**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0587

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| TERRY BIAS | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| INGRAM INDUSTRIES, INCORPORATED | ) | DATE ISSUED: June 18, 2018 |
| | ) | |
| and | ) | |
| | ) | |
| SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED c/o ACCLAIM RISK MANAGEMENT | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Stephen P. Moschetta (The Moschetta Law Firm, P.C.), Washington, Pennsylvania, for claimant.

Scott A. Soule and Emily C. Canizaro (Blue Williams, L.L.P.), Mandeville, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2016-LHC-00250) of Administrative Law Judge Richard A. Morgan 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 rational, supported by substantial evidence, and in

accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On June 24, 2007, claimant sustained injuries to his head and neck while working at employer's Huntington, West Virginia, facility. On January 7, 2011, the administrative law judge issued a Compensation Order and Fee Award wherein he approved a Section 8(i), 33 U.S.C. §908(i), settlement agreement between the parties. Employer paid claimant $220,000 in settlement of claimant's claim for disability benefits, and agreed "to remain responsible for all past and future related medical expenses incurred by Claimant." *See* CX 3.

Claimant continued to seek treatment for headaches which he alleged were related to his work injury. Subsequently, he sought reimbursement from employer for a neuropsychological evaluation recommended by Dr. Nolte and performed by Dr. Mulder, Ph.D., on April 22, 2015, and for the costs of a hospitalization from May 13-15, 2015, for gastrointestinal complaints. Employer disputed its liability for these specific medical charges.

In his Decision and Order, the administrative law judge found that claimant's April 22, 2015, neuropsychological evaluation and hospitalization in May 2015 for gastrointestinal pain were neither reasonable nor necessary for the treatment of his work injury. Consequently, the administrative law judge concluded that claimant was not entitled to reimbursement from employer for these specific costs.

On appeal, claimant challenges the administrative law judge's denial of his claim for medical benefits. Employer responds, urging affirmance.

Claimant asserts the administrative law judge erred in finding he is not entitled to reimbursement for the expense of the neuropsychological evaluation performed on April 22, 2015. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, or other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). Medical care must be appropriate for the injury, 20 C.F.R. §702.402, and claimant must establish that the requested services are necessary for the treatment of the work injury. *See generally Newport News Shipbuilding & Dry Dock Co. v. Loxley*, 934 F.2d 511, 24 BRBS 175(CRT) (4th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992); *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *see also Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

Prior to the April 22, 2015, neuropsychological evaluation, claimant underwent neuropsychological evaluations on November 1, 2007 and September 30, 2008, by Dr. Miller, *see* EX 7, and on September 23, 2009, by Dr. Ruth, *see* EX 6. Following each of these evaluations, claimant was diagnosed with, inter alia, a cognitive disorder. On August 10, 2012, claimant commenced treatment with Dr. Nolte who assessed claimant with, inter alia, common migraine and "Memory Lapses Or Loss." EX 8 at 9. In March 2015, Dr. Nolte referred claimant for a fourth neuropsychological evaluation in order "to try and objectify [claimant's] cognitive complaints," EX 9 at 28, and to ensure that claimant's complaints were credible. *Id.* at 29. Pursuant to Dr. Nolte's referral, claimant underwent a fourth neuropsychological evaluation by Dr. Mulder on April 22, 2015. CX 14.

In his decision, the administrative law judge found that claimant failed to establish that the fourth neuropsychological evaluation was reasonable and necessary to treat his work injury.[1] *See* Decision and Order at 28-29. In making this determination, the administrative law judge relied on the opinion of Dr. Ruth, who offered the only discussion of the reasonableness and necessity of the evaluation. *Id.* at 28. Dr. Ruth reviewed his own 2009 report and the 2015 reports of Drs. Nolte and Mulder and opined that, rather than having claimant undergo a fourth evaluation, he would have initially pursued other courses of treatment which were faster and easier, specifically the streamlining of claimant's multiple medications, which could result in cognitive complaints, and performing in-house testing, before ordering a full-fledged evaluation. *See* EX 6. In crediting Dr. Ruth's assessment, the administrative law judge found

> Dr. Ruth's objective medical opinion that there were at least two other treatment options that could have treated or assessed the claimant's cognitive condition before turning to a full neuropsychological evaluation very persuasive. Dr. Ruth stated that these other avenues of treatment would have been easier, faster, and cheaper than a full neuropsychological evaluation. As such, I find that the claimant has failed to establish that a fourth

[1] Contrary to claimant's contention, the Section 20(a) presumption does not aid him in establishing that the fourth neuropsychological evaluation was reasonable and necessary for the treatment of his work injury. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that claimant has the burden of proving the elements of his claim for medical benefits. *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *see also Newport News Shipbuilding & Dry Dock Co. v. Loxley*, 934 F.2d 511, 24 BRBS 175(CRT) (4th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

> neuropsychological assessment, performed eight years after his initial accident, was reasonable and necessary to treat his work-related injury.

Decision and Order at 29.

It is well-established that the administrative law judge is entitled to evaluate the credibility of the medical evidence and to draw his own inferences from the evidence. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.* [*Carmines*], 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In this case, the administrative law judge discussed the relevant medical evidence, and permissibly concluded, based on Dr. Ruth's opinion, that claimant did not meet his burden of proof to establish the necessity of the fourth evaluation. *See Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). As the administrative law judge's finding is supported by substantial evidence, we affirm the conclusion that employer is not liable for claimant's April 22, 2015 neuropsychological evaluation. *See generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

Claimant next contends the administrative law judge erred in finding that employer is not liable for the costs associated with his hospitalization from May 13-15, 2015, for gastrointestinal complaints. Claimant asserts he presented sufficient evidence for the application of Section 20(a) to presume that his gastrointestinal complaints were related to the work injury. We agree that the denial of medical benefits for this hospitalization cannot be affirmed and we remand the case for reconsideration of this issue.

The term "injury," as defined in Section 2(2) of the Act, 33 U.S.C. §902(2), includes the "natural or unavoidable results" of an employee's work injury. A subsequent injury sustained due to medical treatment for a work-related injury is compensable under the Act. *See White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); *Wheeler*, 21 BRBS 3; *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986). Section 20(a) applies to presume that a consequential injury is related to the work injury, provided claimant makes out a prima facie case. *Metro Machine Corp. v. Director, OWCP* [*Stephenson*], 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017). In order to invoke the Section 20(a), 33 U.S.C. §920(a), presumption in this case, claimant has to show that his work-related injury could have "naturally or unavoidably" caused his gastrointestinal complaints. *Id.*, 846 F.3d at 692-693, 50 BRBS at 88(CRT). If the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that the gastrointestinal condition is not related to the work injury. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). If the administrative law judge finds the Section 20(a) presumption rebutted, it no longer controls, and the issue of causation must

be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

In this case, claimant testified that after his local pharmacy denied his migraine medication, his wife purchased Excedrin, an over-the-counter medication, for him. Tr. at 30. On May 13, 2015, claimant was admitted to St. Mary's Medical Center with abdominal pain. *See* EX 16 at 5. An endoscopy was performed and claimant was diagnosed with gastritis. *See id.* at 15. Dr. Eastone, Board-certified in internal medicine and gastroenterology, stated that claimant's "erosive gastritis" appeared to be a side-effect of his taking Excedrin. CX 10. The administrative law judge, without specifically addressing Section 20(a) of the Act, concluded that claimant's testimony regarding his use of Excedrin and Dr. Eastone's report linking claimant's gastrointestinal complaints to that use were insufficient to meet claimant's burden of establishing that his hospitalization constituted reasonable and necessary treatment for a work-related condition. Alternatively, the administrative law judge determined that, as claimant had gastric complaints and abdominal pain dating to 1998, employer presented evidence sufficient to establish that claimant's May 2015 complaints were not related to his work-injury. Decision and Order at 29-31.

We remand the case for the administrative law judge to address the applicability of Section 20(a) to claimant's claim that his May 2015 gastrointestinal complaints were related to the medication used to treat his work-related migraine headaches. Although Section 20(a) does not apply to the issue of the reasonableness and necessity of medical treatment, *see* n.1, *supra*, it does apply to the issue of whether claimant's gastrointestinal complaints are related to the work injury. *Metro Machine*, 846 F.3d at 690, 50 BRBS at 86(CRT). It is undisputed that claimant was diagnosed in May 2015 with gastritis, i.e., a harm, but the administrative law judge did not make a specific finding as to whether this condition could be related to medication claimant was taking for his work-related injury. *Compare* Decision and Order at 19 *with* Decision and Order at 30. Thus, the administrative law judge should address the evidence relevant to this element of claimant's prima facie case, i.e., claimant's medication usage for his headaches. If the Section 20(a) presumption applies, the administrative law judge must address whether employer rebutted it with substantial evidence that claimant's gastritis is not related to the work injury.[2] *See Holiday*, 591 F.3d 219, 43 BRBS 67(CRT). 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, with claimant bearing the burden of persuasion of establishing that his gastritis is the natural or unavoidable result of medication claimant

[2] The mere existence of a pre-existing condition is insufficient to rebut the Section 20(a) presumption. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

was taking for his injury. In the event that the gastritis is found to be the result of the injury, claimant also must establish that the May 13-5, 2015, hospitalization constituted reasonable and necessary medical treatment for that condition in order for employer to be held liable for medical benefits. 33 U.S.C. §907(a); *Weikert v. Universal Maritime Serv. Corp.*, 36 BRBS 38 (2002).

Accordingly, we vacate the administrative law judge's denial of medical benefits for claimant's hospitalization from May 13-15, 2015, and we remand the case for further findings in accordance with this decision. In all other respects, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge