BRB No. 00-0982

RONALD J. GNIAZDOWSKI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
I.T.O. CORPORATION OF BALTIMORE, INCORPORATED	)	DATE ISSUED: June 20, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Gerald F. Gay (Arnold & Gay, P.A.), Baltimore, Maryland, for claimant.

Robert J. Lynott (Thomas & Libowitz, P.A.), Baltimore, Maryland, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-1488) of Administrative Law Judge John C. Holmes 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 suffered a fracture of his first toe when his right foot was struck by a turnbuckle as he was assisting in the unloading of a barge on October 28, 1992. Subsequently, claimant developed an infection in the toe resulting in the removal of the toe nail on November 23, 1992. Claimant was released to return to work on January 10, 1993, but thereafter retired on a disability pension.[1] In March 1993, claimant developed an infection in his right ankle resulting in an ulcer. On March 24,

[1]In addition to the injury to his toe, claimant has been diagnosed as suffering from diabetes, panic attacks and arthritis. CX 7.

1993, claimant underwent a surgical procedure for the removal of a necrotic ulcer from his right ankle.

In his decision the administrative law judge initially found that the parties were in agreement that claimant sustained a work-related injury to his big toe. The administrative law judge concluded, however, that claimant failed to establish his *prima facie* case under Section 20(a) of the Act, 33 U.S.C. §920(a), with regard to his ankle condition. Assuming, *arguendo*, that claimant was entitled to invocation of the Section 20(a) presumption, the administrative law judge determined that employer had established rebuttal of that presumption and that claimant failed to establish a causal connection between his employment with employer and his ankle condition based upon the evidence as a whole. Accordingly, the administrative law judge found claimant entitled to temporary total disability compensation from November 29, 1992, until January 13, 1993 and, thereafter, permanent partial disability compensation for a ten percent impairment to his great toe under the schedule based upon claimant's stipulated average weekly wage. *See* 33 U.S.C. §908(c)(8).

On appeal, claimant contends that the administrative law judge erred in not finding that claimant sustained a work-related injury to his right ankle. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.[2]

Claimant initially contends that the administrative law judge erred in failing to invoke the Section 20(a) presumption with regard to his right ankle condition. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that an accident occurred or working conditions existed which could have caused the injury or harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). Claimant is not, however, required to prove that the working conditions in fact caused the harm; rather, claimant must show only the existence of working conditions which could have conceivably caused the harm alleged. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); s*ee generally U. S. Industries,* 455 U.S. 608, 14 BRBS 631. However, claimant's theory as to how the injury occurred must go beyond "mere fancy." *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

[2]The Board notes that employer now operates under the name of P&O Ports, Incorporated. *See* Employer's Response Brief.

In his Decision and Order, the administrative law judge acknowledged that claimant sustained "some harm" to his right ankle but declined to invoke the Section 20(a) presumption, stating that claimant's failure to prove that there was a connection between his work-related toe injury and his ankle infection prevents invocation of the presumption. *See* Decision and Order at 5. In order to establish his *prima facie* case for invocation of the statutory presumption, however, claimant is not required to prove that working conditions in fact caused the harm alleged. In any event, in this case, any error with regard to whether Section 20(a) is invoked, is harmless, as the administrative law judge found in the alternative that, if invoked, the presumption was rebutted, and this finding is supported by substantial evidence.

It is employer's burden on rebuttal to present substantial evidence sufficient to sever the causal connection between the injury and the employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert denied*, 429 U.S. 820 (1976); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999)(*en banc); Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999), *aff'g* 31 BRBS 98*; Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55(CRT) (1st Cir. 1997); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *See, e.g., Cairns v. Matson Terminals*, 21 BRBS 252 (1988). The 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, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this case, the administrative law judge determined that employer established rebuttal of the Section 20(a) presumption based upon the opinion of Dr. Honick, claimant's long-term treating physician, that claimant's right ankle infection and toe injury were not connected. Although claimant contends that Dr. Honick's opinion supports his position that the ankle ulcer was related to the work injury, Dr. Honick's records support the administrative law judge's conclusion that Dr. Honick viewed the two conditions as separate and unrelated.[3] Moreover, the administrative law judge found that Dr. Honick's records are

[3]On March 3, 1993, Dr. Honick reported that claimant's work-related toe injury had healed and showed no signs of infection, Dr. Honick then mentioned, without apparent connection, the appearance of a small necrotic ulcer on claimant's ankle. CX 2.

supported by Dr. Becker's assessment that claimant's ankle ulcer was unrelated to either the initial injury to claimant's right great toe or the resulting surgery.[4] These opinions constitute substantial evidence sufficient to rebut the presumption; therefore, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See generally Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Claimant next argues that the administrative law judge erred in finding that he failed to establish causation based on the record as a whole; specifically, claimant avers that the opinions of Drs. Honick and DeLeon establish the existence of a causal relationship between his employment and his ankle condition. After considering all of the medical evidence of record, the administrative law judge concluded that the opinions of Drs. Honick and DeLeon were insufficient to meet claimant's burden of proof. Specifically, the administrative law judge initially found that Dr. DeLeon, while asking the question of whether a causal relationship existed between claimant's toe and ankle condition, never answered that question.[5] Next, the administrative law judge considered the medical records of Dr. Honick, claimant's treating physician, reflecting that claimant's ankle problem was considered a separate condition, CX 2, the supporting opinion of Dr. Becker, and the considerable time gap between the toe injury and claimant's ankle infection, in concluding that claimant's ankle injury is not related to his work accident.

In this case, as the administrative law judge fully evaluated the relevant evidence and his findings regarding the medical opinions are supported by the record, his determination that claimant failed to meet his burden in this case is affirmed. *Greenwich Collieries,* 512

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[4]Dr. Becker stated that any "further management of this patient's foot [ankle ulcer] in no way relates to this accident of 10/28/92....certainly the surgery performed by Dr. DeLeon for this patient's ulcer in the ankle in no way relates to the accident... ." EX 2.

[5]In his office notes of November 29, 1993, Dr. DeLeon asks if the toe and ankle infection are related and refers to a report that would be prepared "for the lawyer." *See* CX 3. Dr. DeLeon never answered his own question in his office notes and no follow-up report is contained in the record.

U.S. 267, 28 BRBS 43(CRT). We therefore affirm the administrative law judge's determination, based on the record as a whole, that claimant's right ankle condition is not

causally related to his October 28, 1992, work accident. *See, e.g., Rochester v. George Washington University*, 30 BRBS 233 (1997).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge