

BRB Nos. 05-0519
and 05-0868

TROY P. CREMEEN, JR.)
)
 Claimant-Petitioner)
)
 v.)
)
 SUPERIOR BOAT WORKS,) DATE ISSUED: 07/24/2006
 INCORPORATED)
)
 and)
)
 MISSISSIPPI INSURANCE GUARANTY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeals of the Decision and Order Denying Benefits, Decision and Order Denying Claimant's Petition for Reconsideration, and Decision and Order-Denying Section 22 Modification of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Troy P. Cremeen, Jr., Greenville, Mississippi, *pro se*.

R. Brittain Virden (Campbell Delong LLP), Greenville, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order-Denying Benefits, Decision and Order Denying Claimant's Petition for Reconsideration, and Decision and Order-Denying Section 22 Modification (2004-LHC-01382) of Administrative Law Judge Richard D. Mills 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). In an appeal where claimant is not represented by counsel, the Board will review the administrative law judge's decision to determine if the findings

of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law; if they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant alleged that, on August 3, 1998, he fell three feet from a dock onto an “iron deck” in a work-related accident. Tr. at 54. Claimant was examined at Family Medical Center on the day of his accident, treated for a leg wound, and released. Claimant subsequently alleged that he also hurt his back in this fall, and he sought medical treatment for his back on September 11, 1998. The record contains evidence of treatment for back pain from this time through April 16, 2004. Claimant filed a claim for benefits under the Act for total disability and medical benefits for his back condition. Employer controverted the claim on the ground that claimant’s current back condition is due to the natural progression of claimant’s pre-existing degenerative disc disease stemming from a 1997 car accident.

The administrative law judge found that claimant presented sufficient evidence to establish his *prima facie* case and invoke the Section 20(a) presumption of causation, 33 U.S.C. §920(a), based on the medical records showing that claimant suffers from a back condition and on claimant’s testimony that he fell three feet from a dock, as corroborated by his father, a supervisor for employer. Tr. at 53-54, 134. The administrative law judge found that employer presented substantial evidence to rebut the presumption because claimant’s MRI’s before and after the accident showed no worsening of his back condition. The administrative law judge also relied on the fact that claimant was taking medication for his pre-existing back pain at the time of the work accident. On weighing the evidence as a whole, the administrative law judge found that claimant did not establish that his current back condition was caused by his fall at employer’s facility. The administrative law judge denied claimant’s motion for reconsideration.

Claimant appealed the administrative law judge’s decision to the Board, without the assistance of counsel, but submitted additional documentation with his notice of appeal. BRB No. 05-0519. The Board issued an Order on June 5, 2005, informing claimant that the new evidence attached to his appeal could not be considered by the Board. The Board construed the documents to constitute a request for modification and therefore dismissed claimant’s appeal without prejudice and remanded the case to the administrative law judge for modification proceedings. 33 U.S.C. §922.

The administrative law judge addressed all of claimant’s newly submitted evidence and found that it is insufficient to establish a change in condition or mistake in fact. Specifically, the administrative law judge stated that he had previously considered medical records documenting claimant sacroiliac (SI) joint problems, but that neither the original nor new evidence relates this condition to claimant’s fall at work. Therefore, the administrative law judge denied the motion for modification.

On July 25, 2005, the district director forwarded to the Board claimant's letter stating that he wished to appeal the administrative law judge's decision denying modification. In an Order dated August 5, 2005, the Board acknowledged claimant's Notice of Appeal of the administrative law judge's decision denying modification, and assigned it BRB No. 05-0868. In addition, the Board reinstated claimant's previous appeal of the administrative law judge's Decision and Order Denying Benefits and Decision and Order Denying Petition for Reconsideration, BRB No. 05-0519, on the docket and consolidated it with claimant's new appeal. Employer responds, urging affirmance of the administrative law judge's decisions.¹

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In this case, the administrative law judge found that claimant suffers from a back condition and that an accident occurred at work that could have caused claimant's back condition. Therefore, he gave claimant the benefit of the Section 20(a) presumption relating claimant's back condition to the work accident. Decision and Order at 10. This finding is affirmed, as it is supported by substantial evidence, and, moreover, is unchallenged on appeal.

Where, as in the present case, claimant has established invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003). When the work-related aggravation of a pre-existing condition is at issue, employer must produce substantial evidence that the work accident neither directly caused the injury nor aggravated the pre-existing condition. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). Pursuant to the "aggravation rule," if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resulting condition is compensable. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *see also Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (*en banc*). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of

¹ We reject employer's contention that claimant's letters to the Board fail to raise any "appealable issues." The Board, by Order dated August 5, 2005, waived the requirements of 20 C.F.R. §802.211(a), (b). *See* 20 C.F.R. §§802.211(e), 802.220.

persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge found that employer rebutted the Section 20(a) presumption by producing evidence that claimant had a pre-existing back injury of a permanent nature and that his MRI's after the work-related accident show no "objective changes" or "worsening" of claimant's back condition when compared to the pre-injury MRI's. Decision and Order at 10-11. After his car accident in 1997, claimant's MRI dated April 8, 1998, revealed central disc protrusions at L4-5, L5-S1. CX 4(a)-(e). The administrative law judge found that the post-injury MRI's dated March 2, 1999, November 13, 2001, and November 30, 2002, each show the same bulging discs at L4-5 and L5-SI, and that therefore there was no change in claimant's back condition after his work accident. Decision and Order at 10- 11; EX 3 at 2. The administrative law judge also relied on the fact that claimant had received treatment for his pre-existing back injury through May 19, 1998, two and one- half months prior to his fall at work, and was still on pain medications for that condition when he fell at work. CX 4(b); Tr. at 79. Citing *Yarbough v. C & P Telephone Co.*, 12 BRBS 104 (1980) (Miller, J., dissenting), the administrative law judge concluded that rebuttal was established based on the temporal proximity of claimant's treatment for his pre-existing back injury, his continued use of pain medication before and after the work accident, and the MRI's.

