BRB No. 02-0747

JOSE PEDROZA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	DATE ISSUED: Feb. 25, 2004
	)	
	)	
Self-Insured Employer-Respondent	)	ORDER on MOTION for RECONSIDERATION *EN BANC*

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, McGRANERY, HALL, and GABAUER, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer has filed a timely motion for reconsideration of the Board's decision in this case, *Pedroza v. National Steel & Shipbuilding Co.*, BRB No. 02-747 (July 28, 2003), requesting *en banc* review. 33 U.S.C. '921(b)(5); 20 C.F.R. '802.407. Claimant responds, urging the Board to deny the motion. We hereby grant employer's request for *en banc* review; however, we deny the motion for reconsideration.

Employer argues that the Board erred in concluding that claimant timely raised the issue of whether his "general working conditions" could have caused his psychological injuries and in remanding the case for the administrative law judge to address this issue. As the Board stated in its initial decision, claimant raised the issue of stressful working conditions while this case was still before the administrative law judge. Although it was not specifically set forth in his pre-hearing statement, claimant alleged in his post-hearing brief that his condition, at least in part, is due to the explosion, to general working conditions, and to interactions with his supervisors. *Pedroza*, slip op. at 3. The Board held that the issue was, thus, timely raised and should have been addressed by the administrative law judge. *Id.* at 4.

In response to our dissenting colleague's opinion, we first note that claimant clearly raised the issue of whether general working conditions caused his problems in his post-hearing brief, while the case was still before the administrative law judge and before the administrative law judge issued his opinion. *See* 20 C.F.R. '702.336. At the formal hearing, the administrative law judge held the record open for evidence regarding certain medical expenses and for the receipt of post-hearing briefs. Tr. at 875-876. Thus, the post-hearing briefs are a part of the record. *See* 20 C.F.R. ''702.343, 702.347.

Moreover, claimant's arguments on brief and on appeal must rest on the existing record and he has not sought to reopen it; thus, he did not amend his claim based on new facts after the record had closed. In this regard, the parties filed their briefs simultaneously, and employer asserts it did not receive sufficient notice of the theory of recovery claimant asserted. In its decision, the Board advised the administrative law judge to consider the merits of employer's argument that it was prejudiced in this regard, and if he determined that employer's argument had merit, he should allow employer the opportunity to respond. *Pedroza*, slip op. at 4 n.1.

The Board's decision simply remands this case for the administrative law judge to address an argument which was raised before him, but which he did not discuss. On appeal, claimant acknowledged the holding in *Marino v. Navy Exchange*, 20 BRBS 166 (1988), that claimant cannot recover for a psychological injury which is due solely to employer's legitimate personnel actions but asserts that claimant's condition is related to cumulative stress from his work. Although the administrative law judge recited employer's argument regarding *Marino,* he explicitly addressed only whether claimant's condition was related to a specific event at work, *i.e.*, an August 1999 explosion, concluding it was not related. The Board's decision remands for the administrative law judge to address claimant's argument consistent with the holding in *Marino.* In this regard, it appears our dissenting colleague interprets the initial decision as distinguishing between "informal" and "formal" personnel actions, and she deems the decision irrational, stating that the Board "found" that claimant sustained compensable injuries if they are the result of the "informal" actions. Contrary to her opinion, the Board made no such finding and the law makes no distinction between "informal" and "formal" personnel actions. As the Board stated in *Sewell v. Noncommissioned Officers' Open Mess*, 32 BRBS 134 (1998) (on recon. *en banc*) (Brown and McGranery, JJ., dissenting), the holding in *Marino* is not limited to actual termination proceedings, as "disciplinary actions may involve personnel actions such as counseling, training, and warnings." *Sewell*, 32 BRBS at 136 n.3. Indeed, the initial decision explicitly recognizes this holding. *Pedroza*, slip op. at 5. Rather, the Board held that, if established by the claimant, stressful general working conditions can satisfy the "working conditions" element of a *prima facie* case, leaving it to the administrative law judge to distinguish between employer's personnel actions and general stressful working conditions.[1] *Sewell*, 32 BRBS at 136. This holding is consistent with *Marino,* which also remanded for the

[1] The exact language in the initial decision requires the administrative law judge to "determine whether claimant demonstrated that stressful conditions, apart from employer's formal personnel actions, existed which could have caused his psychological injury based on the evidence of record." Decision and Order at 5. The use of the word "formal" in this context is simply a reference to employer's personnel actions here which, on the facts presented, can be characterized as "formal." It is for the administrative law judge to determine whether claimant proved the existence of other dangerous or stressful working conditions.

administrative law judge to consider claimant's general working conditions as a cause of his psychological problem.

The Board's decision made no "findings" in this regard. Rather, the initial decision, which we reaffirm, identifies issues the administrative law judge did not address, and it requires him to consider those issues. Primarily, as he initially only addressed whether claimant's psychological problems are related to the explosion, on remand, he must determine whether claimant established any facts in the record to support the existence of stressful working conditions and, if these conditions existed, whether they could have caused, in whole or in part, claimant's psychological injuries. Pursuant to *Marino*, as we stated, the administrative law judge must consider the facts, excluding the legitimate personnel actions, to determine whether conditions existed that could have caused or contributed to claimant's injury. *See also Sewell*, 32 BRBS 134. The Board is not empowered to make findings, and we have not attempted to do so. As the administrative law judge made no findings on the matter, the case is remanded to him so that he may make the necessary findings of fact in the first instance.

Accordingly, employer's request for *en banc* review is granted; however, the motion for reconsideration is denied, and the Board's decision in this case is affirmed. 20 C.F.R. ' 802.409.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

We concur:

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision denying employer's request to reverse the panel's decision, holding that the administrative law judge must consider whether claimant's psychological ill health resulted from claimant's stressful working conditions, apart from employer's formal personnel actions. I believe that the panel's decision is wrong for several reasons: first, insofar as it holds that prior to filing his post-hearing brief claimant sought compensation for a psychological injury based upon stressful working conditions, the decision is not supported by substantial evidence; second, insofar as it holds that the administrative law judge must consider an issue which was not raised before or at the hearing, the decision is contrary to law; third, insofar as it holds that claimant has sustained a compensable psychological injury if it is caused by informal interactions with supervisors related to work performance, but not by formal, legitimate personnel actions, the decision is irrational.

First, as employer correctly argues, the Board's decision is not supported by the record. Contrary to the Board's assertion, claimant did not raise the stressful working conditions theory while the case was before the administrative law judge. Although the panel cited part of one quotation from claimant's counsel statement at the hearing to support its contention, the complete quotation makes clear that claimant alleged that management reprimands for inadequate work performance contributed to his psychological problems, not general, stressful working conditions:

> However, if the competing theory is successful, that is that he suffered psychological ill health as a result of his electrical exposure and he suffered psychological ill health as a result of the management activities thereafter *following[,] concerning reprimands and so forth due to his inability to do his job, the conclusion of Marino does not apply*.

Tr. at 10-11; *see Pedroza*, slip op. at 3 (emphasized words were omitted from the quotation in Decision and Order). Thus, the record does not show that claimant alleged general, stressful working conditions as a cause of his psychological injury before the record in the case was closed. In fact, claimant first mentioned this theory in his post-hearing brief, which was submitted simultaneously with employer's post-hearing brief stating: "Claimant's psychiatric illness and injury are at least in part caused either by the 440 volt electrical explosion, the general working conditions, and/or claimant's interaction with supervisors." Cl. Post-hearing brief at 2-3. Even though claimant's post-hearing brief contained his first statement of his theory of recovery based on general working conditions, the Board found that this statement of the claim was not too late because:

> This argument should not come as a surprise to employer, as claimant's treating physician, Dr. Alvarez, reported a number of factors affecting claimant's psychological condition, including the threat of job loss, discord with his supervisors and co-workers, and an inability to maintain his workload. Cl. Ex. 1; Emp. Ex. 18.

Pedroza, slip op. at 3. As employer points out in its brief, neither the reports from Dr. Alvarez nor his testimony at the hearing support the contention that claimant's psychological injury was due to "general working conditions." At the hearing, Dr. Alvarez testified that the cause of claimant's post-traumatic stress disorder was the work accident on August 24, 1999. Tr. at 410. When asked to identify "other psychological stresses or events in association with his work [which the doctor thought] played a part in his problem," Dr. Alvarez responded, "[p]ersonnel actions on the part of his supervisor, supervisors." Tr. at 417. Thus, contrary to the Board's decision, review of the record does not show that claimant attributed his psychological problems to general working conditions prior to submission of his post-hearing brief, nor did Dr. Alvarez's evidence show that "general working conditions" contributed to claimant's impaired psychological condition.

Because the record establishes that claimant alleged for the first time in his post-hearing brief that his psychological condition was caused in part by "general working conditions" the Board erred in holding the claim was not untimely and in purporting to rely upon *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Although the Board panel acknowledged the Supreme Court's holding in *U.S. Industries* that the Section 20(a), 33 U.S.C. §920(a), presumption attaches only to the claim asserted by the claimant, the Board panel purported to rely upon a footnote in the decision:

> Pertinent to the instant case, the court discussed the requirements for a claim under the Act, specifically addressing the fact that the claim may be amended, noting that "'considerable liberality is usually shown in allowing the amendment of pleadings to correct. . . . defects,' unless the 'effect is one of undue surprise or prejudice to the opposing party.'" *U.S. Industries*, 455 U.S. at 613 n.7, 14 BRBS at 633 n.7, *quoting* 3A. Larson, *The Law of Workmen's Compensation*, §78.11 (1976), currently 7 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, §124.04[3] (2001). In this regard, the Larson treatise states that a wide variance is permitted between pleading and proof, unless the employer is prejudiced by having to defend at the hearing an injury completely different than the one pleaded. 7 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, §124.04[5] (2001).

Pedroza, slip op. at 2.

The Board panel overlooked, however, the Supreme Court's last sentence in the quoted footnote:

> As Professor Larson warns, "[n]o amount of informality can alter the elementary requirement that the claimant allege and prove the substance of all essential elements in his case."

U.S. Industries, 455 U.S. at 614 n.7, 14 BRBS at 633 n.7. If that sentence means anything, it means that claimant cannot allege his claim after the record is closed. Since the allegation of "general working conditions" as the cause of claimant's psychological injury was not made until after the record was closed in the instant case, the statutory presumption never attached to it. In response to employer's argument that it was not notified of the "general working conditions" theory in time to respond, the Board panel stated, "[i]f the administrative law judge finds merit in this assertion, he should allow employer an opportunity to respond to claimant's allegation on remand." *Pedroza*, slip op. at 4 n.1. The Board panel thereby contravenes the teaching of the Supreme Court in *U.S. Industries* that the burden is on claimant to state before the trial a claim with sufficient specificity to notify employer of the allegations and to confine the issues to be tried. *U.S. Industries,* 455 U.S. at 614, 14 BRBS at 633. The High Court declared: "the statutory presumption does not require the administrative law judge to address and the employer to rebut every conceivable theory of recovery." *U.S. Industries,* 455 U.S. at 615, 14 BRBS at 633. By permitting claimant to advance a claim after the record is closed and holding that employer must rebut that claim, the Board panel relieves claimant of his burden to establish the essential elements of his claim and holds that the statutory presumption can attach to a claim which was not advanced at the hearing. In directing the administrative law judge to comb the record in search of evidence supporting a claim which was never properly before him, the Board panel's holding is flatly contrary to the teaching of the Supreme Court in *U.S. Industries.*

Third, in holding that claimant has suffered a compensable, psychological injury if it is caused by interactions with supervisors relating to poor job performance, but that the injury is not compensable if it is caused by a legitimate personnel action or termination, the majority makes an irrational distinction between informal and formal, legitimate personnel actions. The majority on reconsideration states that the Board panel did not intend to distinguish between formal and informal personnel actions in its direction to the administrative law judge:

> The administrative law judge must determine whether claimant demonstrated that stressful conditions, apart from employer's formal personnel actions, existed which could have caused his psychological injury based on the evidence of record.

Pedroza, slip op. at 5. But the panel's decision suggests otherwise.

The administrative law judge in the case at bar denied benefits after crediting the opinion of Dr. Ornish, based upon his superior credentials as a forensic psychiatrist and his well-reasoned and well-documented opinion. Decision and Order at 19, 29. Dr. Ornish diagnosed claimant with depression and anxiety caused by reprimands, for bad performance disciplinary action and demotion with a cut in pay. Thus, the credited evidence of the cause of claimant's psychological injury relates the injury to legitimate personnel actions, but no credited evidence relates the injury to general working conditions. In denying benefits, the administrative law judge was following the Board's teaching in *Marino v. Navy Exchange*, 20 BRBS 166, 168 (1988). The Board held in *Marino* that "[a] legitimate personnel action or termination is not the type of activity intended to give rise to a worker's compensation claim." *Id.* at 168. The Board distinguished between stress due to legitimate personnel actions (not compensable) and stress due to other working conditions (compensable). The "other working conditions" in *Marino* were: responsibility to "supervise a number of locations, insufficient personnel to perform the job, working more than the required number of hours and performing the duties of subordinates . . ." *Id.* The claimant in *Marino* had alleged that his psychological injury was the product of cumulative stress from other working conditions in addition to a legitimate personnel action. There is no comparable claim in the instant case.

The majority's suggestion that claimant's injury is compensable if related to claimant's interactions with his supervisors, even though those interactions were justified criticisms, has support in *Sewell v. Noncommissioned Officers' Open Mess*, 32 BRBS 134 (1998) (on recon. *en banc*) (McGranery and Brown, JJ., dissenting). In *Sewell*, the majority reaffirmed the Board's prior decision in which it reversed the administrative law judge's decision denying benefits and held that the claimant was entitled to benefits for her psychological injury which was caused primarily by her termination, but also by interactions with her supervisor which the administrative law judge had determined constituted legitimate personnel actions. The majority in *Sewell* merely paid lip service to the principle that a psychological injury caused by legitimate personnel actions is not compensable. In reversing the administrative law judge, the *Sewell* majority stated

> While all of these actions arose from changes in management policies due to legitimate business concerns, as the administrative law judge found, the question is whether claimant experienced stress in working under these conditions.

Sewell, 32 BRBS at 131. The obvious answer is that, of course, claimant experienced stress in working under these conditions; but because that stress was caused by actions attributable to legitimate concern for poor performance, that stress is not compensable. That was not, however, the *Sewell* majority's answer. The majority's decisions in *Sewell* and in the case at bar are illogical: if stress due to termination is not compensable, stress induced by corrective action leading ultimately to termination or demotion is not

equivalent to general working conditions and cannot be compensable. *See generally Crawley v. SAIF Corp.*, 115 Or. App. 460, 839 P.2d 236 (1992).

The instant case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit which has rejected a claim similar to that propounded here. *See Turner v. Todd Pacific Shipyards Corp.*, 990 F.2d 1261 (9th Cir. April 8, 1993) (table), 1993 WL 103778. The Ninth Circuit upheld the administrative law judge's denial of a claim under the Longshore Act for psychological injuries arising out of working conditions relating to interactions with supervisors. The claimant in *Turner* incurred psychological injuries near the end of his employment when his new supervisor rewrote his memoranda and embarrassed him in front of co-workers, prior to his demotion, transfer and reduction in pay. The court agreed with the administrative law judge's holding that the "psychological injuries were noncompensable under the LHWCA because they were the product of stress caused by personnel actions resulting from Todd's legitimate business decisions." *Id.*, slip op. at 1. The court cited *Marino* with approval. *Id.*

The only other court to have addressed this issue, the United States Court of Appeals for the Sixth Circuit, agreed with the Ninth Circuit's analysis in *Turner*. *See Army & Air Force Exchange Service v. Drake*, 172 F.3d 47 (6th Cir. Dec. 3, 1998) (table), 1998 WL 869959 (2-1 decision). The administrative law judge in *Drake* had awarded benefits because he found that claimant's psychological injuries were not caused by his discharge alone, but were also caused by other, alleged, discriminatory acts. The Sixth Circuit reversed the award because the administrative law judge did not find that any of employer's acts lacked justification. The court concluded that all of employer's conduct with regard to the claimant constituted a legitimate personnel decision.

In sum, the majority's decision in this case is not supported by the evidence, is contrary to law and is irrational. The majority's basic premise is that stress due to informal, legitimate personnel decisions, such as interactions with supervisors about poor work performance, can support a claim for psychological injury under the Longshore Act. That theory of recovery has been rejected by the only courts to have considered it. Hence, I would vacate the panel's decision, and I would affirm the administrative law judge's decision denying benefits.

REGINA C. McGRANERY
Administrative Appeals Judge