v. Atlantico, Inc.*, 42 BRBS 40 (2008); *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998). The administrative law judge should address the evidence offered to determine if claimant is entitled to disability benefits.

[9] Dr. Lieske's letter is dated May 16, 2008, only four days before the formal hearing.

Accordingly, the administrative law judge's Decision and Order Denying Compensation and Granting Medical Benefits is affirmed. The Order Denying Motion for Reconsideration is vacated, and the case is remanded for further proceedings in accordance with this opinion.

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