BRB No. 11-0110

LARRY D. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 08/17/2011
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, for claimant.

Patricia A. Krebs and Megan Cole Misko (King, Krebs, and Jurgens, P.L.L.C.), New Orleans, Louisiana, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2009-LDA-00260) of Administrative Law Judge Larry W. Price 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). 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In March 2006, claimant commenced employment with employer as a security officer in Bagram, Afghanistan, where he worked seven days a week, 12 to 15 hours per day. On March 11, 2008, claimant sustained work-related injuries to his back and left knee when his left leg fell through a wooden pallet over which he was walking. Claimant sought medical treatment at the hospital, complaining of left knee and back pain. Claimant was subsequently returned to the United States, where he received medical treatment for left and right knee pain, back pain, and depression. Claimant sought benefits under the Act for work-related injuries he allegedly sustained to his left and right knees and back, as well as for a psychological condition that he asserted resulted from the March 11, 2008, work incident.

In his Decision and Order, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption with regard to claimant's left knee and back conditions, found that employer did not establish rebuttal of the presumption, and determined, assuming *arguendo* that employer had established rebuttal, that the record as a whole establishes that claimant suffered injuries to his left knee and back as a result of his March 11, 2008, work incident. Next, citing *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008), the administrative law judge addressed claimant's alleged right knee and psychological injuries without reference to the Section 20(a) presumption, stating that since these alleged injuries constituted "subsequent conditions" which allegedly arose from claimant's initial work injury, those conditions would be compensable only if they "naturally or unavoidably" resulted from claimant's initial work injuries. The administrative law judge found that claimant did not establish that either of these conditions was the natural or unavoidable result of his work-related back and left knee injuries and, therefore, they are not compensable under the Act. The administrative law judge found that claimant is unable to resume his usual employment duties with employer as a result of his left knee and back injuries, and that employer did not establish the availability of suitable alternate employment. Therefore, the administrative law judge awarded claimant ongoing temporary total disability compensation, commencing March 11, 2008, based on a stipulated average weekly wage of $1,905.72, as well as medical benefits for his left knee and back. 33 U.S.C. §§908(b), 907.

On appeal, claimant contends the administrative law judge erred in failing to apply the Section 20(a) presumption to his claim that he sustained a psychological injury as a result of the March 11, 2008, work accident. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant contends that the administrative law judge's finding that his psychological condition is unrelated to his employment with employer is based on an incorrect legal standard. Specifically, claimant contends that the administrative law

judge erred by requiring him to establish, without the benefit of the Section 20(a) presumption, that his psychological condition is the natural or unavoidable result of his work-related back and left knee injuries.[1]

Section 20(a) of the Act states, "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary – that the claim comes within the provision of this chapter." 33 U.S.C. §920(a). It is well-established that a psychological injury can constitute a "harm" under the Act. *See R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009); *S.K [Kamal] v. ITT Industries, Inc.*, 43 BRBS 78 (2009), *aff'd in pert. part and rev'd in part,* F.Supp. , No. 4:09-MC-348, 2011 WL 798464 (S.D.Tex. Mar. 1, 2011); 33 U.S.C. §902(2). Furthermore, the Section 20(a) presumption is applicable in psychological injury cases if claimant establishes the elements of his *prima facie* case. *Id.* It is claimant's burden to establish that he suffered a harm and either that a work-related accident occurred or that working conditions existed 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)); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the Section 20(a) presumption has been invoked, the burden shifts to the employer to rebut the presumption with substantial evidence that claimant's condition is not related to his employment. *See 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); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh the relevant evidence in the record and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion *See Port Cooper*, 227 F.3d 285, 34 BRBS 96(CRT); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1984); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). Employer is liable for sequela of a work injury, as well as for the aggravation of a prior injury. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002).

Claimant contends the administrative law judge improperly applied *Amerada Hess*, 543 F.3d 755, 42 BRBS 41(CRT), to deny him the benefit of the Section 20(a) presumption linking his psychological condition to his employment injury. In *Amerada Hess*, the claimant filed a claim for back and groin injuries he sustained in a work

[1]Claimant does not contest the denial of benefits with regard to his alleged right knee condition.

accident. At the hearing, the claimant testified that steroid medications for his injuries caused or worsened a cardiac condition. The administrative law judge applied the Section 20(a) presumption to the heart condition, found the presumption unrebutted, and thus held employer liable for medical expenses for the cardiac condition. The United States Court of Appeals for the Fifth Circuit reversed the application of the Section 20(a) presumption on these facts, holding that the presumption attaches only to claims made and that, as the claimant's claim referenced only back and groin injuries and not a heart condition, the claimant had to prove that his heart condition "naturally or unavoidably" arose from the work injury in order for it to be compensable.[2] *Amerada Hess*, 543 F.3d at 761 - 762, 42 BRBS at 44(CRT). In this case, the administrative law judge did not apply Section 20(a) to the claim that claimant's depression is due to the work injury and found that in order for claimant's psychological condition to be compensable under the Act, claimant must establish that this condition was the natural or unavoidable result of his work-related back and left knee injuries. Decision and Order at 14. The administrative law judge found that claimant's evidence was insufficient to prove this, and he therefore denied benefits.

We agree with claimant that this case is distinguishable from *Amerada Hess*. In this case, unlike *Amerada Hess*, claimant specifically claimed benefits for a psychological injury, as well as for his knee and back conditions, directly resulting from the March 11, 2008, work incident. *See* Cl. Pre-Hearing Statements dated February 12, 2009 and March 10, 2010; *U.S. Industries*, 455 U.S. 608, 14 BRBS 631 (Section 20(a) presumption applies only to the claim made by claimant and "considerable liberality" allows the amendment of claims); *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). Additionally, in support of his claim for benefits for these conditions, claimant submitted medical evidence that his psychological condition is work-related, and employer defended this claim by presenting contrary medical evidence.[3] *See* CXs

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[2]This holding is based on Section 2(2) of the Act, which states:

> The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or a naturally or unavoidably results from such accidental injury . . . .

33 U.S.C. §902(2). As the Fifth Circuit noted, this definition most frequently comes into play when there is an allegation that claimant's injury and/or disability is due to an intervening cause. *See, e.g., Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1993)

[3]Additionally, both parties addressed the issue of whether claimant's present psychiatric condition is work-related in their respective post-hearing briefs.

17, 20, 27; EX 14. Consequently, unlike the factual situation presented in *Amerada Hess* where the employee's formal claim did not reference a heart condition and he did not offer support for his lay testimony that his steroid use worsened his heart condition, claimant in this case made a claim for benefits for a psychological condition directly due to the work incident, presented evidence in support of his claim, and fully briefed the issue before the administrative law judge; likewise, employer was aware of the claim, presented evidence disputing it, and additionally briefed the issue. In addition, there is evidence of record stating claimant had a pre-existing psychological condition. Under such circumstances, the "aggravation rule" may apply. *Strachan Shipping*, 782 F.2d 513, 18 BRBS 45(CRT). As claimant made a claim alleging that he sustained a psychological injury arising out of and in the course of employment, the Section 20(a) presumption applies to his claim as a matter of law, if the administrative law judge finds that the psychological injury could have resulted from claimant's employment. *Amerada Hess*, 543 F.3d at 761, 42 BRBS at 44(CRT), *citing U.S. Industries*, 455 U.S. at 612-613, 14 BRBS at 632. Therefore, we hold that the administrative law judge erred in requiring claimant to establish that his psychological condition is the natural or unavoidable result of his work-related left knee and back injuries.

Accordingly, we vacate the administrative law judge's finding that claimant's psychological condition is not related to his employment with employer. On remand, the administrative law judge must apply the Section 20(a) presumption to claimant's claim for a psychological condition. If the presumption is invoked, the administrative law judge must address whether employer introduced substantial evidence to establish rebuttal of the Section 20(a) presumption, taking into consideration the aggravation rule. *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT). If rebuttal of the presumption is established, it drops from the case and the administrative law judge must resolve the issue of causation on the evidence of record as a whole, with claimant bearing the ultimate burden of persuasion. *See Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *see also Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT). If the administrative law judge finds claimant's psychological condition caused or aggravated by the work incident he must address claimant's entitlement to medical benefits for this condition. 33 U.S.C. §907.

Accordingly, the administrative law judge's denial of benefits for claimant's psychological condition is vacated, and the case remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge