BRB No. 06-0486

RAYMOND BANKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYERS INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 03/14/2007
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Timothy J. Young, Robert J. Young, Jr., and N. Husted Derussy (The Young Firm), New Orleans, Louisiana, for claimant.

Patricia A. Krebs and J. Geoffrey Ormsby (King, Leblanc & Bland, P.L.L.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2005-LDA-00010) of Administrative Law Judge Patrick M. 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 Defense Base Act, 42 U.S.C. §1651 (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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).

Claimant, a cook, alleged he injured his back when he fell into a pothole while working at Bagram Air Force Base in Afghanistan sometime during late 2002.[1] Claimant continued performing his usual duties until he was returned to the United States in August 2003 for treatment of an unrelated gastrointestinal disorder; he has not worked since that date. Claimant sought compensation and medical expenses for his back injury.

The administrative law judge found that claimant is entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that his back condition is related to the fall. The administrative law judge found the presumption rebutted by evidence of a pre-existing back condition, and that, based on the record as a whole, claimant did not establish that his back condition is related to his employment. He, therefore, denied benefits.[2]

Claimant appeals, contending that the administrative law judge erred in finding he did not establish a causal relationship between his back condition and his employment. Specifically, claimant contends the administrative law judge erred in finding claimant's condition is the result of a pre-existing back injury. Employer responds, urging affirmance of the denial of benefits.

Once, as here, claimant establishes his *prima facie* case, he is entitled to the Section 20(a) presumption that his injury is causally related to his employment. 33 U.S.C. §920(a); *see Port Cooper/T.Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The burden then shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See, e.g., American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). If the administrative law judge finds the presumption rebutted, he must weigh all of the evidence and resolve the causation issue based upon the record as a whole, with claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

The administrative law judge found that employer did not offer any direct evidence that claimant's current back condition is not the result of the fall at work. The

[1] Claimant is unclear as to the exact date of the incident but believes it was either the evening of Thanksgiving or Christmas Day, 2002. JX 1.

[2] In so concluding, the administrative law judge found the other contested issues, *i.e.*, timeliness of the claim and claimant's average weekly wage, were rendered moot. Decision and Order at 19.

administrative law judge nonetheless found the Section 20(a) presumption rebutted by evidence indicating that claimant previously injured his back and had degenerative disc disease. Decision and Order at 17-18. On weighing the evidence as a whole, the administrative law judge found that "the totality of the evidence makes it more likely than not that any back pain . . . was a consequence of his pre-existing degenerative back condition rather than a fall into a hole." *Id.* at 19. Claimant alleges that the finding that his condition is due to a pre-existing back injury is not supported by substantial evidence, in that the administrative law judge disregarded medical evidence that post-dated the fall and diagnosed a serious back condition.

We agree with claimant that the administrative law judge's findings cannot be affirmed as they are not in accordance with law or supported by substantial evidence of record. When it is alleged that a pre-existing condition is the cause of the claimant's current injury, the aggravation rule is implicated. The aggravation rule states that if an employment-related injury contributes to, combines with, or aggravates a pre-existing condition, employer is liable for the entire resulting disability. *See, e.g., Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc).* In order to rebut the Section 20(a) presumption in such a case, employer must introduce substantial evidence that the pre-existing condition was not aggravated by claimant's employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The mere existence of a prior back injury condition does not establish that the current condition is due to that injury or that the pre-existing condition was not aggravated by the work accident. *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982). If claimant's work caused his underlying condition to become symptomatic or otherwise worsened his symptoms, claimant has sustained a work-related injury. *See Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986); *see also Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). As the administrative law judge did not address the aggravation rule, he erred in finding that the Section 20(a) presumption is rebutted by the mere existence of medical records of a prior back condition. *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997).

Moreover, the medical and lay evidence cited by the administrative law judge does not support his finding that claimant's current condition is due to a back injury that pre-existed the 2002 fall at work. In 1994, claimant was treated by Dr. Steiner for back pain. JX 12 at 8-11. Dr. Steiner diagnosed lumbosacral syndrome and placed claimant on work restrictions from August 31 to November 11, 1994. *Id.* Claimant was cleared for normal duties on November 11, 1994. *Id.* at 58. Records from examinations at a Veterans Affairs clinic in August 2000 and May 2001 reported complaints of chronic back pain. X-rays on the lumbar spine were normal. JX 3 at 140-143, 147-148. After the 2002 fall,

however, claimant had an MRI and was diagnosed with early degenerative disc disease at L5-S1, a mild bulge at L3-L4, and a bulge at L4-L5 with moderate to severe bilateral neural foraminal narrowing. JX 11 at 10, 30; JX 12 at 6-7. Dr. Velinker and Dr. Steiner diagnosed a herniated disc at L4-L5. *Id.* Dr. Steiner stated it was likely that claimant would need surgical intervention. This medical evidence does not support a finding that claimant's current back condition is due to a pre-existing back condition; rather, it suggests that a more serious condition was first diagnosed after the fall at work. *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994). In addition, the administrative law judge relied on the fact that claimant was able to continue to perform his job in Afghanistan after the fall as support for his finding that claimant's current condition is due to a pre-existing condition. Decision and Order at 19. The administrative law judge, however, did not address claimant's testimony that he continued to perform his job in Afghanistan despite continued pain in order to maintain the tax benefits of his position, HT at 74, and only through the assistance of his co-workers and the use of pain medications. HT at 38; JX 1 at 58.

Because the administrative law judge did not analyze the evidence in light of the aggravation rule, and as substantial evidence does not support his finding,[3] we vacate the conclusion that claimant's current back condition is not work-related. On remand, the administrative law judge must address rebuttal of the Section 20(a) presumption with reference to the aggravation rule. *See Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). If he finds the presumption rebutted, he must re-weigh all the relevant evidence of record and provide a valid rationale for his findings and conclusions concerning the work-relatedness of claimant's current back condition. If the administrative law judge finds that claimant's back condition is work-related, he must address any remaining issues raised by the parties.[4]

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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[3] The administrative law judge did not cite any medical evidence stating that claimant's current back condition is due to the natural progression of a prior condition.

[4] Claimant also addresses his average weekly wage in his brief. As claimant acknowledges the administrative law judge did not address this issue, it is therefore premature for us to do so.

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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