BRB No. 87-910

MARSHALL T. WRIGHT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
J. A. JONES CONSTRUCTION	)	DATE ISSUED:
	)	
and	)	
	)	
AFIA WORLDWIDE INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

James M. McAdams, (Magana, Cathcart, McCarthy & Pierry), Wilmington, California, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (83-LHC-74) of Administrative Law Judge Henry B. Lasky 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 Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 F.2d 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. To briefly recapitulate, claimant was working for employer in Saudi Arabia as an electrical superintendent when, on August 15, 1975, he wounded his hand on a nail. Following this incident, claimant went to a local medical facility for a tetanus shot; immediately thereafter, he suffered a severe allergic reaction to the injection, experiencing nausea, hives, and nervousness. Claimant continued to work though his symptoms persisted; however, in March 1976 he returned to the United States to seek additional medical treatment and has not worked since. Employer paid temporary total disability benefits to claimant

from April 8, 1976 to June 2, 1982. 33 U.S.C. §908(b).

Claimant was treated by Dr. Kinsling from March 1976 until the hearing in March 1983; Dr. Kinsling treated claimant's symptoms with tranquilizers, anti-depressants, and weekly injections of Vitamin B-12.

In his initial Decision and Order, the administrative law judge discredited Dr. Kinsling's opinion that claimant was suffering from post-serum sickness due to an allergic reaction to the injection in 1975. The administrative law judge did not apply the Section 20(a) presumption, 33 U.S.C. §920(a). However, based on the other medical evidence of record, he found that claimant's present complaints are attributable to military injuries and personality problems which pre-dated the 1975 injection, and are not caused by the injection he received in Saudi Arabia. Thus, the administrative law judge denied claimant's claim for permanent total disability benefits. Previously, claimant had submitted a post-hearing motion to reopen the record for submission of additional medical evidence; the administrative law judge denied this motion prior to issuing his Decision and Order.

Claimant appealed the denial of his claim to the Board. *See Wright v. J. A. Jones Construction*, BRB No. 83-1094 (February 27, 1987)(unpublished)(Brown, J., dissenting). The Board held that the administrative law judge erred in not applying the Section 20(a) presumption, and further determined that this error was not harmless. Specifically, the Board noted that in finding no causation, the administrative law judge relied on a notation of "hypochondreal personality disorder" in a Veterans Administration report, and a statement in Dr. Mauer's 1982 report that the 1975 injection was not the cause of claimant's psychiatric problems. The Board held that this could arguably be deemed insufficient to sever the presumed causal nexus between claimant's psychological difficulties and the 1975 injection. Thus, the Board remanded the case for the administrative law judge to apply the Section 20(a) presumption and consider the issue of rebuttal. The Board also stated that in denying claimant's motion to reopen the record, the administrative law judge may have been influenced by his failure to recognize that claimant is entitled to the Section 20(a) presumption; thus, the Board additionally noted that the administrative law judge on remand may wish to reconsider his decision to deny claimant's request to reopen the record.

On remand, the administrative law judge invoked the Section 20(a) presumption of causation, but found that the presumption was unequivocally rebutted by the credible medical evidence of record, specifically the opinion of Dr. Mauer that claimant's condition is not related to his reaction to the injection in 1975. Thereafter, in analyzing the record as a whole, the administrative law judge found the medical opinions relied upon by claimant, specifically that of Dr. Kinsling, were unpersuasive, and credited the opinions of Drs. Mauer and Cooperman that claimant's condition is not related to his 1975 allergic reaction. Lastly, the administrative law judge reaffirmed his denial of claimant's request to reopen the record, noting that claimant had seven and one-half years between the injury and the hearing to obtain evidence, and finding that his dissatisfaction with the evidence presented was not a basis to reopen the record.

On appeal, claimant contends that the administrative law judge erred in denying his request to reopen the record in order to submit psychiatric evidence. Although not specifically raising causation as an issue, claimant additionally insists that the record should be reopened and the case

heard again. Employer has not responded to the appeal.

Claimant initially contends that since the only psychological evidence of record was the 1978 report of Dr. Porter, the administrative law judge erred on remand by once again denying claimant's request to reopen the record in order to submit additional psychological evidence.[1] We disagree. An administrative law judge has the discretion to hold the record open after a hearing for the receipt of additional evidence, but a party seeking to admit evidence must exercise diligence in developing its claim prior to the hearing. *See Smith v. Ingalls Shipbuilding, Inc.*, 22 BRBS 46 (1989); *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987). In the instant case, the administrative law judge, on remand, specifically noted that he had not denied claimant's post-hearing motion to reopen the record in his first decision due to a failure to recognize that claimant was entitled to the Section 20(a) presumption. Rather, the administrative law judge stated that his decision was based on the fact that claimant had seven and one-half years between the date of his injury and the hearing to marshal probative medical evidence with reference to his claim. Thus, the administrative law judge reaffirmed his finding that the incredible nature of claimant's claim and his dissatisfaction with the evidence presented was not a basis to reopen the record. Inasmuch as claimant had ample opportunity to develop and submit evidence with regard to the issue of whether claimant's psychological problems are related to his work-related allergic reaction in 1975, we hold that the administrative law judge did not abuse his discretion in denying claimant's request to reopen the record. *See Smith*, 22 BRBS at 50. Accordingly, claimant's contention of error is rejected.[2]

Where, as in the instant case, claimant establishes a harm or pain, and working conditions or the occurrence of an accident which could have caused that harm or pain, claimant has established a *prima facie* case, and he is entitled to the presumption at Section 20(a) to establish that his injury arose out of and in the course of his employment. *See generally Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Sam*, 19 BRBS at 228. It is the 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

[1]In his May 1, 1978 report, Dr. Porter did not refer to claimant's 1975 allergic reaction; rather, the physician noted that claimant had lost both parents at an early age, suffered a feeling of loss when he was separated from the military due to an injury, his relationships with women were not rewarding, and that he has never been able to express anger, resulting in depression. Dr. Porter recommended intensive psychiatric treatment. Cl. Ex. 3.

[2]We note that under Section 22 of the Act, 33 U.S.C. §922, claimant may file a motion for modification to reopen the record, if he asserts that there has been either a mistake in fact or a change in condition, and that evidence to be produced would bring the case within the scope of Section 22. *See Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49, 52-53 (1989).

1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). 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 Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). In this regard, the United States Court of Appeals for the Ninth Circuit, wherein appellate jurisdiction of this case lies, has stated that even after substantial evidence is produced to rebut the Section 20(a) presumption, the employer still bears the burden of persuasion. *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980); *see also Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991).

In the instant case, the administrative law judge on remand invoked the Section 20(a) presumption but, after setting forth the medical evidence of record, found that the opinions of Drs. Mauer and Cooperman were sufficient to rebut the presumption. In his 1982 report, Dr. Mauer stated that claimant does not suffer from post-serum sickness since that condition is a benign, self-limited disease which subsides in one to three weeks. Emp. Ex. 1. Dr. Cooperman similarly opined that although claimant did initially suffer from serum sickness after the 1975 injection, it is unheard of for such a reaction to last in excess of one year. Emp. Ex. 2. As these opinions are specific and comprehensive, and constitute substantial evidence severing the casual connection between claimant's present condition and his employment, we affirm the administrative law judge's determination that employer established rebuttal of the Section 20(a) presumption. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Lastly, we hold that it was within the administrative law judge's discretion to credit the opinions of Drs. Mauer and Cooperman over the opinions of Drs. Wiener, Hewitt and Kinsling in determining that claimant's current condition is not related to his employment with employer. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge found that Dr. Wiener

provided no basis for his statement that it was possible that some of claimant's psychological abnormalities are related to his allergic response.[3] Cl. Ex. 3. He also found unpersuasive Dr. Hewitt's 1976 report, which opined that there was a high possibility that claimant was subjected to severe emotional distress in the management of his allergic response; the administrative law judge noted that Dr. Hewitt had not received a sufficiently detailed history of claimant's prior medical condition.[4] Cl. Ex. 3. Lastly, the administrative law judge again discredited the opinion of Dr. Kinsling, finding that the physician has been providing claimant with ineffectual and unnecessary treatment for seven and one-half years following the 1975 allergic reaction without any valid medical basis. *See* Decision and Order on Remand at 2. In adjudicating a claim, an administrative law judge is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Rather, the administrative law judge is entitled to evaluate the credibility of all witnesses and draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Thus, as the administrative law judge's decision to credit the opinions of Drs. Mauer and Cooperman over those of Drs. Kinsling, Wiener and Hewitt is rational, we affirm his determination that claimant's current medical condition is not work-related.

Accordingly, the Decision and Order on Remand of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3]Dr. Wiener stated that while it is possible that some of claimant's psychological abnormalities are related to his allergic response, this cannot be proven with any degree of certainty. Cl. Ex. 3.

[4]Dr. Hewitt also acknowledged that claimant's present complaints might be psychosomatic. Cl. Ex. 3.