BRB No. 88-3945

HADDAS B. SYLVESTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMY & AIR FORCE EXCHANGE	)	DATE ISSUED:
	)	
and	)	
	)	
CIGNA/INA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Denial of Motion for Reconsideration of Vivian Schreter Murray, Administrative Law Judge, United States Department of Labor.

Willie R. Brown (Gardner & Brown), Ayer, Massachusetts, for claimant.

Timothy F. Nevils (Sullivan and Cronin), Boston, Massachusetts, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Denial of Motion for Reconsideration (88-LHC-0136) of Administrative Law Judge Vivian Schreter Murray 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 incorporated by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171, 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).

Claimant sustained an injury to her back on November 1, 1986, when she slipped on a wet floor while in the course of her employment with employer. Claimant filed a claim under the Act, contending that she is temporarily totally disabled as a result of the pain related to her cervical sprain and the onset of urological problems which became symptomatic as a result of her

work-related trauma. Following the November 1986 incident, claimant attempted to return to work, but was allegedly unable to do so due to her pain; as of the date of the formal hearing, claimant had not returned to work.

In her Decision and Order, the administrative law judge, after accepting the parties' stipulation that claimant's average weekly wage at the time of her injury was $172.50, determined that claimant sustained a mild cervical strain, reached maximum medical improvement on December 5, 1986, and was fully capable of performing her usual employment duties with employer after that date. Accordingly, the administrative law judge awarded claimant temporary total disability compensation through December 5, 1986. 33 U.S.C. §908(b). Thereafter, claimant filed a motion for reconsideration, contending that the administrative law judge erred by failing to take into consideration her post-hearing brief. Subsequently, in a Denial of Motion for Reconsideration, the administrative law judge addressed the issues raised by claimant in her post-hearing brief. Specifically, the administrative law judge found that employer was not liable for claimant's urological treatment and tests because such treatment was neither necessary nor appropriate for the work-related cervical strain and because claimant had neither sought prior authorization for such treatment nor provided reports to employer and the deputy commissioner; additionally, the administrative law judge denied claimant's request for reimbursement for the services rendered by Drs. Fleming, Moon, Rathore and Sheffler. Thus, the administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant challenges the administrative law judge's determination that her urological problems are unrelated to her work-injury, as well as the administrative law judge's findings on employer's liability for continuing compensation payments, medical expenses, and claimant's counsel's fee. Claimant also contends that the administrative law judge displayed bias against her and her counsel. Employer responds, urging affirmance.

I. Judicial Bias

Claimant contends that the administrative law judge exhibited bias towards her and her counsel. Specifically, claimant alleges bias in the administrative law judge's determination that her post-hearing Memorandum of Law was not timely filed, the administrative law judge's request for physicians' curricula vitae, and the administrative law judge's decision to question claimant at the formal hearing. Initially, we hold that any error committed by the administrative law judge in her initial decision in stating that claimant's post-hearing brief was untimely filed is harmless, as it is uncontroverted that the administrative law judge thereafter fully considered each of the contentions set forth in that brief. See Denial of Motion at 2.

Section 702.338, 20 C.F.R. §702.338, provides that the administrative law judge has a duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents. See also 33 U.S.C. §923(a). Accordingly, the administrative law judge has great discretion concerning the admission of evidence. Raimer v. Willamette Iron & Steel Co., 21 BRBS 98 (1988). We hold, therefore, that the administrative law judge committed no error in requesting the curricula vitae of the physicians offering testimony in this case. Additionally, we hold that the administrative law judge's questioning of claimant at the hearing does not demonstrate hostility, as an administrative law judge must fully inquire into matters that are fundamental to the disposition of the issues in the case before her. See 20 C.F.R. §§702.330, 702.339. Lastly, we note that adverse rulings alone are insufficient to show bias. Raimer, 21 BRBS at 98.

II. Causation

Claimant next challenges the administrative law judge's determination that her urological problems are not causally related to her November 1986 work injury. In establishing that an injury arises out of her employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption which applies to the issue of whether an injury is causally related to her employment. See Perry v. Carolina Shipping Co., 20 BRBS 90 (1987). Claimant is entitled to this presumption once she has established the two elements of her prima facie case, i.e., that she sustained some harm or pain and that working conditions existed or an accident occurred which could have caused the harm or pain. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981). Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by her employment. Sam v. Loffland Brothers Co., 19 BRBS 228 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence to sever the causal connection between the injury and the employment. See Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. See Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985).

In the instant case, the administrative law judge found that a November 1986 work-accident occurred; furthermore, the administrative law judge found that claimant subsequently experienced urological problems.[1] Thus, claimant has established

[1]We note that the causal connection between claimant's back complaints and her employment is not at issue before us.

the two elements of her prima facie case and is therefore entitled to the Section 20(a) presumption that her urological condition was caused or aggravated by her employment. The administrative law judge, in analyzing causation, did not apply the Section 20(a) presumption to the question of whether claimant's employment accident aggravated a prior urological condition. It is well-established that the Section 20(a) presumption applies to whether an injury is caused directly by the employment or is the result of the aggravation of a prior condition. See Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). It is sufficient for purposes of causation if claimant's employment "aggravates the symptoms of the process." Pittman v. Jeffboat, Inc., 18 BRBS 212 (1986). Our review of the record demonstrates that employer did not present specific and comprehensive evidence to establish that claimant's urological condition was not aggravated by her work injury. Accordingly, as employer has submitted no evidence sufficient to rebut the Section 20(a) presumption, we reverse the administrative law judge's finding of no causation and hold that causation is established as a matter of law. See Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

III. Disability

Next, claimant contends that the administrative law judge erred in finding that claimant was capable of returning to her usual employment duties with employer as of December 5, 1986. We agree. Claimant bears the burden of establishing the nature and extent of her disability. See Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56 (1985). To establish a prima facie case of total disability, claimant must show that she is unable to return to her usual work. See Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988). In order to determine whether claimant has shown that she is incapable of performing her former work duties, the administrative law judge must compare claimant's medical restrictions with the physical requirements of her usual employment, Carroll v. Hanover Bridge Marina, 17 BRBS 176 (1985); however, a claimant's credible complaints of pain alone may be sufficient to meet her burden of establishing disability. See Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989).

In the instant case, the administrative law judge, after specifically rejecting claimant's continued complaints of pain, credited and relied upon the testimony of Dr. Stanton in concluding that claimant was capable of resuming her usual employment duties with employer. Specifically, the administrative law judge, after noting Dr. Stanton's reservations in a December 5, 1986, report regarding claimant's ability to return to work pending the results of an EMG examination, and the subsequent negative findings of that examination, concluded that Dr. Stanton would have returned claimant to her regular employment without modification had he known that claimant's EMG results were

negative. See Decision and Order at 7. This conclusion rests on pure speculation by the administrative law judge. In fact, on both December 9, 1986, and January 27, 1987, Dr. Stanton stated that claimant was not to return to work for an additional eight weeks. Accordingly, as the opinions of the physician relied upon by the administrative law judge support a conclusion that claimant was not capable of returning to work on December 5, 1986, or for some time thereafter, we vacate the administrative law judge's finding that claimant was capable of performing her usual employment duties with employer on that date, since that finding is unsupported by the evidence upon which she relied. See generally Cordero v. Triple A Machine Shop, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979). We remand this case for the administrative law judge to reconsider the issue of the nature and extent of claimant's disability and reach a decision based on substantial evidence in the record as a whole. We note, however, that the record lacks evidence to support a finding that claimant was not disabled as of December 5, 1986.

IV. Medical Expenses

Claimant next alleges that the administrative law judge erred by failing to order employer to pay the medical charges incurred by her as a result of her work-related conditions.

Section 7(a) of the Act generally describes an employer's duty to provide medical and related services and costs necessitated by its employee's work-related injury. 33 U.S.C. §907. In order for a medical expense to be assessed against employer, however, the expense must be both reasonable and necessary and must be related to the injury at hand. See Pardee v. Army & Air Force Exchange Service, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. If claimant's work injury aggravates, accelerates, or combines with a pre-existing condition, the entire condition is compensable. See, e.g., Kelley v. Bureau of National Affairs, 20 BRBS 169 (1988). Pursuant to Section 7, a claimant must request authorization from employer prior to seeking medical help before employer will be held liable for claimant's medical expenses. See 33 U.S.C. §907(d). Once employer refuses to provide treatment or to satisfy claimant's request for treatment, claimant is released from the obligation of continuing to seek employer's approval for subsequent treatment. See Roger's Terminal and Shipping Co. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cit. 1986), cert. denied, 107 S.Ct. 101 (1986)

In denying reimbursement for the medical charges of claimant's treating physicians, the administrative law judge, after finding that claimant's work-related back injury had resolved, and that claimant's urological condition was not work-related, determined that claimant did not obtain authorization

from employer for those physicians' services, the treatment rendered was not necessary for any work-related condition, and the necessary reports were not filed. Claimant, however, as discussed, submitted medical evidence that her work-related back condition prohibited her from returning to work subsequent to December 5, 1986. Therefore, as we have vacated the finding that her back condition resolved as of this date, the necessity of treatment thereafter must be reconsidered on remand. Moreover, we have held that employer failed to rebut the presumption that her work injury aggravated a pre-existing urological condition; thus, claimant is entitled to reasonable and necessary medical treatment for this work-related condition. See Romeike v. Kaiser Shipyards, 22 BRBS 57 (1989).

On remand, therefore, the administrative law judge must reconsider claimant's entitlement to medical benefits. Regarding the administrative law judge's findings as to whether claimant requested authorization and reports were filed as required by Section 7(d), 33 U.S.C. §907(d), we note claimant asserts that the administrative law judge raised these issues sua sponte and that employer never raised Section 7(d). This assertion is supported by employer's Response Brief to the Board, stating that if claimant's ongoing treatment were related to the work injury, it would be liable for medical expenses. Moreover, the administrative law judge's decision indicates that some medical treatment was authorized by employer or the district director and that claimant was referred for other treatment by her authorized physician. Claimant contends that correspondence in the record establishes that both employer and the district director were advised of the referrals and course of treatment. The administrative law judge should reconsider the authorization issue, if properly raised, under the appropriate standard, see Roger's Terminal, 784 F.2d at 687, 18 BRBS at 79 (CRT). Finally, the reporting requirement of Section 7(d) refers only to the first report of treatment. 33 U.S.C. §907(d)(2). The file contains reports from Drs. Stanton and Sheffler on Department of Labor forms, Pet. Ex. 14, 18, as well as numerous other reports allegedly sent to employer and the district director. Therefore, the administrative law judge's decision to deny payment of claimant's medical expenses is vacated, and the case is remanded for further consideration of claimant's entitlement to medical treatment for her work-related back and urological conditions.

V. Attorney's Fee

Lastly, claimant challenges the administrative law judge's failure to award an attorney's fee. Employer responds that claimant's attorney has failed to file a proper petition. Although the record contains a fee petition which claimant's attorney filed with the Office of Administrative Law Judges, the administrative law judge has not addressed this petition.

Therefore, there is no Order for the Board to review. Accordingly, on remand, the administrative law judge must address claimant's request for a fee award.

Accordingly, the administrative law judge's determination that claimant's urological condition is not work-related is reversed. Additionally, the administrative law judge's findings that claimant is capable of returning to her usual employment duties and that employer is not liable for claimant's medical expenses are vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order and Denial of Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge