

JOHN J. MASIELLO)	
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Claimant-Respondent)	
)	
v.)	
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NORTHROP GRUMMAN)	DATE ISSUED: 03/07/2011
SHIPBUILDING, INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Disability Compensation Benefits of Alan L. Bergstrom, United States Department of Labor.

Charlene A. Moring (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges

PER CURIAM:

Employer appeals the Decision and Order - Awarding Disability Compensation Benefits (2009-LHC-00638) of Administrative Law Judge Alan L. Bergstrom 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant has worked for employer as a security guard since 1973. He suffered work-related bilateral foot injuries in 2004 and underwent right-foot surgeries in 2004 and 2005. Emp. Ex. 1. In 2005, doctors placed screws into claimant's right foot. In 2006, following recuperation from the second surgery, claimant returned to his security guard job with permanent restrictions. Tr. at 16. Employer paid temporary total

disability and medical benefits for these injuries in accordance with a decision issued in 2006. Emp. Exs. 19-20.

Due to complaints of pain in his right foot that became progressively worse with prolonged activity and walking, claimant returned to Dr. Keller, his orthopedic surgeon, on October 12 and December 27, 2007, and on April 28, 2008. Dr. Keller discovered a lesion on the third metatarsal of claimant's right foot. X-rays taken in 2008 revealed that the screws from the 2005 reconstructive surgery had shifted and were pushing down on claimant's foot. Dr. Keller stated that work-related walking in steel-toed boots aggravated claimant's right foot causing the lesions. On May 8, 2008, Dr. Keller performed surgery to remove the screws, and claimant was out of work until July 8, 2008, at which time he returned to his usual job under the same permanent restrictions. Because employer contended this condition is related to the original 2004 injury, it paid medical benefits but declined to pay compensation based on its contention that the claim for modification was not timely filed.

The administrative law judge found that, based on claimant's credible testimony and the opinion of Dr. Keller, claimant established a *prima facie* case that his work aggravated his foot condition; thus, the administrative law judge invoked the Section 20(a) presumption, 33 U.S.C. §920(a). He found that employer did not rebut the presumption. Decision and Order at 12-13. Accordingly, as the parties stipulated that claimant's claim for the new injury was timely filed, the administrative law judge awarded claimant temporary total disability benefits from May 8 to July 8, 2008, as well as reasonable and necessary medical benefits for the 2008 right foot injury.

On appeal, employer contends the administrative law judge erred in awarding claimant temporary total disability benefits. Employer argues that claimant's condition is the result of the natural progression of his 2004 injury/2005 surgery, for which it had paid benefits pursuant to a 2006 decision, such that claimant's claim for benefits is barred by the time limitation in Section 22 of the Act, 33 U.S.C. §922. Claimant responds, urging affirmance.

Pursuant to Section 22 of the Act, an otherwise final compensation order may be reopened on the grounds that there has been a change of conditions or a mistake in the determination of a fact "at any time within one year of the last payment of compensation. . . ." 33 U.S.C. §922; *see Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *Daigle v. Scully Bros. Boat Builders, Inc.*, 19 BRBS 74 (1986). The last payment of temporary total disability benefits in accordance with the 2006 decision was made on January 8, 2006. In 2008, the parties stipulated that claimant has a 14 percent impairment of his right foot from the 2004 injury. Decision and Order at 3. The record, however, does not disclose whether employer paid permanent partial disability payments under the

schedule, 33 U.S.C. §908(c)(4), for that disability. Claimant filed a claim for temporary total disability benefits for a new injury in 2008, and the parties stipulated that this claim was timely filed under Section 13 of the Act, 33 U.S.C. §913. Decision and Order at 2. As substantial evidence supports the administrative law judge's finding that claimant's foot condition was aggravated by claimant's continued employment, which constitutes a new injury, we need not determine if claimant filed his claim within one year of the last payment of benefits. *See generally Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002).

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). 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. *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 649 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). This rule applies not only where the underlying condition is affected but also where the work causes the claimant's underlying condition to become symptomatic. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Aggravation of a prior injury constitutes a new injury. *See Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1982), *aff'd mem.*, No. 81-7801 (9th Cir. 1982). Upon invocation of the presumption, the burden shifts to the employer to establish with substantial evidence that the claimant's condition was not caused or aggravated by his employment. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

In this case, it is evident that claimant suffered a harm to his foot. Cl. Exs. 1-6. Claimant testified that, while his job is essentially a desk job, he is required to wear steel-toed boots and walk on hard surfaces. Tr. 13-14. Dr. Keller opined that wearing steel-toed boots and doing considerable walking aggravated claimant's pre-existing foot condition. Specifically, he acknowledged that, with prolonged activity, the screws from the prior right foot reconstructive surgery caused a bony prominence and the development of painful lesions. Cl. Exs. 1-2, 5; Emp. Exs. 7, 9. Therefore, contrary to employer's contention, the administrative law judge did not err in finding that claimant established a *prima facie* case of work-related aggravation, and we affirm his finding as it is supported by substantial evidence. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Brown*

v. I.T.T./Continental Baking Co., 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

Next, employer asserts that the administrative law judge erred in finding that it did not rebut the Section 20(a) presumption. The administrative law judge rejected the opinion of Dr. Stewart, a board-certified orthopedic expert, who examined claimant once and reviewed his medical records. The administrative law judge found that Dr. Stewart's opinion was vague and speculative regarding the cause of claimant's right foot lesions. Decision and Order at 13; *see generally Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2^d Cir. 2008). This is a reasonable description of Dr. Stewart's opinion, as he stated that claimant could have on-going problems from the original surgery and that claimant's condition seems to be related to his previous condition, as well as to the "removal of the hardware and the complication from that[.]" Emp. Ex. 11.¹ In any event, Dr. Stewart did not state there was no work-related aggravation of claimant's condition. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *see also C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3^d Cir. 2008). The administrative law judge also rejected employer's proffer of Dr. Keller's opinion as sufficient to establish rebuttal. The administrative law judge rationally stated that, generally, Dr. Keller's opinion supports claimant's position. Decision and Order at 13. The administrative law judge thus properly determined that the evidence relied upon by employer to rebut the Section 20(a) presumption does not constitute substantial evidence that claimant's right foot lesions were not caused, contributed to, or aggravated by his continued employment. Therefore, we affirm his finding that employer did not rebut the presumption and that claimant's foot condition is related to his continued employment as a matter of law. *See Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). As claimant's condition is related to his continued employment between 2006 and 2008, and as claimant filed a timely claim for this injury, the administrative law judge properly held employer liable for disability and medical benefits. We therefore affirm the award of benefits. 33 U.S.C. §§907, 908(b).

¹Claimant testified that his problem has resolved since the screws were removed from his right foot. Tr. at 21-22.

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