BRB No. 01-0556

DENNIS D. EMERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: March 26, 2002
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Richard B. Donaldson, Jr. and Bryan H. Schempf (Jones, Blechman, Woltz & Kelly, P.C.), Newport News, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (97-LHC-515) of Administrative Law 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 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).

This case is before the Board for the second time. To recapitulate, claimant, who had

worked for employer as a firefighter since 1968, experienced an attack of angina at work on February 7, 1996, after climbing a fifty-foot ladder in order to extinguish a fire on top of a ship shed. He was treated with medication at employer's infirmary that day, and was examined by his treating physician, Dr. Zullo, the following day. Claimant attempted to return to work on February 22, 1996, but employer instead placed claimant on retirement. Thereafter, claimant underwent two angioplasty procedures on April 26, 1996. It is undisputed that claimant, who suffers from coronary artery disease, previously underwent angioplasty and bypass graft procedures in 1991. Claimant filed a claim for permanent total disability benefits under the Act, contending that his work environment, including the February 7, 1996, incident, aggravated his underlying heart condition.

In his initial decision, the administrative law judge found that claimant was entitled to invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), linking his heart condition to his employment, and that employer did not establish rebuttal of that presumption. The administrative law judge awarded claimant ongoing permanent total disability benefits, 33 U.S.C. §908(a), commencing on February 23, 1996. The administrative law judge further found that employer was entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f). Lastly, the administrative law judge found that employer was liable for a penalty on all amounts of compensation previously due, pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), as employer had failed to file a timely notice of controversion. In his subsequent Decision and Order on Motion for Reconsideration, the administrative law judge denied employer's request to submit evidence of a timely notice of controversion, and he reaffirmed the Section 14(e) award.

Employer appealed the award of benefits, challenging the administrative law judge's findings regarding causation. Specifically, while not challenging the fact that claimant experienced an angina attack at work on February 7, 1996, employer asserted that claimant's underlying coronary disease was not caused or aggravated by his employment. The Board reversed the administrative law judge's finding that the Section 20(a) presumption was not rebutted with regard to claimant's underlying heart disease. *Emerson v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 99-0978 (June 16, 2000) (unpublished). The Board held that the opinion of Dr. Israel that claimant's job as a firefighter played no role in claimant's heart disease and its sequelae, and that other factors wholly account for claimant's illness, satisfies employer's burden of production on rebuttal. The Board vacated the administrative law judge's finding that claimant's heart condition is causally related to his employment and remanded the case for the administrative law judge to weigh all the evidence regarding causation, with claimant bearing the burden of persuasion.[1]

[1]Employer additionally contended that the administrative law judge erred in denying its request to submit post-hearing evidence of a timely notice of controversion and in finding it liable for a Section 14(e) penalty. The Board vacated the administrative law judge's

In his decision on remand, the administrative law judge credited the opinion of Dr. Israel and found that claimant failed to show that his underlying coronary artery disease was caused or aggravated by his employment. The administrative law judge therefore denied the claim, found premature employer's application for Section 8(f) relief, and found that employer is not liable for a penalty under Section 14(e) because compensation benefits were not awarded.

On appeal, claimant asserts that the administrative law judge erred by finding rebuttal of the Section 20(a) presumption and by crediting the opinion of Dr. Israel over the opinions of claimant's treating physicians, Drs. Micale and Zullo, to find based on the record as a whole that claimant's coronary artery disease is not related to his employment. Claimant also challenges the administrative law judge's finding that he is not entitled to compensation for his work-related angina attack. Employer responds, urging affirmance of the denial of benefits.

Initially, we reject claimant's contention that the opinion of Dr. Israel is not sufficient to rebut the Section 20(a) presumption. In its prior Decision and Order, the Board reversed the administrative law judge's conclusion that the presumption was not rebutted. The Board held Dr. Israel's opinion that claimant's job as a firefighter played no role in claimant's heart disease and its sequelae, and that other factors "completely and totally" account for his current illness, constitutes substantial evidence sufficient to rebut the Section 20(a) presumption. *See Emerson*, slip op. at 3-4. As the Board's holding on this issue is the law of the case, the Board will not address claimant's contention in this appeal. *See Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998); *Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988).

We next address claimant's contention that the administrative law judge erred in finding, based on the record as a whole, that claimant's coronary artery disease was not

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findings in this regard as he did not determine when the period of the Section 14(e) assessment terminated. If the administrative law judge found on remand that claimant's heart condition was related to his employment, the Board instructed the administrative law judge to re-open the record and admit employer's evidence, as this evidence may be sufficient to establish the termination date of employer's Section 14(e) assessment.

aggravated by his employment or his angina attack at work on February 7, 1996. In his decision on remand, the administrative law judge discussed the opinions of Drs. Zullo and Micale that clamant's heart condition was caused or aggravated by his employment as a firefighter. The administrative law judge, however, found Dr. Israel's detailed and persuasive reports more credible notwithstanding that he was not a treating physician. The administrative law judge credited Dr. Israel's opinion that claimant's work played no role in claimant's heart disease and that claimant's acute angina attack at work on February 7, 1996, did not result in any increase in the underlying heart disease. The administrative law judge thus concluded that claimant failed to show a work-related aggravation of his heart condition.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to determine the weight to be accorded to the evidence of record, and is not bound to accept the opinion or theory of any particular medical examiner. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, the administrative law judge rationally credited the opinion of Dr. Israel. We therefore affirm the administrative law judge's determination on remand, based on the record as a whole, that claimant's coronary artery disease was not caused or aggravated by his employment, as it is supported by substantial evidence. *See*, *e.g.*, *Rochester v. George Washington University*, 30 BRBS 233 (1997).

We agree with claimant's contention, however, that these findings by the administrative law judge do not result in the denial of all benefits, as claimant is entitled to benefits for any disability due to his angina. Where a claimant experiences pain or symptoms at work, he has suffered an injury under the Act. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). In his decision on remand, the administrative law judge found that employer acknowledged that claimant sustained exertional angina at work on February 7, 1996, when he climbed a fifty-foot ladder in order to extinguish a fire. The symptoms resulting from claimant's exertion at work on February 7, 1996, which are a consequence of claimant's underlying coronary artery disease, constitute a work-related injury under the Act, as claimant's work contributed to the onset of the angina attack. *See generally Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). Indeed, employer conceded as much,[2] and Dr.

[2]The Board stated in its initial decision that employer conceded that the Section 20(a) presumption is not rebutted with respect to claimant's angina attack on February 7, 1996. *Emerson*, slip op. at 3. Specifically, in its brief to the Board in that appeal, employer stated that it did not contest the administrative law judge's finding that claimant's angina attack of February 7, 1996, arose out of and in the course of employment and that Section 20(a) was not rebutted in this regard. Brief at 11, 12. Employer argued that the administrative law judge erred in finding claimant's underlying coronary artery disease work-related, and the Board's decision addressed only this issue.

Israel stated that patients with coronary disease often sustain chest discomfort with extreme physical activity. EX 6 at 3. Thus, claimant established that he sustained a work-related injury on February 7, 1996.

We therefore must remand this case for the administrative law judge to address the extent of claimant's disability resulting from his angina attack. *See generally Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). An aggravation or progression of the claimant's underlying disease is not necessary for an injury to be compensable; an increase in symptoms resulting in disability is sufficient. *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981), *aff'g Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979). Thus, the fact that claimant's angina attack on February 7, did not increase his underlying heart disease does not end the inquiry, as claimant is entitled to compensation for any disability due to his angina. *Id.* Moreover, when a compensable injury consists of disabling symptoms that are temporary in nature, as in the case of angina which subsides when claimant leaves the work environment, claimant may nonetheless be entitled to benefits for a permanent disability if the evidence establishes that the condition may continue indefinitely. *See Crum*, 738 F.2d at 480, 16 BRBS at 124(CRT); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988). Thus, even where claimant's pain abates and his health improves away from the work environment, he may be disabled if the recurrence of symptoms prevents his return to work. *Id.*

In this case, the record establishes that claimant never returned to work for employer after his work-related angina attack; employer involuntarily retired claimant on February 22, 1996, when he attempted to return to work. Claimant's primary care physician, Dr. Zullo, noted on April 22, 1996, that claimant was diagnosed in 1991 with coronary artery disease and had recently developed angina, and he opined that claimant is disabled due to the nature of his occupation as a firefighter. CX 4V. Dr. Zullo reiterated his opinion in his July 2, 1996, report, which states that claimant develops recurrent chest pain and shortness of breath if he exercises or lifts any significant amount of weight. Dr. Zullo opined that such activities would be detrimental to his health, and he imposed permanent work restrictions. Dr. Zullo also opined that claimant's clinical condition was aggravated by his employment as a fireman due to the rigorous physical activity and exposure to smoke. CX 4X. Claimant's cardiologist, Dr. Micale, opined on September 30, 1996, that claimant should not return to work, and he noted on February 25, 1997, that claimant is asymptomatic but is living a sedentary lifestyle. CX 3 at H, I. Dr. Israel, however, opined that an angina attack is a benign event and that patients "are sometimes encouraged to walk-through their angina pectoris in order to achieve physical activity requirements in an attempt to delay the natural progression of coronary artery disease." EX 6 at 5.

On remand, the administrative law judge must weigh this evidence and determine whether claimant is disabled due, in part, to his employment-related angina. The administrative law judge must determine whether claimant's symptoms preclude his return to his former work and, if so, whether employer established suitable alternate employment.[3] *See Crum*, 738 F.2d at 479, 16 BRBS at 122-123(CRT). The administrative law judge must also evaluate the medical evidence and determine whether claimant's disability is permanent or temporary, consistent with the decision in *Crum*.

Should the administrative law judge award claimant compensation for a permanent disability on remand, he must then address employer's request for Section 8(f) relief. Moreover, pursuant to the Board's initial decision, the administrative law judge also should reopen the record for receipt of employer's notice of controversion and address employer's contention regarding the assessment of a Section 14(e) penalty.

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed in part insofar as it denies benefits for an alleged aggravation of claimant's underlying heart condition. The denial of benefits is vacated with regard to claimant's work-related angina, and the case is remanded for further proceedings consistent with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[3]Employer introduced evidence from a vocational consultant regarding alternate work claimant could perform. EX 7.