BRB No. 03-0613

JERRY L. PHILLIPS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHEVRON, U.S.A.	)	DATE ISSUED: JUN 17, 2004
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

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

Tony B. Jobe, Madisonville, Louisiana, for claimant.

Patrick E. O'Keefe (Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-LHC-1148) of Administrative Law Judge C. Richard Avery 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was working as a facility operator on the oil producing platform "Double Fox" and alleged that he developed a disabling psychological condition following events surrounding an oil spill in February 1996. On February 15, 1996, claimant was notified by an employee arriving at the platform that there was a sheen of oil on the water. Claimant did not believe that the oil was coming from the platform, but investigated to determine its source. He concluded that it was a small amount of oil spread over

approximately two miles. After checking the graph charts and inspecting other rig facilities, claimant concluded that the spill had not come from "Double Fox." Claimant testified that it was his responsibility to complete a spill sighting report, which he did, and he faxed the report to "Romeo," the mother structure, at 8:00 a.m. Later that afternoon, the Coast Guard flew over "Double Fox" in order to film the spill. The Coast Guard called claimant, as the facility operator, to report that there was a spill coming from the platform, specifically out of the flare piling approximately 75 yards from the platform. Claimant was convinced that the oil was not coming from "Double Fox," and he told the Coast Guard "if you see oil squirting and dripping out of that flare, one of us needs our glasses cleaned because you're seeing something I'm not seeing." H. Tr. at 41. That evening, claimant received a call from the mother structure stating that they had not received a slick report. Consequently, claimant re-faxed the report that evening. H. Tr. at 30.

On February 22, 1996, claimant was told to attend a meeting in New Orleans, Louisiana, with Chevron employees in preparation for a Coast Guard hearing to be held the following day in Morgan City, Louisiana. At the Coast Guard hearing, claimant explained his position regarding the source of the oil, but felt that he was more aggressively cross-examined by his co-employees than he was by the Coast Guard. Claimant felt that his co-workers did not believe his account and that he was "left standing out in the cold."[1] Cl. Ex. 13

On February 29, 1996, claimant returned to the platform for his next seven day work period. He worked his regular seven days on and seven days off work schedule until April 10, 1996. On that day, claimant was informed that he was suspended for seven days without pay because of an investigation into the February oil slick. After his return, claimant was called to the mother structure for a meeting with his supervisors, where he was formally reprimanded regarding his conduct in filing a tardy spill report and speaking flippantly to the Coast Guard in denying the spill. The reprimand included a reminder that any further infractions would result in termination. Claimant initialed the bottom of the letter, but wrote that he did not agree with the facts. Following this

[1] At the conclusion of the Coast Guard hearing, it was determined that the sole penalty pursued would be a civil penalty of $625. Ronald Fiore wrote a memorandum summarizing the outcome of the hearing, but claimant denies ever receiving this document. H. Tr. at 60, 107.

meeting, claimant was sent home on stress leave, and he has not returned to work.[2] He began treatment with Dr. Stanley, a psychologist, and sought benefits under the Act.

In his decision, the administrative law judge initially found that claimant's psychological condition, if any, was not caused by cumulative stress but rather a legitimate personnel decision, and thus is not compensable under the Act. In addition, the administrative law judge found that the evidence is not sufficient to establish that claimant suffered an injury or that working conditions existed which could have caused an injury. Thus, the administrative law judge found the evidence insufficient to establish invocation of the Section 20(a), 20 U.S.C. §920(a), presumption that claimant suffers from a work-related condition. Alternatively, the administrative law judge found that the evidence is sufficient to rebut the presumption, and that the evidence weighed as a whole does not establish that claimant suffers from an injury due to work-related stress.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence does not establish that claimant suffers from a psychological injury due to work-related stress. In addition, claimant contends that the administrative law judge erred in finding that any injury was not due to cumulative stress, but rather to a legitimate personnel action.

It is well settled that a psychological impairment which is work-related is compensable under the Act, and that Section 20(a) applies to such injuries. *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989); *Turner v. The Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984)(Ramsey, C.J., dissenting on other grounds). In order to invoke the Section 20(a) presumption, claimant must show that he sustained a harm and that either an accident occurred or working conditions existed which could have caused the harm. 33 U.S.C. §920(a); s*ee Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In considering whether a claimant had established the existence of working conditions which could have caused the alleged harm, the Board reviewed a case in which the claimant sustained a stress-induced psychological injury allegedly resulting from a reduction-in-force by his employer. *Marino v. Navy Exchange,* 20 BRBS 166 (1988). The Board held that a legitimate personnel action, such as a reduction-in-force, is not a working condition that can form the basis of a compensable injury. *Id.* at 168. The Board reasoned that to hold otherwise would unfairly hinder employer in making legitimate personnel decisions and

[2] On May 7, 1996, claimant was called by one of his supervisors and told that the reprimand had been amended to reflect disciplinary measures solely for the manner in which he addressed the Coast Guard. H. Tr. at 117.

in conducting its business. *Id.* The Board has also held that while legitimate personnel actions may not establish working conditions sufficient to invoke the Section 20(a) presumption of causation, the working conditions element is satisfied if day-to-day conditions could have caused claimant's harm. *Id.; see also Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127 (1997) (McGranery, J., dissenting), *aff'd on recon. en banc*, 32 BRBS 134 (1998)(Brown and McGranery, JJ., dissenting); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994).

Contrary to claimant's contention, the Board's decisions in *Sewell* did not invalidate the holding in *Marino*, but rather held that because the record contained incidents of day-to-day working conditions, rather than personnel actions, that could have caused or aggravated the claimant's psychological injury, the claimant had established a *prima facie* case, and therefore was entitled to invocation of the Section 20(a) presumption.[3] In the present case, the administrative law judge determined that claimant was disciplined for remarks to the Coast Guard and that the meetings and hearing related to this action were conducted in a businesslike manner. Moreover, unlike the claimants in *Konno* and *Sewell*, the administrative law judge in this case found that claimant was not terminated, persecuted, or demeaned during his day-to-day work. The actions cited by claimant that are alleged to have caused his psychological condition were related to the investigation and resolution of the incident which took place on February 15, 1996, and not to his general working conditions.[4] Although these actions may have been sufficiently stressful to claimant to have resulted in a psychological injury, we affirm the administrative law judge's finding that they were a part of a disciplinary process which involved a legitimate personnel action. *See Sewell*, 32 BRBS at 136 n.3. Thus, we affirm the denial of benefits as claimant has not established the "working conditions" element of his *prima facie* case.[5] *Marino*, 20 BRBS at 168.

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[3] Likewise, the decisions cited by claimant are inapposite because in those cases, the day-to-day working conditions, rather than a personnel action, were sufficient to establish the *prima facie* case for invocation of the Section 20(a) presumption. *Whittington v. National Bank of Washington*, 12 BRBS 439 (1980); *Putnam v. Electric Boat Corp.*, 1998-LHC-00242 (ALJ)(Feb. 4, 1999)(unpub.).

[4] It is not the role of the Board to determine whether the actions taken by employer were based on valid concerns, but rather whether they were legitimate personnel decisions made in the course of business. *See generally Marino*, 20 BRBS at 168.

[5] As we affirm the administrative law judge's finding that claimant did not establish the "working conditions" element of his *prima facie* case, we need not address claimant's remaining contentions.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge