BRB No. 01-0423

JEREMIAH BRUNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RYAN WALSH STEVEDORING, INCORPORATED	)	DATE ISSUED: Jan. 30, 2002
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Edward E. Boshears, Brunswick, Georgia, for claimant.

Shari S. Miltiades, Savannah, Georgia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (97-LHC-0411) of Administrative Law Judge David W. Di Nardi 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 if they 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).

This case has previously been before the Board. On July 20, 1994, claimant suffered an injury during the course of his employment as a longshoreman with employer. Specifically, while bending over to straighten a mat on the dock, claimant was struck from behind and knocked down by a forklift truck. Claimant sought medical treatment on the day of his accident at Glynn Immediate Care, complaining of pain in his left shoulder and both knees. Claimant was diagnosed with a sprained left shoulder for which Naprosyn was prescribed. Claimant's blood pressure was recorded as 200/120, and he was given a

prescription for blood pressure medication. Claimant was released to return to work the following day with lifting restrictions.[1] Employer paid for the medical services provided by Glynn Immediate Care, but did not voluntarily pay any compensation benefits. Claimant sought permanent total disability benefits from January 1, 1995, based on back and shoulder injuries and heart problems, all of which he asserted were related to his July 20, 1994, work injury.

In a Decision and Order issued on March 5, 1998, Administrative Law Judge Edward J. Murty, Jr., determined that claimant's back and heart problems were unrelated to the July 20, 1994, work accident, and, accordingly, denied the claim for compensation. Claimant's subsequent motion for reconsideration was denied on April 21, 1998.

Claimant thereafter appealed Judge Murty's decisions to the Board. In a Decision and Order issued on April 20, 1999, the Board agreed with claimant that Judge Murty erred by addressing the causation issues without invoking the Section 20(a), 33 U.S.C. §920(a), presumption, holding that claimant is entitled as a matter of law to invocation of the presumption that his shoulder and heart conditions are causally related to his employment.[2] Accordingly, the Board vacated the

[1]On the day after his injury, claimant returned to work driving cars off ships for another employer, and was involved in a car accident. Claimant was suspended from his union, initially for 90 days and then permanently, because he tested positive in drug testing conducted after both work accidents on July 20, 1994 and July 21, 1994, and again in a subsequent random drug test. He has not worked since July 21, 1994.

[2]The Board declined to consider the issue of the causation of claimant's back condition because claimant did not present a specific argument in support of his allegation that the administrative law judge erroneously failed to apply the Section 20(a) presumption to

administrative law judge's decision in part and remanded the case to the administrative law judge for further consideration. *Brunson v. Ryan Walsh Stevedoring, Inc.,* BRB No. 98-1064 (April 20, 1999)(unpublished).

With regard to claimant's shoulder condition, the Board held that the administrative law judge was to determine on remand whether employer established rebuttal of the presumption with substantial countervailing evidence that claimant's shoulder condition was not caused or aggravated by his employment. With respect to claimant's heart condition, the administrative law judge was to reconsider Dr. Martinez's testimony in light of the applicable principles regarding aggravation of an underlying condition, and determine whether his opinion constitutes evidence sufficient to sever the causal connection between claimant's heart condition and his employment. The Board further held that if the administrative law judge found that the presumption was rebutted, he must weigh all the evidence and resolve the causation issue based on the record as a whole. Lastly, the Board held that if the administrative law judge found a causal relationship between claimant's employment and either or both his shoulder and heart conditions, the administrative law judge must then consider the nature and extent of claimant's disability. In an Order dated September 7, 1999, the Board denied employer's motion for reconsideration.

On remand, the case was assigned to Administrative Law Judge David W. Di Nardi (the administrative law judge), as Judge Murty had retired. In his Decision and Order on Remand - Denying Benefits issued on January 5, 2001, the administrative law judge, without specifically identifying the evidence which he found sufficient to establish rebuttal, stated that employer had produced sufficient evidence to rebut the Section 20(a) presumption with respect to claimant's cardiac and shoulder conditions. *See* Decision and Order at 18. Next, the administrative law judge weighed all of the record evidence and concluded that neither of claimant's conditions is causally related to his employment. *See* Decision and Order at 21-22. Accordingly, the administrative law judge denied the claim for benefits.

On appeal, claimant contends that the administrative law judge failed to follow the Board's instructions on remand with respect to whether employer rebutted the

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claimant's back condition. As the Board's previous decision not to consider the causation of claimant's back condition constitutes the law of the case, this issue will not be revisited. *See Armfield v. Shell Offshore, Inc.*, 30 BRBS 122 (1996).

Section 20(a) presumption, failed to apply the correct standard for rebuttal when addressing that issue and, lastly, that the administrative law judge's factual findings regarding the cause of claimant's cardiac and shoulder conditions are not supported by substantial evidence. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

It is well-established that once the Section 20(a) presumption has been invoked, as in this case, the burden shifts to the 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); *see also Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP,* 109 F.2d 53, 31 BRBS 19(CRT) (1st Cir. 1997). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the presumption no longer controls, and the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Brown,* 893 F.2d 294, 23 BRBS 22(CRT); *see also Director, OWCP v. Greenwich Collieries,* 512 U.S. 257, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge did not follow precisely the analysis as set forth in the preceding discussion in that he did not explicitly identify the evidence upon which he relied to find that employer met its burden of rebutting the Section 20(a) presumption. Rather, the administrative law judge first, summarily found the presumption rebutted, next, engaged in a discussion of all the record evidence, and finally, found neither claimant's cardiac nor shoulder conditions to be causally related to his employment. Despite the administrative law judge's omission of the specific evidence supporting rebuttal of Section 20(a), his discussion of the evidence relevant to the causation issue provides an adequate basis for our review of his decision. *Gooden v. Director, OWCP,* 135 F.3d 1066, 1068, 32 BRBS 59, 61(CRT) (5th Cir. 1998).

In challenging the administrative law judge's determination that claimant's cardiac and shoulder conditions are unrelated to his employment, claimant first avers that the administrative law judge erred as a matter of law in failing to apply the "ruling out" standard for rebuttal of the Section 20(a) presumption. As noted by claimant on appeal, the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this claim arises, has adopted a "ruling out" standard when

addressing the issue of rebuttal of the Section 20(a) presumption. *See Brown,* 893 F.2d 294, 23 BRBS 22(CRT). In *Brown,* the court found that the Act placed 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 concrete evidence sufficient to rebut the presumption. *Id.,* 893 F.2d at 297, 23 BRBS at 24(CRT); *cf. Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999) (court rejects "ruling out" standard, but affirms finding Section 20(a) was not rebutted); *Bath Iron Works Corp. v. Director, OWCP [Shorette],* 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997) (employer need not "rule out" any possible causal relationship; employer must proffer substantial evidence that the condition was not caused or aggravated by the employment). Under this standard, it is sufficient if a physician unequivocally states, to a reasonable degree of medical certainty, that the harm is not related to the employment. *Jones v. Aluminum Company of America,* 35 BRBS 37, 40 (2001); *O'Kelley,* 34 BRBS at 41-42.

The administrative law judge's Decision and Order in the instant case contains a lengthy recitation of the case law relevant to Section 20(a) rebuttal in which the administrative law judge, having misidentified this case as arising within the jurisdiction of the United States Court of Appeals for the First Circuit, summarizes the First Circuit's decision in *Shorette* rejecting the "ruling out" standard. *See* Decision and Order at 15. Also included in the administrative law judge's discussion of Section 20(a) rebuttal case law is the statement that, on rebuttal, employer is required to produce evidence which completely "rules out" the causal connection between the claimant's condition and his employment. *See* Decision and Order at 16. This lack of certainty as to the legal standard for rebuttal actually employed by the administrative law judge, however, does not preclude us from deciding, consistent with the applicable legal standards, whether the administrative law judge's determination that there is no causal relationship between claimant's conditions and his employment is rational and supported by substantial evidence.

In undertaking this review, we consider, first, whether the administrative law judge's determination that claimant's cardiac condition is not causally related to his employment is supported by substantial evidence and in accordance with law. The administrative law judge relied on the opinion of Dr. Martinez, claimant's treating cardiologist, to conclude that claimant's cardiac condition is not work-related. Having set forth at length and considered the totality of Dr. Martinez's testimony, the administrative law judge found that his opinion establishes conclusively that claimant's cardiac condition was neither caused nor aggravated by his work-related accident. *See* Decision and Order 21-22. It is well-established that the

administrative law judge, as factfinder, must independently analyze and discuss the medical evidence before him. *See O'Kelley,* 34 BRBS at 42. In so doing, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *Id.; see also Mendoza v. Marine Personnel Company, Inc.,* 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

In arguing that the administrative law judge erroneously found Dr. Martinez's opinion sufficient to rebut the Section 20(a) presumption, claimant notes that physician's deposition testimony as to the theoretical possibility that pain resulting from trauma could worsen a pre-existing heart condition. *See* Cl. P/R at 18; RX 11 at 34. We do not agree that the testimony of Dr. Martinez cited by claimant renders his opinion insufficient to rebut the Section 20(a) presumption. Although Dr. Martinez did acknowledge the theoretical possibility that severe pain could worsen a pre-existing cardiac condition, his testimony, considered in its entirety, reflects his belief that such a scenario did not, in fact, occur in the instant case. *See* RX 11 at 18-19, 24-25, 27-34, 43; *see also* RX 5. As Dr. Martinez's reports and deposition testimony unequivocally express his opinion, rendered within a reasonable degree of medical certainty, that claimant's cardiac condition was neither caused nor aggravated by his work-related accident, his opinion is sufficient to meet employer's burden on rebuttal. *See Brown,* 893 F.2d 294, 23 BRBS 22(CRT); *Jones,* 35 BRBS at 40; *O'Kelley,* 34 BRBS at 41-42. As the administrative law judge rationally credited Dr. Martinez's testimony, and as the record contains no medical evidence of a causal relationship between claimant's cardiac condition and his work-related accident, we affirm the administrative law judge's conclusion that a causal connection between claimant's cardiac condition and his employment has not been established based upon the record as a whole. *See Brown,* 893 F.2d 294, 23 BRBS 22(CRT); *see also Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43(CRT); *Holmes v. Universal Maritime Service Corp.,* 29 BRBS 18 (1995).

We next consider claimant's contention that the administrative law judge erred in finding that claimant's left shoulder condition is not causally related to his work injury. We agree with claimant that because the factual findings made by the administrative law judge with respect to claimant's shoulder condition are not supported by substantial evidence, the administrative law judge's conclusion that the shoulder condition is not employment-related cannot be affirmed. Specifically, the administrative law judge, having discredited claimant's testimony, found that the record contained no evidence that claimant sought treatment or complained about his left shoulder subsequent to the treatment that he received at Glynn Immediate Care on the date of his accident until nearly two years after his injury when he first complained to Dr. Martinez. *See* Decision and Order at 21; *see also* Decision and Order at 4, 9, 12, 20, 24, 27. Contrary to the administrative law judge's finding, the

medical reports of record dating from the time of claimant's accident through the following two years do in fact contain references to claimant's left shoulder injury and complaints of shoulder pain.[3] The administrative law judge further found that any shoulder complaints from the July 20, 1994, work accident had resolved by the day after claimant's accident when he returned to work for another stevedoring employer. *See* Decision and Order at 20. However, contrary to the administrative law judge's statement that Glynn Immediate Care released claimant to return to work without restrictions, the records from claimant's treatment at Glynn reflect that claimant was released to return to work the following date with a lifting restriction of 20 pounds to continue through July 24, 1994. *See* CX 1. Moreover, the administrative law judge's finding that claimant successfully performed "physically demanding" work on July 21, 1994, *see* Decision and Order at 20, 23, 28, is not supported by the record evidence which indicates that claimant's duties on that date consisted solely of driving cars off a ship. *See* Tr. at 27, 48-49, 64-66.

In concluding that claimant's shoulder condition is unrelated to his employment, the administrative law judge found that the July 20, 1994 work accident was "relatively minor." *See* Decision and Order at 20, 28. The severity of the work-related incident, however, is not determinative of whether an aggravation occurred since even a minor incident can aggravate

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[3]In this regard, the history and physical examination report by Charter By-the-Sea Hospital dated July 23, 1994, refers to claimant's work injury and shoulder pain. CX 4; RX 3 at 17. During a subsequent hospitalization at Charter By-the-Sea, Dr. Harris, on August 10, 1994, diagnosed claimant with subacromial bursitis of his left shoulder based on clinical exam. CX 4; *see also* RX 3 at 3. A report from Southeast Georgia Regional Medical Center reflects that claimant reported to the emergency room on November 21, 1994, with a complaint of left shoulder pain and contains diagnoses of left shoulder strain and bursitis. CX 5. Lastly, contrary to the administrative law judge's finding that claimant first complained about his shoulder to Dr. Martinez two years after his July 20, 1994 accident, Dr. Martinez's records of office visits on December 2, 1994 and May 2, 1995 report claimant's complaints of shoulder pain. CX 16; RX 5 at 43; RX 11 at 35-41.

a pre-existing condition and impair a claimant's ability to work. *See, e.g., Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT)(9th Cir. 1991). Whether the circumstances of a claimant's employment combine with the pre-existing condition so as to increase his symptoms to such a degree as to incapacitate him for any period of time or whether they actually alter the underlying process is not significant. *See Gooden,* 135 F.3d 1066, 32 BRBS 59(CRT); *Gardner v. Director, OWCP,* 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981), *aff'g* 11 BRBS 561 (1971).

We therefore vacate the administrative law judge's determination that claimant's shoulder condition is unrelated to his employment and remand the case for reconsideration of the evidence relevant to the cause of claimant's shoulder condition in light of the applicable principles regarding aggravation of a pre-existing condition. *See Brown,* 893 F.2d 294, 23 BRBS 22(CRT). Once again, the administrative law judge, on remand, must accord claimant the benefit of the Section 20(a) presumption of causation with regard to his shoulder injury. On rebuttal, the administrative law judge must consider the evidence supporting employer's position and specifically discuss whether employer has produced substantial evidence to meet its rebuttal burden. *See, e.g., Gooden,* 135 F.3d 1066, 32 BRBS 59(CRT); *see also Brown,* 893 F.2d 294, 23 BRBS 22(CRT).[4] If employer is found to have met this burden, the presumption drops from the case and the administrative law judge must decide

[4]The administrative law judge additionally engaged in a lengthy discussion of the case law pertaining to intervening events. *See* Decision and Order at 24-27. He then concluded that claimant's lifestyle, or intentional misconduct, constituted an intervening cause breaking the chain of causality between claimant's work-related injury and his present medical condition. Decision and Order at 27. The decisions cited by the administrative law judge relate to cases in which an intervening event occurs between the initial work-related injury and a subsequent injury; in such an instance, a claimant may not recover if the remote consequences of his work injury are the direct result of his intentional post-injury misconduct, and are only the indirect, unforeseeable result of the work-related injury. *See Jackson v. Strachan Shipping Co.*, 32 BRBS 71, 73 (1998)(Smith, J., concurring and dissenting). In the instant case, the administrative law judge did not find that a specific non-work-related event followed claimant's work accident. Rather, the administrative law judge found that claimant's "lifestyle for many years, pre-injury and post-injury, was an intervening cause . . ." Decision and Order at 27. The administrative law judge, however, failed to cite medical evidence that claimant's present shoulder condition is the direct result of his "lifestyle." *See Jackson*, 32 BRBS at 73. His determination that claimant's lifestyle was an intervening event which severed the causal relationship between claimant's work accident and his present shoulder condition, therefore, cannot be affirmed.

the causation issue based on the evidence considered as a whole, with claimant bearing the ultimate burden of persuasion. *See Brown,* 893 F.2d 294, 23 BRBS 22(CRT); *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT). In addition, if claimant's shoulder condition is work-related, the administrative law judge must award Section 7(a), 33 U.S.C. §907(a), benefits for medical treatment reasonable and necessary for the treatment of the condition. Even where a claimant is not entitled to disability benefits, employer still may be liable for medical benefits for a work-related injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). Lastly, if the administrative law judge finds a causal relationship between claimant's shoulder condition and his employment, he must consider the nature and extent of claimant's work-related disability.[5]

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[5]Claimant is entitled to disability benefits for any period his work injury causes a total or partial loss of wage-earning capacity. *See generally Shell Offshore v. Director, OWCP,* 122 F.3d 321, 31 BRBS 129(CRT) (5th Cir. 1997); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992).