BRB No. 09-0526

JOHN WALTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAHER TERMINALS, INCORPORATED	)	DATE ISSUED: 02/26/2010
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Richard M. Winograd (Ginarte O'Dwyer González Gallardo & Winograd LLP), Newark, New Jersey, for claimant.

Joseph T. Stearns (Kenny, Stearns & Zonghetti, LLC), New York, New York, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-LHC-00921) of Administrative Law Judge Adele Higgins Odegard 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 alleges that his myasthenia gravis symptoms occurred as a consequence of his February 9, 2001, work-related injury, and overall work for employer.[1] Claimant alleges that on February 9, 2001, he hit a bump while driving a hustler onto a barge which caused him to hit his head on the side of that vehicle. Claimant stated that as a result of the incident he was "a little dazed" and frightened about going off the ramp into the water, but that he returned to his usual work for employer on February 11, 2001. Following work on that day, claimant stated that he began to have symptoms, such as double vision and anxiety, prompting him to seek treatment from his primary care physician, Dr. Wallen, and from a number of specialists, including a neurologist, Dr. Eisenberg.

Dr. Eisenberg stated in his report dated March 28, 2001, that claimant's symptoms "strongly suggest" that he has myasthenia gravis for which the physician prescribed medication. CX 14. Claimant experienced increased weakness in his legs, as well as a general inability to move about, and was hospitalized from May 14 to May 31, 2001, "with what appeared to be a myasthenia gravis crisis." *Id.* Claimant's symptoms became progressively better following this hospitalization, to the point where he obtained clearance to return to work from Dr. Wallen. Despite continued treatment for his myasthenia gravis, and occasional episodes of double vision, claimant returned to his usual work for employer in February 2002.

While working for employer on June 27, 2002, claimant sustained injuries to his back, legs and arms, when the hustler he was operating was inadvertently lifted by a crane and dropped from a height of about five to six feet. Claimant filed a claim relating to this specific accident, which was settled pursuant to the district director's Order dated May 15, 2006, wherein the parties agreed that claimant was entitled to permanent partial disability benefits at the rate of $600 per week. 33 U.S.C. §908(i). On June 2, 2006, claimant filed a claim for compensation in connection with his February 9, 2001, work accident seeking benefits due to "head trauma with post-concussion syndrome," and "aggravation of and precipitation of myasthenia gravis syndrome." As a result of this claim, both parties sought expert opinions from neurologists as to the cause of claimant's condition.

[1] Myasthenia gravis is "a syndrome of fatigue and exhaustion of the muscular system marked by progressive paralysis of muscles without sensory disturbance or atrophy." Dorland's Illustrated Medical Dictionary 1004 (25th ed. 1974); *see also* HT at 402, 508-509. It is characterized by weakness and rapid fatigue of any of the muscles under voluntary control. *See* http://www.mayoclinic.com/health/myasthenia-gravis/DS00375.

Dr. Greenberg opined that claimant's work for employer, as well as the stress induced due to the head injury he sustained on February 9, 2001, contributed to the onset and progression of claimant's myasthenia gravis which, Dr. Greenberg stated, evolved between February 9 and 13, 2001. In contrast, Dr. Rapoport opined that the eye symptoms claimant developed in February 2001 were the consequence of an exacerbation of claimant's well-established ocular myasthenia gravis, a disease which the physician opined that claimant has had since at least 1993, and which was most recently caused by either a flu shot or cold which claimant had a few days prior to the onset of those symptoms. Dr. Rapoport added that claimant's head injury of February 9, 2001, was of no consequence in the exacerbation of his ocular myasthenia gravis, and moreover, that any stress relating to that work incident, and claimant's work history of working long hours, likewise played no role in causing or worsening claimant's myasthenia gravis condition.

In her decision, the administrative law judge found that claimant established invocation of the Section 20(a) of the Act, 33 U.S.C. §920(a), with regard to his myasthenia gravis, and that employer established rebuttal thereof. The administrative law judge concluded, based on the record as a whole, that claimant did not establish that his myasthenia gravis was caused by, or is related to, his work for employer. Accordingly, the administrative law judge denied claimant's claim for benefits.

On appeal, claimant challenges that the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption, and further contends that the administrative law judge committed procedural errors by her unwillingness to control the misconduct of employer's counsel during the course of Dr. Rapoport's hearing testimony, by excluding certain evidence from the record, and by not allowing claimant the opportunity to amend his claim for benefits. Employer responds, urging affirmance of the administrative law judge's decision. Claimant has filed a reply to employer's response, reiterating the arguments raised on appeal.

Claimant argues that the administrative law judge's unwillingness to control the conduct of employer's attorney, Mr. Stearns, during the course of Dr. Rapoport's testimony violated the rules governing procedure and resulted in fundamental unfairness by undercutting claimant's ability to effectively cross-examine this witness.

It is axiomatic that an administrative law judge must conduct a fair and impartial hearing and that she may take any actions authorized by the Act, the Administrative Procedure Act (APA), and where appropriate, the Federal Rules of Civil Procedure (FRCP), and "[d]o all other things necessary to enable him or her to discharge the duties of the office." 29 C.F.R. §18.29(a); *see also* 5 U.S.C. §556; 33 U.S.C. §§923, 927(a); 20 C.F.R. §702.331 *et seq*. Section 18.36 of the Office of Administrative Law Judge

(OALJ) Rules, 29 C.F.R. §18.36, requires persons appearing before administrative law judges to act ethically and with integrity, and it gives the administrative law judge the authority to: "exclude parties, participants, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, [and] failure to act in good faith. . . ." 29 C.F.R. §18.36(b); *see Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989).

In this case, review of the hearing transcript with regard to the questioning of Dr. Rapoport reveals an extremely contentious interaction between the parties' attorneys with numerous objections raised during both the direct and cross-examination of the witness.[2] While the transcript indicates that employer's counsel, Mr. Stearns, interrupted Mr. Winograd's cross-examination of Dr. Rapoport, there is nothing to suggest that Mr. Winograd was unable to effectively advocate claimant's interests in this case. In fact, Mr. Winograd extensively questioned Dr. Rapoport during cross-examination, HT at 566-683, and re-cross-examination, HT at 691-696, and Mr. Winograd's own statements indicate that he was able to obtain all the information he needed from Dr. Rapoport and that he was satisfied at the conclusion of the physician's testimony.[3] As there is nothing in the record to support claimant's general allegations that he was unable to fully explore all issues relevant to Dr. Rapoport's opinion, or that claimant was "completely deprived" of a fair hearing in this case, we reject claimant's contention that his due process rights were violated with regard to the hearing testimony proffered by Dr. Rapoport. 29 C.F.R. §18.29(a); *see also* 5 U.S.C. §556; 33 U.S.C. §§923, 927; 20 C.F.R. §702.331 *et seq.*; *see generally United States v. Hays*, 515 U.S. 737 (1995) (a blanket complaint is insufficient to establish a denial of due process).

[2] The administrative law judge admonished counsel that "both of you" are to blame for "inappropriate" and "unprofessional" conduct. HT at 647-648. She added that "I have been litigating cases for thirty-five years and I have never seen such behavior on the part of anyone that approaches, that even approaches what you guys have been doing." HT at 679. Moreover, the administrative law judge stated, in her decision, that "as the record clearly reflects, both counsel had difficulty formulating questions to Dr. Greenberg and Dr. Rapoport, particularly during cross-examination," given that "opposing counsel consistently interrupted examining counsel during the physicians' testimony." Decision and Order at 28, n. 29.

[3] In this regard, Mr. Winograd stated at the end of his cross-examination, that "that's all I have of the Doctor." HT at 683. Moreover, at the conclusion of his re-cross-examination of Dr. Rapoport, 691-696, Mr. Winograd again commented that "that's it." HT at 696.

Claimant next argues that the administrative law judge erred in finding that employer established rebuttal of the Section 20(a) presumption that his myasthenia gravis symptoms were related to his work for employer. Once, as here, claimant establishes his *prima facie* case, Section 20(a) applies to relate the claimant's harm to his employment. Employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also 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). When aggravation of a pre-existing condition is at issue, employer must produce substantial evidence that work events neither directly caused the injury nor aggravated the pre-existing condition. *C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). 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).

In this case, the administrative law judge's finding that the opinion of Dr. Rapoport is sufficient to rebut the Section 20(a) presumption is rational, supported by substantial evidence, and in accordance with law. In his report dated October 7, 2007, Dr. Rapoport opined that "[t]he February 2001 ocular myasthenia gravis exacerbation resulted from either the flu vaccination that [claimant] received a few days before, or from his viral upper respiratory infection for which he consulted Dr. Wallen a few days before, or from a combination of both of these events." EX 22. Additionally, he explicitly stated that claimant's "[b]umping his head on 2/9/01 was of no consequence in his ocular myasthenia gravis exacerbation; such trauma has never been reported to trigger the onset of mysasthenia gravis." *Id.* Dr. Rapoport also expressed an opinion as to whether emotional factors, including claimant's alleged fight or flight response immediately following the February 9, 2001, accident played any role in the onset of claimant's myasthenia gravis symptoms. HT at 672, 675, 684, 692, and 695. In this regard, Dr. Rapoport repeatedly opined that there are no non-physical stimulants that could provoke the requisite immune response for an episode of myasthenia gravis. HT at 695; *see also* HT at 550, 672, 675, 692. At the hearing, Dr. Rapoport stated that myasthenia gravis has "nothing to do with exposure to the work *per se*." HT at 663-667. Inasmuch as the opinion of Dr. Rapoport constitutes substantial evidence severing the connection between claimant's onset of myasthenia gravis symptoms following his February 9, 2001, work accident and his work for employer, we affirm the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption. *See Bellows*, 538 F.3d 293, 42 BRBS 37(CRT); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

In addressing causation based on the record as a whole, the administrative law judge acted within her discretion in crediting Dr. Rapoport's opinion that the myasthenia gravis symptoms which claimant endured following his February 9, 2001, work accident were unrelated to his work for employer over the contrary opinion of Dr. Greenberg on the basis that it is better explained and consistent with the other relevant evidence of record.[4] *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). In addition, we note that the administrative law judge rationally gave greater weight to the opinion of Dr. Rapoport based on his extra credential, *i.e.*, his Ph.D. in neurophysiology. The Board is not empowered to reweigh the evidence, but must respect the rational findings and inferences of the administrative law judge. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). As substantial evidence supports the administrative law judge's finding that claimant did not establish the work-relatedness of his condition, we affirm the denial of benefits. *Sistrunk*, 35 BRBS 171.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[4] We therefore reject claimant's assertion that the administrative law judge erred by excluding Dr. Greenberg's testimony regarding the causal connection between work-related emotional stress and the onset of claimant's myasthenia gravis symptoms, and by denying claimant's request to amend his claim to encompass this causation theory. In view of Dr. Rapoport's credited opinion, which eliminates emotional stress as a trigger for the onset of claimant's myasthenia gravis symptoms, any error committed by the administrative law judge with regard to claimant's raising this causation theory is harmless.