BRB No. 03-0380

MYRON BAUMLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINETTE MARINE CORPORATION	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION/FRANK GATES ACCLAIM	)	DATE ISSUED: Feb. 24, 2004
	)	
Employer/Carrier-Petitioners	)	
	)	
CRUM & FORSTER	)	
	)	
Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

H. Thomas Lenz (Spector & Lenz, P.C.), Chicago, Illinois, for claimant.

Gregory P. Sujack (Garofalo, Schreiber, Hart & Storm, Chartered), Chicago, Illinois, for employer and Signal Mutual Indemnity Association.

Larry J. Peterson (Peterson, Logren & Kilbury, P.A.), St. Paul, Minnesota, for employer and Crum & Forster.

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

PER CURIAM:

Employer and Signal Mutual Indemnity Association (Signal) appeal the Decision and Order (2001-LHC-3240, 3241) of Administrative Law Judge Robert J. Hillyard 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 April 8, 1997, claimant was forming side plates for a vessel. The plates were six to eight feet long and weighed between two and three hundred pounds each. Claimant's working partner dropped his end of one of the plates, causing claimant to let go of his end. The plate struck claimant across the top of his right foot and he felt a tear in his back at his beltline. Over time, claimant developed lower back pain that fluctuated throughout his leg down to his ankle. After conservative treatment, and surgery for a later knee injury, claimant underwent surgery in January 1998 on his back to alleviate the burning pain in his leg. *See* Cl. Ex. 7 at 9. After a period of recovery, claimant returned to work with restrictions in April 1998. He performed modified duty work and eventually returned to the plate shop. Crum & Forster was the insurer on the risk at the time of claimant's 1997 injury.

While working at the plate shop on May 22, 2001, claimant attempted to step onto the facing of the machine, which is five inches high, when his back "locked up" and he was unable to put his right foot back down due to muscle pain in his back. He stayed in that position for three to five minutes until he was able to walk around again. The safety director on duty called for an ambulance, but claimant refused to go to the hospital when it arrived. However, claimant sought treatment from Dr. Ots in July 2001 for continued back and leg pain. Dr. Ots recommended additional back surgery, which was not scheduled because employer contested liability. On September 10, 2001, claimant returned to work in the plate shop with restrictions and sought benefits under the Act. Signal was the insurer on the risk at the time of claimant's 2001 injury.

In his decision, the administrative law judge found that the witnesses' testimony supports the finding that claimant sustained physical harm or pain on May 22, 2001, and that conditions existed at work which could have caused the harm or pain. Therefore, the administrative law judge found that the evidence is sufficient to support invocation of the

Section 20(a) presumption that claimant's condition was caused by his employment at Marinette. 33 U.S.C. §920(a). The administrative law judge also found that the evidence is insufficient to establish rebuttal of the presumption. In making this finding, the administrative law judge weighed the evidence and found that the opinion of Dr. Lemon is entitled to less weight than the opinions of Drs. Yakusa and Ots, as the latter are better reasoned and in accord with the objective evidence. The administrative law judge found that the opinions of Dr. Yakusa and Dr. Ots establish that claimant's current condition is related to the incident on May 22, 2001, and thus concluded that Signal is the responsible carrier. In addition, the administrative law judge found that claimant had not reached maximum medical improvement, and that he returned to modified duty on September 10, 2001.[1] The administrative law judge also found that the medical treatment required for claimant's current condition is causally related to his employment on May 22, 2001, and that the recommended surgery is reasonable and necessary. Thus, the administrative law judge found that Signal is also responsible for claimant's medical benefits, including the recommended surgery. Finally, the administrative law judge found that claimant has not reached maximum medical improvement and thus that Signal failed to establish that claimant suffered from a pre-existing permanent partial disability, which is a necessary requirement to establish entitlement to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge also found that as claimant is seeking only temporary total disability benefits, Section 8(f) relief is not available.

On appeal, Signal contends that claimant only suffered a cramp on May 22, 2001, asserting that is not sufficient to establish the element of physical harm for invocation of the Section 20(a) presumption. Moreover, Signal contends that the administrative law judge erred in finding working conditions could have caused a "harm," because a harm did not occur. Signal also contends that the administrative law judge erred in finding that the evidence does not establish rebuttal of the Section 20(a) presumption and in finding that claimant's current problems are not due to the natural progression of his pre-existing condition. Lastly, Signal contends that in considering its entitlement to relief under Section 8(f), the administrative law judge erred in finding that claimant does not have a pre-existing permanent partial disability. Claimant and carrier Crum & Foster respond, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, has not responded to this appeal.

[1] Accordingly, claimant would be entitled to temporary total disability benefits from July 17, 2001 through his return to modified employment on September 10, 2001. 33 U.S.C. §908(b). In his response brief, claimant states that the administrative law judge awarded these benefits, and he does not appeal the administrative law judge's failure to specifically include them in the "Order" portion of his decision.

Initially, employer contends that the administrative law judge erred in finding that claimant established a *prima facie* case under Section 20(a). Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999). The determination of the responsible carrier in the case of multiple traumatic injuries turns on whether the claimant's condition is the result of the natural progression or the aggravation of the prior injury. If the claimant's disability resulted from the natural progression of the initial injury, then the carrier at the time of that injury is responsible for compensating claimant for the entire disability. If there is a second injury which aggravated, accelerated or combined with the earlier injury, resulting in claimant's disability, the carrier at the time of the second injury is liable for all medical expenses and compensation related thereto. *See Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3rd Cir. 2002); *Buchanan v. Int'l Transp. Serv.*, 33 BRBS 32 (1999), *aff'd mem.*, No. 99-70631, 2001 WL 201498 (9th Cir. Feb. 26, 2001). Each employer or carrier bears the burden of persuading the factfinder, by a preponderance of the evidence, that the claimant's disability is due to the injury with the other employer or carrier. *See Buchanan*, 33 BRBS at 35-36.

In finding that working conditions existed that could have aggravated claimant's back condition, the administrative law judge reviewed the witnesses' testimony and concluded that claimant established that he suffered a physical harm or pain in his back and that conditions existed at work that could have caused the harm or pain. Decision and Order at 17. The administrative law judge found that claimant testified that his back locked up for several minutes after he stepped up on a ledge on May 22, 2001, H. Tr. at 54-55, and that Ralph Todzy, claimant's co-worker, testified that claimant stepped up five inches to the ledge and the "color was out of his face" and "he was in pain." H. Tr. at 93-94. In addition, the administrative law judge found that Melissa Seele, employer's foreman that day, was present when the rescue squad was called and it was obvious to her that claimant was in pain, H. Tr. at 103, and that Bill Getchell, employer's environment safety manager who called the rescue squad, was called because someone was hurt. H. Tr. at 108-110.

Contrary to employer's contention, claimant is not required to establish exactly what happened to his body as a result of the working conditions in order to establish invocation of the Section 20(a) presumption. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). Rather, credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm. *See Harrison v. Todd Pacific Shipyards Corp.*,

21 BRBS 339 (1988). The administrative law judge thoroughly reviewed the evidence and substantial evidence supports the administrative law judge's finding that claimant established a *prima facie* case for invocation of the Section 20(a) presumption. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT)(2d Cir. 2001). Therefore, we affirm this finding.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's disabling condition was not caused or aggravated by his employment. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). In the instant case, the administrative law judge found the evidence insufficient to establish rebuttal of the Section 20(a) presumption. Employer relies on the opinions of Drs. Ots and Lemon to establish rebuttal. Dr. Ots reported in July 2001 that claimant had an increase in symptoms but that he had not suffered a new injury. *See* Cl. Ex. 1 at 16, 17. However, in his deposition Dr. Ots opined that claimant's work activity on May 22, 2001, was a "participant" in the current need for surgery, Cl. Ex. 7 at 37, and that the incident on May 22, 2001, was one of the causes to aggravate his pre-existing condition. *Id.* at 18. Thus, we affirm the administrative law judge's finding that Dr. Ots's opinion is insufficient to establish rebuttal as it does not constitute substantial evidence that claimant's condition is not related to the incident on May 22, 2001. *See Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

The administrative law judge also found that the opinion of Dr. Lemon is insufficient to establish rebuttal. He found that "[d]ue to his failure to discuss the reasons for his conclusions and reference the data upon which he relied in making his diagnosis, [his] opinion is outweighed by the better reasoned and documented opinions of Drs. Ots and Yakusa." Decision and Order at 19. He also faulted Dr. Lemon's reports because Dr. Lemon did not believe that claimant suffered an injury in either April 1997 or May 2001, but concluded that claimant's current problems are solely related to his degenerative disk disease, without addressing the lack of low back pain prior to April 1997. As employer correctly asserts, the administrative law judge did not completely reject Dr. Lemon's opinion, but rather he assigned it little weight. Thus, as there is a medical opinion of record that states that claimant's condition is not work-related, the administrative law judge may have erred in finding that rebuttal of the Section 20(a) presumption is not established. *See generally O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

The administrative law judge's weighing of the evidence as a whole, however, is rational and supported by substantial evidence. Thus, any error the administrative law judge may have made in finding that the Section 20(a) presumption was not rebutted is

harmless. *See Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). As the administrative law judge found, both Drs. Ots and Yakusa state that claimant's work-related incident on May 21, 2001 played at least a minor role in aggravating claimant's pre-existing condition. Dr. Ots opined that claimant's work activity on May 22, 2001, was a "participant" in the current need for surgery, Cl. Ex. 7 at 37, and that the incident on May 22, 2001 was one of the factors aggravating his pre-existing condition. *Id.* at 18. Dr. Yakusa testified in a deposition that claimant returned to heavy work, and this work, including the mechanics of the episode on May 2, 2001, was a part of his increase in symptoms and aggravated his problems. Crum & Forster Ex. D1 at 16. Dr. Yakusa also testified that the episode on May 22, 2001, aggravated claimant's symptoms so that he had to have surgery to relieve the pain. *Id.* at 38. The administrative law judge found that Dr. Lemon is not as familiar with claimant's physical condition and history as is Dr. Ots, claimant's treating physician. Decision and Order at 26. Moreover, the administrative law judge found that Dr. Lemon did not discuss claimant's prior medical history or identify the "familial factors" that contribute to his current condition. *Id*. at 25-26. Thus, as is within his discretion, the administrative law judge gave less weight to Dr. Lemon's opinion as he found it was not as well-reasoned as those of Drs. Ots and Yakusa. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Moreover, an aggravation or progression of the underlying condition is not necessary for there to be a compensable injury; an increase in symptoms resulting in disability is sufficient. *See Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Therefore, as the administrative law judge rationally weighed the evidence of record, and employer has raised no reversible error on appeal, we reject employer's argument that there was not an aggravation of claimant's back condition on May 21, 2001. As substantial evidence supports the finding that claimant's work injury on May 21, 2001, aggravated claimant's condition and contributed to his need for surgery, we affirm the administrative law judge's finding that Signal is the responsible carrier.[2] *See Price*, 339 F.3d at 1105, 37 BRBS at 91(CRT); *Delaware River Stevedores*, 279 F.3d at 242, 35 BRBS at 161 (CRT); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

Lastly, employer contends on appeal that the administrative law judge erred in denying its request for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Section 8(f) shifts liability for payment of compensation for permanent disability or death after 104 weeks from an employer to the

[2] As we affirm the administrative law judge's finding that Signal is the responsible carrier, we also affirm the administrative law judge's finding that Signal is liable for claimant's medical benefits, including the recommended surgery. *See generally Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002).

Special Fund established in Section 44 of the Act. *See* 33 U.S.C. ''908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury but is materially and substantially greater than that which would have resulted from the subsequent injury alone. 33 U.S.C. '908(f)(1); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT)(4th Cir. 1997); *Director, OWCP v. Bath Iron Works Corp.*, 129 F.3d 45, 31 BRBS 155(CRT)(1st Cir. 1997); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT)(5th Cir. 1997); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT)(5th Cir. 1990); *see also Pennsylvania Tidewater Dock Co. v. Director, OWCP*, 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000). If claimant is found to be permanently totally disabled, employer may be granted Special Fund relief, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury. *See Harcum II*, 131 F.3d 1079, 31 BRBS 164(CRT); *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002); *see also Two "R" Drilling Co.*, 894 F.2d 748, 23 BRBS 34(CRT).

Without reviewing the evidence or providing a rationale, the administrative law judge found that employer failed to establish that claimant suffered from a pre-existing partial disability as claimant's pre-existing disability had not reached maximum medical improvement. In addition, the administrative law judge found that Section 8(f) is not applicable in the instant case because claimant is seeking only temporary total disability benefits and Section 8(f) does not apply where the disability is temporary. Employer does not contest the finding that Section 8(f) is not applicable at this time, but does contest the administrative law judge's finding that claimant did not suffer from a pre-existing permanent partial disability. Contrary to the administrative law judge's apparent finding, Section 8(f) does not require a finding of maximum medical improvement before a pre-existing permanent partial disability can be found.[3] *Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992). In addition, the administrative law judge's decision does not contain a sufficient rationale to support his finding and thus must be vacated. *See Goody v. Thames Valley Steel Corp.*, 28 BRBS 167 (1994)(McGranery, J., dissenting). However, as the issue of Section 8(f)'s applicability is premature at this time, we need not remand the case. Employer may seek to establish all elements of Section 8(f) entitlement if and when claimant becomes permanently

[3] The evidence shows that claimant returned to work in 1999, with restrictions, following the surgery on his back in 1998, and that he worked for two years without incident.

disabled. *See generally Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1985).

Accordingly, the Decision and Order of the administrative law judge finding that Signal is the responsible carrier for claimant's current disability and medical benefits is affirmed. The administrative law judge's finding that claimant did not suffer from a pre-existing permanent partial disability for purposes of Section 8(f) is vacated.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge