BRB No. 00-0539

WINSLOW SELVIG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTH FLORIDA SHIPYARDS, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
JACKSONVILLE SHIPYARDS INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

David N. Neusner (Embry and Neusner), Groton, Connecticut, for claimant.

Mary Nelson Morgan (Cole, Stone, Stoudemire & Morgan, P.A.), Jacksonville, Florida, for self-insured employer.

Before: SMITH and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (94-LHC-2841, 94-LHC-2842, 99-LHC-1676) of Administrative Law Judge David W. Di Nardi 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 the 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, claimant filed a claim under the Act for injuries to his right hip, left knee, and feet. Claimant initially began working as a pipefitter in 1955, working for Jacksonville Shipyards from 1967 to August 1989. After leaving Jacksonville Shipyards, claimant accepted a job with employer, North Florida Shipyards, in November 1989, working as a pipefitter for three weeks before being laid off on December 5, 1989. Claimant testified that during the course of his brief stint with employer, he suffered a traumatic injury to his right hip when a hatch cover hit him on the head causing him to strike his right hip on the edge of the hatch as he was climbing down to the work site. Tr. I at 40 - 41.[1] Claimant also testified that his work activities for employer aggravated pre-existing left knee and right hip conditions. *Id.* at 36-40; SX 2.[2]

Claimant suffered a series of medical problems prior to accepting employment

[1]Transcript of formal hearing conducted on May 8, 1997. Hereinafter, Tr. I refers to this transcript; Tr. II refers to the transcript of the formal hearing conducted on August 3, 1999; CX I refers to exhibits claimant submitted at the May 8, 1997, hearing; CX II refers to exhibits submitted by claimant at the August 3, 1999, hearing; and SX refers to exhibits submitted by St. Paul Fire & Marine Insurance Company on behalf of Jacksonville Shipyards at the August 3, 1999, hearing.

[2]Claimant's deposition conducted on July 14, 1999.

with North Florida Shipyards. Claimant testified that while working for Jacksonville Shipyards, he suffered injuries to his fingers, elbow, and left knee, ultimately undergoing left knee surgery in 1972. *See, e.g.,* Tr. I at 31-32; CX I -10. In a procedure unrelated to his work, claimant also had implants inserted into both big toes due to pain associated with gout. Tr. I at 33. Claimant had pre-existing osteoarthritis in various joints. Following his layoff from employer, claimant underwent hip replacement surgery on January 30, 1990. *See, e.g.,* Tr. I at 43, 64. He filed a claim for a traumatic injury to the right hip and for repetitive trauma to the left knee on July 9, 1993, and amended his claim on January 12, 1995, to include repetitive trauma injuries to the left leg, right hip and feet.

In the initial decision, Administrative Law Judge Levin denied benefits on all asserted claims. The administrative law judge found the claim for the hip injury barred as untimely. Specifically, the administrative law judge concluded that employer rebutted the presumption of timeliness under Section 20(b) of the Act, 33 U.S.C. §920(b), because claimant did not provide employer with timely notice of the injury as required by Section 12(a) of the Act, 33 U.S.C. §912(a), and because claimant did not file his claim within the time limits specified in Section 13(a) of the Act, 33 U.S.C. §913(a). Decision and Order at 12 - 14. The administrative law judge also found that claimant is not entitled to medical expenses for his hip condition because the testimony that claimant sustained a traumatic injury to his hip is not credible. *Id.* at 14 - 15. Claimant also was denied compensation for the hip injury on the basis that the condition was not aggravated or accelerated by repetitive work-related trauma. *Id.* at 15. With regard to the claims for the left knee and feet injuries, the administrative law judge concluded that the claims were timely filed, but nonetheless were not compensable because employer successfully severed the causal nexus between the injuries and claimant's employment with employer. *Id.* at 15 - 16.

Claimant appealed the denial of benefits, contending that the administrative law judge erred in finding the claim for the hip injury barred under Sections 12 and 13 of the Act, and in finding none of the injuries work-related. Specifically, claimant argued that the Section 13(a) statute of limitations for his traumatic hip injury claim was tolled by employer's failure to file a report under Section 30(a) of the Act, 33 U.S.C. §930(a), and that therefore the claim filed in July 1993 is timely pursuant to 33 U.S.C. §930(f). The Board held the administrative law judge rationally concluded that the Section 13(a) statute of limitations was not tolled by employer's failure to file a report under Section 30(a) because employer had not been given notice and was unaware of claimant's injury. Accordingly, the Board held that the traumatic injury claim was untimely filed as the claim was filed more than one year after January 30, 1990, when the administrative law judge found that claimant was aware the his injury was related

to his employment.[3] The Board specifically noted that claimant did not appeal the administrative law judge's finding that he was aware of the interrelatedness of his injury, disability and employment on January 30, 1993.

[3]The Board therefore declined to address the Section 12 issues raised by claimant.

The Board, however, vacated the administrative law judge's findings that claimant's hip condition is not work-related. The claim for a traumatic hip injury was remanded for the administrative law judge to apply the Section 20(a) presumption, 33 U.S.C. §920(a).[4] The claim based on repetitive trauma was remanded for the administrative law judge to clarify whether the claim was properly raised before him. If so, the Board instructed the administrative law judge to apply the Section 20(a) presumption. Finally, the Board affirmed the administrative law judge's finding that claimant's left knee and left and right foot conditions are not related to his employment with employer. *Selvig v. North Florida Shipyards, Inc.*, BRB No. 98-1236 (June 17, 1999) (unpublished).

On remand, the case was reassigned to Administrative Law Judge David W. Di Nardi (the administrative law judge). In his Decision and Order on Remand - Awarding Benefits, the administrative law judge initially found that claimant had asserted a claim for a hip injury caused by repetitive trauma, and is entitled to the Section 20(a) presumption linking his hip injury to his three weeks of employment for employer based on claimant's testimony as to his working conditions. The administrative law judge found that employer did not introduce any evidence severing the relationship between claimant's employment and his hip condition, and that, moreover, evidence of record supported claimant's contention that his hip injury was related to his employment with employer. Decision and Order on Remand at 21, 44-45.

The administrative law judge next addressed the timeliness of claimant's notice and filing of the repetitive trauma claim as he found that these issues had been raised by employer but not addressed by Administrative Law Judge Levin because he instead rejected the repetitive trauma claim as not work-related. Administrative Law Judge Di Nardi concluded that claimant provided timely notice to employer of the claim for injury due to repetitive trauma and that the claim was timely filed. *Id*. at 48-49. The administrative law judge found that claimant is unable to return to his usual employment and that employer failed to introduce evidence establishing the availability of suitable alternate employment. He accordingly awarded claimant compensation under the Act for permanent total disability, 33 U.S.C. §908(a). *Id*. at 50-52.

Finally, the administrative law judge determined claimant's average weekly wage, found claimant entitled to medical expenses for his right hip condition and denied claimant's claim for penalties under Section 14(e), 33 U.S.C. §914(e). Employer was found to be the responsible employer for compensation and medical benefits related to claimant's right hip condition; however, the administrative law judge also found that employer established its entitlement to Section 8(f) relief from

[4]Although not explicitly stated in the Board's decision, the remand on this issue relates to claimant's entitlement to medical benefits, which are never time-barred. *Ryan v. Alaska Constructors, Inc.,* 24 BRBS 65 (1990).

continuing compensation liability, 33 U.S.C. §908(f). Jacksonville Shipyards was found responsible for medical benefits related to claimant's left knee and right and left foot conditions.[5]

On appeal, employer challenges Administrative Law Judge Di Nardi's finding on remand that the repetitive trauma claim is timely under Sections 12 and 13, contending the administrative law judge improperly addressed this issue. Employer also asserts that the administrative law judge erred in finding that claimant's right hip condition was aggravated by repetitive trauma to claimant's left knee during the course of his employment for employer. Claimant responds, urging affirmance.

Employer contends that the Board held in its prior decision that the repetitive trauma claim was not timely filed, that the Board's holding is the law of the case, and that the administrative law judge therefore erred on remand by readdressing the timeliness of claimant's claim alleging injury due to repetitive trauma. In its decision, the Board addressed only the timeliness of the traumatic hip injury claim, *see Selvig*, slip op. at 2-4, because claimant failed to challenge Administrative Law Judge Levin's finding that the repetitive injury claim was time-barred. *See* Claimant's Memorandum of Law at 19 (1998). The Board frther noted in its decision that claimant also did not appeal Administrative Law Judge Levin's finding that claimant was aware on January 30, 1990, that his disabling hip injury was related to his employment. *Selvig*, slip op. at 3.

[5]On remand, the administrative law judge granted claimant's motion to join Jacksonville Shipyards to the case based on claimant's new assertion that his left knee and right and left foot injuries are related to his employment with Jacksonville Shipyards.

Administrative Law Judge Di Nardi found on remand that Administrative Law Judge Levin did not address the timeliness of the repetitive injury claim. We disagree. In his decision addressing Sections 12 and 13, Administrative Law Judge Levin begins the second paragraph of his timeliness analysis by stating, " [C]laimant allegedly sustained a traumatic injury and *repetitive trauma* to his right hip in November 1989. Claimant testified he knew that his condition was work-related and that he was disabled as a result of that work-related hip condition in December 1989, and, at the latest January 30, 1990, the date of his total hip replacement surgery." Decision and Order at 12 (italics added). Thus, based on this plain language in Administrative Law Judge Levin's decision, we hold that Administrative Law Judge Di Nardi erred in finding that the timeliness of claimant's repetitive trauma claim under Sections 12 and 13 was not addressed in Administrative Law Judge Levin's decision. Moreover, based on claimant's failure to challenge the date of awareness finding on appeal, the claim for a hip injury due either to traumatic accident or repetitive trauma is untimely unless tolled under Section 30(f), which the Board held in its first decision did not apply. *Selvig*, slip op. at 3-4. Accordingly, we hold that Administrative Law Judge Di Nardi erred by addressing the timeliness of the repetitive injury claim. Administrative Law Judge Levin addressed the timeliness of the amended claim alleging a hip injury due to repetitive trauma, and claimant failed in his initial appeal to the Board to appeal either this finding or Administrative Law Judge Levin's finding that claimant's date of awareness is January 30, 1990. We therefore agree with employer that, pursuant to the Board's affirmance in its initial decision of all findings unchallenged by claimant on appeal, including the above findings by Administrative Law Judge Levin, the denial of the repetitive trauma injury claim under Section 13(a) constitutes the law of the case.[6] *See Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000); *see also Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999). Accordingly, we reverse Administrative Law Judge Di Nardi's finding that the repetitive injury claim was timely filed pursuant to Section 13 of the Act. Consequently, we also vacate the administrative law judge's compensation award for permanent total disability.

We next address employer's contentions that the administrative law judge erred on remand in finding that claimant's hip condition is related to claimant's three weeks of work for employer prior to his undergoing hip replacement surgery. Claimant's entitlement to medical benefits for a condition determined to be work-related is not affected by the untimely claims. *Siler v. Dillingham Ship Repair,* 28 BRBS 38 (1994)(*en banc*). 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 in order to establish a

[6]The law of the case doctrine would not apply if the claim were reopened under Section 22 of the Act, 33 U.S.C. §922. However, while Judge Di Nardi could have reopened this issue under Section 22, which permits the factfinder to resolve mistakes of fact based on consideration of new evidence, cumulative evidence or further reflection on the evidence originally submitted, *see O'Keeffe v. Aerojet-General Shipyards*, 404 U.S. 254 (1971), *reh'g denied,* 404 U.S. 1053 (1972), he did not make his timeliness finding under this provision.

prima facie case. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Where claimant has established his *prima facie* case, Section 20(a) of the Act, 33 U.S.C. §920(a), provides him with a presumption that his condition is causally related to his employment; the burden then 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 Kelly, 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. *Moore*, 126 F.3d at 256, 31 BRBS at 119(CRT). 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. *Id.; see also 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).

In the instant case, employer initially contends that the administrative law judge erred by invoking the Section 20(a) presumption. Specifically, employer asserts that the administrative law judge erred in finding that working conditions existed that could have caused claimant's hip injury as claimant offered no evidence or testimony that his work activities for employer could have caused or aggravated any hip symptomatology.[7] We disagree. In his decision, the administrative law judge properly stated that he may rely on claimant's testimony to find that claimant established a *prima facie* case linking his hip injury to working conditions at employer's facility. *See, e.g., Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *see also Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). The administrative law judge credited claimant's testimony that his work for employer aggravated his pre-existing knee, foot and hip conditions, as climbing ladders, and crawling and working in confined spaces at employer's facility aggravated his left knee. Decision and Order on Remand at 11, 23. Specifically, claimant testified to chronic pain and swelling of his left knee following surgery in 1972, including during the course of his employment for employer. SX 2 at 41-44; *see also* Tr. I at 36-40; Tr. II at 61-63, 89. We therefore affirm the administrative law judge's invocation of the Section 20(a) presumption as claimant's testimony is substantial evidence of working conditions that could have aggravated claimant's left knee, thereby altering claimant's gait and causing injury to claimant's right hip.

[7]Employer does not dispute the administrative law judge's finding that claimant's right hip condition constitutes a harm for purposes of invoking the Section 20(a) presumption. Employer's Petition for Review at 24.

Employer next challenges the administrative law judge's findings that employer failed to produce evidence rebutting the Section 20(a) presumption, and his alternative finding that claimant established, based on the record as a whole, that his working conditions for employer aggravated claimant's pre-existing left knee condition, thereby altering his gait, which resulted in a right hip injury on or about November 23, 1989.[8] We need not address employer's contention that the administrative law judge erred in finding that it did not rebut the Section 20(a) presumption, as any error would be harmless since substantial evidence supports the administrative law judge's conclusion, based on the record as a whole, that claimant's hip condition is due to his work for employer. In concluding that claimant sustained a right hip injury due to repetitive trauma during the course of his employment for employer, the administrative law judge credited claimant's passing a physical agility test for employer prior to beginning work there in November 1989. Tr. II at 97; *see* CX I-1. The administrative law judge credited claimant's testimony as to his working conditions for employer, which the administrative law judge found aggravated both his pre-existing left knee and right hip conditions. Tr. I at 36-40, Tr. II at 61-63, 89, SX 2. Finally, the administrative law judge credited the deposition testimony of Dr. Pohl, who was one of claimant's treating physicians. CX I-4. Specifically, the administrative law judge found significant Dr. Pohl's testimony that claimant reported no right hip complaints at office visits on May 15, July 26, and August 23, 1989. Decision and Order on Remand at 30. Claimant first reported right hip pain of two weeks duration to Dr. Gaillard on December 8, 1989, and Dr. Pohl opined that there was no indication of any need for a right hip replacement prior to claimant's office visit on January 11, 1990. CXS I-3 at 13-15; 4; 7. Moreover, Dr. Pohl testified that claimant's longshore employment, including his work for employer, aggravated his knee condition, that this condition would probably alter claimant's gait, which, in turn could accelerate the progression of claimant's right hip condition. CX I-3 at 32-37. Inasmuch as substantial evidence supports his conclusion that claimant's right hip condition is related to his employment with employer, we affirm the administrative law judge's finding that employer is liable for medical benefits associated with claimant's hip injury.

Accordingly, we reverse the administrative law judge's finding that claimant's

[8]We decline to address employer's unsupported assertion that the administrative law judge erred in finding that a repetitive trauma claim was properly raised before Administrative Law Judge Levin. Petition for Review at 23. Mere allegation of error is insufficient to invoke the Board's review. *Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff'g on recon. en banc*, 31 BRBS 13 (1997). Additionally, employer argues that it rebutted the Section 20(a) presumption and established, based on the record as a whole, that claimant did not sustain a traumatic accident to his right hip during the course of his employment for employer. Petition for Review at 16-22. The administrative law judge, however, did not address whether claimant sustained a traumatic work accident that accelerated or aggravated his pre-existing hip condition, but based his causation finding on claimant's general working conditions.

repetitive hip injury claim was timely filed, and we vacate the administrative law judge's award of compensation for permanent total disability. In all other respects, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge