BRB No. 91-764

MERRELL DEDMON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMY & AIR FORCE EXCHANGE SERVICE	)	DATE ISSUED:
	)	
and	)	
	)	
ESIS/CIGNA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of James J. Butler, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum, San Francisco, California, for claimant.

Frank B. Hugg, San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (89-LHC-1736) of Administrative Law Judge James J. Butler 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 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 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).

Claimant, a black woman, was employed as a Grade 5 storage warehouse foreman at employer's Oakland Distribution Center. On August 8, 1988, claimant's recently appointed supervisor, Vernon Heckel, initiated a discussion with claimant concerning rumors that claimant had coached her cousin regarding an Equal Employment Opportunity (EEO) discrimination claim against employer. On August 23, 1988, claimant filed an EEO complaint against employer. There-after, claimant took disability leave due to psychiatric

problems from September 20, 1988 to February 28, 1989, during which time claimant was treated by Dr. Kyle-Vega. Dr. Kyle-Vega released claimant to return to work on February 28, 1989, but continued to provide psychiatric care. Upon her return to work, claimant was informed by Mr. Heckel that he would not change his managerial style. On March 27, 1989, claimant filed an EEO retaliation complaint against Mr. Heckel, and was thereafter transferred from employer's storage department to its shipping department. Claimant experienced difficulties in performing her new employment duties, continued to experience psychiatric problems, and intermittently took days off work.

On October 6, 1989, claimant and employer entered into an EEO settlement agreement whereby employer agreed to publicly acknowledge Mr. Heckel's wrongdoing and to remove him from employment at the Oakland Distribution Center, to retroactively promote claimant to a Grade 6 warehouse foreman in its storage department, to acknowledge wrongdoing in the transfer of claimant from its storage department to its shipping department, and to upgrade claimant's June 1989 performance rating. Thereafter, on December 20, 1989, claimant, contending that employer's failure to fully comply with the terms of the EEO settlement had caused her further emotional stress, resigned from her position with employer. Claimant began work as an eligibility technician with the Alameda County Social Services Agency on January 8, 1990, and was working in that capacity at the time of the hearing.

Claimant filed a claim for benefits under the Act, contending that she suffered stress-related psychiatric problems as a result of the August 8, 1988 incident and her subsequent difficulties with Mr. Heckel which she attributed to racial discrimination, harass-ment and retaliation directed toward both herself and other black employees and job applicants. In her claim, claimant sought an award of temporary total disability compensation, pursuant to 33 U.S.C. §908(b), for the period September 15, 1988 through February 28, 1989, and for intermittent days when she missed work between February 28, 1989 and January 1, 1990. Claimant also requested an award of permanent partial disability compensation, pursuant to 33 U.S.C. §908(c)(21), from the end of 1989 and continuing. Following a formal hearing, claimant filed a trial brief and employer filed a proposed Decision and Order - Denying Benefits with the administrative law judge. In his Decision and Order, the administrative law judge denied claimant's claim on the grounds that claimant did not sustain a work-related injury, that claimant's period of temporary disability from September 15, 1988 to February 28, 1989 was unrelated to her employment, and that claimant suffered no permanent partial disability.

On appeal, claimant challenges the administrative law judge's denial of benefits; specifically, claimant contends, inter alia, that the administrative law judge erred in adopting employer's post-hearing brief in its entirety. Employer responds, urging affirmance.

We agree with claimant that the administrative law judge erred in adopting employer's brief as his decision. In his decision, the administrative law judge initially states that "with little editing I have adopted and fully utilized each of the suggested findings and conclusions submitted by Employer." See Decision and Order at 2. Decisions rendered by administrative law judges under the Act, however, are required by the Administrative Procedure Act (APA) to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented in the record." 5 U.S.C. §557(c)(3)(A). Thus, in rendering a decision, an administrative law judge must adequately detail the rationale behind his decision, he must analyze and discuss the medical evidence of record, and he must explicitly set forth the reasons as to why he has accepted or rejected such evidence. See, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 380 (1990); Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988); Ballesteros v. Willamette Western Corp., 20 BRBS 184 (1988); Williams v. Newport News Shipbuilding & Dry Dock Co., 17 BRBS 61 (1985).

Although it is not per se error for an administrative law judge to adopt or to incorporate verbatim language from a party's pleading, see Williams, supra, 17 BRBS at 62; Orange v. Island Creek Coal Co., 3 BLR 1-636 (1978), an administrative law judge's incorporation of factual and legal assertions from a party's brief is impermissible to the extent it prevents independent review of the evidence by the adjudicator. Id. In the instant case, the administrative law judge's adoption of employer's proposed Decision and Order, which presents a view of the evidence which is biased in support of employer's opposition to the claim, conflicts with the administrative law judge's duty to impartially evaluate the evidence in his role as a neutral adjudicator. Rather, the administrative law judge's decision reflects a selective analysis of the evidence and conclusory findings.

Our review of the record, for example, indicates that the medical evidence regarding causation, which consists primarily of the opinions of Drs. Kyle-Vega and Brodsky, is in conflict. In evaluating this evidence, the administrative law judge relied heavily upon the office notes of Dr. Kyle-Vega, claimant's treating psychiatrist, which he found to be accurate and reliable, but rejected Dr. Kyle-Vega's opinion that claimant was disabled by a work-related stress condition without setting forth and discussing Dr. Kyle-Vega's diagnosis or opinions as to causation and disability.[1] Rather, the administrative law judge set forth

[1]Dr. Kyle-Vega initially diagnosed claimant's condition as depression reaching psychotic proportions, which she opined was primarily caused by claimant's work-related stress. See Transcript at 273-293. Dr. Kyle-Vega further testified that,

his own conclusions, which are contrary to the conclusions reached by Dr. Kyle-Vega, as to the effect of various events in claimant's personal life on claimant's mental condition; specifically, after referring to Dr. Kyle-Vega's notes, the administrative law judge found that "all of the personal, nonindustrial events in Claimant's life were tragic, chronic and debilitating" and that the work-events which form the basis for claimant's claim "pale against the personal hardships which Claimant suffered and endured." See Decision and Order at 8. Additionally, the administrative law judge relied on the opinion of Dr. Brodsky, employer's psychiatrist, without addressing the inconsistencies in Dr. Brodsky's report and hearing testimony concerning the issue of whether claimant has a mental disorder, the cause of any such disorder, or Dr. Brodsky's explanation of these inconsistencies.[2] Based upon the administrative law judge's failure to perform independent factfinding based upon the totality of the evidence of record, we conclude that remand of this case to the administrative law judge is necessary.

On remand, the administrative law judge must independently consider the medical evidence of record, consistent with the applicable legal standards, regarding the issue of whether claimant has a work-related psychiatric impairment.[3] It is well-

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absent her work-related stress, claimant would not have been off work due to her personal stresses. Id. at 281-82, 319-328.

[2]Specifically, the administrative law judge initially determined that Dr. Brodsky was of the opinion that claimant had no mental disorder as defined by the American Psychiatric Association's Diagnostic and Statistical Manual (DSM III), apparently based upon statements by Dr. Brodsky in his report and initial hearing testimony, without addressing Dr. Brodsky's further testimony that claimant did have the mental disorders, classifiable by the DSM III, of dysthymia and an anxiety disorder. See Decision and Order at 11; Transcript at 142-145, 155, 168-170. Secondly, while the administrative law judge credited Dr. Brodsky's opinion that claimant's employment did not cause or aggravate a mental disorder, the administrative law judge failed to address the inconsistencies in Dr. Brodsky's statements concerning the significance of any personal problems claimant might have had; specifically, Dr. Brodsky noted that claimant's anger at Mr. Heckel could have aggravated the psychological factors affecting her physical condition. Id. at 143.

[3]The administrative law judge, when discussing the initial event of August 8, 1988 which claimant alleges precipitated her medical condition, stated that "[Mr.] Henkel was reprimanded for his "reprisal," and whatever may have been the EEO resolution, any and all "whole remedy" relief was afforded the Claimant for the events of the "closed door meeting" [with Mr. Henkel]." See

established that a work-related psychiatric impairment is compensable under the Act, and that the Section 20(a), 33 U.S.C. §920(a), presumption applies to psychiatric injury cases. See Sanders v. Alabama Dry Dock and Shipbuilding Co., 22 BRBS 340 (1989); Marino v. Navy Exchange, 20 BRBS 166 (1988). See also Director, OWCP v. Potomac Electric Power Co., 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979). Where an employment-related injury aggravates, combines with or accelerates a pre-existing condition, the entire resultant condition is compensable. See Sinclair v. United Food and Commercial Workers, 23 BRBS 148 (1989). In order to invoke the Section 20(a) presumption, claimant must establish a prima facie case by proving that she suffered some harm or pain and that an accident occurred or working conditions existed which could have caused the harm or pain.[4] Id. If, on remand, the administrative law judge finds the Section 20(a) presumption invoked, he must determine whether employer has produced substantial countervailing evidence to rebut the work-relatedness of claimant's psychological condition. See generally Care v. WMATA, 21 BRBS 248 (1988). If the administrative law judge determines that the presumption has been rebutted, he must consider the causation issue based upon the record as a whole, with employer bearing the ultimate burden of persuasion. See Parsons Corp. of California v. Director, OWCP, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980).

Finally, if the administrative law judge finds that claimant sustained a psychological injury caused or aggravated by her employment, he must independently consider the issues of the

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Decision and Order at 10. Contrary to the administrative law judge's statement, the resolution of claimant's EEO action against employer does not preclude claimant from establishing entitlement to benefits under the Act. Rather, employer's acknowledgement of wrongdoing by Mr. Henkel supports claimant's prima facie case, i.e., that working conditions existed which could have caused her harm. See discussion infra.

[4]In finding a legitimate business purpose for the employment incidents forming the basis of claimant's claim, the administrative law judge relied on the perception of these events held by Brenda Johnson, employer's personnel representative. Specifically, after noting claimant to be a sincere and believable person, the administrative law judge rejected her testimony in favor of the testimony of Ms. Johnson, who "did not perceive any conduct even remotely suggesting racially motivated or unfair action directed against claimant." See Decision and Order at 11. The relevant issue, however, is whether claimant experienced employment-related stress; thus, it is claimant's perception of the employment events which is relevant to establishing claimant's prima facie case. Moreover, the administrative law judge may not ignore the evidence of the EEO settlement agreement, which resolved the racial discrimination issues in this case in favor of claimant.

nature and extent of claimant's disability, as well as claimant's entitlement to medical care, since a work-related injury need not be disabling in order for claimant to be entitled to medical benefits. See, e.g., Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1986).

Lastly, we reject claimant's argument that the administrative law judge erred in failing to order employer to produce a psychiatric report obtained by employer's short-term disability insurer, Aetna Insurance. The administrative law judge rationally accepted employer's assertion that it did not possess a copy of the report and determined that claimant could have requested that Aetna's records be subpoenaed prior to the hearing; thus, the administrative law judge acted within his discretion in declining to order employer to produce the report. See, e.g., Sam v. Loffland Brothers Co., 18 BRBS 228, 230 (1987).

Accordingly, the administrative law judge's denial of claimant's motion to compel production of the Aetna psychiatric report is affirmed; in all other respects, the Decision and Order Denying Benefits of the administrative law judge is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge