BRB No. 03-0312

MARK A. ROBINSON	)	
	)	
Claimant-Respondent	)	DATE ISSUED: Jan 16, 2004
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

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

Mark W. Oberlatz and Peter D. Quay (Murphy and Beane), New London, Connecticut, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2000-LHC-2342; 2002-LHC-2552) 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 which 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 is the second time this case is before the Board. Claimant, an outside machinist who worked for employer for approximately seventeen years between 1979 and 1999, filed a claim for benefits alleging that his working conditions aggravated his diabetic condition, first diagnosed in the mid-1980's, rendering him totally disabled.[1] In

[1]Following his diagnosis of diabetes in 1985 or 1986, claimant's condition worsened as he developed peripheral vascular disease, retinopathy, polyneuropathy, and periodontal disease; as of August 1999 claimant was diagnosed as being industrially blind. CX 3.

his first decision, the administrative law judge found that claimant's diabetes was aggravated by his employment, based on his evaluation of the evidence as a whole, and he awarded claimant ongoing temporary total disability compensation, commencing August 24, 1999. Employer appealed this decision.

On appeal, the Board held that the administrative law judge's findings regarding invocation and rebuttal of the Section 20(a) presumption were made in light of the applicable legal standards. 33 U.S.C. §920(a). The Board held, however, that the administrative law judge's weighing of the evidence could not be affirmed as the administrative law judge erroneously relied on testimony from other cases concerning employer's Safety Award Program and on documents regarding this program which the administrative law judge *sua sponte* admitted into evidence. Thus, the Board vacated the award and remanded the case to the administrative law judge to reweigh the evidence of record.[2] *Robinson v. Electric Boat Corp.*, BRB No. 01-0907 (Aug. 22, 2002) (McGranery, J., concurring and dissenting).[3]

On remand, the administrative law judge explained that he had not relied on extra record "evidence," but had, in fact, informed the parties of his intent to admit additional evidence concerning employer's safety program and gave the parties the opportunity to respond.[4] The administrative law judge then reviewed the evidence of record and again found that claimant's employment aggravated his diabetes. Accordingly, he awarded claimant total disability benefits. Employer again appeals, contending that the administrative law judge erred in finding that claimant's diabetes was aggravated by his employment. Employer also contends that the administrative law judge's decision demonstrates a decided bias in claimant's favor in view of his inferences concerning employer's safety program. Claimant has not responded to this appeal.

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[2]In its decision, the Board also stated that although problematic, the administrative law judge's incorporation of verbatim language from claimant's post-hearing brief was not *per se* error as he did discuss the medical opinions of record and the testimony regarding claimant's job duties.

[3]In view of the specific instructions given to the administrative law judge regarding the review of the evidence of record, the Board denied employer's request that the case be assigned to a new administrative law judge.

[4]Indeed, the record contains an Order issued by the administrative law judge after the formal hearing, advising the parties of his intention to admit into the record documents concerning employer's Safety Award Program and giving the parties the opportunity to respond to this evidence. ALJX 7. On remand, the administrative law judge described the evidence submitted by employer following this Order. Decision and Order on Remand at 13.

Once, as here, the Section 20(a) presumption is invoked and rebutted, it falls from the case, and claimant bears the burden of establishing by a preponderance of the evidence that his physical harm was caused or aggravated by his employment. *See Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Under the aggravation rule, employer is liable for the claimant's entire disability if the employment aggravates a pre-existing condition. *See Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); *see also Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*).

The administrative law judge first credited claimant's testimony that he was unable to properly monitor his diabetic condition or to eat at appropriate times due to the places in which he worked, such as on submarines, and due to the lack of predictability concerning the level of physical activity that would be required on a given day. Tr. at 50-52, 60; Decision and Order on Remand at 26. The administrative law judge observed that Henry Doucette, employer's Area Superintendent, also attested to this latter factor. RX 25 at 8-13; Decision and Order on Remand at 26-27, 32, 36. The administrative law judge next credited the opinion of Dr. Alessandro, claimant's treating physician, that claimant's working the second shift and the unpredictability of his exertional level aggravated his diabetic condition. CX 13 at 13, 21-22, 39, 69, 85-86; Decision and Order on Remand at 34-35. The administrative law judge noted that Dr. Forman, while unwilling to definitively state that claimant's employment aggravated his diabetes, stated that erratic eating and unpredictable work shifts can alter glucose levels. RX 14. Dr. McKee, the physician at employer's clinic, stated that some employees' physicians requested that the employees work the first shift so as to better enable them to control their diabetes. RX 17 at 14-15. The administrative law judge gave less weight to the opinion of Dr. Hare, employer's expert, that claimant's working conditions did not aggravate his diabetes, because Dr. Hare was not fully aware of claimant's working conditions and because he stated that patients who have the most trouble controlling their diabetes are those who work the night shift. RX 23 at 48, 50; Decision and Order on Remand at 31.

The administrative law judge's decision to credit claimant's testimony concerning his working conditions is neither "inherently incredible" nor "patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge is entitled to determine the weight to be accorded to the physicians' opinions, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and, contrary to employer's contention, the administrative law judge did not blindly accept the opinion of claimant's treating

physician, but, in fact, found Dr. Alessandro's opinion corroborated by other medical opinions of record. Decision and Order on Remand at 35; *see generally The Black & Decker Disability Plan v. Nord*, 123 S.Ct. 1956 (2003); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). The administrative law judge also found that the treating physician is in the best position to give an opinion as to claimant's condition. Decision and Order on Remand at 34. As the administrative law judge's finding that claimant's diabetes was aggravated by his employment is rational and supported by substantial evidence, it is affirmed.[5] *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is 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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REGINA C. McGRANERY
Administrative Appeals Judge

[5]As employer argues, however, there is no support for the administrative law judge's inference that claimant was deterred from going to employer's clinic because of the Safety Award Program. Claimant's testimony does not mention this program at all, nor did he state that his visits to the clinic would have to be reported to OSHA. *See* Decision and Order on Remand at 27. Claimant testified only that his supervisors were concerned about how to charge his time when he went to the clinic to monitor his diabetes, *e.g.*, should the time be charged to a Navy contract or to something else, and that eventually he just stopped going. Tr. at 45, 47, 88. The administrative law judge's error in this regard is harmless, as substantial medical evidence supports a finding that claimant's condition was aggravated by the conditions of his employment.