BRB No. 99-1136

PETER DAUNOY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EXXON CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
PETROLEUM CASUALTY COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and Order Correcting Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Leonard A. Washofsky (Leonard A. Washofsky A Law Corporation), Metarie, Louisiana, for claimant.

Ira J. Rosenzweig (Smith Martin), New Orleans, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Order Correcting Decision and Order (98-LHC-1087) of Administrative Law Judge James W. Kerr, Jr., 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).

Claimant suffers from fibromyalgia, a condition characterized by generalized pain.

Claimant began working for employer in 1973, first as a field maintenance man and progressing to a senior operator. Claimant testified that in 1994 he was depressed, was not sleeping and began drinking. He separated from his wife in 1992, and was divorced in 1995. He testified that he had problems with sleep adjustment resulting from his alternating day/night shifts and seven days on/seven days off work schedule. He stated that he began experiencing aches and pains, and related them to his job. His drinking escalated and he began using cocaine, resulting in his termination from employment on September 15, 1995, after he failed a random drug screening. In early 1996, claimant began working as a plumber. He sought medical treatment as his hands began to hurt and swell, and he was eventually diagnosed with fibromyalgia. After leaving work as a plumber due to the pain, claimant has not been employed. He sought permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's condition is work-related is invoked as claimant has an injury, fibromyalgia, and there were working conditions, specifically the alternating day/night shifts and later night shifts, with a seven days on/seven days off work schedule and other job stressors, which could have contributed to the development of fibromyalgia. The administrative law judge noted that Dr. Sanders opined that claimant's condition is not related to his work schedule, but found this opinion insufficient to establish rebuttal as it was based on only one interaction with claimant. Thus, the administrative law judge found claimant's fibromyalgia is work-related. In addition, the administrative law judge found that claimant established that he cannot return to his former work based on his credible testimony to that effect and Dr. Wilson's opinion that claimant is "very disabled" by fibromyalgia. Thus, the administrative law judge found that claimant is entitled to permanent total disability benefits from May 5, 1998, and continuing.

On appeal, employer contends that the administrative law judge erred in his application of the Section 20(a) presumption, and thus in finding that claimant's fibromyalgia is work-related. In addition, employer contends that the administrative law judge erred in finding that employer stipulated to claimant's average weekly wage, and contends that claimant's average weekly wage is not represented by his earnings with employer at the time he was fired. Claimant responds, urging affirmance of the administrative law judge's decision.

Initially, employer contends that the administrative law judge erred in finding that Dr. Sanders's opinion is insufficient to establish rebuttal of the Section 20(a) presumption, and thus in failing to weigh the evidence as a whole without the benefit of the presumption. Dr. Sanders stated that "there is no evidence to suggest that [claimant's] illness, be it labeled depression or fibromyalgia, is, in any way, attributable to his work [with employer]." Emp. Ex. 9 at 4. Once, as here, the Section 20(a) presumption is invoked, employer may rebut it

by producing substantial evidence that claimant's employment did not cause, accelerate, aggravate or contribute to his injury. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied,* 120 S.Ct. 1239 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If such evidence is produced, the presumption no longer applies, and the administrative law judge must weigh the competing evidence as a whole, with claimant bearing the burden of persuasion. *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).

In the present case, the administrative law judge found that Dr. Sanders's opinion that claimant's fibromyalgia is not related to his employment is insufficient to rebut the Section 20(a) presumption because he only saw claimant on one occasion. However, the conclusion that this opinion is not persuasive for this reason is not relevant to whether the opinion constitutes substantial evidence that claimant's injury is not work-related, as the evidence is not weighed at rebuttal. Rather, only evidence supportive of employer's position is considered at this juncture. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 102 (1986). Moreover, the unequivocal opinion of a physician that no relationship exists between an injury and claimant's employment is sufficient to rebut the presumption. *See Duhagon v. Metropolitan Stevedore Co.,* 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999). Thus, as Dr. Sanders unequivocally opined that claimant's fibromyalgia is not related to his work with employer, we reverse the administrative law judge's finding that rebuttal is not established and hold that Dr. Sanders's opinion is sufficient to establish rebuttal of the Section 20(a) presumption. Consequently, we vacate the award of benefits and remand the case for the administrative law judge to weigh all of the relevant evidence regarding the cause of claimant's fibromyalgia without the benefit of the presumption. *See Santoro v. Maher Terminals, Inc.,* 30 BRBS 171 (1996).

Employer also contends that the administrative law judge erred in finding that the parties stipulated to claimant's average weekly wage. Employer notes that it did stipulate that claimant earned $1,139 per week in the 52 weeks prior to his termination from employer for drug use, H. Tr. at 10-11, but contends that it did not stipulate that the date of firing was the "time of injury" for purposes of calculating claimant's average weekly wage. In response, claimant does not contend the parties entered into a binding stipulation on this issue, but does aver that the time of injury is appropriately viewed as claimant's last date of employment with employer.

As employer correctly asserts, an employee's average weekly wage is to be

determined as of the "time of injury." 33 U.S.C. §910(a)(b), (c), (i). In the present case, the administrative law judge found that the parties stipulated to claimant's average weekly wage, and thus he did not render findings regarding the appropriate "time of injury." As it is not apparent that the parties, in fact, agreed that claimant's wages at the time of his firing should be used as his average weekly wage, we must remand this case for further consideration of this issue. We therefore vacate the administrative law judge's finding that claimant's average weekly wage is $1,139. If, on remand, the administrative law judge finds claimant's fibromyalgia is work-related, he must determine if the parties indeed stipulated to claimant's average weekly wage. If they did not, the administrative law judge must determine claimant's "time of injury" for purposes of calculating claimant's average weekly wage,[1] and calculate claimant's average weekly wage in reference to this date. *See generally Leathers v. Bath Iron Works Corp.*, 135 F.3d 78, 32 BRBS 169(CRT) (1st Cir. 1998); *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d. 157, 31 BRBS 195(CRT) (5th Cir. 1997); *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989); *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997).

Accordingly, the administrative law judge's award of benefits is vacated, and the case is remanded for further findings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[1] Employer also contends that fibromyalgia is not an occupational disease as defined in *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d. 157, 31 BRBS 195(CRT) (5th Cir. 1997). On remand, the administrative law judge must resolve this issue in order to determine the appropriate date of injury for purposes of Section 10. 33 U.S.C. §910; *see also Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989); *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999).