BRB No. 06-0706

NOLA J. GARDNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LAKE CHARLES CARBON COMPANY	)	DATE ISSUED: 05/24/2007
	)	
and	)	
	)	
RISK SPECIALTY SERVICES	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

Jere Jay Bice (Bice, Palermo & Veron, L.L.C.), Lake Charles, Louisiana, for claimant.

John J. Rabalais, Janice B. Unland, Robert T. Lorio and Charles G. Clayton (Rabalais, Unland & Lorio), Covington, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2005-LHC-00165) 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*. (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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as a general laborer in the bake furnace area of employer's facility. In 2001, claimant began suffering from shortness of breath and fatigue. She

began treatment with Dr. Broussard in August 2001. Dr. Broussard kept claimant off work on a month-by-month basis until January 2002, when he diagnosed sarcoidosis and restricted further exposure to the irritants at claimant's former work site (carbon dust, fumes, and heat). Claimant began a course of oral steroids and her sarcoidosis improved. Claimant is currently employed as a cafeteria worker at an elementary school. Claimant filed a claim for benefits under the Act on October 20, 2003.

In his Decision and Order, the administrative law judge found that Dr. Broussard removed claimant from the work environment on a month-by-month basis beginning in August 2001, and that claimant did not know the full nature and extent of her injury until January 8, 2002. Therefore the administrative law judge found that the claim filed in October 2003 was timely pursuant to Section 13 of the Act, 33 U.S.C. §913. Moreover, the administrative law judge found that although claimant did not give employer timely notice of her injury pursuant to Section 12, 33 U.S.C. §912, employer had all of the same medical records as claimant did, and that employer was not prejudiced by claimant's failure to give timely notice. 33 U.S.C. §912(d)(1), (2). The administrative law judge found, after application of the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's sarcoidosis was not caused by her work environment. He further found, however, that claimant's work environment aggravated her lung condition. The administrative law judge found that claimant cannot return to her usual job with employer, but that her post-injury work as a cafeteria worker is suitable alternate employment. The administrative law judge concluded that claimant reached maximum medical improvement on August 12, 2004, and thus is entitled to temporary total disability benefits until August 12, 2004, and to continuing permanent partial disability benefits thereafter, based on a loss in wage-earning capacity. 33 U.S.C. §908(c)(21), (h).

Employer appeals, contending that the administrative law judge did not make a finding as to whether claimant had an occupational disease or traumatic injury for purposes of determining the applicable statute of limitations. Employer also contends that the administrative law judge erred in finding that the claim was timely filed, that employer was not prejudiced by the lack of timely notice and that it had knowledge of claimant's injury. In addition, employer contends that the administrative law judge erred in finding that claimant's work environment aggravated her sarcoidosis and asthma. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer contends that the administrative law judge erred in assuming that claimant suffers from an occupational disease, and thus in applying the two-year statute of limitations under Section 13(b)(2) of the Act. 33 U.S.C. §913(b)(2). Section 13(b)(2) provides that in the case of an occupational disease which does not immediately result in disability or death the statute of limitations does not begin to run until claimant is aware or should have been aware of the relationship between the employment, the disease, and the disability. 33 U.S.C. §913(b)(2); *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS

154, 156 (1996). The administrative law judge did not make an explicit finding that claimant suffered from an occupational disease, but he applied the two-year statute of limitations. *See* Decision and Order at 38-40.

In order to be considered an occupational disease, the Fifth Circuit has held that the condition must result from the "peculiar [] nature of the claimant's particular line of work." *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d. 157, 160, 31 BRBS 195, 197(CRT) (5th Cir. 1997), citing *McNeelly v. Sheppeard*, 89 F.2d 956, 957 (5th Cir. 1937). "The generally accepted definition of an occupational disease is 'any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally.'" *LeBlanc*, 130 F.3d at 160, 31 BRBS at 197(CRT) (internal quotations omitted); *see also Bunge Corp. v. Carlisle,* 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989). In this case, the administrative law judge found that claimant was exposed to carbon fumes and heat from the bake furnace area, which are conditions peculiar to claimant's employment. As these findings establish that claimant's lung condition is an occupational disease, we affirm the administrative law judge's application of the extended statutes of limitations. *Bunge Corp.*, 227 F.3d 934, 34 BRBS 79(CRT).

