

BRB No. 99-0978

DENNIS D. EMERSON)
)
 Claimant-Respondent)
)
 v.)
)
 NEWPORT NEWS SHIPBUILDING)
 AND DRY DOCK COMPANY) DATE ISSUED:
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order Granting Benefits to the Claimant and Section 8(f) Relief to the Employer and the Decision and Order on Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Richard B. Donaldson, Jr. (Jones, Blechman, Woltz & Kelly, P.C.), Newport News, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason), Newport News, Virginia, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits to the Claimant and Section 8(f) Relief to the Employer and the Decision and Order on Motion for Reconsideration (97-LHC-515) of Administrative Law Richard K. Malamphy 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, who had worked for employer as a firefighter since 1968, experienced an attack of angina on February 7, 1996, after climbing a fifty-foot ladder in order to extinguish a fire on top of a ship shed. He was treated with medication at employer's infirmary that day, and was examined by his treating physician, Dr. Zullo, the following day. Claimant attempted to return to work on February 22, 1996, but employer placed claimant on retirement that day. Thereafter, claimant underwent two angioplasty procedures on April 26, 1996. It is undisputed that claimant, who suffers from coronary artery disease, previously underwent angioplasty and bypass graft procedures in 1991. Claimant filed a claim for permanent total disability benefits under the Act, contending that his work environment, including the February 7, 1996, incident, aggravated his underlying heart condition. Employer voluntarily paid claimant temporary total disability compensation from September 1, 1996 until October 21, 1996. 33 U.S.C. §908(b).

In his Decision and Order, the administrative law judge found that claimant satisfied the status test for coverage under Section 2(3) of the Act, 33 U.S.C. §902(3)(1994). This finding is unchallenged on appeal. The administrative law judge then found that claimant was entitled to invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer did not establish rebuttal of that presumption. The administrative law judge awarded claimant permanent total disability benefits commencing on February 7, 1996, but in a subsequent errata order, modified the award of permanent total disability compensation to commence on February 23, 1996, and continuing. The administrative law judge further found that employer was entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f). Lastly, the administrative law judge found that employer was liable for a penalty for all amounts of compensation previously due pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), as employer had failed to file a timely notice of controversion. In his subsequent Decision and Order on Motion for Reconsideration, the administrative law judge denied employer's request to submit into the record a June 21, 1996, letter, which employer contended was evidence of a notice of controversion, and reaffirmed his Section 14(e) award.

On appeal, employer challenges the administrative law judge's findings regarding causation. Specifically, employer contends that claimant's symptoms were not caused or aggravated by his employment, but rather, were due to his underlying heart condition. Employer further contends that the administrative law judge erred in denying employer's request to reopen the record to submit evidence that it disputed claimant's claim for benefits, in compliance with Section 14(d) of the Act, 33 U.S.C. §914(d), and erred in finding that it was consequently liable for a Section 14(e) penalty. Claimant responds, urging affirmance of the administrative law judge's decisions.

We first address the issue of causation. In the instant case, the administrative law judge properly invoked the Section 20(a) presumption as he found that claimant suffered a harm and that an accident occurred, or working conditions existed, which could have

aggravated his underlying heart condition. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Upon invocation of the presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's underlying heart condition was not aggravated by his employment. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all of the relevant evidence must be weighed to determine if a causal relationship has been established, with claimant bearing the burden of persuasion. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

While employer concedes that the Section 20(a) presumption is not rebutted with respect to claimant's angina attack on February 7, 1996, it argues that the opinion of Dr. Israel is sufficient to rebut the presumption that claimant's heart condition was aggravated by his employment. In the instant case, the administrative law judge, in addressing the issue of rebuttal, initially discussed the opinion of Dr. Israel, who stated in his report of May 14, 1997, that claimant's coronary artery disease and its sequelae are not related to his exposure to fire or job-related stress. Rather, Dr. Israel opined that claimant's multiple risk factors, including his family history of heart disease, his smoking history, hypertension, sex and age over 50, completely and totally explained his coronary artery disease.¹ The administrative law judge discussed Dr. Israel's opinion, but stated that, in contrast, claimant's treating physician, Dr. Micale, opined to a reasonable degree of medical certainty that claimant's working conditions contributed to his heart disease. *See* Decision and Order at 8; Cl. Ex. 3. The administrative law judge then concluded that as claimant established a harm and working conditions which could have caused it, and his treating physician agreed that claimant's working conditions may have contributed to his disease, employer did not rebut Section 20(a).

¹In his November 15, 1996, report, Dr. Israel noted that claimant had complained of angina prior to the February 7, 1996 episode, and stated that any therapy claimant received after this date was not causally related to the February 7, 1996, incident. *See* Emp. Ex. 6.

We cannot affirm the administrative law judge's finding of causation, as his analysis is not consistent with law; specifically, the administrative law judge erred in concluding the presumption was not rebutted based on the fact that claimant's treating physician supported a causal nexus. Employer's burden under Section 20(a) is one of production; it must introduce substantial evidence that the harm is not work-related, and once it does so, the presumption falls from the case. *Moore*, 126 F.3d at 256, 31 BRBS at 119 (CRT); see *Conoco, Inc. v. Director, OWCP*, 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). In this case, employer met its burden of production through the opinion of Dr. Israel that claimant's current heart condition is not related to his employment. His opinion that claimant's job as a firefighter played no role in claimant's heart disease and that other factors "completely and totally" account for his current illness constitutes substantial evidence sufficient to rebut the Section 20(a) presumption. See *Moore*, 126 F.3d at 256, 31 BRBS at 119 (CRT); *Devine*, 23 BRBS at 279; *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). The administrative law judge's determination that employer did not rebut Section 20(a) must thus be reversed. The administrative law judge's finding of causation is vacated, and the case is remanded for the administrative law judge to weigh all of the evidence regarding causation, pro and con, with claimant bearing the burden of persuasion.² See *Greenwich Collieries*, 512 U.S. at 267, 28 BRBS at 43 (CRT).

Employer next challenges the administrative law judge's assessment of a penalty against it pursuant to Section 14(e) of the Act. Section 14(b) of the Act provides that the first installment of compensation becomes due on the fourteenth day after the employer has been notified pursuant to Section 12(d), 33 U.S.C. §912(d), or after the employer has knowledge of the injury. 33 U.S.C. §914(b). Section 14(d) sets forth the procedure for controverting the right to compensation, and it provides that an employer must file a notice of controversion on or before the fourteenth day after it has received notice pursuant to Section 12(d) or after it has knowledge of the injury. 33 U.S.C. §914(d). Section 14(e) mandates that if an employer fails to pay benefits in accordance with Section 14(b) or timely controvert the claim in accordance with Section 14(d), then it shall be liable for a 10 percent penalty added to unpaid installments of compensation. *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989); *Frisco v. Perini Corp.*, 14 BRBS 798 (1981). The Board has held that an employer need not file a notice of

²In addition to the opinions of Drs. Israel and Micale, the record contains the opinion of claimant's other treating physician, Dr. Zullo, who opined that claimant's heart condition was aggravated by his employment as a firefighter due to the rigorous physical activity and occupational exposure to smoke. See Cl. Ex. 4. The administrative law judge did not discuss this opinion in his discussion of the evidence regarding rebuttal and should consider it in weighing the evidence on remand.

controversion until it is aware of an actual controversy, *De villier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979); however, it has rejected the argument that there is no controversy until a claim has been filed. *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

In the instant case, claimant, in his post-hearing brief before the administrative law judge, requested that employer be assessed a Section 14(e) penalty. In his Decision and Order, the administrative law judge determined that employer was liable for a Section 14(e) assessment on all amounts of compensation previously due. Thereafter, employer filed a motion for reconsideration, requesting that the administrative law judge consider a letter addressed to the district director, dated June 21, 1996, as evidence of a notice of controversion. In his Decision and Order on Motion for Reconsideration, the administrative law judge denied employer's request, finding that employer failed to provide a sufficient explanation as to why this letter was not submitted as evidence at the hearing or attached to employer's post-hearing brief. *See* Decision and Order on Motion for Reconsideration at 2.

On appeal, employer contends that the administrative law judge erred in denying its request to submit, post-hearing, its June 21, 1996, letter, which it contends is tantamount to a notice of controversion. While an administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion, *see, e.g., Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999), we hold that, on the facts of this case, the administrative law judge on remand should re-open the record to admit evidence relevant to this issue. In this regard, our review of the administrative law judge's decision reveals that the administrative law judge did not determine when the period of employer's Section 14(e) assessment terminated. While employer's June 21, 1996, letter, even if it does constitute a notice of controversion, would not be timely, as the injury occurred on February 7, 1996,³ employer's liability under Section 14(e) terminates when the Department of Labor knows of the facts that a proper notice of controversion would have revealed, *see Hearndon v. Ingalls Shipbuilding, Inc.*, 26 BRBS 17 (1992), or when a notice of suspension of benefits is filed.⁴ Thus, employer's June 21, 1996, letter may constitute evidence sufficient to terminate the period of employer's Section 14(e) assessment. *See Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff'd mem. sub nom. Sea Tac*

³Claimant filed his claim on April 24, 1996. Emp. Ex. 1.

⁴In the instant case, employer voluntarily paid temporary total disability compensation from September 1, 1996 until October 21, 1996, and suspended benefits thereafter. *See* Cl. Ex. 2.

Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (9th Cir.1993). On remand, if the administrative law judge finds that claimant's employment is related to his heart condition, he must re-open the record to consider evidence regarding the period during which the Section 14(e) penalty would apply.

Accordingly, the administrative law judge's Decision on Motion for Reconsideration, his determination that rebuttal of the Section 20(a) presumption was not established, and his award of a penalty under Section 14(e) are vacated, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the Decision and Order Granting Benefits to the Claimant and Section 8(f) Relief to the Employer of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge