BRB Nos. 11-0659
and 11-0659A

MICHAEL TOMMINELLO	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 05/17/2012
	)	
and	)	
	)	
CHARTIS INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Daniel F. Sutton, Jr., Administrative Law Judge, United States Department of Labor, and the Order Denying Claimant's Motion for Reconsideration, Granting Respondents' Motion for Reconsideration, and Amending Decision and Order Awarding Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits (2010-LHC-0407) of Administrative Law Judge Daniel F. Sutton, Jr., and the Order Denying Claimant's Motion for Reconsideration, Granting Respondents' Motion for Reconsideration, and Amending Decision and Order Awarding Benefits of

Administrative Law Judge Jonathan C. Calianos 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).

Claimant commenced working for employer in 1979 as a pipefitter. In approximately 1984, claimant was promoted to a management position, specifically that of a ship superintendent. In January 2007, claimant was assigned to the United States Navy's Portsmouth Naval Shipyard (PNS).[1] Claimant was employer's sole management representative assigned to PNS, and his employment duties required him to, *inter alia*, serve as employer's representative with the United States Navy at PNS, act as the liaison between PNS and employer's employees, coordinate the assignment to and work of employer's loaned employees with the specific requirements of PNS's various departments, investigate injuries to employer's employees, document the hours worked by employer's employees and issue employer's employees' pay and per diem payments. These employment duties required claimant to move about PNS as needed.

Claimant's testimony regarding his employment duties was corroborated by Mr. Condon, the "program lead" in employer's maintenance and modernization department. CX 6; H.Tr. at 134-143. Mr. Loftus, who performed claimant's duties at PNS in February 2008, similarly testified regarding the responsibilities of being employer's representative at PNS. H.Tr. at 208-232.

On November 20, 2008, a day on which payroll information was to be submitted by claimant to employer, claimant worked on an employment discrimination complaint by one of employer's tradesmen. Claimant, who has a history of psychological and physical problems, did not complete his payroll duties on that day and, after apparently sustaining a psychological episode, found himself in a parking lot in Providence, Rhode Island. Claimant, who testified to thoughts of suicide during this period of time, returned to PNS over the following weekend whereupon he completed the paperwork necessary to process employer's PNS payroll. On Monday, November 24, 2008, claimant checked himself into Portsmouth Regional Hospital. He has not returned to gainful employment. Claimant subsequently sought temporary total disability benefits under the Act, averring that his present psychological condition is causally related to his employment duties while working for employer at PNS.

[1]Employer loans employees to the Portsmouth Naval Shipyard, where they are assigned to work on submarines. Employer provided testimony that, between 2007 and 2008, the number of its employees assigned to this facility fluctuated from a low of 15 to a high of approximately 150 workers.

In his Decision and Order, Administrative Law Judge Sutton described claimant's job duties at PNS, and found that he was engaged in covered employment pursuant to Section 2(3) of the Act, 33 U.S.C. §902(3). The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption with regard to causation, and found that employer did not establish rebuttal of that presumption. As the parties stipulated that claimant has remained temporarily totally disabled since November 21, 2008, and that claimant's average weekly wage for compensation purposes was $2,279.77, the administrative law judge awarded claimant temporary total disability benefits commencing November 21, 2008, at the maximum compensation rate in effect at the time his disability commenced.

Both parties sought reconsideration of Judge Sutton's decision. On reconsideration, the case was reassigned to Administrative Law Judge Calianos due to Judge Sutton's retirement. In an Order dated June 14, 2011, Judge Calianos denied claimant's challenge to the maximum compensation rate awarded by Judge Sutton, but amended the decision to reflect that claimant's temporary total disability benefits are not subject to subsequent increases in the statutory maximum compensation rate.

On appeal, claimant contends that the administrative law judges erred in limiting claimant's temporary total disability award to the maximum compensation rate in effect on November 21, 2008, when he first became disabled. In its cross-appeal, employer challenges the award of benefits to claimant. Specifically, employer contends that claimant has not satisfied the status requirement for coverage under the Act. Employer further challenges Judge Sutton's finding that it did not present evidence sufficient to establish rebuttal of the Section 20(a), 33 U.S.C. §920(a), presumption. Claimant responds, urging the Board to reject employer's contentions of error.

The threshold issue presented by employer on appeal is whether claimant's employment duties while he was assigned to PNS are covered under the Act. In this regard, employer contends that Judge Sutton erred in finding that claimant satisfied the status element for coverage under the Act. To be covered under the Act, a claimant must satisfy the "status" requirement of Section 2(3), and the "situs" requirement of Section 3(a).[2] 33 U.S.C. §§902(3); 903(a); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Section 2(3) of the Act provides:

> The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder and shipbreaker. . . .

33 U.S.C. §902(3). Generally, a claimant satisfies the "status" requirement if he is an employee engaged in work that is integral to the loading, unloading, constructing, or repairing of vessels. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS

[2] The parties agree that the PNS facility is a covered situs. *See* H.Tr. at 37.

96(CRT) (1989); *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). To satisfy the status requirement, a claimant need only "spend at least some of [his] time in indisputably [covered] operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165; *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must bear an integral or essential relationship to the loading, unloading, building or repairing of a vessel. *See Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981).

In challenging the administrative law judge's finding that claimant was engaged in covered employment, employer asserts that claimant's employment duties while working at PNS were not sufficiently integral to the shipbuilding process. We reject employer's contention. The administrative law judge accurately described claimant's employment responsibilities, as testified to by claimant and Mr. Condon, while he was assigned to PNS. Specifically, the administrative law judge found that claimant's job duties included, *inter alia:* 1) coordinating the trade support that employer provided to PNS; 2) working with employer's departments to ensure that the trade support requested by PNS is provided; 3) ensuring the smooth transition of employer's employees into the PNS workforce; 4) preparing employer's employees' time sheets for processing, and issuing payroll and per diem checks; 5) investigating injuries to employer's employees; and 7) attending critiques involving employer's employees assigned to PNS. *See* Decision and Order at 4-5, 24; CXs 6, 7; H.Tr. at 138-139. The administrative law judge determined that, although claimant's payroll processing and injury investigation duties are not indisputably maritime in nature, claimant's remaining employment duties as employer's sole manager assigned to PNS made him responsible for performing all of the managerial functions necessary to ensure that employer's employees contributed to the shipbuilding and submarine repair work at PNS. Decision and Order at 24. Thus, the administrative law judge concluded that claimant's duties as employer's only manager at PNS were essential and integral to the shipbuilding process, and therefore constituted covered maritime employment under Section 2(3) of the Act. *Id.*

We affirm the administrative law judge's finding of coverage, as it is supported by substantial evidence and is in accordance with law. Specifically, in addition to his payroll and investigative duties, the administrative law judge found that claimant was responsible for ensuring that the employees requested by PNS were provided by employer and that those employees received the appropriate documentation, training, and smooth transition into their respective departments at PNS. The administrative law judge fully considered the totality of claimant's job duties and rationally found that his employment was essential and integral to shipbuilding at PNS. *See generally Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085, 21 BRBS 18(CRT) (11th Cir. 1988) (claimant's job as a labor relations assistant, the function of which was to keep the shipyard work uninterrupted was significantly related to and directly furthered

employer's shipbuilding operations); *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (union shop steward involved in resolving labor disputes held to have coverage); *Jannuzzelli v. Maersk Container Service Co.*, 25 BRBS 66 (1991) (timekeeper who checked men for payroll purposes and ensured work crews were fully manned was covered under the Act); *Mackay v. Bay City Marine*, 23 BRBS 332 (1990) (general manager of shipyard covered). Thus, the administrative applied the proper legal standard in this case, and his conclusion that claimant's employment duties were essential and integral to the shipbuilding process is supported by substantial evidence. Accordingly, the administrative law judge's finding that claimant is a covered maritime employee under Section 2(3) is affirmed.

We next address employer's challenge to the administrative law judge's finding that it did not produce substantial evidence to rebut the presumed causal relationship between claimant's psychological condition and his employment with employer. Once, as in this case, the Section 20(a), 33 U.S.C. §920(a), presumption has been invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, employer avers that the administrative law judge erred in concluding that the testimony of Dr. Borden is insufficient to establish rebuttal of the Section 20(a) presumption. We agree. Employer's burden on rebuttal is one of production, not persuasion. *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *see, e.g., Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 180, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). The United States Court of Appeals for the First Circuit, within whose jurisdiction this case arises, has stated that,

> the requirement that the employer come forward with "substantial evidence" of non-causation . . . to rebut the presumption of causation sets up an "objective test," which requires the employer to produce "not the degree of evidence which satisfies the [ALJ] that the requisite fact [(non-causation)] exists, but merely the degree which *could* satisfy a reasonable factfinder."

Bath Iron Works Corp. v. Fields, 599 F.3d 47, 55, 44 BRBS 13, 17(CRT) (1st Cir. 2010) (internal citation omitted)(emphasis in original). In his decision, Judge Sutton noted in his recitation of the medical evidence Dr. Borden's deposition testimony that claimant's work at PNS neither caused nor aggravated his psychological disability. However, in addressing rebuttal of the Section 20(a) presumption, Judge Sutton found that Dr. Borden failed to state that claimant's working conditions did not contribute to or aggravate his pre-existing psychological condition. *Compare* Decision and Order at 20 *with* Decision and Order at 28. The administrative law judge therefore concluded that a reasonable mind could not conclude from Dr. Borden's testimony that claimant's disabling condition is unrelated to his employment. Thus, the administrative law judge found that Dr. Borden's opinion is legally insufficient to rebut the Section 20(a) presumption.

As employer asserts on appeal, a review of Dr. Borden's deposition reveals that he stated, as the administrative law judge noted in the recitation of the evidence, that claimant's employment did not cause or aggravate his present psychiatric condition. Specifically, Dr. Borden testified on deposition:

> Q: [B]ased on your education, training and experience, your review of the records we discussed here this morning, as well as your two evaluations of [claimant], do you have an opinion to a reasonable degree of medical certainty whether or not any portion of [claimant's] disability from November of 2008 to the present time was in any way caused, hastened, or accelerated by his work [with employer at PNS]?
>
> * * *
>
> Dr. Borden: Yeah. I have an opinion.
>
> Q: What is that opinion, doctor?
>
> Dr. Borden: No. My opinion is that his work at [PNS] is neither a causative or an aggravating factor. And my opinion is that he'd be in his current mental state in any event whether he was working there or not. Because, indeed, he has psychiatric hospitalizations and similar blackout problems prior to going to [PNS].

EX 13 at 29. Additionally, on cross-examination, Dr. Borden responded

> Q: [Y]ou . . . say that [claimant's] work-related stress plays no part at all in the breakdown that [claimant] suffered in November of 2008?
>
> Dr. Borden: Not in the breakdown, no. It was an added stress, yes. It wasn't causative. . . .
>
> * * *

> Q: [A]nd you stick to this today – you do not attribute any of [claimant's] injuries to his work at all; right?
>
> Dr. Borden: Not in a causative fashion, no.

Id. at 92-93, 120. The administrative law judge cited only this last statement, which did not use the terms "contribute" or "aggravate," in finding that a reasonable mind could not conclude that Dr. Borden's opinion was that claimant's psychiatric condition is unrelated to his employment. *See* Decision and Order at 28. This singular statement, however, does not detract from the totality of Dr. Borden's testimony, wherein Dr. Borden expressed his opinion that claimant's employment was not a causative or an aggravating factor and that claimant's work-related stress played no part in his psychiatric breakdown. *See* EX 13 at 29, 92-93. Thus, as Dr. Borden opined, with a reasonable degree of medical certainty, that claimant's employment for employer at PNS neither caused nor aggravated his psychiatric condition, we hold that employer has produced substantial evidence of the lack of a causal relationship between claimant's employment and his harm. *See Harford*, 137 F.3d at 675-676, 32 BRBS at 46-47(CRT); *Sprague v. Director, OWCP*, 688 F.2d 862, 865, 15 BRBS 11, 15(CRT) (1st Cir. 1982). Accordingly, we reverse the administrative law judge's finding that employer did not rebut the Section 20(a) presumption. We remand the case for the administrative law judge to weigh all of the relevant evidence and to resolve the causation issue based on the record as a whole. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

In his appeal, claimant challenges the decision of the administrative law judges limiting his award of temporary total disability benefits to the maximum compensation rate in effect on November 21, 2008, when he first became disabled. The issue raised by claimant was recently addressed by the United States Supreme Court in *Roberts v. Sea-Land Services, Inc.*, 566 U.S. ___, 132 S.Ct. 1350 (2012), wherein the Court held that an employee is "newly awarded compensation" under Section 6(c) of the Act, 33 U.S.C. §906(c), when he first becomes disabled, irrespective of whether, or when, a compensation order issues on his claim.[3] Thus, the Court held that the maximum compensation rate of Section 6(b)(1), 33 U.S.C. §906(b)(1), of the Act is the one in effect on the date the employee's disability commences. Therefore, for the reasons set forth in *Roberts*, we affirm the administrative law judges' findings that any benefits ultimately awarded to claimant are limited by the maximum rate in effect as of the date claimant first became disabled, November 21, 2008.[4]

[3]We accept claimant's supplemental filing of a copy of this decision. 20 C.F.R. §802.215.

[4]Claimant additionally argues that the initial Decision and Order and subsequent Decision on Reconsideration did not include an award for a specific amount of weekly

Accordingly, the administrative law judge's finding that employer failed to establish rebuttal of the Section 20(a) presumption is reversed. The case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order Awarding Benefits of Judge Sutton, and the Order Denying Claimant's Motion for Reconsideration, Granting Respondents' Motion for Reconsideration, and Amending Decision and Order Awarding Benefits of Judge Calianos are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

compensation due claimant and that, thus, the case must be remanded for the entry of an award. Contrary to claimant's contention, Judge Calianos's Order paragraph states that claimant is entitled to temporary total disability compensation, limited to the applicable maximum compensation rate of $1,200.62. The administrative law judge thus fulfilled his duty under Section 19(c), 33 U.S.C. §919(c), to make an award directing the payment of benefits to claimant. *See also* 20 C.F.R. §702.348. That award is, however, contingent upon claimant's establishing on remand a causal relationship between his psychiatric disability and his employment for employer.