We cannot affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption because the administrative law judge did not address the aggravation rule. Since claimant's work injury was to the same body part as that injured in the 1997 car accident, the aggravation rule is at issue, as is clear from claimant's assertions and from employer's contention that the residual effects of the pre-existing 1997 car accident are the sole cause of claimant's disabling condition. *See Post-hearing Briefs of Claimant and Employer*. As the Section 20(a) presumption was invoked, it became employer's burden to produce substantial evidence that the work accident did not cause claimant's present condition or aggravate the prior condition. *See Burley v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 185 (2002). In this regard, we note that the work accident need not actually worsen claimant's underlying condition. It is sufficient for purposes of causation if the accident aggravated claimant's symptoms, including his pain. *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *see also Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981) (no distinction between acceleration of underlying disease and manifestation of symptoms).

Moreover, we cannot affirm the administrative law judge's reliance on *Yarbough*, 12 BRBS 104, as its viability is undermined by its lack of a detailed discussion of the aggravation rule. In *Yarbough*, the claimant had suffered from chest pains beginning at

least in 1973, when he sustained cracked ribs in a car accident. He subsequently underwent surgery for a spontaneous pneumothorax of the left lung. In 1976, claimant, a security guard, was involved in a shoving match at work with a person who was not authorized to enter the building. Claimant alleged that the shoving incident caused chest and back pain.

The administrative law judge found the Section 20(a) presumption rebutted by claimant's history of chest pain and injury prior to the January 1976 work incident. The Board affirmed the rebuttal finding on the basis that claimant's chest pain after the work incident was the same as it was prior to it, that claimant had complained of this pain only one month before the work incident, and that the x-rays taken after the incident did not reveal any trauma. *Yarbough*, 12 BRBS at 107. With regard to the aggravation rule, the Board stated that the claimant had not made a claim of aggravation, and that the x-rays belied such a claim, in any event. *Id.* The dissenting Board member stated that an aggravation claim had been made, and that, in his opinion, evidence of pre-existing conditions was not sufficient to rebut the Section 20(a) presumption. *Id.* at 108-109.

In this case, claimant raised an aggravation claim, and we agree that evidence of a pre-existing condition and treatment therefor in temporal proximity to the work accident is insufficient to rebut the Section 20(a) presumption. An employer takes its employees as it finds them, *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-148 (D.C. Cir. 1967), and it is employer's burden on rebuttal to produce substantial evidence that the work accident did not aggravate the pre-existing condition. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). In addition, that claimant's MRI's before and after the accident show the same condition in claimant's lumbar spine is not determinative on the facts of this case in light of the evidence that the work injury involves a different condition. Dr. Vohra and Dr. Adam Smith opined that claimant's current condition is due to SI joint disease, CX 17; Letters dated July 21, 2004, April 19, 2005; whereas Dr. Dare opined that the car accident had left claimant with discogenic pain. *See, e.g.*, CX 4c. Consequently, we must vacate the administrative law judge's finding that employer rebutted the Section 20(a) presumption. On remand, the administrative law judge must make a finding as to the nature of claimant's back condition and address whether employer produced substantial evidence that this condition was not caused, and that his pre-existing condition, including the symptoms therefrom, was not aggravated, by the work accident. *Wheatley*, 407 F.2d at 312. If, on remand, the administrative law judge finds that the Section 20(a) presumption is not rebutted, he must address the remaining issues raised by the parties.

In the event that the administrative law judge again finds the Section 20(a) presumption rebutted, we affirm the administrative law judge's finding, in his initial decisions and on modification, that claimant did not establish the work-relatedness of his condition by a preponderance of the evidence, as it is supported by substantial evidence.

In his initial decision, the administrative law judge properly noted that the record contained no medical evidence affirmatively stating that claimant's back condition was related to the fall, and the administrative law judge did not err in refusing to so infer. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Moreover, the administrative law judge rationally rejected claimant's testimony concerning the source and onset of his pain. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

On modification, the administrative law judge addressed all the evidence submitted by claimant and found that claimant did not establish a mistake in fact regarding the cause of his back condition. Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *see Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo I (Rambo I)*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The only evidence submitted on modification addressing the cause of claimant's condition is the letter of Dr. Adam Smith, dated July 21, 2004, wherein he states, "Mr. Cremeen suffers from sacroiliac joint disease, which he apparently sustained in a fall while on the job." The administrative law judge acted within his discretion in finding this opinion to be conclusory, in that there is no documentation concerning Dr. Smith's examinations or treatment of claimant. *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994). As claimant did not establish the work-relatedness of his back condition based on the record as a whole, we affirm the administrative law judge's findings in this regard. *See generally Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004).

Accordingly, we vacate the administrative law judge's denial of benefits and specifically the finding that employer rebutted the Section 20(a) presumption. The case is remanded for further findings consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge