BRB No. 10-0445

BRYAN K. DOUCET	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND OPERATING COMPANY, INCORPORATED	)	DATE ISSUED: 01/31/2011
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

John G. Fontenot, Eunice, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2009-LHC-0550) of Administrative Law Judge Patrick M. Rosenow 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a "D" Operator on West Cameron 485, a fixed platform on the Outer Continental Shelf. On or about July 15, 2008, claimant was flown by helicopter from West Cameron 485 to another platform where for five to six hours he worked alone to exchange five expired fire extinguishers and to clean trash off the platform. Tr. at 27-31. Claimant testified that it was an unusually heavy work day for him.[1] *Id.* at 32-33. Claimant returned that evening to West Cameron 485 and the next morning he awakened with severe back pain. *Id.* at 31-33. After returning to shore, claimant was treated for back pain, and on July 23, 2008, he underwent an MRI which revealed degenerative changes and herniated discs at L4-5 and L5-S1. CX 8. Claimant filed a claim for benefits under the Act for his back condition which he asserted was causally related to his July 15, 2008 work activities. Employer controverted the claim, asserting that claimant's present back condition resulted from the natural progression of a pre-existing condition.

In his Decision and Order, the administrative law judge found claimant entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), having determined that claimant established that he suffers from back pain and that his working conditions on July 15, 2008 could have caused or aggravated his back injury. Decision and Order at 15-16. The administrative law judge further found that the evidence relied upon by employer is insufficient to rebut the presumption and he therefore concluded that claimant's back condition is work-related. *Id.* at 16. The administrative law judge accepted the parties' stipulation that claimant's condition has not reached permanency and found that claimant has been totally disabled from July 15, 2008 to the present and continuing. *Id.* at 3-4, 17. Accordingly, the administrative law judge found claimant entitled to an ongoing award of temporary total disability benefits commencing as of July 15, 2008. *Id.* at 17.

Employer appeals the administrative law judge's award of benefits. Employer has filed with the Board a Petition for Review and a Brief in Support of Petition for Review that is virtually identical to the Post-Trial Brief that employer filed with the administrative law judge following the hearing in this claim. Claimant responds, urging affirmance.

[1] Claimant testified that the fire extinguishers weighed approximately 30 pounds, that he carried one in each hand, and that he carried the new fire extinguishers from the heliport up 40 to 50 steps to the main platform deck and then reversed this process with the expired extinguishers; additionally, claimant stated that two of the exchanged extinguishers were located on a lower deck which entailed climbing an additional 40 to 50 steps. Tr. at 28-30.

In reviewing an appeal, the findings of fact in the administrative law judge's decision "shall be conclusive if supported by substantial evidence in the record as a whole." 33 U.S.C. §921(b)(3). Thus, the circumscribed scope of the Board's review authority necessarily requires a party challenging the decision below to address that decision and demonstrate that it is legally erroneous or unsupported by the evidence. *Carnegie v. C&P Telephone Co.,* 19 BRBS 57 (1986). The Board's Rules of Practice and Procedure further provide that a party's petition for review to the Board shall list "the specific issues to be considered on appeal" and that "[e]ach petition for review shall be accompanied by a . . . . statement which: Specifically states the issues to be considered by the Board." *See* 20 C.F.R. §802.211(a), (b). Where a party is represented by counsel, mere assignment of error is not sufficient to invoke Board review. *See Collins v. Oceanic Butler, Inc.,* 23 BRBS 227 (1990).

In its appeal to the Board, employer has failed to meet these threshold requirements. Specifically, employer's Brief in Support of Petition for Review replicates the brief employer submitted to the administrative law judge post-hearing, contains only a passing reference to the administrative law judge's decision and does not identify any specific errors in the administrative law judge's determination that the Section 20(a) presumption was invoked and not rebutted. Employer's summaries of various pieces of evidence cannot substitute for legal argument. *See generally Plappert v. Marine Corps Exchange,* 31 BRBS 109, 111 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997); *Carnegie,* 19 BRBS at 58-59. Consequently, employer has not demonstrated that the administrative law judge's decision is legally erroneous or unsupported by the record. Therefore, the decision below must be affirmed. *See Collins,* 23 BRBS 227; *Carnegie,* 19 BRBS 57.

Moreover, our review of the record confirms that the administrative law judge's decision is supported by substantial evidence. The administrative law judge thoroughly addressed the totality of the evidence and properly found the Section 20(a) presumption invoked based on claimant's back pain and his July 15, 2008 work activities which entailed the lifting and carrying of fire extinguishers.[2] *See Port Cooper/T. Smith Stevedoring Co. v. Hunter,* 227 F.3d 285, 287, 34 BRBS 96, 97(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP [Prewitt],* 194 F.3d 684, 687, 33 BRBS 187, 189(CRT) (5th Cir. 1999); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Welch v. Pennzoil Co.,* 23 BRBS 395, 401 (1990). Further, the administrative law judge properly

[2] Contrary to employer's statements regarding invocation, claimant is not required to introduce medical evidence establishing that the working conditions in fact caused the harm in order to invoke the Section 20(a) presumption; rather, he need establish only the existence of an accident or working conditions that could have caused the harm. *Hampton v. Bethlehem Steel Corp.,* 24 BRBS 141, 144 (1990).

determined that the evidence relied upon by employer to rebut the Section 20(a) presumption does not constitute substantial evidence that claimant's back condition was not caused or aggravated by his July 15, 2008 work activities.[3] *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *see generally Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). As our review of the administrative law judge's decision and the record in this case reveals no reversible error by the administrative law judge in concluding that the Section 20(a) presumption was invoked and not rebutted, we affirm the administrative law judge's finding that claimant's disabling back condition is work-related. Consequently, we affirm the administrative law judge's ongoing award of temporary total disability benefits commencing July 15, 2008.

[3] Employer relied on evidence that claimant had a pre-existing back condition and on claimant's initial failure to causally relate his onset of back pain to his work activities. The administrative law judge correctly recognized that, in view of the aggravation rule, evidence of a pre-existing condition alone cannot rebut the Section 20(a) presumption. *See* Decision and Order at 15-16; *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). Furthermore, the fact that claimant was initially unsure of the reason for the onset of severe back pain does not meet employer's burden of producing substantial evidence that his condition is not work-related. *See generally Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge