BRB No. 10-0333

DOLLARD ROOT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 11/04/2010
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C.), New London, Connecticut, for claimant.

Mark P. McKenney (McKenney, Quigley, Izzo & Clarkin), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-LHC-00142) of Administrative Law Judge Colleen A. Geraghty 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In December 2006, claimant was selected without contest to serve as the union steward for the lab in which he worked for employer as an electronics technical aide. EX 6 at 13-14; Tr. at 36-39. In his role as union steward, claimant was involved, *inter alia,* in resolving contentious issues regarding the collective bargaining agreement's overtime provisions and the manner in which overtime and travel assignments were distributed

among the employees working in the lab. Tr. at 36-40, 43-48. Claimant alleged that he experienced stress resulting from acrimonious interactions with his supervisor, Paul Fontaine, regarding these issues and from hostility he encountered from various co-workers regarding claimant's efforts to equalize the distribution of overtime and travel assignments in the lab.[1] Tr. at 43-44, 51, 72-73; EX 6 at 38-40, 49-51. In an initial evaluation of claimant performed on May 11, 2007, psychiatrist Dr. Traboulsi diagnosed claimant with major depressive disorder for which he prescribed medication; thereafter, Dr. Traboulsi saw claimant for ongoing medication management. CX 3. On Dr. Traboulsi's referral, claimant saw Steven Simonson, LCSW, for ongoing individual psychotherapy. *Id.*; CX 12. Claimant subsequently received an additional diagnosis of generalized anxiety disorder. *Id.* Dr. Traboulsi and Mr. Simonson took claimant off work between October 30, 2007, and November 19, 2007, because of an exacerbation of his depression. CXs 3 at 14-15; 12 at 23-25. Claimant returned to work for one day on November 19, 2007, but after encountering hostility from his co-workers regarding his former activities as a union steward,[2] claimant left the lab and sat in another room until his shift ended. EX 6 at 12, 48-49; Tr. at 54-55, 75-76, 88-89. Claimant, who has not worked since that date, filed a claim under the Act alleging that he suffers from disabling anxiety and depression as a result of stress experienced during his employment with employer. CX 1.

In her Decision and Order, the administrative law judge found claimant entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), as claimant established that he suffers from anxiety and depression and that his working conditions could have caused, contributed to or aggravated his psychological injury. Decision and Order at 12-15. The administrative law judge further found that employer did not rebut the presumption with the opinion of Dr. Harrop and she therefore concluded that claimant's psychological condition is work-related. *Id.* at 15-16. The administrative law judge determined that claimant's condition has not reached permanency, that he is incapable of returning to his usual employment duties with employer, and that employer established the availability of suitable alternate employment. *Id.* at 16-18. She thus found claimant

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[1] Claimant additionally asserted that he experienced stress resulting from harassment by co-workers relating to his personal life. As the administrative law judge found that this additional allegation of work-related stress did not give rise to a compensable injury, *see* Decision and Order at 13-14, and as the administrative law judge's findings regarding claimant's union activity-related stress are affirmed, *see infra,* employer's arguments concerning harassment related to claimant's personal life need not be addressed.

[2] In October 2007, claimant was asked by the union to step down as union steward. Tr. at 48-49, 74.

entitled to temporary total disability benefits from October 30, 2007, to April 29, 2009, and to an ongoing award of temporary partial disability benefits thereafter. *Id.* at 18-19.

On appeal, employer challenges the administrative law judge's finding that claimant has a work-related psychological condition. Claimant responds, urging affirmance.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment if claimant establishes his *prima facie* case by proving that he sustained a harm and that conditions existed or an accident occurred at his place of employment which could have caused the harm. *Rainey v. Director, OWCP*, 517 F.3d 632, 634, 42 BRBS 11, 12(CRT) (2d Cir. 2008); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 64-65, 35 BRBS 41, 49(CRT) (2d Cir. 2001). It is well-established that a psychological condition constitutes a "harm" within the meaning of the Act. *See, e.g., Pedroza v. Benefits Review Board,* ___ F.3d ___, No. 05-75449, 2010 WL 4105067, (9th Cir. Oct. 20, 2010); *R.F. [Fear] v. CSA, Ltd.,* 43 BRBS 139 (2009); *S.K. [Kamal] v. ITT Industries, Inc.,* 43 BRBS 78 (2009). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the disabling injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not caused or aggravated by his employment.[3] *Rainey*, 517 F.3d at 634, 42 BRBS at 12(CRT); *Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Id.; Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Employer first contends that the administrative law judge erred in finding that claimant met the requirements for invocation of the Section 20(a) presumption. Employer's arguments, however, reflect a misapprehension of claimant's burden in establishing the elements of his *prima facie* case. To successfully invoke the presumption, claimant is not required to affirmatively prove that his work injury in fact caused or aggravated the harm; rather, claimant need establish only that the work injury could have caused or aggravated the harm alleged. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 605, 38 BRBS 60, 65(CRT) (1st Cir. 2004); *Peterson v. General*

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[3] When aggravation of a pre-existing condition is at issue, employer must produce substantial evidence that work events neither directly caused the injury nor aggravated the pre-existing condition. *Rainey*, 517 F.3d at 634, 42 BRBS at 12(CRT). If a work-related injury contributes to, combines with, or aggravates a pre-existing condition, the entire resultant condition is compensable. *Id.,* 517 F.3d at 636, 42 BRBS at 13(CRT).

Dynamics Corp., 25 BRBS 71 (1991), *aff'd sub nom. INA v. United States Dep't of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

In addressing whether claimant established the harm element of his *prima facie* case, the administrative law judge credited the treatment notes of claimant's psychiatrist, Dr. Traboulsi, and the written reports and deposition testimony of his psychotherapist, Mr. Simonson, and determined that this evidence is sufficient to establish that claimant suffers from anxiety and depression.[4] Decision and Order at 12-13; CXs 3, 12. The administrative law judge acted within her discretion in crediting the treatment notes of Dr. Traboulsi and the reports and testimony of Mr. Simonson, and these constitute substantial evidence that claimant sustained a psychological harm. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Kamal,* 43 BRBS at 79-80. The administrative law judge's finding that claimant established the harm element of his *prima facie* case is therefore affirmed.

The administrative law judge next addressed whether claimant established that working conditions existed which could have caused, contributed to or aggravated his psychological injury. In addressing this issue, the administrative law judge credited evidence that claimant and his supervisor, Mr. Fontaine, had a series of disagreements over Mr. Fontaine's implementation of the collective bargaining agreement's overtime provisions.[5] Decision and Order at 14. The administrative law judge further credited claimant's testimony, as corroborated by the testimony of his co-worker Robert Buono, that his efforts to equalize the distribution of overtime and travel opportunities among the employees working in the lab created hostility from those co-workers who had benefited

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[4] As of the date of his April 29, 2009 deposition, Mr. Simonson had seen claimant for individual psychotherapy continuously on a biweekly basis since May 21, 2007. CX 12 at 8, 34-35; *see also* CX 3. Dr. Traboulsi oversaw the management of the medications he prescribed claimant for depression and anxiety; these medications included Lexapro, Wellbutrin, Strattera, Trazadone, and Vistaril. CXs 3; 12 at 17-22, 36. Dr. Traboulsi and Mr. Simonson reported that claimant exhibited anxiety and depression-related symptoms including apathy, decreased energy, forgetfulness, difficulty concentrating, social withdrawal, blunt affect, sleep problems, decreased appetite and loss of weight, crying episodes, nervousness, and apprehension. CXs 3; 12 at 16-20.

[5] The administrative law judge noted employer's attempt to downplay these disagreements over the overtime issue, but he found that Mr. Fontaine testified that some of his discussions with claimant regarding this issue would get heated. Decision and Order at 14; Tr. at 131-132.

from the existing practices.[6] *Id.* at 14-15. Based on this credited evidence, the administrative law judge determined that claimant established that stressful working conditions existed which could have caused, contributed to or aggravated his psychological condition. *Id.* at 15. We reject employer's contentions of error with respect to the administrative law judge's finding that claimant satisfied the working conditions element of his *prima facie* case. The administrative law judge reasonably credited claimant's testimony concerning the stress he experienced in the performance of his union steward duties, as corroborated by Mr. Buono, and this credited testimony is sufficient to establish the working conditions element of claimant's *prima facie* case.[7] *See Preston,* 380 F.3d 597, 38 BRBS 60(CRT); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112, 117 (2000), *aff'd,* 248 F.3d 54, 35 BRBS 41(CRT); *see also Pietrunti,* 119 F.3d 1035, 31 BRBS 84(CRT). Employer's contention that "disagreements are 'part and parcel' of a union representative's activity," Emp. Memorandum in Support of Petition for Review at 28, is unavailing. For a psychological harm to be caused by "stressful" working conditions, the working conditions need not be unusually stressful nor need they be circumstances universally recognized as stressful; rather, it is the effect of the events

[6] Claimant testified that the distribution of overtime and travel assignments was a contentious issue among the workers in the lab and that there were frequent discussions and arguments about the issue. Tr. at 44-46, 51. He further testified that at the time he left work in November 2007, many of his co-workers were angry about his actions regarding the overtime issue and accused him of causing trouble in his role as union steward. *Id.* at 72-73, 75-76, 88-89; EX 6 at 38-40, 48-49. Mr. Buono concurred that there was a difference of opinion among the workers in the lab as to how overtime assignments should be made and that some people in the lab were disturbed about how claimant handled the overtime issue in his capacity as union steward. Tr. at 97-99, 107-109.

[7] Employer avers that the administrative law judge erred in ignoring the fact that claimant's treating psychotherapist did not causally relate claimant's psychological condition to union activity-related stress. As previously discussed, claimant is not required to produce an affirmative medical opinion stating that his psychological injury was *in fact* caused or aggravated by stress associated with his union activities in order to satisfy his *prima facie* case. *See Preston,* 380 F.3d at 605, 38 BRBS at 65(CRT). Employer's challenge to the administrative law judge's assessment of claimant's credibility is also rejected. The inconsistencies in claimant's testimony alleged by employer were addressed by the administrative law judge, *see* Decision and Order at 4-5, and her determination to credit claimant's testimony regarding his work-related stress is rational and supported by substantial evidence. *See Pietrunti,* 119 F.3d 1035, 31 BRBS 84(CRT).

on the particular claimant that is significant.[8] *Fear,* 43 BRBS at 141; *Kamal,* 43 BRBS at 79 n.1; *see also Preston,* 380 F.3d 597, 38 BRBS 60(CRT); *Wheatley v. Adler,* 407 F.2d 307 (D.C. Cir. 1968). Thus, as claimant established both the harm and working conditions elements of his *prima facie* case, the administrative law judge's finding that claimant is entitled to invocation of the Section 20(a) presumption is affirmed.

Employer further assigns error to the administrative law judge's finding that employer failed to produce evidence sufficient to rebut the Section 20(a) presumption. To rebut the presumption, employer must produce substantial evidence that the injury was not caused or aggravated by the employment. *Rainey*, 517 F.3d 634, 42 BRBS 11CRT); *Marinelli,* 248 F.3d 54, 35 BRBS 41(CRT). An employer cannot meet this burden by producing just "any evidence;" rather, it "must introduce 'such relevant evidence as a reasonable mind might accept as adequate' to support a finding that workplace conditions did not cause the accident or injury." *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 817, 33 BRBS 71, 76(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2007)(quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In this case, employer relied on the opinion of Dr. Harrop, a psychiatrist who examined claimant at the request of employer on February 12, 2009, to rebut the presumption. EX 1. Dr. Harrop opined that claimant did not have a psychiatric condition and was capable of returning to his regular employment without restrictions.[9] *Id.*; EX 15

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[8] Employer's additional assertions regarding the propriety of Mr. Fontaine's implementation of the collective bargaining agreement's overtime provision also lack merit. The issue is not whether Mr. Fontaine's actions in this regard were legitimate or justified but, rather, whether claimant experienced cumulative stress in his general working conditions which could have caused or aggravated his psychological injury. *See Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base,* 32 BRBS 127, 130 (1997) (McGranery, J., dissenting), *aff'd on recon. en banc,* 32 BRBS 134 (1998) (Brown and McGranery, JJ., dissenting).

[9] In his initial February 12, 2009 report, Dr. Harrop stated, with respect to claimant's diagnosis, that "at best, [claimant had] an adjustment disorder with mixed emotional features (depression and anxiety)" and added that claimant "barely fulfills [the] criteria for that." EX 1 at 3. Dr. Harrop additionally stated that claimant "has no significant psychiatric symptoms as of this date," was functioning normally, and was capable of returning to employment without restrictions. *Id.* at 3-4. After reviewing additional records, Dr. Harrop testified on deposition that he now held the opinion that claimant did not have any psychiatric condition, EX 15 at 51; he additionally reiterated his initial opinion that claimant had no significant psychiatric symptoms and could return to his regular employment. *Id.* at 32-34.

at 32-34, 51. A medical opinion that a claimant did not sustain a psychological injury, which is supported by a proper foundation, may constitute substantial evidence to rebut the Section 20(a) presumption. *See Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *see also American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT); *Hampton,* 24 BRBS 141. Here, however, the administrative law judge found that Dr. Harrop's opinion is insufficient to establish rebuttal pursuant to the standard set forth in *Rainey.* Decision and Order at 15-16 and n. 19. Specifically, the administrative law judge found that Dr. Harrop's opinion that claimant has no psychiatric condition is inconsistent with the range of symptoms documented by Dr. Traboulsi and Mr. Simonson and with claimant's continuing course of treatment with mutliple medications for depression and anxiety, *see id.*; *see* n.4 *infra,* and thus is insufficient to constitute substantial evidence sufficient to rebut the presumption. Decision and Order at 16. The administrative law judge acted within her discretion as the trier-of-fact when addressing Dr. Harrop's testimony, and her finding that it does not constitute evidence that a reasonable mind might accept as adequate to support a finding of rebuttal is affirmed. *See Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *see generally Pietrunti,* 119 F.3d 1035, 31 BRBS 84(CRT). In the absence of substantial evidence that claimant's condition was not caused or aggravated by his working conditions, the administrative law judge's finding that the Section 20(a) presumption was not rebutted is affirmed.[10] *Id.* Consequently, claimant's condition is causally related to his employment with employer. As employer does not challenge the administrative law judge's findings regarding the nature and extent of claimant's work-related disability or claimant's entitlement to medical benefits, the administrative law judge's award of disability and medical benefits to claimant is also affirmed.

[10] Evidence of other stressors in claimant's life cited by employer is insufficient to rebut the Section 20(a) presumption, as claimant's injury need only be due in part to work-related conditions to be compensable under the Act. *Rainey,* 517 F.3d 636, 42 BRBS 13(CRT).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAH HALL
Administrative Appeals Judge