

NILES RICKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE	)	
CORPORATION	)	
	)	DATE ISSUED: <u>May 23, 2005</u>
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Baker, Garber, Duffy & Pedersen), Hoboken, New Jersey, for claimant.

Francis M. Womack III (Field Womack & Kawczynski), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (1997-LHC-2589) of Administrative Law Judge Stephen L. Purcell 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).

This case is before the Board for the third time. To recapitulate the relevant facts and proceedings, claimant worked for employer as a longshoreman from 1979 until he retired on January 30, 1995, due to chronic obstructive pulmonary disease (COPD). He testified that during the course of his employment he was exposed to diesel fumes and noxious dust. Claimant also has a smoking history of approximately 45 pack years, he is obese, and he has sleep apnea. At the initial formal hearing, claimant alleged that his working conditions contributed to his present disability and/or that a return to his usual employment as a dockman would exacerbate his disability. Tr. at 7, 12, 63-77 (Jan. 16, 1998).

In the initial Decision and Order, Administrative Law Judge Teitler found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a). With regard to claimant's work-place exposures, Judge Teitler found that claimant credibly testified as to the presence of various dusts and exhaust fumes in the hold of ships and in the terminal. The administrative law judge further found that employer established rebuttal of the Section 20(a) presumption based on the testimony and report of Dr. Adelman. Based on the record as a whole, the administrative law judge concluded that claimant failed to establish that his disability is in part work-related, and denied benefits. He credited the opinion of Dr. Adelman that claimant's COPD is due to smoking and aggravated by sleep apnea.

Claimant appealed, contending that employer failed to rebut the Section 20(a) presumption as Dr. Adelman's opinion does not state that claimant's work exposures did not aggravate his COPD or contribute to his disability. The Board held that Dr. Adelman's opinion is not sufficient to rebut the Section 20(a) presumption as he did not state that claimant's COPD was not exacerbated by his employment or that claimant's disability is not due in part to his work exposure to dust and fumes. Dr. Adelman, in fact, stated that the exposures increased claimant's symptomatology while he was at work. The Board therefore vacated the administrative law judge's finding that Dr. Adelman's opinion rebuts the Section 20(a) presumption, and, in the absence of any other evidence of record that could rebut the Section 20(a) presumption, remanded the case for the administrative law judge to address the remaining issues. *Ricker v. Universal Maritime Serv. Corp.*, BRB No. 99-0564 (March 1, 2000) (unpub.).

Employer filed a motion for reconsideration of the Board's decision.<sup>1</sup> Employer contended claimant did not make a claim based on "aggravation" or "exacerbation," and

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<sup>1</sup> In addition, the Board granted the motion of the American Shipbuilding Association and the National Association of Waterfront Employers to participate as *amici curiae*, and accepted the brief filed on behalf of these organizations that supported employer's position.

that the Board therefore erred in holding Dr. Adelman's opinion insufficient to rebut the Section 20(a) presumption. The Board denied employer's motion for reconsideration, detailing the several ways in which claimant raised the theory before the administrative law judge that his underlying pulmonary condition was aggravated by his employment exposures. *Ricker v. Universal Maritime Serv. Corp.*, BRB No. 99-0564 (Nov. 30, 2000) (*en banc*) (unpub.), slip op. at 4. The Board also rejected the contention that it had required employer to "rule out" any possibility that claimant's condition was work-related. The Board stated that employer did not produce "substantial evidence" that claimant's COPD was not aggravated by his employment exposures, *id.* at 5, as Dr. Adelman stated that claimant's occupational exposures irritated claimant's condition, even though claimant's underlying disease did not progress as a result of the exposures. *Id.* at 6. The Board held that as Dr. Adelman stated that claimant's symptoms are work-related, his opinion cannot rebut the Section 20(a) presumption. The Board remanded the case for the administrative law judge to address the nature and extent of any disability sustained as a result of claimant's work injury.

On remand, Judge Teitler did not adhere to the Board's instructions. Rather, he stated that the Board had raised the aggravation rule and incorrectly applied the "ruling out" standard to its rebuttal analysis. Decision and Order on Remand at 3-4. He stated that the Board effectively overruled the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), by allowing claimant to prevail by virtue of the Section 20(a) presumption. The administrative law judge further found that claimant was barely exposed to injurious substances. He specifically contradicted his first decision by stating "the exposures alleged by Claimant are not creditable," and that the medical evidence is devoid of claimant's complaints of such exposures. Judge Teitler again concluded that Dr. Adelman's testimony was sufficient to rebut the Section 20(a) presumption and to establish the absence of a causal connection between claimant's disability and his employment. Therefore, he denied benefits.

Claimant appealed. The Board first held that the administrative law judge was not free to ignore its instructions, noting that the administrative law judge failed to determine the extent of "any disability resulting from the aggravation of this underlying condition, including the exacerbation of his symptomatology," as directed by the Board. *Ricker v. Universal Maritime Serv. Corp.*, BRB No. 01-0942 (Sept. 9, 2002). The Board also held that the administrative law judge reconsidered the credibility of claimant's testimony regarding the extent of his industrial exposures without justification for doing so, as he had specifically credited in his first decision claimant's testimony concerning his exposures. Furthermore, the Board explained why its prior decisions were not in conflict with *Greenwich Collieries*, how the Board applied the "substantial evidence" rebuttal standard, and how claimant, and not the Board, had raised the aggravation theory. *Id.*, slip op. at 6-7. As Judge Teitler had been recalcitrant in following the Board's remand

instructions, the Board ordered that the case be remanded to a new administrative law judge.

On remand, the case was assigned to Administrative Law Judge Purcell (the administrative law judge). He held a hearing and admitted additional evidence into the record. As instructed by the Board, the administrative law judge addressed the nature and extent of claimant's disability. He found that exacerbations of claimant's COPD caused by exposure to industrial irritants preclude claimant's return to his usual work. He also found that claimant's condition is permanent. As employer did not offer any evidence of suitable alternate employment, the administrative law judge found that claimant is permanently totally disabled. The administrative law judge awarded employer Section 8(f) relief, 33 U.S.C. §908(f).

Employer appeals the administrative law judge's decision. Employer contends the aggravation rule is inapplicable because claimant is totally disabled by diseases completely independent of his exposures at work. Employer also contends the Board erred in ordering that a new administrative law judge hear the case on remand, as, under the Administrative Procedure Act, reassignment is appropriate only when the original administrative law judge is unavailable. In addition, employer preserves for appeal two issues raised in the previous proceedings, namely, that the Board erred in "allowing" claimant to change his theory of the case to raise the aggravation rule and in holding that the Section 20(a) presumption was properly invoked and not rebutted. Claimant responds that the administrative law judge's award is consistent with the aggravation rule. Claimant also responds that the assignment of the case to a new administrative law judge was appropriate.

We first reject employer's challenge to the Board's prior decisions in this case concerning claimant's raising of the aggravation rule and the application of the Section 20(a) presumption. These issues have been thoroughly addressed in the Board's prior decisions, and the Board's holdings therein constitute the law of the case. Employer has not provided any basis for the Board's departure from this doctrine. *See, e.g., Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003).

We also reject employer's contention that the Board erred in ordering this case remanded to a different administrative law judge. The Act and the regulations provide that the Board may remand a case to the administrative law judge for "further appropriate action." 33 U.S.C. §921(b)(4); 20 C.F.R. §802.405. When an administrative law judge has been recalcitrant in following the Board's remand instructions, the Board has taken the extraordinary action of ordering the case remanded to a different administrative law judge. *See, e.g., Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989); *Wade v. Gulf Stevedore Corp.*, 8 BRBS 335 (1978). Contrary to employer's contention, Judge Teitler was indeed recalcitrant in following the Board's instructions. The Administrative

Procedure Act, 5 U.S.C. §554(d), states that the adjudication officer “who presides at the reception of evidence . . . shall make the recommended decision . . . unless he becomes unavailable to the agency.” *See, e.g., McRoy v. Peabody Coal Co.*, 10 BLR 1-33 (1987); *see also* 33 U.S.C. §919(d). Contrary to employer’s contention, the APA is satisfied in this case, as Judge Purcell held an evidentiary hearing at which he received testimony and documentary evidence.<sup>2</sup> *See Creasy v. J.W. Bateson Co.*, 14 BRBS 434 (1981).

Employer next contends that the administrative law judge erred in awarding claimant benefits pursuant to the aggravation rule, as it alleges the medical evidence establishes that claimant is totally disabled independent of any work-related exposures and does not support a finding that claimant’s aggravated symptomatology contributes to his disability. We reject this contention, and we affirm the administrative law judge’s award of permanent total disability benefits as it is rational, supported by substantial evidence, and in accordance with law.

Contrary to employer’s contention, the administrative law judge correctly applied the aggravation rule. The aggravation rule provides that when an employment injury aggravates, accelerates or combines with a pre-existing condition, the entire resulting condition is compensable. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5<sup>th</sup> Cir. 1986) (*en banc*); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Independent Stevedore Co. v. O’Leary*, 357 F.2d 812 (9<sup>th</sup> Cir. 1966). The relative contributions of the underlying disease and the work-related component are not weighed. *O’Leary*, 357 F.2d at 815. In *O’Leary*, the Ninth Circuit addressed an argument similar to that made by employer herein. The employer contended that,

the natural progression of the employee's arthritis would have resulted in total disability even if the accident (and fusion) had not occurred at all; and therefore, appellant's (sic) contend, the accident and fusion cannot be said to be related to the employee's permanent disability.

357 F.2d at 815. The Ninth Circuit responded,

If an employee is incapacitated from earning wages by an employment injury which accelerates a condition which would ultimately have become incapacitating in any event, the employee is incapacitated “because of” the

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<sup>2</sup> Judge Purcell stated that he found claimant’s testimony concerning his workplace exposures credible and that employer has not rebutted the Section 20(a) presumption because Dr. Adelman stated in his additional deposition that claimant’s exposures increased his symptomatology while he was at work. Decision & Order at 15 n.12, 17 n.16.

employment injury, and the resulting “disability” is compensable under the Act.

*Id.* Similarly, in *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), the court addressed a case in which the medical evidence established that the claimant’s condition, COPD, was due to smoking, but also that occupational exposures to fumes and odors of nitrogen temporarily aggravated the claimant’s symptoms. The court conceded to employer that the record established that factors other than the welding fumes contributed to claimant’s disability, but stated that,

we are bound by the rule that the presence of other contributing factors do (sic) not control the determination of applicability under the “aggravation rule.” In fact, the “aggravation rule” is only relevant when other factors are present.

*Id.*, 580 F.2d at 1335, 8 BRBS at 747. Indeed, the employer takes the employee as he finds him. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069, 32 BRBS 59, 61(CRT) (5<sup>th</sup> Cir. 1998); *J. V. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). In *Cordero*, the administrative law judge had found that the claimant was permanently totally disabled due to the aggravation of his condition by the welding fumes, and the court affirmed as the administrative law judge’s finding was rational and supported by substantial evidence. Moreover, in *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1<sup>st</sup> Cir. 1981), the First Circuit stated,

Whether circumstance of [claimant’s] employment combined with his disease so to induce an attack of symptoms severe enough to incapacitate him or whether they actually altered the underlying disease process is not significant. In either event his disability would result from the aggravation of his preexisting condition.

*Id.*, 640 F.2d at 1389, 13 BRBS at 106. In this case, the administrative law judge correctly recognized that the severity of claimant’s underlying disease and the likelihood that it would have disabled claimant by itself are not determinative of whether claimant’s work exposures aggravated his condition. Decision and Order at 17-18; *Gardner*, 640 F.2d at 1389, 13 BRBS at 106; *Cordero*, 580 F.2d at 1335, 8 BRBS at 747; *O’Leary*, 357 F.2d at 815. The administrative law judge therefore properly addressed the evidence in terms of whether claimant’s disability is due at least in part to the work-related aggravations of claimant’s pre-existing COPD. We therefore reject employer’s contention that the aggravation rule is not applicable in this case.

In addition, the administrative law judge's finding that claimant is totally disabled due to the aggravation of his symptoms is supported by substantial evidence. The parties agree that claimant is totally disabled. The administrative law judge credited claimant's testimony that the exacerbations of his COPD due to work exposures caused him to need a rest period and to seek treatment at employer's clinic. Tr. at 50, 55 (April 28, 2003). The administrative law judge rationally found that this evidence demonstrates claimant's inability to return to work. See generally *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5<sup>th</sup> Cir. 1991). The administrative law judge also credited the opinion of claimant's treating physician, Dr. Nahmias, that claimant would be susceptible to aggravations if he were to return to work and that exacerbations would certainly occur resulting in decreased lung function and worsening of claimant's COPD. Tr. at 17-18, 39 (April 28, 2003). Finally, the administrative law judge relied on that portion of the opinion of employer's expert, Dr. Adelman, stating that claimant's exposure to fumes and dust is contraindicated, and that an increase in symptoms can affect one's ability to work. Dep. at 27-29 (July 30, 2003). Opinions that a return to work is contraindicated due to the likely exacerbation of a condition will support a *prima facie* case of total disability, even if only on a temporary basis and the underlying disease is not worsened by the exposures.<sup>3</sup> *Gardner*, 640 F.2d at 1389, 13 BRBS at 106; *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 1 (1988); *Lobue v. Army & Air Force Exchange Serv.*, 15 BRBS 407 (1983); *Sweitzer v. Lockheed Shipbuilding & Constr. Co.*, 8 BRBS 257 (1978). Substantial evidence of record therefore establishes that claimant's workplace exposures are "a cause" of claimant's inability to work. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 193, 33 BRBS 65, 67(CRT) (5<sup>th</sup> Cir. 1999) ("the only legally relevant question is whether the [work] injury is a cause of that disability"). Consequently, we affirm the award of permanent total disability benefits.<sup>4</sup> *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984).

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<sup>3</sup> We reject employer's contention that the Board should extend the holding in *Peabody Coal Co. v. Smith*, 127 F.3d 504 (6<sup>th</sup> Cir. 1997) to this case. In *Smith*, the Sixth Circuit stated that in establishing that a miner's total disability is "due to" pneumoconiosis, the Black Lung Act "requires a miner to prove more than a de minimis or infinitesimal contribution by pneumoconiosis to his total disability." *Id.* at 507. Employer assumes that the contribution of claimant's workplace exposures to his disability is *de minimis*, although the administrative law judge made no such finding. Moreover, there is no precedent under the Longshore Act for the application of such a *de minimis* rule.

<sup>4</sup> Employer does not challenge the findings that claimant's condition is permanent and that it did not submit any evidence of suitable alternate employment.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge