BRB No. 03-0591

RICHARD P. STEARNS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MWR, DEPARTMENT OF ARMY (NAF) FT. STEWART, GA	)	DATE ISSUED: 12/8/04
	)	
and	)	
	)	
ALEXSIS, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	ORDER on MOTION for RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board's decision in this case. *Stearns v. MWR, Dep't of Army (NAF) Ft. Stewart, GA*, BRB No. 03-0591 (May 27, 2004)(unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301, 802.407. Claimant responds in support of the Board's decision. Claimant's counsel also has filed a fee petition for work performed before the Board in BRB No. 03-0591, requesting $3,862.50 for 12.875 hours at an hourly rate of $300. Employer filed an objection to the requested hourly rate, but also requests an extension of time to file a detailed response to the fee petition, inasmuch as employer's counsel did not receive the fee petition in sufficient time to respond in full. *See generally* 20 C.F.R. §802.203(g). For the reasons stated below, we deny employer's motion for reconsideration. We grant employer's request for an extension of time to respond to counsel's fee petition.

In its decision, the Board affirmed the administrative law judge's finding that employer did not establish rebuttal of the Section 20(a), 33 U.S.C. §920(a), presumption. In its motion for reconsideration, employer argues that the Board erred in applying the "rule out" standard in its rebuttal analysis. This contention is without merit. The United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises, affirmed a finding that the Section 20(a) presumption was not rebutted by stating, "None of the physicians expressed an opinion ruling out the possibility that there was a causal connection between the accident and Brown's disability." *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 297, 23 BRBS 22, 24(CRT)(11th Cir. 1990). This standard has not been applied in other circuits, which have relied on the statutory language that the Section 20(a) presumption

applies "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a); *see, e.g. Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT)(5th Cir.), *cert. denied*, 124 S.Ct. 825 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); *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). The disposition of this case is controlled by Eleventh Circuit precedent. Nonetheless, the Board discussed both standards and affirmed the administrative law judge's finding that the evidence is insufficient to rebut under either standard as employer failed to present *any* evidence that claimant's condition was not aggravated by his employment. *Stearns*, slip op at 4. Therefore we, reject employer's contention of error.

Employer also argues that the opinions of Drs. Collier, Deriso, Dulamal, Needleman, and Sheils establish rebuttal of the Section 20(a) presumption. Employer's argument lacks merit as the opinions of Drs. Collier, Deriso, and Needleman support a relationship between claimant's general working conditions and his right foot ulcers.[1] *Stearns*, slip op. at 4. Dr. Dulamal's opinion is not relevant to the issue of rebuttal; as employer conceded on appeal and in its motion for reconsideration, Dr. Dulamal rendered no testimony with regard to whether claimant's employment conditions aggravated his pre-existing condition. Emp. Motion for Reconsideration at 27; Emp. Br. at 35; Cl. Ex. 10; Emp. Exs. 5, 6. Moreover, Dr. Sheils's opinion attributing claimant's foot injury to causes other than his work activities cannot support a rebuttal finding since it does not address whether claimant's right foot injury was aggravated by his employment activities and since Dr. Sheils deferred on this issue to the opinions of claimant's treating physicians after May 13, 1987, the last time Dr. Sheils treated claimant. *Stearns*, slip op. at 4; Emp. Ex. 9 at 27-28. As employer did not produce any evidence that claimant's working conditions did not aggravate his pre-existing condition, employer has not demonstrated error in the Board's affirmance of the administrative law judge's finding that the Section 20(a) presumption is not rebutted. *See Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT).

[1]Dr. Collier opined that claimant's constant standing and walking on his foot ulcers aggravated them and attributed claimant's back and shoulder problems to this altered gait and use of a cane, respectively, which, in turn, were caused by the treatment needed for his foot ulcers. Cl. Ex. 9 at 2; Emp. Ex. 29 at 55-58. Dr. Needleman stated that claimant's right foot ulcer was aggravated by his employment activities, which involved a lot of walking and standing. Cl. Ex. 12 at 9; Emp. Ex. 8 at 42. Dr. Deriso opined that the activities of daily living and/or the workplace could have caused claimant's right foot problems. Emp. Ex. 2 at 42-43.

Accordingly, the motion for reconsideration filed by employer is denied, and the Board's decision is affirmed. 20 C.F.R. §802.409. Employer is granted 20 days from receipt of this Order in which to file its response to claimant's counsel's fee petition. 20 C.F.R. §§802.203, 802.217. An order addressing claimant's counsel's fee petition and any objection thereto will be issued after the Board receives employer's response to the fee petition.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge