BRB No. 02-0386

JAMES KLOTZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICES	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED: Feb. 10, 2003
	)	
Employer/Carrier-Petitioners	)	
		DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Breit, Klein & Camden LLP), Norfolk, Virginia, for claimant.

R. John Barrett (Vandeventer Black LLP), Norfolk, Virginia, for employer/ carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (01-LHC-2213) of Administrative Law Judge Fletcher E. Campbell, Jr., awarding benefits 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On November 28, 2000, claimant was working as a lasher for employer onboard a vessel; in the course of that employment, claimant climbed a ladder to a catwalk above the ship's deck and was in the process of unlashing containers when he experienced chest pain. As his pain worsened, claimant descended the ladder and collapsed on the vessel's deck. He was transported by ambulance to the hospital where he was found to have suffered an acute anterior wall myocardial infarction, or heart attack, with a total occlusion of the proximal left anterior descending artery. Dr. Goldstein performed an angioplasty and stenting of the front wall artery, and continued to treat claimant following his discharge from the hospital. Dr. Goldstein released claimant to return to work without restrictions on February 9, 2001. Claimant sought temporary total disability compensation from November 28, 2000 to February 8, 2001, and medical benefits under the Act. Employer controverted the claim on the basis that claimant's disability was not causally related to his employment.

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. The administrative law judge further determined that employer failed to produce evidence that claimant's heart attack was not triggered or hastened by the physical or mental stress of claimant's job and, therefore, failed to rebut the presumption. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from November 28, 2000 to February 8, 2001.

On appeal, employer challenges the administrative law judge's finding that employer failed to present evidence sufficient to establish rebuttal of the Section 20(a) presumption. Claimant responds, urging affirmance.

In the instant case, it is undisputed that the administrative law judge properly found that claimant is entitled to invocation of the Section 20(a) presumption. Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *Independent Stevedore Co. v.*

[1] The administrative law judge accepted the parties' stipulation that, *inter alia,* if claimant's heart attack was found to be causally related to his employment, claimant is entitled to temporary total disability benefits from November 28, 2000 to February 8, 2001. *See* Decision and Order at 2; JX 1.

O'Leary, 357 F.2d 812 (9th Cir. 1966); *Kubin v. Pro-Football, Inc.,* 29 BRBS 117, 119 (1995). This rule applies not only where the underlying condition itself is affected but also where the injury "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.,* 18 BRBS 212, 214 (1986). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence in the record and resolve the causation issue based on the record as a whole. *See Moore,* 126 F.3d 256, 31 BRBS 119(CRT); *Port Cooper,* 227 F.3d 284, 34 BRBS 96(CRT); *Gooden,* 135 F.3d 1066, 32 BRBS 59(CRT); *see also Director, OWCP v. Greenwich Collieries,* 512 U.S. 257, 28 BRBS 43(CRT)(1994).

In the case at bar, employer contends that the administrative law judge erred in finding that it failed to produce evidence sufficient to rebut the Section 20(a) presumption. We disagree. It is well-established that a heart attack suffered in the course and scope of employment is compensable even though the employee may have suffered from a related preexisting cardiac condition. *See Gooden,* 135 F.3d at 1069, 32 BRBS at 61-62(CRT). In considering whether the Section 20(a) presumption has been rebutted, the focus should be on the heart attack which constitutes the ultimate injury, not the underlying heart disease. *Id.* Accordingly, a heart attack which is *precipitated* by the conditions of an employee's employment is compensable under the Act. *Id.* Furthermore, as the administrative law judge in the instant case correctly recognized, if the employee's work played any role in the *manifestation* of his underlying heart disease, the entire resulting disability is compensable notwithstanding that the heart attack or chest pains could have occurred elsewhere. *See* Decision and Order at 8; *Obert v. John T. Clark & Son of Maryland,* 23 BRBS 157, 160 (1990); *Cairns v. Matson Terminals, Inc.,* 21 BRBS 252, 257 (1988). *See also Bechtel Associates v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981); *Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

The administrative law judge acknowledged that employer has produced evidence, specifically, Dr. Lynch's report, EX 2, that claimant's *underlying coronary artery disease* probably was not related to his employment. *See* Decision and Order at 8. The administrative law judge found, however, that "[e]mployer has produced no evidence that Claimant's heart attack was not triggered or hastened by the physical or mental stress of Claimant's job . . ." and that, accordingly, employer failed to rebut the Section 20(a) presumption. *Id.* This determination is both consistent with the applicable law regarding aggravation and supported by the record in this case. *See Gooden,* 135 F.3d 1066, 32 BRBS 59(CRT); *Obert,* 23 BRBS 157; *Cairns,* 21 BRBS 252. Moreover, contrary to employer's argument on appeal, the administrative law judge did not err in

declining to find the presumption rebutted by the statements of cardiologists Drs. Lynch and Goldstein that they knew of no published evidence in the medical literature which establishes an association between any occupation and the development of heart disease. *See* Emp*.* brief at 10; EX 2.2-2.3; EX 6.32. As previously discussed, the absence of a causal relationship between claimant's employment and his underlying heart disease is not dispositive of the relevant inquiry, *i.e.,* whether claimant's heart attack was precipitated by employment-related events, or whether the symptoms of claimant's underlying heart disease were aggravated or manifested by those events. *See Gooden,* 135 F.3d 1066, 32 BRBS 59(CRT); *Obert,* 23 BRBS 157; *Cairns,* 21 BRBS 252; *Pittman,* 18 BRBS 212. Neither Dr. Lynch's report nor Dr. Goldstein's testimony constitutes substantial evidence that claimant's ultimate heart attack was not triggered or hastened by his employment with employer. In this regard, although Dr. Lynch was asked by employer to "address specifically the potential risk factors and/or causative factors regarding Mr. Klotz's sustained heart attack . . .," that physician confined his opinion to a discussion of the risk factors for the development of heart disease, and did not render an opinion with regard specifically to whether claimant's employment aggravated, precipitated or hastened his heart attack. EX 2.1-2.2 Thus, Dr. Lynch's report, which does not state that claimant's employment did not aggravate, trigger or hasten claimant's heart attack, does not rebut the presumption. *See Gooden,* 135 F.3d 1066, 32 BRBS 59(CRT); *Obert,* 23 BRBS 157; *Cairns,* 21 BRBS 252; *Pittman,* 18 BRBS 212. Employer's contention that Dr. Goldstein's opinion serves to rebut the presumption is also without merit. Dr. Goldstein's testimony, in which he stated that claimant's work may or may not have played a role in his heart attack, *see* EX 6.22, 6.30, does not constitute substantial evidence that there is no causal relationship between

[2] Dr. Lynch did not examine claimant; rather, he rendered his opinion based upon a review of claimant's medical records.

[3] Dr. Lynch stated, in this regard, that there is "no suspected association between any occupation and the development of heart disease. . ." and that claimant's "risk factors included his smoking and family history [of heart disease]." EX 2.3.

claimant's heart attack and his employment. *Id.* As there is no other evidence sufficient to rebut the Section 20(a) presumption, we affirm the administrative law judge's finding that the presumption was not rebutted and, consequently, that claimant's heart attack is work-related. *See Gooden,* 135 F.3d 1066, 32 BRBS

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[4] Citing Dr. Goldstein's inability to confirm whether or not claimant's work played a role in his heart attack and to explain why his heart attack occurred when it did, employer avers that Dr. Goldstein's testimony does not support the compensation claim. *See* Emp. brief at 10-11; EX 6.16, 6.22, 6.30. Employer's argument, however, reflects a misapprehension of the operation of the Section 20(a) presumption. In *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994), the Court distinguished the "burden of persuasion," which is "the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose," from the "burden of production" which is "a party's obligation to come forward with evidence to support its claim." Upon invocation of the Section 20(a) presumption, the burden of *production* shifts to employer; employer must produce substantial evidence that a causal relationship does not exist between claimant's injury or harm and his employment. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). Thus, on rebuttal, only evidence supporting employer's position is considered by the factfinder in determining whether employer has produced sufficient evidence. *See, e.g., Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998). If so, the presumption drops from the case and the administrative law judge must decide the case based on the weight accorded the evidence in the record as a whole, *see Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997), with claimant bearing the ultimate burden of persuasion.

In the instant case, because Dr. Goldstein was unable to render a sufficiently definitive opinion, his testimony cannot serve as substantial evidence to meet employer's burden of production. *See American Grain Trimmers,* 181 F.2d at 818-819, 33 BRBS at 77-78(CRT). It is only after employer produces sufficient evidence to rebut that the presumption drops from the case and the administrative law judge must weigh the evidence as a whole, with claimant bearing the ultimate burden of persuasion. *See Moore,* 126 F.3d 256, 31 BRBS 119(CRT).

[5] Employer additionally contends that the presumption is rebutted by evidence that Dr. Goldstein returned claimant to his regular work, and did not require him to discontinue that work in order to prevent recurrence of his cardiovascular problems. *See* Emp. brief at 11-12. We disagree. A physician's opinion that a claimant should not return to his usual work to prevent aggravation of his condition has relevance with respect to establishing the nature and extent of the claimant's disability. *See Care v. Washington Metropolitan Area Transit Authority,* 21 BRBS 248, 251 (1988). Evidence that a physician released a claimant to his regular employment following a period of temporary total disability, however, does not compel an inference that the claimant's condition was not aggravated by his employment.

59(CRT).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

Lastly, employer's contention that evidence of claimant's smoking history, his elevated cholesterol and his family history of heart problems rebuts the presumption, *see* Emp. brief at 11, is without merit. The evidence cited by employer does not support a finding that claimant's employment did not contribute to his heart attack. *See Gooden,* 135 F.3d 1066, 32 BRBS 54(CRT); *Obert,* 23 BRBS 157; *Cairns,* 21 BRBS 252; *Pittman,* 18 BRBS 212.