Employer next contends that the administrative law judge erred in finding that the claim was timely filed pursuant to Section 13(b)(2), as claimant should have known at least by October 15, 2001, that she suffered from a work-related respiratory condition that would impair her earning capacity. As the claim was not filed until October 20, 2003, employer maintains that the claim is time-barred. Section 13(b)(2) states:

> a claim for compensation for death or disability due to an occupational disease which does not immediately result in such death or disability shall be timely if filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability, ...

33 U.S.C. §913(b)(2). Section 20(b) of the Act, 33 U.S.C. §920(b), provides a presumption that a claim was timely filed, "in the absence of substantial evidence to the contrary." *See Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987).

Claimant was off work on a month-by-month basis between August 2001 and January 2002. As employer contends, on October 15, 2001, Dr. Broussard reported that claimant's return to work at that time would "greatly impair her respiratory status." Cl.

Ex. 1 at 43. Employer contends that this knowledge was sufficient to start the statute of limitations. However, Dr. Broussard did not state that claimant should not return to her previous occupation until January 8, 2002. Cl. Ex. 1 at 39. The administrative law judge found that "while she should have made the basic connection much sooner than January 2002, it was then that she was first informed of the permanency of the removal from the workplace and learned of the full extent of her disability." Decision and Order at 40. Thus, the administrative law judge found that the notice and claim periods began to run on January 8, 2002.

We reject employer's contention of error. Claimant's condition improved incrementally from the time of her initial diagnosis in August 2001 until she was told in January 2002 that she would not be able to return to her former employment. Thus, claimant was not aware of the full nature and extent of her disability until January 2002. *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984). In addition, there is no evidence that claimant was ever told by any physician that her condition was caused or exacerbated by her working conditions. *Id.; see also Lewis*, 30 BRBS at 156 (claimant must be aware of a relationship between employment and disease). As claimant's claim was filed in October 2003, which is within two years of January 2002, we affirm the administrative law judge's finding that claimant's claim was timely filed.

We next address employer's contention that the administrative law judge erred in finding that claimant's failure to give timely notice of her injury pursuant to Section 12(a) is excused pursuant to Section 12(d).[1] A claimant's failure to give proper notice of her injury will not bar a claim if the employer had knowledge of the injury or if it was not prejudiced by claimant's failure to give such notice. 33 U.S.C. §912(d); *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986). It is employer's burden, pursuant to Section 20(b) of the Act, to establish that it did not have knowledge of the injury and that it was prejudiced by the lack of proper notice. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *see also Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 12 BRBS 478 (5th Cir. 1980).

Employer asserts that it was prejudiced because it was unable to provide appropriate medical treatment and vocational rehabilitation to claimant, asserting, in addition, that it paid benefits to claimant for over two years under a non-workers' compensation sickness and accident disability policy. Employer also contends it did not have imputed knowledge of claimant's condition such that the knowledge excuse is

[1] In an occupational disease claim, claimant must give notice of her injury to employer within one year of her date of awareness. 33 U.S.C. §912(a). It is uncontested that claimant did not do so.

applicable. The administrative law judge found that employer had access to the same medical information as claimant did, as claimant submitted her medical records to employer for non-workers' compensation disability benefits. Decision and Order at 40. Thus, employer was not precluded from taking a more active role in monitoring claimant's medical treatment and employer does not establish how its supervision would have altered the course of claimant's medical treatment. *See Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999); *see also Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir.1998), *cert. denied*, 525 U.S. 1102 (1999). With regard to employer's argument that it was prejudiced in pursuing vocational rehabilitation for claimant, we note that employer may attempt to establish suitable alternate employment on a retroactive basis and therefore has not established prejudice on this ground. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). Finally, with regard to the disability payments made to claimant, the administrative law judge awarded employer a credit, and he therefore found no prejudice to employer on this basis.[2] As employer has failed to establish reversible error in the administrative law judge's finding that employer did not provide specific examples of prejudice due to claimant's lack of notice, we affirm the administrative law judge's finding that claimant's claim is not barred due to non-compliance with Section 12(a).[3] 33 U.S.C. §912(d)(2). *See generally I.T.O. Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989).

Employer next contends that the administrative law judge erred in finding that claimant's respiratory conditions are related to her employment at employer's facility. Specifically, employer contends that the administrative law judge erred in finding that Dr. Emory's opinion does not establish rebuttal of the Section 20(a) presumption, and that the opinions of Drs. Shellito and Emory establish that claimant's condition is unrelated to her work environment when the evidence is weighed as a whole.

