BRB No. 99-0505

SLATER B. MATTHEWS, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Temporary Total Disability of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh and Chanda L. Wilson (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Temporary Total Disability (95-LHC-2504) 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).

This case is before the Board for the second time. To recapitulate, on September 12, 1994, claimant, a pipefitter at the shipyard, injured his hands while lock wiring in the steel shop, and was later diagnosed with carpal tunnel syndrome.

In his initial Decision and Order, the administrative law judge denied claimant temporary total disability benefits from April 17 through April 30, 1995, and from January 16 through August 4, 1996. Claimant appealed the administrative law judge's denial of temporary total disability benefits for these two time periods. The Board vacated the administrative law judge's decision, holding that he erred by failing to apply Section 20(a) of the Act, 33 U.S.C. §920(a), in considering whether claimant's disabling condition from April 17 through April 30, 1995, was due to his work-related hand injury, and in addressing whether claimant's total disability from January 16 through August 4, 1996, was due to a work-related psychological condition. Accordingly, the case was remanded for further consideration. *Matthews v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 97-1218 (April 29, 1998)(unpublished).

On remand, the administrative law judge found claimant entitled to the Section 20(a) presumption for the period of disability from April 17 through April 30, 1995, which he further found that employer rebutted. In analyzing the record as a whole, the administrative law judge found that claimant's disability was work-related. The administrative law judge also found claimant entitled to the Section 20(a) presumption with regard to the cause of the period of disability running from January 16 through August 4, 1996. He further found that employer failed to rebut the presumption, as no physician of record stated that claimant's psychological disability was not due, even in part, to the work injury. Employer appeals the administrative law judge's award of temporary total disability benefits for these two time periods. Claimant responds, urging affirmance.

Employer contends that the administrative law judge erred in finding claimant's temporary total disability from April 17 through April 30, 1995, was work-related. Where, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption by producing substantial evidence that claimant's condition was neither caused nor aggravated by his employment. *See American Grain Trimmers, Inc. v. Director*, *OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999)(*en banc*); *Swinton v. J. Frank Kelley, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds the Section 20(a) presumption rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). The administrative law judge then must weigh all the evidence and resolve the issue of causation on the record as a whole with claimant bearing the burden of persuasion. *See Santoro v. Maher Terminals, Inc.,* 30 BRBS 171 (1996); *see generally Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994).

Employer contends that the absence of any medical opinion attributing claimant's disability to the September 12, 1994, work injury, and, in particular, the absence of an opinion on causation from Dr. Maxwell, who excused claimant from

work from April 17 through April 30, 1995, establishes that claimant failed to prove the work-relatedness of his disability based on the record as a whole.

We need not reach the issue of whether claimant established the work-relatedness of his disability, based on the record as a whole, inasmuch as we hold that the administrative law judge erred in finding the Section 20(a) presumption rebutted. The administrative law judge found rebuttal based on the absence of an opinion by Dr. Maxwell regarding the work-relatedness of claimant's disability from April 17 through April 30, 1995. Dr. Maxwell first examined claimant on March 27, 1995. Decision and Order at 7. Dr. Maxwell diagnosed overuse syndrome of the hands with flexor tenosynovitus, secondary sensory carpal tunnel syndrome and chronic rotator cuff tendinitis. EX 5(b). On April 28, 1995, he noted that claimant was unable to work from April 17 through April 30, 1995. CX 1. On May 10, 1995, he responded in the affirmative to a request from claimant's attorney that he confirm that claimant was totally disabled by pain from April 17 through April 30, 1995. CX 2. Dr. Maxwell did not specifically address the causal relationship between claimant's pain and the September 12, 1994, work injury; however, at no time was he asked by either claimant or employer to offer such an opinion.

We hold that Dr. Maxwell's opinion is not sufficient to rebut the Section 20(a) presumption as he does not state that claimant's pain and resultant disability are not work-related. *See Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 56, 31 BRBS 19, 21 (CRT)(1st Cir. 1997); *see also Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175, 179 (1996). It is employer's burden to produce substantial evidence severing the connection between claimant's disability and the work injury. *American Grain Trimmers,* 181 F.3d at 817, 33 BRBS at 77 (CRT). An opinion that does not address the cause of claimant's disability is insufficient to rebut the Section 20(a) presumption. *See Bath Iron Works,* 109 F.3d at 56, 31 BRBS at 21 (CRT). We therefore vacate the administrative law judge's finding that Dr. Maxwell's opinion rebuts the Section 20(a) presumption. Decision and Order at 7. Moreover, as there is no other medical opinion of record which could rebut the presumption, we affirm the administrative law judge's ultimate conclusion that claimant is entitled to benefits for temporary total disability from April 17 through April 30, 1995. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995).

Employer next contends that the administrative law judge erred in awarding claimant temporary total disability benefits from January 16 through August 4, 1996, as the administrative law judge erred by finding claimant entitled to the Section 20(a) presumption and that employer failed to rebut the presumption. Specifically, employer argues that claimant failed to establish the "working conditions" element of his *prima facie* case. Moreover, employer argues that the report of Dr. Gingras rebuts the presumption and establishes, based on the record as a whole, that

claimant's psychological disability from January 16 through August 4, 1996, is not related to his employment.

Employer's contentions are meritless. A psychological impairment, which is work-related even in part, is compensable under the Act. *Manship*, 30 BRBS at 179; *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989)(decision on remand). The Section 20(a) presumption is applicable in psychological injury cases if claimant establishes his *prima facie* case. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 384 n. 2 (1990). To establish a *prima facie* case, it is claimant's burden to prove the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. *See U.S. Industries/Fedreral Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Moore,* 126 F.3d at 262, 31 BRBS at 122-123 (CRT).

In the instant case, the administrative law judge found claimant entitled to the Section 20(a) presumption based on claimant's undisputed psychological disability, claimant's testimony of work stress due to relations with his supervisors and pain from his physical injuries, and Dr. Gingras's diagnosis attributing claimant's psychological disability, in part, to his employment. Decision and Order at 11. The administrative law judge found that employer failed to rebut the presumption as no physician stated that work-related stress did not play a role in causing claimant's disability.

We affirm the administrative law judge's invocation of the Section 20(a) presumption based on claimant's testimony and Dr. Gingras's diagnosis, which, coupled with the undisputed evidence of claimant's psychological disability, provide substantial evidence to invoke the presumption.[1] *See Konno*, 28 BRBS at 60-62 (1994). Moreover, we affirm the administrative law judge's finding that employer failed to rebut the presumption. The only medical report of record to address

[1]Employer's contention that a psychological disability is compensable only when it results from a work-related physical injury is not supported by the law. *See, e.g., American National Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964). In any event, in this case Dr. Gingras attributed claimant's psychological disability to physical pain in claimant's hands, arm and back and to physical and psychological work stress. EX 7(b). Thus, this argument also does not apply on the facts presented.

claimant's psychological disability, that of Dr. Gingras, attributed the disability to claimant's work-related physical injury and work stress, as well as to non-work-related factors. As it thus supports a causal nexus, this opinion cannot constitute substantial evidence rebutting the Section 20(a) presumption. *See Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6, 8 (1998); *see also Konno*, 28 BRBS at 62. We accordingly affirm the administrative law judge's award of benefits for temporary total disability from January 16 through August 4, 1996.

Accordingly, the administrative law judge's Decision and Order on Remand Granting Temporary Total Disability is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge