BRB No. 06-0753

DIANE R. REID	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: 06/14/2007
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Edward E. Boshears, Brunswick, Georgia, for claimant.

Shari S. Miltiades (Miltiades & Steffen), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2004-LHC-00422) of Administrative Law Judge 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 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).

This is the second time that this case is before the Board. On January 11, 1999, claimant, while standing on a ladder during the course of her employment as a

longshoreman with employer, was struck from behind by a forklift and pinned between two large rolls of paper. The next day, claimant was treated in the hospital emergency room for a left elbow contusion. On January 14, 1999, claimant was seen by Dr. Hagen, an orthopedic surgeon, for her complaints of pain in her left elbow, shoulder, neck, and right knee. Dr. Hagen, who diagnosed contusions of claimant's left shoulder and right knee, found no evidence of injury to her cervical or lumbosacral spine. He indicated that there was no evidence of serious injury and released claimant to return to work with no restrictions. Claimant returned to work on January 15, 1999, but stopped working on December 6, 1999.[1] Claimant sought compensation for temporary total disability and medical benefits for injuries to her neck, shoulder, elbows, right knee, and lumbosacral spine which she asserted were the result of her January 11, 1999, work-related accident. While employer agreed that claimant's left elbow was injured in the accident and it voluntarily paid the costs of claimant's January 12, 1999, hospital emergency room treatment and Dr. Hagen's January 14, 1999, office visit, employer contested claimant's claim that she sustained a period of disability as the result of her work-related accident, or that any current medical problems claimant may have are causally related to her January 11, 1999, work-incident.

In the initial Decision and Order, the administrative law judge found the Section 20(a), 33 U.S.C. §920(a), presumption invoked on the basis of employer's acknowledgment that claimant sustained an injury to her left elbow while at work on January 11, 1999. Next, the administrative law judge summarily found the presumption rebutted, stating he agreed with employer that there has not been "a chronicity of objective findings," and, after indicating that he had weighed all the evidence of record, he concluded that claimant's left elbow injury resolved without residuals and that any present conditions claimant may have are not causally related to her January 11, 1999, work accident. Accordingly, the administrative law judge denied all disability and medical benefits for any condition other than claimant's left elbow injury.

On appeal, the Board, after stating that the lack of objective findings alone cannot meet employer's burden of establishing rebuttal of the Section 20(a) presumption, determined that the administrative law judge's conclusory finding of rebuttal is insufficient to establish that the administrative law judge considered the evidence in accordance with the legal standards applicable to that issue. The Board therefore vacated the administrative law judge's determination that employer rebutted the presumption and remanded the case for a reasoned analysis of this issue, stating that the administrative law

[1] Claimant testified that she continued to experience pain in several parts of her body after her January 11, 1999, work-related accident and therefore was unable to perform the strenuous work handling paper rolls that she had done prior to that accident. She further testified that, after her accident, because she accepted only the less strenuous work driving vehicles off "car ships," fewer hours of work were available to her than before her accident.

judge on remand must reconsider the evidence relevant to the cause of claimant's pain and alleged injuries in light of the relevant case law, as well as the aggravation rule. *See Reid v. Stevedoring Services of America*, BRB No. 05-0349 (Dec. 20, 2005)(unpub.).

Following the submission of briefs by both parties, the administrative law judge issued his Decision and Order on Remand wherein, after summarizing the Board's decision remanding the case and the medical evidence, he stated that the Section 20(a) presumption was rebutted by employer and the weight of the evidence does not support claimant's contentions. He thus again denied claimant's claim for benefits.

On appeal, claimant challenges the administrative law judge's denial of her claim for benefits, contending that the administrative law judge did not comply with the Board's instructions on remand. Employer responds, urging affirmance of the administrative law judge's decision.

The instant case involves a claim for compensation and medical benefits based upon complaints by claimant of pain and multiple ongoing symptoms regarding her neck, shoulders, elbows, right knee, and lumbosacral spine.[2] Accordingly, as it is undisputed that claimant was involved in a work-related incident on January 11, 1999, the initial issue presented for adjudication involves whether these alleged conditions are causally related to that work-incident. We agree with claimant that the administrative law judge on remand did not follow the Board's instructions regarding analysis of the causation issue in accordance with Section 20(a). Moreover, even if Section 20(a) was rebutted, his decision on remand is plainly inadequate in failing to fully weigh the medical evidence. Therefore, the administrative law judge's decision on remand denying benefits to claimant must be vacated and the case remanded for further consideration of the evidence as to whether claimant's January 11, 1999, work accident constitutes a cause of her continuing complaints of pain and symptoms associated with her neck, shoulders, elbow, right knee, and lumbosacral spine.

On remand, after setting forth a description of the medical evidence of record, the administrative law judge denied claimant's claim stating:

> Neither Dr. Thompson nor Dr. Lubet saw Reid for a year and a half after the injury, and the physician reported that the examination was normal. Since 2001, Reid has been seen by Drs. Hines, Hein, and King. Only Dr.

[2] Employer asserts that the Board did not include claimant's low back complaints in its prior remand. The lumbosacral spine was included in the description of claimant's claim on pages 2 and 3 of the Board's Decision and Order, but omitted in its final paragraph on page 4. As this alleged injury was raised, its inadvertent omission on one page does not eliminate this condition from consideration, and it must be addressed by the administrative law judge on remand.

> Hines felt that a restriction was indicated, and this was based on guarding rather than on objective findings.
>
> It is clear that there must be some objective findings of impairment before an award of compensation and medical benefits can be made. Examination conducted four years after the injury does not reflect such evidence. [Claimant's] complaints are not substantiated by the record.
>
> The Section 20(a) presumption is rebutted, and the weight of the evidence does not support the claimant's contentions.

Decision and Order on Remand at 4. These statements are inadequate for multiple reasons. Initially, the administrative law judge did not apply the legal standards under Section 20(a) detailed in the Board's decision. When rebuttal of Section 20(a) is at issue, the necessary findings involve whether employer has produced substantial evidence that the harms alleged by claimant were neither caused nor aggravated by her work accident. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990). As the Board specifically stated in its prior decision, moreover, the lack of objective findings is not dispositive of the causation issue. *See Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). In fact, the existence of restrictions on claimant's capabilities, or objective evidence of impairment, is more relevant to a disability determination, an issue which the administrative law judge did not purport to reach.[3] Finally, even if Section 20(a) rebuttal were not at issue, the administrative law judge's summary statements regarding the medical evidence are wholly inadequate to fulfill his duty to evaluate and weigh the evidence before him in resolving claimant's claim based on pain and alleged injuries to her shoulders, elbow, neck, right knee, and lumbosacral spine.

According to the administrative law judge's decision, the record contains the testimony and reports of six physicians who examined claimant subsequent to her January 11, 1999, work-incident. Decision and Order on Remand at 2-3; Decision and Order at 5-9. Dr. Hagen initially examined claimant on January 14, 1999, for complaints regarding her lumbar spine, left elbow, and right knee. He found no evidence of a serious injury requiring restrictions, and diagnosed claimant as having sustained contusions of the left shoulder and right knee. CX 1. A July 1, 1999, examination for a stumped toe revealed a swollen foot. On September 24, 1999, when claimant presented with numerous complaints, Dr. Hagen diagnosed claimant with a lumbosacral strain, noting normal x-rays of the spine. In December 1999, Dr. Hagen reported that injuries of June 23, 1999, and September 24, 1999, "could have resulted in her ability not to be able to work at full capacity." *Id.* *See* Decision and Order at 5. On May 4, 2000, Dr. Lubet reported claimant's complaints of back, neck and shoulder pain and discomfort, and

[3] However, even when considering disability, it is well-settled that a finding of disability may be based on claimant's credible complaints of pain alone. *See Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980).

opined that claimant's lumbar and cervical sprain/strains were causally related to her reported January 11, 1999, accident. CX 3. Dr. Thompson saw claimant in 2000 and 2001, and a February 2001 MRI of the spine was normal. CX 17. On February 15, 2001, claimant was examined by Dr. Hines, a Board-certified neurologist. Dr. Hines found significant degenerative changes in claimant's upper cervical vertebrae, diagnosed claimant's condition as consisting of cervical arthritis, probably with a post-traumatic element, and pain in her right shoulder and neck, and opined that work restrictions should be placed on claimant. CX 7 at 1-2. Dr. Hines subsequently examined claimant on March 28, 2001, October 1, 2001, and July 2, 2003, during which time claimant repeatedly expressed complaints of pain in her neck and shoulder, and he concluded that the vast majority of claimant's ongoing pain is musculoskeletal in origin. *Id.* at 8. Dr. Hines was deposed on July 14, 2004, during which time he addressed his previous examinations of claimant, concluding that claimant had legitimate pain syndrome, that claimant's complaints were not enhanced or the result of malingering, and that claimant's condition warranted the implementation of physical restrictions. EX 11 at 27, 35-39. In addition, claimant saw Dr. Hein in February 2002 for complaints of neck, back and shoulder pain and Dr. King in July 2003 for her knees. Both physicians reported normal examinations. EX 8; CX 4.

Given this relevant and conflicting evidence, it is apparent that the administrative law judge's summary statements are inadequate to support his conclusion. Missing is any finding that employer produced evidence that claimant's symptoms are not related to her employment, as is required for rebuttal of Section 20(a) presumption. *See Brown*, 893 F.2d 294, 23 BRBS 22(CRT). In stating that the weight of the evidence did not support claimant's contentions, the administrative law judge failed to adequately evaluate and weigh claimant's testimony and the medical evidence of record addressing claimant's complaints and treatment subsequent to her work-injury.[4] Claimant testified regarding

[4] The administrative law judge's findings are merely a series of observations about the evidence rather than a reasoned analysis. We have already discussed the error in his belief that objective findings are necessary. In addition, while the administrative law judge is correct that claimant's visits to Drs. Lubet and Thompson occurred a year and a half after the accident, this timing alone is not a sufficient basis to totally reject their medical opinions. The evidence recited by the administrative law judge indicates that claimant complained of pain regarding her back, elbow and knee to Dr. Hagen immediately following her work accident. Claimant returned to work after seeing Dr. Hagen following her January 11, 1999, accident and she continued to work until December 1999, during which time she saw Dr. Hagan and testified she continued to experience pain. The opinions of Drs. Lubet and Thompson are based on examinations within months of claimant's ceasing work. The administrative law judge's rejection of Dr. Hines' testimony on the basis that his examination was conducted four years after claimant's date of injury is also in error. While Dr. Hines' deposition was taken in 2004, his opinion was based on his examinations of claimant in 2001 and 2003. EX 11. In any

her long-standing complaints of physical symptoms following the January 11, 1999, work-incident, and she submitted into evidence the testimony of physicians which, if credited, would support her assertions that her present medical conditions are related to her January 11, 1999, work accident. Employer submitted contrary medical opinions. The administrative law judge has not adequately evaluated this conflicting medical evidence. Even more critical in this case involving a claim based on pain and symptoms, the administrative law judge has not assessed claimant's credibility regarding her complaints of pain and physical symptoms.

In this regard, employer asserts that claimant's testimony is not credible and that, aside from a healed injury to her elbow, claimant has no work-related injuries. The administrative law judge has not made specific findings as to whether claimant established the alleged ongoing harm to her neck, shoulders, knee, and lumbosacral spine, and the Board's prior decision addressed only claimant's arguments on appeal regarding rebuttal. The prior opinion viewed the presumption as invoked, even though the administrative law judge addressed only the elbow complaints in so doing. We now conclude that in order for the administrative law judge on remand to fully address employer's arguments, he must consider whether Section 20(a) was invoked with regard to claimant's alleged symptoms in her neck, shoulder, knee, and lunbosacral spine.

In order to invoke the Section 20(a) presumption, claimant must establish 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 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). Claimant need not present objective evidence of impairment to meet this burden, as her credible testimony alone is substantial evidence sufficient to support invocation of the presumption. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Harrison*, 21 BRBS 339. In the instant case, the administrative law judge found claimant entitled to invocation of the Section 20(a) presumption based upon the occurrence of the January 11, 1999, accident and employer's acknowledgement that claimant sustained an injury to her left elbow on that date. Decision and Order at 9. On remand, the administrative law judge must determine whether claimant established that she in fact experiences the pain and other medical conditions, in addition to the established elbow injury, which she alleges resulted from the January 11, 1999, accident. *See Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Resolution of this issue turns on claimant's credibility and the weight accorded the opinions of the physicians corroborating her complaints, as opposed to the medical opinions recording normal findings. Therefore, on remand the administrative law judge must determine whether claimant has met her burden of establishing the "harm" element

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event, the medical evidence must be evaluated consistent with the fact that latent injuries, *i.e.*, injuries which worsen or become manifest over time, are compensable under the Act.

of her *prima facie* case with regard to her complaints of pain and symptoms affecting her neck, shoulders, right knee, and lumbosacral spine.

If the Section 20(a) presumption is invoked with regard to any of the conditions alleged by claimant, the burden shifts to employer to rebut it by producing substantial evidence that each condition was not caused, contributed to, or aggravated by her January 1999 accident.[5] *See Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case, *see Moore*, 126 F.3d 256, 31 BRBS 119(CRT), and the administrative law judge must proceed to weigh all of the relevant evidence and determine whether a causal relationship has been established, with claimant bearing the burden of persuasion. *See Greenwich Collieries v. Director, OWCP*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996).

The administrative law judge must consider invocation and rebuttal of Section 20(a) in accordance with these standards and those set forth in our prior opinion. In weighing the medical and other evidence, the administrative law judge must provide a rational basis for his findings, explaining which evidence he credits and why, after considering such factors as the experts' credentials and the reasoning underlying their opinions. If, on remand, the administrative law judge finds that any of the conditions asserted by claimant are related to her January 11, 1999, accident, he must then determine whether claimant suffered any disability due to the work-related conditions, *see, e.g., New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1991), and whether employer is liable for related medical benefits. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

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[5] Employer asserts that claimant's July and September 1999 visits with Dr. Hagan followed accidents with another employer. Employer may rebut Section 20(a) by producing evidence that claimant's injury is related to another cause; thus, this issue depends on whether employer produced evidence sufficient to establish that claimant's conditions were related to an intervening cause. *See Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). Employer also relies on an October 2003 car accident as a cause of her neck and back problems. The medical examinations referenced by the administrative law judge, however, pre-date this accident.

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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