BRB No. 07-0745

B.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: 02/29/2008
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland, Bath, Maine, for claimant.

Stephen Hessert (Norman, Hanson & Detroy, L.L.C.), Portland, Maine, for self-insured employer.

Kathleen H. Kim (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2005-LHC-2355, 2005-LHC-2356, 2005-LHC-2357) of Administrative Law Judge Colleen A. Geraghty 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).

Claimant was injured at work on March 11, 1991, when he struck his head on a bar. He injured his neck and developed headaches. Claimant did not lose time from work immediately, but underwent physical therapy and chiropractic treatment, and lost only occasional days due to extreme headache pain. Claimant filed a claim for benefits due in 1996 under the Maine Workers' Compensation Act. The case was resolved in 1997 when the parties stipulated that claimant suffered a work-related injury to his head and neck in 1991. The parties agreed that claimant was not entitled to benefits for individual missed days of work because his earnings in 1996 were greater than his average weekly wage in 1991; however, employer agreed to pay claimant benefits for a five percent whole person permanent impairment. The Maine Workers' Compensation Board entered a Consent Decree to this effect. Cl. Ex. 23. Claimant continued to miss occasional days of work over the years, and he alleges he aggravated his neck and head conditions on December 3, 2001, when he was walking out of low ceilinged area, he stood up too soon, and struck his head on the cement ceiling. He also suffered an injury to his back at work when he slipped on stairs wet with snow in January 2005. Claimant missed several days of work due to his back injury. Since 2002, claimant has had work restrictions limiting overhead work and prohibiting work in confined spaces, and employer has accommodated these restrictions. Decision and Order at 4-5. Claimant filed a claim under the Act for benefits for days of work missed in 2003, 2004, 2005, and through April 5, 2006. Decision and Order at 3 n.7.

In challenging the cause of claimant's headaches before the administrative law judge, employer argued that the 1997 Consent Decree does not prevent it from arguing that claimant's headaches are not work-related. The administrative law judge found that the Decree implicitly included headaches and that the 1991 work injury was established as the cause of claimant's harm at least until the date the Decree was issued. Decision and Order at 15-16. She found, however, that employer was not prohibited from establishing that intervening events may have broken the chain of causation thereafter. Decision and Order at 16. She then addressed the cause of each of claimant's three injuries. With regard to the 1991 injury, the administrative law judge found that claimant

is entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), that employer rebutted the presumption, and that, on the record as a whole, claimant's neck pain and severe headaches were caused by the work injury. Decision and Order 18-20. With regard to the 2001 incident, the administrative law judge found that claimant is entitled to invocation of the Section 20(a) presumption, employer rebutted the presumption, and the evidence as a whole establishes that a work-related aggravation of claimant's chronic neck pain and headaches occurred. *Id.* at 21-22. The administrative law judge then found that the 2005 incident caused a low back injury which had resolved and did not aggravate claimant's neck or head conditions. *Id.* at 22-23. She found that the chronic neck and head conditions are permanent, and she awarded claimant benefits for 49 days of missed work based on his average weekly wage at the time of his 2001 aggravation. *Id.* at 24, 27-29; Amended Cl. Ex. 20; Jt. Ex. 1. However, the administrative law judge relieved employer of liability for continued on-going manipulative therapy, which claimant had received regularly since 1991, finding it unreasonable and unnecessary. She observed that short-term therapy might be appropriate in the future and that claimant could bring a claim if the treatment were denied. *Id.* at 25 n.24. With regard to employer's request for Section 8(f), 33 U.S.C. §908(f), relief, the administrative law judge found that there are no medical records establishing that claimant's headaches pre-dated the 1991 injury.[1] Thus, she concluded employer failed to establish the first manifest and pre-existing permanent partial disability elements of Section 8(f), and she denied employer's request for Section 8(f) relief. *Id.* at 27.

Employer challenges the administrative law judge's decision, arguing that she erred in finding that collateral estoppel prevents it from arguing that claimant's headaches are not work-related, in rejecting Dr. Kolkin's opinion because of that collateral estoppel determination, in finding that the 2001 incident constituted any more than a temporary aggravation of claimant's condition, and in denying Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that it was premature to address the Section 8(f) issue because the administrative law judge awarded only 49 days of benefits. Claimant responds to employer's appeal, arguing that collateral estoppel prevents employer from arguing that the headaches are not work-related because there has been no modification of the Consent Decree or any intervening circumstances, and that substantial evidence supports the administrative law judge's decision. In reply, employer argues that the Board is authorized to perform *de novo* review because the

[1]The administrative law judge noted that the pre-employment questionnaire claimant filled out in 1989, wherein he admitted to having had "frequent or severe headaches," currently or in the past, Cl. Ex. 15, was not a medical document, and she had already ruled that employer is precluded from arguing that the headaches pre-dated 1991 by virtue of the Consent Decree. Decision and Order at 27.

collateral estoppel question is a question of law and that the administrative law judge erred in looking beyond the pages of the Decree to find that it encompassed claimant's headaches.

Employer first contends it is not collaterally estopped from arguing that claimant's severe headaches pre-dated his 1991 injury and are not work-related because headaches were not encompassed in the 1997 Consent Decree. We need not address employer's specific argument, as the administrative law judge's decision renders it moot. Although the administrative law judge found that the Consent Decree implicitly included claimant's headaches and that employer could not challenge the work-relatedness of claimant's headaches as they pertained to the 1991 injury, she also performed a complete analysis of causation under the Act, including considering Section 20(a) and weighing the relevant evidence, and she found based on the evidence in the record before her that the 1991 injury caused claimant's headaches and neck pain. Decision and Order at 16, 18-20.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the disabling injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge found that claimant is entitled to invocation of the Section 20(a) presumption because he submitted reports from doctors following the 1991 injury establishing continuing medical care for chronic cervical strain and occasional severe headaches. Decision and Order at 18; Cl. Exs. 5, 8, 9. She found that employer rebutted the presumption via the medical reports of Drs. Klein and Kolkin, who stated that claimant's neck and head pain are not the result of his 1991 injury. Decision and Order at 19. On the record as a whole, however, the administrative law judge credited

the opinions of claimant's doctors[2] over employer's experts[3] and concluded that claimant's chronic neck pain and occasional severe headaches were caused by the 1991 injury.[4] Decision and Order at 20. The credited reports, from Drs. Baxter, Austin, Chasse, and Vigna, constitute substantial evidence supporting the administrative law judge's determination that claimant's conditions are related to the 1991 injury. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988); *Reed v. The Macke Co.*, 14 BRBS 568 (1981); Cl. Exs. 5, 8-10.

The administrative law judge also completed a Section 20(a) analysis for the December 2001 injury. The administrative law judge stated that the reports of Drs. Chasse and Austin showed increased visits following the 2001 incident and both doctors imposed work restrictions on claimant by November 2002. Based on Dr. Chasse's notes and communications, the administrative law judge found that claimant suffered a harm and that an accident occurred that could have caused that harm; therefore, she invoked

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[2]She found claimant's physicians' opinions entitled to greater weight because they are the opinions of claimant's treating physicians, who saw claimant many more times than did employer's experts. They also observed objective findings that corresponded with claimant's complaints. Decision and Order at 19; *see generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999).

[3]The administrative law judge rejected Dr. Klein's opinion on the ground that he reached conflicting results based on essentially the same information: in 1995, he said the condition was work-related, but in 1998, he said it was not. She rejected Dr. Kolkin's opinion because he examined claimant only once in 2006 and because he based his conclusion that claimant had a long history, prior to 1991, of migraine headaches on a 1989 questionnaire alone. After reiterating her determination that claimant's treating physicians' opinions were entitled to greater weight, the administrative law judge noted, in addition, that her prior collateral estoppel determination precluded her acceptance of Dr. Kolkin's opinion. Decision and Order at 20. We reject employer's assertion that the administrative law judge erred in rejecting Dr. Kolkin's opinion. The administrative law judge gave several valid reasons for her decision to reject this opinion and credit the opinions of claimant's experts. As her determinations are rational, any error in adding the reference to collateral estoppel is harmless.

[4]The administrative law judge stated that the report from Dr. Pier, another of employer's experts, was equivocal as to causation because he stated that headaches were multifactorial, but he could not state that the work incident did not contribute to the condition. Decision and Order at 20 n.18; Emp. Ex. 36 at 247.

the Section 20(a) presumption. The administrative law judge found that Dr. Kolkin's opinion that claimant's condition was due to a pattern of long-standing common migraines unrelated to work was sufficient to rebut the presumption. Decision and Order at 21. On the record as a whole, the administrative law judge found that, following the 2001 injury, claimant's neck pain returned to baseline within months. However, based on claimant's testimony, the opinions of claimant's treating physicians, including Dr. Chasse's reports indicating increased frequency of visits for headache treatment, and the imposition of permanent work restrictions prohibiting working in confined spaces and minimizing overhead work, the administrative law judge found that the 2001 injury aggravated claimant's headache condition. *Id.* at 22.

We reject employer's assertion that there is insufficient support for the administrative law judge's findings regarding the 2001 injury. Dr. Chasse's notes show an increase in the frequency of claimant's visits over the course of the next year and into 2003. Cl. Ex. 8; *see also* Cl. Ex. 9 at 244 (Dr. Austin's November 18, 2002 notes indicate claimant's increased use of medication since December 2001 injury). Although headaches are subjective, the administrative law judge credited claimant's consistent statements that the headaches became more frequent after the 2001 injury. Employer acknowledges that the administrative law judge credited the opinions of Drs. Chasse and Austin over those of Drs. Pier and Kolkin[5] but asks that the Board adopt the findings of Drs. Pier and Kolkin. This we cannot do; the Board is not empowered to reweigh the evidence, but may only inquire as to the existence of substantial evidence supporting the fact-finder's determinations. 33 U.S.C. §921(b)(3). It is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses and has considerable discretion in weighing the evidence of record. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). As substantial evidence supports the administrative law judge's finding that the 2001 incident aggravated claimant's condition, it is affirmed. Accordingly, we reject employer's arguments and affirm the administrative law judge's award of benefits.

Finally, employer asserts the administrative law judge erred in denying it Section 8(f) relief, as the two work injuries in conjunction with the pre-existing headache condition warrant an award of Section 8(f) relief. The Director argues that the administrative law judge erred in addressing this issue prematurely. Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from

[5]Drs. Pier and Kolkin agreed with imposing reasonable accommodations at work. Cl. Ex. 12 at 272; Emp. Ex. 49 at 368.

an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944; *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

In this case, the administrative law judge denied Section 8(f) relief on the ground that employer did not establish that claimant had a manifest pre-existing permanent partial disability as the only evidence of headaches pre-dating the 1991 injury is the pre-employment questionnaire filled out by claimant in 1989.[6] We need not address whether employer satisfied the requirements of Section 8(f) because the Director correctly argues that the Section 8(f) issue is not ripe for adjudication. Section 8(f) relief cannot be granted if there is no award for permanent disability or death benefits in excess of 104 weeks. *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94, 96 (1999); *Hansen*, 31 BRBS 155. In this case, the administrative law judge awarded claimant only 49 days of benefits. Therefore, even if employer had satisfied the requirements, it would not be entitled to Section 8(f) relief at this time. Consequently, we vacate the administrative law judge's Section 8(f) findings for the reasons stated by the Director.

[6]The administrative law judge did not discuss whether employer is entitled to Section 8(f) relief if the pre-existing condition was caused in 1991 and the second injury occurred in 2001. Employer takes issue with the administrative law judge's statement that it is not permitted to argue that the headache condition pre-dated the 2001 injury. Although the administrative law judge's decision so states, Decision and Order at 27 n.26, it appears that this statement is a typographical error, as the administrative law judge clearly recognized that the Maine Consent Decree referred only to the 1991 injury. Decision and Order at 16.

Accordingly, the administrative law judge's findings concerning Section 8(f) are vacated. In all other respects, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge