

BRB No. 12-0513

THERESA C. RODRIGUEZ)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ARMY CENTRAL INSURANCE FUND)	DATE ISSUED: 05/09/2013
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Theresa C. Rodriguez, El Paso, Texas, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2011-LHC-01020) of Administrative Law Judge Lee J. Romero, Jr., 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working at the School Age Center at Fort Bliss, Texas, in May 1998 where she provides after-school care and homework assistance for school-age children of military families. On October 18, 2007, she and her co-workers were in training to learn new games to play with their students. Claimant suffered an injury when a co-worker, with whom she had interlocked arms for the game, pulled claimant's arms back. Claimant experienced pain in her neck, back, and left shoulder, and later developed chest pain causing her to be hospitalized between November 7 and 11, 2007. She returned to work at the end of November and continued to work restricted hours until

December 15, 2008. During this period, and continuing into 2010, claimant had physical therapy and epidural injections for pain in her neck, shoulder, and low back. Employer paid claimant temporary total disability benefits from December 15, 2008, through May 6, 2009, when she again returned to work. Because claimant continued to have pain, she treated with Dr. Smith, who noted a prior diagnosis of degenerative disc disease and, based on MRIs, diagnosed various cervical disc conditions such as stenosis, bulging, dessication, narrowing, and disc height loss. Dr. Smith performed artificial cervical disc replacement surgery on April 15, 2011. Claimant remained off work following her surgery until October 12, 2011.

Claimant filed a claim for benefits, requesting reimbursement of medical expenses paid to Dr. Smith and other doctors, as well as disability benefits for her post-surgery convalescence. Emp. Ex. 3; Tr. at 37-40. Claimant also sought authorization for surgery on her left shoulder.

The administrative law judge found that claimant established a prima facie case relating her neck, back, and shoulder injuries to her employment, and he invoked the Section 20(a), 33 U.S.C. §920(a), presumption. He then found that employer rebutted the presumption as to claimant's neck and back problems; however, employer presented no rebuttal evidence with regard to claimant's left shoulder injury. Decision and Order at 23-25. Upon weighing the evidence as a whole, the administrative law judge found that claimant suffered from a work-related sprain or strain to her neck and back, but that she did not establish that her work-related back and neck strains aggravated any underlying conditions. *Id.* at 26-28. The administrative law judge found that claimant's work-related back and neck conditions reached maximum medical improvement on March 20, 2009, and he awarded claimant temporary total disability benefits from December 15, 2008 through March 20, 2009, and permanent total disability benefits from March 21 until May 6, 2009, when she returned to work. As claimant had no loss of wage-earning capacity thereafter, the administrative law judge found she had no further disability related to the work injury. With regard to medical benefits, the administrative law judge found that claimant's neck surgery was not necessitated by the work injury. Thus, the administrative law judge denied claimant's claim for reimbursement of the expense of Dr. Smith's treatment, including the surgery, and for disability benefits during her recuperation thereafter. As he found claimant's left shoulder injury was work-related, but as the record contains no evidence of disability related to the left shoulder, the administrative law judge did not award disability benefits for that injury but did hold employer liable for reasonable and necessary medical expenses related to that injury. However, he denied claimant's request for authorization of left shoulder surgery because claimant did not establish it was reasonable and necessary treatment. He stated that claimant would be entitled to left shoulder surgery in the future if she shows it is reasonable and necessary for treatment of her work-related shoulder injury. *Id.* at 30-33.

Claimant, without representation, appeals the administrative law judge's denial of her medical reimbursement claim, her claim for additional disability benefits, and her request for authorization for left shoulder surgery. Employer has not responded to the appeal.

Once the claimant establishes a prima facie case, as here, Section 20(a) of the Act applies to relate her injury to her employment, and the burden shifts to the employer to rebut the presumption by producing substantial evidence showing that the injury is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The employer's burden is one of production, not persuasion; once the employer produces substantial evidence of the absence of a causal relationship, the Section 20(a) presumption is rebutted. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), cert. denied, 540 U.S. 1056 (2003); *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT). When aggravation of a pre-existing condition is claimed, the employer must produce substantial evidence that work events neither directly caused the injury nor aggravated a pre-existing condition to result in injury. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If a work-related injury contributes to, combines with, or aggravates a pre-existing condition, the entire resultant condition is compensable. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998). If the employer rebuts the presumption, it no longer controls, and the issue of whether there is a causal relationship must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In finding that employer rebutted the Section 20(a) presumption as it pertains to claimant's current back and neck conditions, and in finding those conditions are not work-related based on the record as a whole, the administrative law judge relied on the opinion of Dr. Xeller, an independent medical examiner who examined claimant at the request of the Department of Labor. Dr. Xeller diagnosed claimant with cervical and lumbar sprains, which had resolved three to four months following the injury. Emp. Ex. 19. He opined that claimant's work accident did not cause spurs or degeneration, and that the cervical surgery was performed because of claimant's arthritis, which pre-existed the injury and was not aggravated by the injury.¹ *Id.*; Tr. at 45. The administrative law judge rationally found that Dr. Xeller's opinion constitutes substantial evidence establishing that claimant's current back and neck complaints, including those that

¹Employer's expert, Dr. Pollet, was of the same opinion – claimant's injury was a sprain/strain which resolved within six to 12 weeks. Emp. Exs. 10, 13. Moreover, Dr. Smith provided no opinion as to whether claimant's cervical surgery was necessitated by her work injury or her underlying arthritis, and, contrary to claimant's belief, no doctor opined that her work injury accelerated her arthritis causing the need for surgery.

necessitated her neck surgery, are not related to the October 18, 2007, work incident.² *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT). As the administrative law judge's finding is supported by substantial evidence, we affirm the finding that the Section 20(a) presumption, as it relates to claimant's neck and back injuries, was rebutted, as well as the finding on the record as a whole that claimant's current back and neck conditions are not work-related. *Id.* Consequently, as claimant has not established a causal relationship between her current back and neck conditions and the work incident, the administrative law judge properly denied her claim for disability and medical benefits related to her neck surgery.³ *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2001); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

Section 7(a) of the Act provides that an employer is liable for medical expenses related to the work injury if the treatment is reasonable, necessary, and appropriate for the work injury. 33 U.S.C. §907(a); 20 C.F.R. §702.401(a); *see, e.g., M. Cutter Co., Inc. v. Carroll*, 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006); *Pietruni v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2^d Cir. 1997). As the administrative law judge properly found, there is no medical evidence in the record to support claimant's request for shoulder surgery at this time.⁴ Claimant, therefore, did not establish that her request for left shoulder surgery was reasonable and necessary for the treatment of her work-related injury, and we affirm the administrative law judge's finding that claimant is not entitled to such authorization at this time. However, as the administrative law judge also properly stated, if, in the future, claimant can establish that such surgery is reasonable and necessary for the treatment of her work-related left shoulder condition, because the condition is work-related, she would be entitled to medical benefits. *See* 20 C.F.R. §702.407 (district director supervises medical care of injured employees).

²Dr. Xeller stated that claimant's symptoms appear to be from fibromyalgia, which is not work-related. Emp. Ex. 19.

³Moreover, the administrative law judge did not err in finding that claimant failed to seek prior authorization for her treatment by Dr. Smith and therefore that employer is not liable for this treatment on this basis as well. 33 U.S.C. §907(d). The administrative law judge did hold employer liable for all reasonable and necessary medical expenses related to claimant's compensable cervical and lumbar strain. Decision and Order at 32.

⁴Claimant's shoulder is being treated by Dr. Bean, and there are no reports from Dr. Bean in the record. Decision and Order at 23 n.4.

Accordingly, the administrative law judge's Decision and Order is affirmed.
SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge