BRB No. 03-0379

BARRY OUBRE, JR.	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: Feb. 18, 2004
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

William R. Mustian, III (Stanga & Mustian, P.L.C.), Metairie, Louisiana, for claimant.

Richard S. Vale, William C. Cruse, Christopher K. LeMieux, and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-LHC-1733) of Administrative Law Judge C. Richard Avery 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, a pipe welder, injured his back at work on June 28, 2001. Employer voluntarily paid claimant temporary total disability benefits from June 29 through November 12, 2001. Emp. Ex. 6. Claimant returned to work in November 2001 in a light duty capacity and was working in that capacity at the time of the December 20, 2002, formal hearing. Claimant sought to hold employer liable for a weight reduction program. Claimant is

approximately 100 pounds overweight and has been so since his mid twenties; claimant is now in his late thirties. In his decision, the administrative law judge found that claimant's obesity is not work-related, and that the weight reduction program is not reasonable and necessary for the treatment of claimant's work-related back injury.

On appeal, claimant challenges the administrative law judge's denial of medical benefits for a weight reduction program. Employer responds in support of the administrative law judge's decision.[1]

Claimant first argues that, in finding that employer is not liable for his weight reduction program, the administrative law judge erred in framing the issue as whether claimant's obesity is work-related. We agree with claimant. The administrative law judge stated, "Had Claimant in this instance gained his weight because of his work-related condition, I would be more inclined to find that a weight reduction program would be a related, reasonable and necessary medical expense." Decision and Order at 5. Claimant in fact concedes that his work injury did not cause his obesity, but maintains that his obesity is slowing the recovery of his work-related back injury. Thus, the issue before the administrative law judge concerns whether claimant's work injury combined with his pre-existing obesity. Under such circumstances, the aggravation rule applies and the entire resultant condition is compensable. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990); *see also J.V. Vozzolo, Inc. v. Britton,* 377 F.2d 144, 147-148 (D.C. Cir. 1967) ("employers accept with their employees the frailties that predispose them to bodily hurt"); *Vandenberg v. Leicht Material Handling Co.*, 11 BRBS 164 (1979). For example, in *Marko*, 23 BRBS 353, the Board affirmed a finding that claimant was totally disabled by the combination of his pre-existing heart condition and work-related hernias. *See also Simmons v. State*, 502 So.2d 187 (La. Ct. App. 1987), *writ denied*, 503 So.2d 1017 (La. 1987) (court holds that claimant's weight reduction program was necessary for work-related back injury based on doctors' opinions that claimant's losing weight would relieve work-related back pain). Since the administrative law judge focused on the cause of claimant's obesity rather than on whether the obesity combined with claimant's work injury, we must remand this case.[2] We vacate the

[1] The Board cannot consider claimant's new evidence referenced in his brief on appeal and attached to his post-hearing brief to the administrative law judge since, as employer correctly argues, it was not admitted into the record. 33 U.S.C. §921(b)(3); *Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985); Cl. Br. at 4-5; Emp. Br. at III. If claimant wishes the administrative law judge to consider this evidence, he can move to reopen the record on remand or request modification. *See* 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT)(1995); *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985).

[2] Contrary to employer's argument, the fact that claimant is working the same hours

administrative law judge's finding that employer is not liable for a weight reduction program on the ground that claimant's obesity is not work-related. On remand, the administrative law judge must address claimant's testimony and the medical evidence with regard to the issue of whether the recovery of claimant's work-related back injury is slowed by his pre-existing obesity.[3] *See* Cl. Exs. 1-2; Emp. Exs. 4, 10-12; Tr. at 22.

Claimant next argues that the administrative law judge erred in determining that employer is not liable for a weight reduction program because claimant returned to his pre-accident condition. We agree that the administrative law judge also erred in this regard. The administrative law judge stated,

> In other words, to live with his weight was Claimant's choice prior to his accident, and I find it unreasonable for Employer now to be expected to pay for a weight loss program, particularly in view of the fact that Claimant has returned to his pre-accident "baseline" and is again working.

Decision and Order at 4-5. In fact, claimant has not returned to his pre-accident condition since claimant was working full duty before his injury and now is limited to light duty work. Emp. Ex. 4. Thus, the administrative law judge erred in rejecting Dr. Rauchwerk's opinion that a weight loss program would enable claimant to return to work, on the basis that claimant had already returned to full duty. Decision and Order at 5; Cl. Ex. 2. Moreover, in view of claimant's light-duty status, the administrative law judge must reconsider his reliance on Dr. Katz's opinion that claimant returned to his pre-accident "baseline." Dr. Katz also noted that excess weight can place an excess load on the spine. Therefore, on remand, if the administrative law judge finds that claimant's back injury combined with his obesity, the administrative law judge must reweigh the medical evidence concerning the reasonableness and necessity of a weight reduction program. Cl. Exs. 1, 2; Emp. Ex. 10.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded to the administrative law judge for further consideration of employer's liability for a weight reduction program.

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post-injury as he did pre-injury and earns a dollar per hour more post-injury does not affect its liability for claimant's weight reduction program as a work injury need not be economically disabling in order for a claimant to be entitled to medical expenses. *See, e.g.*, *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); 33 U.S.C. §907.

[3] Contrary to claimant's contention, the administrative law judge may, but is not required to, give determinative weight to the opinion of claimant's treating physician. *See Pietruni v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT)(2d Cir. 1997).

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge