BRB No. 10-0361

STEVEN HUMFLEET	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA c/o AIG WORLDSOURCE	)	DATE ISSUED: 02/18/2011
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Steven Humfleet, Sakhon Nakhon, Thailand, *pro se*.

Grover E. Asmus (Asmus & Gaddy, LLC), Mobile, Alabama, for employer/carrier.

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

PER CURIAM:

Claimant, appearing without representation, appeals the Decision and Order and Order Denying Motion for Reconsideration (2008-LDA-00273, 00274) of Administrative Law Judge Clement J. Kennington rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act or DBA). In reviewing an appeal where claimant is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine if they are supported by substantial evidence, are rational, and are in accordance with law; if they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant testified that he injured his right shoulder on November 15, 2004, and reinjured it on February 15, 2006, in the course of his work for employer in Iraq.[1] Tr. at 31-32, 44-45, and 47. Following the initial accident, claimant was diagnosed with a subacrominal impingement. CX 2 at 1-4. Claimant continued to work until March 2, 2006, when he was placed on medical leave by employer due to right shoulder pain and an inability to use his shoulder; employer listed claimant's date of injury as November 15, 2004. EX 9. Claimant was examined on March 7, 2006, by Dr. Branch, who diagnosed degenerative acromioclavicular joint disease and rupture of the rotator cuff. CX 2 at 15. Dr. Branch operated on claimant's right clavicle and rotator cuff on March 15, 2006. *Id*. at 17-19. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from March 5 to May 13, 2006. Claimant obtained work from PGS Offshore, Inc. (PGS), commencing on May 1, 2006. CXs 5-7. Claimant, who was represented by counsel before the administrative law judge, contended he was entitled to compensation for periods of total and partial disability.

In his decision, the administrative law judge found, based on claimant's lack of credibility and the absence of medical corroboration of work injuries on the dates alleged, that claimant did not establish a *prima facie* case of a work-related injury that could have caused his right shoulder condition. Thus, the administrative law judge found that claimant is not entitled to the benefit of the Section 20(a) presumption that his injury is work-related. The administrative law judge denied the claim and found that employer's claim for Section 8(f) relief is moot. 33 U.S.C. §908(f). The administrative law judge alternatively found that employer rebutted the Section 20(a) presumption and that claimant's condition is not work-related based on a consideration of the record as a

[1]The November 15, 2004 injury allegedly occurred when claimant was changing a tire on a military vehicle. The February 15, 2006 incident allegedly occurred when claimant was carrying equipment at a training center.

whole. Decision and Order at 12. The administrative law judge also alternatively found that, if claimant's condition is work-related, he would be entitled to temporary total disability benefits from March 15 to May 1, 2006, based on a weekly compensation rate of $787.15, and to temporary partial disability benefits thereafter, with a weekly compensation rate of $76.35. Decision and Order at 17.

Claimant, without the benefit of counsel, timely filed a motion for reconsideration. Claimant subsequently obtained counsel, who filed a "Memorandum In Support of Claimant's 11/6/2008 Motion for Reconsideration or Modification." Claimant attached nine exhibits to his memorandum. In his Order Denying Motion for Reconsideration, the administrative law judge found that claimant's contention that he was ineffectively represented by his former counsel was without merit, that claimant's post-traumatic stress disorder (PTSD) claim should be addressed by the filing of a new claim, and that claimant's attempts to submit evidence that was available prior to the hearing is an insufficient ground for granting reconsideration. The administrative law judge did not address claimant's motion for modification. Claimant appeals the administrative law judge's decision and employer responds, urging affirmance of the decisions.

As claimant has appealed the administrative law judge's decision without counsel, the Board will address the administrative law judge's findings that are adverse to claimant. We first address the administrative law judge's finding, based on claimant's lack of credibility and the absence of medical corroboration, that claimant failed to establish a *prima facie* case of work-related shoulder injuries on November 15, 2004, and February 15, 2006.[2] Specifically, the administrative law judge found that, contrary to claimant's testimony that he received medical attention within a short time after each alleged work incident, the medical records in evidence nearest in time to the alleged November 2004 and February 2006 work injuries, which reflect claimant's first receiving treatment in December 2004 and March 2006, CX 2 at 1, 13-16, EX 9 at 1-3, 12, rely on claimant's "implausible" assertion of a work injury and show "little objective evidence" of recent injury. The administrative law judge also discounted the reports ascribing claimant's pain to a work incident, as claimant did not tell the examining doctors about a 2002 right shoulder injury.[3]

[2]Among the reasons the administrative law judge gave for finding that claimant is not a credible witness were that: (1) there were no witnesses to either of the alleged injuries; and (2) there are no "contemporaneous" medical records of the November 15, 2004 injury or the February 15, 2006 injury. Decision and Order at 8-9.

[3]The administrative law judge did not address whether claimant's alleged work injuries could have aggravated the 2002 shoulder injury. *See* discussion, *infra.*

We cannot affirm the administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his alleged November 15, 2004, work injury to his right shoulder condition. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. Claimant is not required to affirmatively prove that his work injury in fact caused or aggravated the harm; rather, claimant need establish only that the work injury *could have* caused or aggravated the harm alleged. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

In this case, the administrative law judge's finding that claimant did not receive medical treatment after the alleged November 15, 2004, work injury until December 20, 2004, is contradicted by employer's incident report that was completed around December 20, 2004.[4] EX 6. The incident report notes claimant's description of the tire-changing accident and that he sought treatment from a medic a few days after the incident. The report filled out by employer states,

> [F]urther investigation revealed Mr. Humfleet reported several days *after the incident* to the KBR medics at Camp Victory, Iraq for a persistent pain in his right shoulder and he continued to report to KBR medics at Camp Cedar, during the month of November 2004. On 20th of December, 2004, Cedar KBR medics requested Mr. Humfleet to see the Army Doctor at Cedar to rule out any serious problems.

EX 6 at 1 (emphasis added). The Camp Cedar doctor noted claimant's description of the injury and complaints; he diagnosed impingement syndrome relating to that incident. EX 8 at 1-2. Dr. York, who initially examined claimant at employer's request on August 9, 2007, opined that claimant had some pre-existing shoulder impairment prior to November 2004, and that the November 2004 work injury aggravated this impairment (as did the February 2006 alleged work injury). EX 11c at 14-17; *see also* EX 11b.

Employer's injury report directly refutes the administrative law judge's reasons for finding that the November 2004 accident did not occur. It states that employer investigated the incident and found that claimant reported for medical treatment "several days" after the incident. EX 6 at 1. In light of this evidence provided by employer that

[4]The administrative law judge noted but did not discuss this report. Decision and Order at 3 n.3.

claimant promptly reported the incident and obtained medical treatment, the administrative law judge's finding that the accident did not occur cannot stand. Claimant has established the elements of his *prima facie* case as a matter of law. *See generally Brown v. I.T.T. Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990). He has a harm, impingement syndrome and a torn rotator cuff of the right shoulder, and employer's incident report documents the November 15, 2004, accident and immediate medical treatment. In addition, Dr. York related claimant's condition to the work incident. Therefore, claimant is entitled to the benefit of Section 20(a) presumption that his right shoulder condition is related to his employment. Thus, we reverse the administrative law judge's finding on this issue.[5] *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989).

We next address the administrative law judge's alternative finding that employer established rebuttal of the Section 20(a) presumption. In his decision, the administrative law judge summarily found that "employer presented more than sufficient evidence as set forth [in his discussion of Section 20(a) invocation] to destroy claimant's credibility to not only rebut but undermine any case for causation claimant may have had." Decision and Order at 12. He thus concluded that claimant did not establish a causal connection between his right shoulder condition and work for employer.

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Kelley v. Department of the Army/NAF*, 34 BRBS 39 (2000). Where aggravation of a pre-existing condition is at issue, employer must submit substantial evidence that work events did not aggravate the pre-existing condition. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). If employer rebuts the Section 20(a)

[5]We affirm the administrative law judge's finding, based on the original record, that claimant did not establish a *prima facie* case of a work-related shoulder injury on February 15, 2006. In the absence of any corroboration in the original record that claimant aggravated his shoulder condition in an incident at the training center, the administrative law judge rationally found that claimant's testimony that he aggravated his shoulder on February 15, 2006, is not credible. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). However, claimant submitted documentation in support of this claim with his motion for reconsideration/ modification. *See* CXMs 2, 7, 8, 9. Pursuant to claimant's motion for modification, on remand the administrative law judge must consider this evidence and re-address claimant's contention that he injured his shoulder during the course of his employment on February 15, 2006. *See infra* at 8-9.

presumption, it no longer controls, and the issue of causation must be resolved on the whole body of proof, with claimant bearing the burden of persuasion. *See 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).

We cannot affirm the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption. In *Brown*, the United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises,[6] stated that the Act places on employer the duty of rebutting the Section 20(a) presumption with evidence that the employee's employment neither caused nor aggravated his harm. Where none of the physicians of record expressed an opinion "ruling out" a causal connection, the court determined that there was no direct concrete evidence sufficient to rebut the presumption. *Brown*, 893 F.2d at 297, 23 BRBS at 24(CRT); *see also O'Kelley*, 34 BRBS at 41-42. In this case, the administrative law judge did not address the evidence in terms of this standard, or whether employer presented substantial evidence to rebut the presumption that claimant's 2002 shoulder injury was aggravated by the November 2004 work injury. *See, e.g., C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 43 BRBS 37(CRT) (3d Cir. 2008). Accordingly, the administrative law judge's finding of rebuttal must be vacated and the case remanded for the administrative law judge to address, pursuant to the appropriate standard, whether employer rebutted the Section 20(a) presumption. *Brown*, 893 F.2d at 297, 23 BRBS at 24(CRT); *see also O'Kelley*, 34 BRBS at 41-42. If the Section 20(a) presumption is not rebutted, claimant's shoulder condition is work-related as a matter of law. *See Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). Should the administrative law judge find on remand that employer rebutted the Section 20(a) presumption, he must then address whether claimant established a causal relationship based on the record as a whole.[7] The administrative law judge must discuss all relevant evidence.[8] *See* discussion *infra.* at 8-9.

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[6]Pursuant to 20 C.F.R. §704.101, this claim was filed in OWCP District 2 in New York. The case was then transferred to OWCP District 6 in Jacksonville, Florida. As the Jacksonville district director filed and served the administrative law judge's decision, Eleventh Circuit law applies in this case. 42 U.S.C. §1651(b); *Service Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *Pearce v. Director, OWCP*, 603 F.2d 763, 10 BRBS 867 (9th Cir. 1979).

[7]In light of this, we vacate the administrative law judge's order denying reconsideration insofar as it affirms his findings in this regard.

[8]Should the administrative law judge find that claimant has a permanently disabling work-related shoulder condition, he must address employer's application for Section 8(f) relief.

For purposes of judicial economy, we next address the administrative law judge's alternative findings as to the nature and extent of claimant's shoulder disability. The administrative law judge found that claimant could perform his usual work until the date of his surgery on March 15, 2006, based on claimant's testimony that he worked at his "normal duties" until March 2006. Decision and Order at 13, Tr. at 34-35. The administrative law judge additionally found that, after claimant recuperated from shoulder surgery, his actual employment with PGS commencing May 1, 2006, established the availability of suitable alternate employment. The administrative law judge found that claimant's pre-employment physical for PGS stated that he had no restrictions, that claimant testified he worked for PGS without any apparent limitations, Tr. at 54-55, EX 13 at 52, and that claimant's ability to work without restrictions is consistent with the results of similar patients reported by Dr. York, EX 11c at 8-9. Decision and Order at 13; EX 13 at 35. As the administrative law judge's findings that claimant was incapable of returning to his usual work as of March 15, 2006, and that employer established suitable alternate employment via claimant's successful post-injury return to work with PGS on May 1, 2006, are rational and supported by substantial evidence, they are affirmed.[9] *See generally DelMonte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009). Therefore, in the event that the administrative law judge finds on remand that claimant's shoulder condition is work-related, we affirm the finding that claimant is entitled to temporary total disability benefits from March 15 to May 1, 2006, to temporary partial disability benefits from May 2, 2006 to January 17, 2007, and to permanent partial disability benefits thereafter.[10] 33 U.S.C. §908(b), (c)(21), (e), (h).

We next address the administrative law judge's calculation of claimant's average weekly wage. The administrative law judge properly found Section 10(c), 33 U.S.C. §910(c), applicable to determine claimant's average weekly wage since claimant worked seven days per week and there is no evidence of the wages earned by comparable employees. *See J.T. [Tracy] v. Global International Offshore, Ltd.*, 43 BRBS 92 (2009);

[9]We also affirm the administrative law judge's finding that claimant reached maximum medical improvement as of January 18, 2007, as it based on the parties' stipulations. Decision and Order at 3; *see Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999).

[10]The administrative law judge's calculation of claimant's post-injury wage-earning capacity, by taking the average of the annual salaries paid by claimant's three post-injury employers to derive a post-injury wage-earning capacity of $1,066.19, CXs 5-7, is affirmed as it is reasonable and is based on substantial evidence of record. *See* 33 U.S.C. §908(h); *see generally Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990).

33 U.S.C. §910(a), (b). The administrative law judge, however, used a blended approach based on the wages claimant earned in his pre-Iraq employment from 2000 to 2004 and the wages he earned in Iraq from 2005 to March 2006, as supplemented by the annual percentage increase in the compensation rate from October 1, 2000 to October 1, 2008, *see* 33 U.S.C. §906(b), which resulted in an average weekly wage of $1,180.72. Decision and Order at 15; *see* CX 4, EXs 4, 12. The Board has rejected "the blended approach" in certain cases arising under the DBA and has held that in cases where claimant is injured while working overseas in a dangerous environment in return for higher wages under a long-term contract, his annual earning capacity should be calculated based solely upon the earnings in that job as they reflect the full amount of the earnings lost due to the injury. *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 136, *aff'g on recon en banc*, 43 BRBS 18 (2009); *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006). In light of *Simons*, we vacate the administrative law judge's average weekly wage finding and remand the case for the administrative law judge to determine if the requisite criteria are present for basing claimant's average weekly wage solely on his earnings in Iraq and, if so, to recalculate claimant's average weekly wage and resulting loss in wage-earning capacity. *Simons*, 43 BRBS at 137; *Proffitt*, 40 BRBS 41.

Claimant sought reconsideration and/or modification of the administrative law judge's findings that he did not establish a *prima facie* case and that employer established rebuttal of the Section 20(a) presumption. Memorandum at 1, 6, 14-15. Although the administrative law judge did not err in denying the motion for reconsideration,[11] he erred in not addressing claimant's submission as a motion for Section 22 modification, 33 U.S.C. §922, since claimant appended new evidence to the memorandum and entitled the document a motion for reconsideration or modification. *See, e.g., Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986). Contrary to the administrative law judge's finding, the fact that claimant offered on modification evidence that was available prior to the initial hearing is not, alone, a basis for declining to consider the evidence. *See Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *G.K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008). '"The modification process is flexible,

[11]We affirm the administrative law judge's rejection of claimant's contentions on reconsideration that he was ineffectively represented by counsel at the hearing, and that his counsel should also have presented his claim of a psychological injury due to PTSD. The administrative law judge rationally found that counsel has a long history of competence and his finding that claimant should file a new claim for his alleged PTSD is in accordance with law, as such a claim is not encompassed in the claim for a shoulder injury. 33 U.S.C. §913; *see generally Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Meehan Seaway Service Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

potent, easily invoked, and intended to secure 'justice under the act.'" *Betty B. Coal Co. v. Director, OWCP*, 194 F.3d 491, 497-98 (4th Cir. 1999) (quoting *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 464 (1968). "Mistake of fact" modification may be based on new evidence, cumulative evidence, or merely "further reflection" on the evidence originally submitted. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *Dobson v. Todd Pacific Shipyards, Corp.*, 21 BRBS 174 (1988). Accordingly, on remand, the administrative law judge must address claimant's new evidence, after affording employer an opportunity to submit responsive evidence.

Accordingly, the administrative law judge's finding that the Section 20(a) presumption is not invoked is reversed. The case is remanded for further findings on the causation issue consistent with this decision. The average weekly wage calculation is vacated, and the case is remanded for further consideration consistent with this decision. The administrative law judge must address claimant's new evidence in accordance with Section 22 of the Act. In all other respects, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are affirmed.

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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BETTY JEAN HALL
Administrative Appeals Judge