In the instant case, Dr. Broussard testified that claimant's occupational exposure to dust, carbon fumes, and heat most likely caused her sarcoidosis to become symptomatic and that the work environment exacerbated her disease. Emp. Ex. 6 at 17-18, 25. He also testified that carbon dust exposure may produce irritation of the respiratory system and cause a flare-up in an underlying disease, such as asthma or sarcoid. We affirm the

[2] This finding is not challenged on appeal.

[3] Thus, we need not address employer's contention that the administrative law judge erred in finding that employer had imputed knowledge of the work-relatedness of claimant's injury. Employer must have this knowledge in order for Section 12(d)(1) to apply. *See Strachan Shipping Co. v. Davis*, 571 F.2d 968, 8 BRBS 161 (5th Cir. 1978).

administrative law judge's finding that this opinion is sufficient to establish invocation of the Section 20(a) presumption that claimant's respiratory condition was aggravated by her employment as it is supported by substantial evidence.[4] *See Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005).

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by her employment. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). Pursuant to the aggravation rule, employer is liable for disability and medical benefits that result from a work-related aggravation of a pre-existing condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). It is sufficient for purposes of a causal relationship if the work environment caused claimant to become symptomatic, even if the underlying condition is not worsened thereby. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981).

The administrative law judge found that Dr. Emory's opinion that claimant's symptoms were "possibly" aggravated by her workplace exposures, but more likely a result of the internal process of the sarcoid and unrelated to her work environment, is insufficient to establish rebuttal of the Section 20(a) presumption. Dr. Emory testified by deposition that claimant's exposure to carbon fibers, dust and extreme temperatures did not cause her sarcoidosis or make her sarcoidosis or asthma symptomatic. In addition, he testified that sarcoidosis is an internal process and that exposure to dust or particulate matter will not exacerbate a patient's symptoms. Emp. Ex. 8 at 13, 18, 24, 50. As employer's burden on rebuttal is one of production rather than persuasion and as employer need not "rule out" possibilities, we hold that Dr. Emory's opinion is sufficient to establish rebuttal of the Section 20(a) presumption as a matter of law. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003).

The administrative law judge made an alternative finding that even if rebuttal was established, "the evidence of record establishes that it is more likely than not claimant's exposure to the work environment aggravated" claimant's symptoms of sarcoidosis and asthma. Decision and Order at 38-39. Claimant was treated for her respiratory conditions by Dr. Broussard who opined that claimant's work environment aggravated her sarcoid and made it symptomatic. Subsequently, claimant was evaluated by Dr. Emory, who concluded that claimant's occupational exposure to carbon fibers, dust and

[4] Claimant does not challenge the administrative law judge's finding that her sarcoidosis was not caused by her work exposures.

extreme temperatures did not make her sarcoidosis become symptomatic, Emp. Ex. 8 at 24.[5]

The administrative law judge did not fully weigh the medical evidence or provide a rationale for his apparent crediting of Dr. Broussard's opinion. 5 U.S.C. §557(c)(3)(A). The Fifth Circuit has held that an administrative law judge must make express findings on material issues of law and fact. *See H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000). Claimant bears the burden of establishing the work-relatedness of her condition based on the record as a whole. *See Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). As the administrative law judge did not provide a basis for his finding that claimant's lung condition is work-related based on the aggravation rule, his finding is vacated and the case is remanded for the administrative law judge to state which evidence he is crediting and the basis for that determination. *Frazier v. Nashville Bridge Co.*, 13 BRBS 436 (1981).

[5] As there was a difference of opinion regarding the effect of claimant's occupational exposure on her respiratory conditions, the parties agreed to have claimant evaluated by Dr. Shellito. In his deposition, Dr. Shellito testified that claimant's exposure to carbon dust could have been a "triggering event" exacerbating the sarcoidosis, Emp. Ex. 7 at 16-17, and that it was possible that that the work environment exacerbated the disease and made her more symptomatic, *id*. at 48-49. However, he also testified that claimant's exposure to the environmental conditions did not in any way exacerbate or make her symptoms of sarcoidosis and asthma worse, *id*. at 33. The administrative law judge noted the inconsistencies in Dr. Shellito's testimony. Decision and Order at 38.

Accordingly, we hold that employer produced substantial evidence rebutting the Section 20(a) presumption that claimant's lung condition was aggravated by her employment. We vacate the administrative law judge's finding that claimant's lung conditions are related to her work environment based on the evidence as a whole, and we remand the case for further findings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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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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REGINA C. McGRANERY
Administrative Appeals Judge