BRB No. 98-0513

TRINA R. PUSEY	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-LHC-44) of Administrative Law Judge Richard K. Malamphy 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 findings of fact and conclusions of law of the administrative law judge which 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, who suffered from long-standing depression, worked in employer's Sail Loft making glove boxes, tents and decorations for approximately fifteen years

until April 1996, when she was transferred to work aboard an aircraft carrier installing ventilation. Claimant was not initially told the reason for her transfer and thereafter filed a grievance in an effort to return to her former job. Claimant worked in the ventilation shop for approximately three weeks until the day of her grievance meeting, when she was told that the transfer occurred because work in the Sail Loft was being curtailed and there was a need for more workers to perform ventilation installation. Subsequent to this meeting, claimant did not return to work for employer. Experiencing feelings of hostility and suicidal and homicidal ideation, claimant was hospitalized from May 17, 1996 until May 21, 1996, and was diagnosed with bipolar disorder and depression. Thereafter, claimant's treating physician, Dr. Poe, released claimant to return to work in employer's Sail Loft, but not on aircraft carriers. Claimant attempted to return to work for employer, but after employer did not grant her request to accommodate Dr. Poe's restriction, claimant returned to her part-time non-covered employment at a grocery store. Claimant thereafter sought temporary total and temporary partial disability compensation under the Act, 33 U.S.C. §908(b), (e), alleging that her transfer to the aircraft carrier aggravated her pre-existing psychiatric condition.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption linking her present medical condition to her employment. The administrative law judge concluded, however, that employer established rebuttal of the presumption based on the opinion of Dr. Thrasher. Next, weighing the evidence as a whole, the administrative law judge credited Dr. Thrasher's opinion that claimant's transfer to the aircraft carrier, from a psychiatric perspective, does not qualify as a work-related injury. Thus, the administrative law judge denied claimant's claim for compensation.

On appeal, claimant challenges the administrative law judge's denial of benefits. Specifically, claimant contends that the administrative law judge erred in finding rebuttal of the Section 20(a) presumption established, and in ultimately finding that claimant's psychological impairment is not related to her employment with employer. Employer responds, urging affirmance of the administrative law judge's decision.

A psychological impairment which is work-related is compensable under the Act. *American National Red Cross v. Hagen,* 327 F.2d 559 (7th Cir. 1964); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989)(decision on remand). Furthermore, the Section 20(a) presumption, which provides a presumed causal nexus between the injury and employment, is applicable in psychological injury cases. *See Cotton v. Newport News Shipbuilding*

& Dry Dock Co., 23 BRBS 380, 384 n. 2 (1990); 33 U.S.C. §920(a). In order to be entitled to the Section 20(a) presumption, however, claimant must establish a *prima facie* case by showing not only that she has a psychological condition but also that a work-related accident occurred or that working conditions existed which could have caused or aggravated the condition. *See Stevens v. Tacoma Boatbuilding Co.,* 23 BRBS 191 (1990); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). An employment injury need not be the sole cause of a disability; rather, if the employment injury aggravates, accelerates or combines with an underlying condition, the entire resultant condition is compensable. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Thus, claimant's injury need only be due in part to work-related conditions to be compensable under the Act. *See Peterson v. General Dynamics Corp.,* 25 BRBS 78 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept. of Labor, OWCP,* 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied,* 507 U.S. 909 (1993). Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the presumption is rebutted, the administrative law judge must weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994).

Initially, we note that the administrative law judge invoked the Section 20(a) presumption linking claimant's present psychological problems to her employment with employer on the basis that those problems constituted a harm and that claimant's work-related stress could have aggravated this medical condition. *See, e.g., Phillips v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 94 (1988). As no party challenges the administrative law judge's finding that claimant is entitled to invocation of the presumption, it is affirmed.[1]

[1]Employer's reliance on *Marino v. Navy Exchange,* 20 BRBS 166 (1988), is misplaced. In *Marino*, the issue in dispute regarded whether the working conditions prong needed to invoke Section 20(a) could be satisfied based on a legitimate personnel action, *i.e.,* termination due to a reduction in force. In the instant case, however, the administrative law judge's statements that claimant experienced stress while working for employer led to his determination that claimant is entitled to invocation of the Section 20(a) presumption, which is not challenged on appeal. In any event, the only arguable "personnel action" here is the act of the transfer itself; injuries due to working conditions thereafter are, of course, compensable. Thus, the sole issue here is whether employer established that claimant's working conditions

did not cause or aggravate her condition.

In the instant case, in concluding that claimant's psychological condition is not employment-related, the administrative law judge found rebuttal of the Section 20(a) presumption established based upon the testimony of Dr. Thrasher. In order to establish rebuttal, however, a medical opinion must unequivocally state that no relationship exists between claimant's harm and his employment; thus, in order to be sufficient to rebut the Section 20(a) presumption, the opinion of Dr.Thrasher must establish that claimant's employment did not cause claimant's condition nor aggravate, accelerate, or combine with an underlying condition. *See O'Leary*, 357 F.2d at 812. Our review of the testimony of this physician, however, reveals that his opinion is insufficient to sever the presumed casual relationship between claimant's medical condition and her employment. Claimant testified without contradiction that she had physical difficulties performing her job on the carrier, that she sustained burns and cuts on the job, and almost fell down the stairs one day, and these incidents contributed to her dislike of her new job.[2] Tr. at 19-20. Moreover, claimant testified that not being provided with a reason for her transfer contributed to her feelings of hatred.[3] *Id.* at 24-25. Dr. Thrasher, in discussing claimant's condition, indicated that working on the aircraft carrier, *i.e.*, the working conditions experienced by claimant, as well as the manner in which claimant was told of her transfer, did in fact contribute to claimant's current psychological condition. Specifically, in his November 14, 1996 report, Dr. Thrasher stated:

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[2]Claimant additionally testified that she hated her work on the carrier because she was a perfectionist and had previously done a good job in the Sail Loft. Tr. at 25. In discussing the evidence as a whole, the administrative law judge implicitly credited claimant's testimony regarding her work aboard the aircraft carrier when he stated: "Apparently, it was stressful for the Claimant to work in the installation of ventilation on the carrier." Decision and Order at 15.

[3]Claimant testified that she cried when she was told of the transfer because her supervisor did not tell her the reason for the transfer. Tr. at 24. Claimant further stated that she hated her new assignment and felt that employer had no right to move her for no reason. *Id.* at 25.

> She has considerable low self-esteem and is very sensitive to rejection and found it devastating to be transferred, particularly when she was unable to identify any clear reason that she should be the one to be transferred. The loss of self-esteem associated with this 'rejection' combined with her knowledge, as she compared herself to her co-workers doing duct work, greatly diminished her self-esteem and this stress exacerbated the onset of a full episode of her already developing relapse into Bipolar Disorder, Mixed.

Emp. Ex. 5. Dr. Thrasher subsequently commented, in a July 3, 1997 report, that claimant "does not like vent work and did not like the prospect of doing more physically demanding work (climbing ladders, etc.) as she became older."[4] As the opinion of Dr. Thrasher, taken in its entirety, does not rule out claimant's working conditions following her job transfer as a cause or contributor to claimant's current psychological condition, it is insufficient as a matter of law to establish rebuttal of the Section 20(a) presumption. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). Thus, as the opinion of Dr. Thrasher constitutes the only relevant evidence proffered by employer on rebuttal, there is no need to remand this case for reconsideration of the issue of causation since a causal relationship between claimant's employment and her psychological condition has been established. *See Manship v. Norfolk & Western Railway Co.*, 30 BRBS at 175; *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *see generally ITO Corp. v. Director,*

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[4]We note that, in finding rebuttal, the administrative law judge specifically cited that portion of Dr. Thrasher's opinion wherein the physician stated that claimant did not have problems returning to her part-time work at a grocery store. *See* Decision and Order at 13. However, this statement relates to the issue of the extent of claimant's disability, not to the issue of causation. The administrative law judge also quoted Dr. Thrasher's statement that

> Ms. Pusey does not appear to have experienced an event at work that is outside the normal range of experience a worker may have and therefore she does not appear to have experienced a work-related injury.

Decision and Order at 10. This statement cannot meet employer's burden, as it is well-settled that a claimant need not prove unusually stressful conditions in order to have a work-related injury under the Act. *See Ronno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). *See generally Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968)(*en banc)*; 1B Larson, Workmen's Compensation Law, §42.25(f), (g) (1996).

OWCP, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989). The administrative law judge's determination to the contrary on this issue is therefore reversed, and the case must be remanded to the administrative law judge for consideration of the remaining issues.[5]

[5]In its response brief, employer contends, as it did before the administrative law judge, that if benefits are awarded, it is entitled to a credit for the amount it paid to claimant pursuant to employer's sickness and disability plan. As benefits were initially denied by the administrative law judge, this argument was not considered below. We note that, on remand, the administrative law judge should consider employer's contention in this regard.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge