BRB No. 12-0340

KENNETH A. SUIRE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MORENO ENERGY SERVICES, INCORPORATED	)	DATE ISSUED: 06/19/2013
	)	
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Jean Ouellet (Perrin, Landry, deLaunay, Dartez & Ouellet), Lafayette, Louisiana, for claimant.

David K. Johnson (Johnson, Rahman & Thomas), Baton Rouge, Louisiana, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2010-LHC-02165) of Administrative Law Judge Patrick A. Rosenow 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 alleged he sustained an injury to his right shoulder on May 13, 2009, while swinging a hammer at work.[1] Claimant told his co-worker Elton Jones, and his supervisor, Rusty Slate, that his shoulder was injured and that he could not lift his arm while holding the hammer. Mr. Slate gave claimant ibuprofen for the pain; however, no one filled out an injury report. Cl. Ex. 21 at 1. Claimant completed the remainder of his stint offshore by performing other duties that did not hurt his shoulder. Following his return to shore, claimant saw a number of doctors and was treated conservatively. On September 9, 2009, a right shoulder MRI revealed mild arthrosis and impingement with a thinning of the glenoid labrum and a possible superior tear. Cl. Ex. 11. After physical therapy with no improvement, a delay in getting an orthopedic consultation, and more physical therapy, claimant saw an orthopedic surgeon in September 2010, who also prescribed physical therapy. Due to continued pain, however, claimant underwent another shoulder MRI on January 21, 2011, which revealed a torn labrum, a paralabral cyst, degenerative changes and mild impingement. Labrum repair surgery was performed on May 6, 2011, and revealed several labral tears. Claimant, who has not returned to work, filed a claim for benefits; employer paid no benefits, as it disputed that a work injury occurred in May 2009 and whether any injury caused disability.

The administrative law judge found that claimant established a prima facie case relating his shoulder injury to his employment, and he invoked the Section 20(a) presumption, 33 U.S.C. §920(a). The administrative law judge also found that employer failed to rebut the presumption; thus, he found claimant's right shoulder condition to be work-related. Decision and Order at 18-19. The administrative law judge further determined that claimant is unable to perform his usual work, employer did not establish the availability of suitable alternate employment, and claimant's condition has not reached maximum medical improvement. *Id.* Accordingly, the administrative law judge awarded claimant continuing temporary total disability benefits beginning May 14, 2009, as well as medical benefits. 33 U.S.C. §§907, 908(b). Employer appeals the administrative law judge's award, contending that claimant's condition is not work-related. Claimant responds, urging affirmance of the award of benefits.

Employer contends the administrative law judge erred in invoking the Section 20(a) presumption with regard to claimant's right shoulder complaints. Specifically, employer avers that claimant did not establish the occurrence of a work-related accident which could be the cause of his present shoulder condition. In order to establish a prima facie case, a claimant bears the burden of proving the existence of an injury, or harm, and

[1]Claimant alleged an injury while "hot bolting" with co-worker Elton Jones. "Hot bolting" is a two-worker job where one holds a wrench and the other swings a heavy hammer to take off a nut and replace it with a new one. Claimant and Mr. Jones took turns swinging the hammer and holding the wrench. Claimant stated that he had to stop the hammer mid-swing because Mr. Jones had removed the wrench to adjust its position and that this caused his injury. *See* Cl. Ex. 27.

a work-related accident or working conditions that could have caused the harm. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *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). If these two elements are established, the Section 20(a) presumption applies to relate the claimant's injury to his employment. *Port Cooper/T.Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Under the aggravation rule, if a work-related injury contributes to, combines with, or aggravates a pre-existing condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986).

In this case, the administrative law judge found, based on objective medical evidence, that claimant sustained an injury to his right shoulder. Decision and Order at 18. The administrative law judge found that medical records establish that claimant had a torn labrum that was consistent with having to stop a heavy hammer in mid-swing. Cl. Exs. 15, 19.[2] Therefore, it was rational for the administrative law judge to find that claimant established a harm. *Drake*, 795 F.2d 478, 19 BRBS 6(CRT); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (en banc). The administrative law judge also found that claimant had a work-related accident. Specifically, although the administrative law judge found that claimant was not an entirely credible witness, Decision and Order at 18; *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), he found that Mr. Jones's statement that claimant was using a hammer and complained immediately about shoulder pain corroborated claimant's assertion regarding the circumstances of his injury. Decision and Order at 18. Employer does not dispute that claimant's job included swinging a hammer. The Board is not empowered to reweigh the evidence but must accept the rational findings and inferences of the administrative law judge. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge's finding that an accident occurred at work that could have caused a shoulder injury or aggravated a pre-existing condition is rational and supported by substantial evidence.[3] Decision and Order at 18-19. As claimant established both a harm and the occurrence of

[2]Claimant's MRI identified, *inter alia*, a posterior labral tear and a paralabral cyst. During arthroscopic surgery on claimant's shoulder, multiple tears in the anterior, posterior and superior labrum were detected and repaired. Additionally, significant bursitis and minor amounts of arthritis were seen. Dr. Jones, one of several physicians to treat claimant at LSU Hospital, stated that claimant's symptoms were consistent with the surgical findings and that his physical condition was consistent with his description of how the injury occurred.

[3]There is evidence indicating claimant may have sustained a previous shoulder injury. Cl. Exs. 9, 25-26.

an incident at work which *could have* caused that harm or aggravated a pre-existing condition, the administrative law judge properly invoked the Section 20(a) presumption, and we affirm his finding. *H.B. Zachary Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

To rebut the Section 20(a) presumption, employer must produce substantial evidence that claimant's condition was not caused or aggravated by his employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The mere existence of a pre-existing condition does not rebut the presumption. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). As employer does not dispute the administrative law judge's finding that it did not present substantial evidence rebutting the Section 20(a) presumption, we affirm that finding as unchallenged. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Accordingly, the administrative law judge properly found that claimant's right shoulder condition is work-related as a matter of law. *See Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Obadiaru*, 45 BRBS 17. Therefore, we affirm the award of benefits.[4]

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[4]As we have affirmed the finding that claimant's shoulder condition is work-related, we affirm the administrative law judge's award of medical expenses as employer does not otherwise challenge this award. *Scalio*, 41 BRBS 57.