BRB No. 09-0204

D.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYERS INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 08/26/2009
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

David G. Mills, Cordova, Tennessee, for claimant.

Jerry R. McKenney and James L. Azzarello, Jr. (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-LDA-00014) of Administrative Law Judge Jeffrey Tureck 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). 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 began working as a generator mechanic for employer in Kandahar, Afghanistan, on March 21, 2005. Claimant stated that this work was particularly difficult on his hands, and that his working conditions caused the gradual contraction of his fingers. On May 16, 2006, claimant stated that he felt his left shoulder pop when the handle of a bucket containing at least four gallons of oil became caught in his contracted fingers. The next morning claimant sought treatment at employer's medical facility and he was subsequently repatriated for evaluation of his medical conditions. On June 21, 2006, Dr. Weiss diagnosed Dupuytren's contractures (DC) with significant contractures of the left little finger, a cord on the left thumb, and a contracture of the right ring finger. Dr. Weiss attributed claimant's shoulder complaints to bursitis or biceps tendonitis, although he gave no indication as to the etiology of this condition.

On June 26, 2006, Dr. Weiss performed a fasciectomy and release procedure on claimant's left hand, followed by a similar procedure on claimant's right hand on August 21, 2006. On July 28, 2006, claimant requested and received a release to return to full-duty work effective July 31, 2006. He returned to work as a mechanic in the Memphis, Tennessee, area on November 6, 2006, and has, since that time, held various mechanic jobs with intermittent periods of unemployment. Claimant subsequently sought temporary total and permanent partial disability benefits, as well as medical benefits, arguing that his work for employer accelerated the progression of his DC to the point that he required surgery, and moreover, that the May 16, 2006, accident resulted in a permanent impairment of his left shoulder.

In his decision, the administrative law judge found that claimant was entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to both his DC and left shoulder conditions, but that employer established rebuttal in each instance. Weighing the evidence as a whole, the administrative law judge found that claimant's work for employer did not cause, aggravate, or accelerate either his DC or left shoulder condition. The administrative law judge thus concluded that claimant did not establish that his DC and/or left shoulder conditions are related to his work for employer. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings that his DC and left shoulder conditions are not related to his work for employer. Employer responds, urging affirmance.

Claimant argues that the administrative law judge erred in finding that employer established rebuttal of the Section 20(a) presumption with regard to both his left shoulder and DC conditions. Claimant also avers that the administrative law judge erred in crediting the opinions of employer's experts, *i.e.*, Drs. Weiss, Strauss and Fahey with regard to claimant's DC condition, and Dr. Fahey with regard to claimant's left shoulder

condition, over that of his physician, Dr. Hellman, to find no causal connection between claimant's employment and his DC and/or left shoulder conditions.

Once, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it by producing substantial evidence that each of claimant's conditions was not caused, contributed to, or aggravated by, his work for employer. *See, e.g., Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990) (employer must present evidence "ruling out" the employment as a possible cause of the claimant's injury). Under these standards, it is sufficient if a physician states, to a reasonable degree of medical certainty, that the employment did not cause or aggravate the employment. *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the presumption is rebutted, the administrative law judge must weigh all of the relevant evidence contained in the record to determine whether a causal relationship has been established, with claimant bearing the burden of persuasion. *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).

In finding that employer established rebuttal with regard to claimant's DC condition, the administrative law judge relied on the opinions of Drs. Strauss, Weiss, and Fahey. Specifically, the record reflects that claimant's treating surgeon, Dr. Weiss, stated that claimant's DC "is a hereditary condition that is not work-related," Employer's Exhibit (EX) 28, and that Dr. Strauss concluded, after a review of claimant's medical records, that claimant's DC is a manifestation of his pre-existing disease process and not due to manual labor or the use of impact wrenches which claimant may have used while working for employer in Afghanistan, EX 16.[1] Dr. Fahey stated that based on all of the studies of which he is aware, manual labor, including the types of jobs which claimant performed for employer while in Afghanistan that may leave little minor scrapes and cuts to the hands, does not statistically increase the risk of accelerating DC. EX 26, Dep. at 16. Dr. Fahey thus opined, based on claimant's medical history, that the DC symptoms which claimant experienced while in Afghanistan occurred as a result of a natural progression, and not an exacerbation, of the disease process. EX 26, Dep. at 24. As the credited opinions of Drs. Weiss, Strauss and Fahey establish that claimant's DC was not

[1] The administrative law judge additionally found that while Dr. Strauss stated that "an open injury of the hand with pre-existing [DC] can accelerate the contraction process," there is no evidence that claimant sustained any open injury of the hand while working for employer. Decision and Order at 4; *see also* EX 16.

caused or aggravated by his employment, they constitute substantial evidence severing the presumed causal link between claimant's DC condition and his work for employer.[2] We affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted with regard to this condition. *See O'Kelley*, 34 BRBS 39.

In weighing the evidence as a whole with regard to claimant's DC condition, the administrative law judge accorded greatest weight to the opinions of Drs. Weiss, Strauss and Fahey. Specifically, the administrative law judge found that Dr. Weiss is claimant's treating physician and hand surgeon, that Dr. Strauss is a board-certified specialist in plastic and reconstructive surgery who specializes in hand surgery, and that Dr. Fahey is a board-certified orthopedic surgeon specializing in surgery of the hand, wrist and upper extremities. In contrast, the administrative law judge found that claimant's expert, Dr. Hellman, is not board-certified in any specialty and has stated that he has never treated a patient with DC except to the extent that he has been "involved with the rehabilitation of upper extremity injuries including DC." Decision and Order at 6. Additionally, the administrative law judge found that Dr. Hellman was not a credible witness based on his general appearance at the hearing and because his answers were frequently long and unresponsive to the questions asked. HT at 104-106; 113-114.

In this case, the administrative law judge acted within his discretion in crediting the opinions of Drs. Weiss, Strauss, and Fahey, over the contrary opinion of Dr. Hellman, based on their superior credentials and better reasoning in the formation of their opinions on causation, *Calbeck v. Strachan Shipping Co*., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). As the opinions of Drs. Weiss, Strauss and Fahey constitute substantial evidence supporting the conclusion that claimant has not established that his DC condition is related to his work for employer, *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT), we affirm the administrative law judge's denial of benefits based on this condition. *See Duhagon v. Metropolitan Stevedore Co.,* 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

[2] This case arises under the Defense Base Act, which provides that judicial proceedings under Section 21 of the Act, 33 U.S.C. §921, are instituted in the judicial district where the office of the district director whose compensation order is involved is located. 42 U.S.C. §1643. In this case, the administrative law judge's decision was served by the district director in Jacksonville, Florida, which would appear to locate this case within the appellate jurisdiction of the Eleventh Circuit. The rebuttal evidence in this case provides concrete evidence ruling out a causal connection between claimant's DC and his work, thus meeting the requirements of *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990).

However, we cannot affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption with regard to claimant's left shoulder injury based on Dr. Fahey's opinion that claimant's left shoulder condition is not related to his employment. While Dr. Fahey initially opined that claimant's shoulder was related to his work, after review of claimant's medical records,[3] he stated that as claimant had similar complaints several years prior to the 2006 incident, he did not believe there was "reasonable evidence that this is a work related condition. I believe this is not a work-related condition." EX 27, Dep. at 55-56. While this statement supports the conclusion that claimant had a pre-existing shoulder symptoms and thus, his condition was not directly caused by his employment, it does not specifically address aggravation.[4] Moreover, while an administrative law judge may draw reasonable inference from a doctor's overall opinion, a review of Dr. Fahey's deposition does not necessarily support a conclusion that he found no aggravation. After the statement quoted above, Dr. Fahey was asked a series of questions regarding whether claimant's shoulder condition changed during the interval between 2004 and 2007.[5] The administrative law judge did not

[3] The administrative law judge recognized that while Dr. Fahey had initially opined, on July 11, 2007, that claimant's shoulder condition was related to his work, he altered his opinion following a review of claimant's treatment records from 2004, which revealed a diagnosis, at that time, by Dr. Calandruccio of a shoulder impingement. In particular, Dr. Fahey stated that "it would appear that [claimant] had very similar if not exactly the same complaints several years before his initiation of his employment. And, therefore, I do not believe that there is reasonable evidence that this is a work-related condition." EX 27, Dep. at 55.

[4] We further note that Dr. Fahey's opinion that claimant's left shoulder condition pre-existed his work for employer is insufficient, on its own, to establish that that condition was not aggravated or accelerated by that work. Rather, a pre-existing condition is a necessary element in applying the aggravation rule. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*).

[5] In this regard, Dr. Fahey's testimony states that claimant's left shoulder condition pre-existed his work injury, but contains statements indicating he could not say whether claimant's work for employer aggravated that pre-existing condition. EX 27, Dep. at 55-58. In particular, Dr. Fahey stated, when asked regarding the efficacy of conducting another MRI on claimant's left shoulder, that he did not think "at this point we could differentiate whether his injury happened as he claims in Afghanistan and I think it was 2006 or previously." *Id.* at 58. In other words, Dr. Fahey stated that if a present MRI revealed a tear, he "could not tell [at this point in time] the difference between a tear from 2006 and a tear from 2004." *Id.* Finally, when asked if it was "fair then to say using reasonable medical probability" that there was nothing he was aware of during the interval from 2004 and 2007 that would result in the need for an MRI other

discuss this testimony, which is relevant to aggravation, or apply the appropriate standard, which requires addressing whether Dr. Fahey opined to a reasonable degree of medical certainty that claimant's pre-existing shoulder condition was not aggravated by his work. *Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *O'Kelley*, 34 BRBS 39. We therefore vacate the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption with regard aggravation of claimant's left shoulder condition. On remand, the administrative law judge must address whether claimant's pre-existing left shoulder condition was aggravated or accelerated by his work for employer pursuant to the appropriate standard. If Section 20(a) was not rebutted, then causation is established, and the administrative law judge must address whether the shoulder condition resulted in any disability and any other remaining issues.

Accordingly, the administrative law judge's finding that claimant's DC condition is not work-related is affirmed, his finding that employer established rebuttal of the Section 20(a) presumption with regard to claimant's left shoulder condition is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

---

than degeneration of the shoulder condition existing in 2004, Dr. Fahey replied, "The only exception to that statement I would take is that there was a specific incident, and with a claim of a specific incident I would kind of feel obligated to evaluate it." *Id.* at 59-60.