BRB No. 07-0213

T.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN-AVONDALE INDUSTRIES	)	DATE ISSUED: 11/23/2007<u>2007</u>
	)	
Self-Insured Employer-Respondent	)	
		DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

T.S., New Orleans, Louisiana, *pro se*.

Richard S. Vale, Frank J. Towers, and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant, appearing without legal representation, appeals the Decision and Order Denying Benefits (2005-LHC-1837) of Administrative Law Judge Clement J. Kennington 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). In an appeal by a claimant without an attorney, we will review the findings of fact and conclusions of law of the administrative law judge to determine if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed.

On November 21, 2002, claimant began working for employer as a cable puller and worked without incident until October 5, 2004, when she had an altercation with another employee. As a result of the altercation, employer suspended claimant for three

days (October 6-8) and terminated her on October 11, 2004. Claimant was subsequently arrested and charged with aggravated battery, but the charges were dismissed. Claimant sought compensation and medical benefits under the Act, alleging that her pre-existing psychological disorder was aggravated by the incident at work.

In his decision, the administrative law judge found that claimant established a *prima facie* case that her condition was aggravated by the October 5, 2004, fight at work. However, the administrative law judge also found that employer established rebuttal of the Section 20(a) presumption, 33 U.S.C. §920(a), and after weighing the evidence as a whole, the administrative law judge concluded that claimant's condition pre-existed the October 2004 fight and, in all probability, was not aggravated by the fight. Consequently, the administrative law judge denied compensation and medical benefits.

On appeal, claimant contends that the administrative law judge erred in finding that employer established rebuttal of the Section 20(a) presumption and in finding, on the evidence as a whole, that her condition was not aggravated by the fight at work. Employer responds, urging affirmance of the administrative law judge's decision.

Where, as in the instant case, the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that claimant's injury was not caused by her employment. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Moreover, when claimant alleges that the work incident aggravated a pre-existing condition, employer must produce substantial evidence that claimant's work did not aggravate her pre-existing condition. *See, e.g., Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). An opinion given to a reasonable degree of medical certainty that the employee's injury is not caused or aggravated by the work incident is sufficient to rebut the Section 20(a) presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge found that "[e]mployer rebutted [the Section 20(a) presumption] by Dr. Roniger's testimony that claimant's psychotic condition was not caused by the fight nor in all probability aggravated by the altercation." Decision and Order at 9. In weighing the evidence as a whole, the administrative law judge found that Dr. Roniger's opinion does not establish that claimant's condition was

caused or aggravated by any traumatic event at work. *Id*. at 4, 9. Therefore, the administrative law judge denied the claim.

We cannot affirm the administrative law judge's finding that Dr. Roniger's opinion is sufficient to establish rebuttal of the Section 20(a) presumption that claimant's psychiatric condition was aggravated by the October 2004 altercation at work. It is not disputed that claimant had a pre-existing psychiatric condition which was not work-related. Dr. Roniger submitted a report dated May 22, 2006, in which he opined that claimant's psychiatric condition is a chronic one, genetically determined, and has been present for many years. Emp. Ex. 8. He further stated that claimant's condition has nothing to do with the incident at work. *Id*. However, in a deposition dated May 23, 2006, Dr. Roniger was asked several times whether he could determine to a reasonable degree of medical certainty whether or not claimant's psychotic disorder was aggravated by the incident at work in October 2004, and he answered that he is unable to determine whether the incident did or did not aggravate claimant's condition. Emp. Ex. 9 at 22-23, 55. In testimony cited by the administrative law judge, Dr. Roniger stated that with proper treatment claimant may be able to return to gainful employment, but he does not state that her condition was not aggravated by the work incident. *Id*. at 24, 27, 28. Dr. Roniger explicitly stated that he does not know if the incident aggravated claimant's condition, *id.* at 55, but he did state the incident "could have tipped her over the edge." *Id.* at 53. As Dr. Roniger does not state that claimant's condition was not aggravated by the altercation at work on October 5, 2004, and he specifically stated that it could have triggered her condition to become symptomatic, this opinion does not constitute substantial evidence sufficient to rebut the Section 20(a) presumption, as a matter of law. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). As there is no other evidence of record which addresses whether claimant's psychiatric condition was aggravated by the work incident, we reverse the administrative law judge's finding that the Section 20(a) presumption is rebutted. Therefore, pursuant to Section 20(a), claimant's psychiatric condition is work-related as a matter of law. *See Preston*, 380 F.3d 597, 38 BRBS 60(CRT); *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). Consequently, the case is remanded to the administrative law judge for resolution of any remaining issues.[1]

[1] The administrative law judge granted employer's motion to strike documents claimant attempted to submit into evidence with her post-hearing brief. As employer now is aware of these documents, the administrative law judge should reconsider his decision to strike any relevant evidence, in accordance with the regulations governing the admission of new evidence. 20 C.F.R. §§702.338, 702.339; 29 C.F.R. §18.54; *see also* 33 U.S.C. §923(a).

Accordingly, the Decision and Order of the administrative law judge denying benefits is vacated, and the case is remanded for consideration of any other issues raised by the parties.

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