BRB No. 03-0115

ROBERT P. POMELOW	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ATKINSON CONSTRUCTION	)	DATE ISSUED: Oct. 6, 2003
	)	
and	)	
	)	
TRAVELERS PROPERTY CASUALTY CORPORATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Robert P. Pomelow, Norridgewock, Maine, *pro se*.

Richard F. Van Antwerp and Thomas R. Kelly (Robinson, Kriger, & McCallum, P.A.), Portland, Maine, for employer/carrier.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant, without the assistance of counsel, appeals the Decision and Order (2001-LHC-00838 and 00839) of Administrative Law Judge Jeffrey Tureck 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 filed by a claimant without representation, we will review the administrative law judge=s decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. '921(b)(3).

Claimant, a welder/laborer, alleged that he was injured in a fall at work on July 5, 2000, or through gradual onset over the course of his six months of employment for

employer. Claimant did not return to work after July 5, 2000, and sought continuing temporary total disability benefits from July 11, 2000. Claimant filed a written claim alleging injuries to his knees, and at the hearing and in his post-hearing brief also alleged that he sustained work-related injuries to his back and hips. The administrative law judge addressed only claimant=s claim for knee injuries, based on the written pleadings. Claimant previously was awarded a 10 percent disability rating by the Veteran=s Administration because of service-connected left knee injuries. Claimant had surgery on his left knee in 1982 and 1987. Cl. Exs. 4 at 146-149, 15 at 45.

The administrative law judge found that claimant is not entitled to the benefit of the Section 20(a), 33 U.S.C. '920(a), presumption because he did not establish that a discrete work accident occurred on July 5, 2000, or that his work with employer aggravated his pre-existing injuries. The administrative law judge also found that if claimant invoked the Section 20(a) presumption, it would be rebutted by the opinions of Drs. Boucher and Antonucci. Assuming, *arguendo*, the Section 20(a) presumption was invoked and rebutted, the administrative law judge found that claimant=s alleged injury was not work-related upon a weighing of the evidence as a whole. Consequently, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge=s denial of benefits. Employer responds in support of the administrative law judge=s decision.

We first address claimant=s claims for injuries to his hips and back. In his decision, the administrative law judge addressed only claimant=s claim for his alleged knee injuries, as claimant filed a written claim only for these injuries. *See* Decision and Order at 2 n. 2. Claimant also asserted a claim for injuries to his hips and back at the hearing and in his post-hearing brief. Cl. Post-hearing Br. at 4, 5; Tr. at 26. We hold that the administrative law judge erred in not addressing the claims for these alleged injuries. Thus, we must remand this case for further consideration.

In *U.S.Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), the Supreme Court held that the Section 20(a) presumption attaches only to the claim asserted by the claimant. Pertinent to the instant case, the Court discussed the requirements for a claim under the Act, specifically addressing the fact that the claim may be amended, noting that Aconsiderable liberality is usually shown in allowing the amendment of pleadings to correct . . . defects, unless the effect is one of undue surprise or prejudice to the opposing party.@ *U.S. Industries*, 455 U.S. at 613 n. 7, 14 BRBS at 633 n. 7, *quoting* 3 A. Larson, *The Law of Workmen=s Compensation*, '78.11 (1976), currently 7 Arthur Larson and Lex K. Larson, *Larson=s Workers= Compensation Law*, '124.04[3](2001). In this regard, the Larson treatise states that a wide variance is permitted between pleading and proof, unless the employer is prejudiced by having to defend at the hearing an injury completely different than the one pleaded. 7 Arthur Larson and Lex K. Larson, *Larson=s Workers= Compensation Law*, '124.04[5](2001); *see also Meehan Seaway Serv. Co. v.*

Director, OWCP, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998). In *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994), the claimant filed a timely claim for death benefits alleging that her husband's death was due to cancer caused by work-related asbestos exposure. Two and one-half years later, claimant filed an amended pre-hearing statement seeking death benefits based on her husband's being permanently totally disabled due to a back injury at the time of death. The administrative law judge allowed the amended claim, citing *U.S. Industries*, finding that employer was not prejudiced by the amendment of the claim and that it was aware of this theory of recovery prior to the hearing and had adequate opportunity to prepare its defense. The Board affirmed this finding. *Mikell*, 24 BRBS at 104-105, *citing* 29 C.F.R. ' 18.5(e)(allowing an amendment to a pleading if it is determined by the administrative law judge to be reasonably within the scope of the original claim).

In this case, claimant=s claim of injury to his back and hips is sufficiently within the scope of claimant=s initial claim, as claimant alleged that his back and hips were injured as a result of the same working conditions that injured his knee. *See, e.g.,* Cl. Post hearing Br. at 4, 5; Tr. at 26; *Meehan Seaway Serv. Co.*, 125 F.3d 1163, 31 BRBS 114(CRT). Moreover, employer cannot claim surprise or prejudice by these additional claims because employer filed two notices of controversion, prior to the hearing, regarding the alleged injuries to claimant=s knees, hip, and back. Cl. Ex. 10 at 275, 278. Furthermore, employer=s post-hearing brief addresses claimant=s claims to his knees and back, and discusses Dr. Boucher=s opinion addressing claimant=s lack of acute problems with his knees, hips, or low back. Emp. Post-hearing Br. at 2, 3. As claimant=s claim for hip and back injuries arises out of the same employment conditions as his knee claim, and as employer is not prejudiced by the administrative law judge=s consideration of this issue, we remand the case for the administrative law judge to address claimant=s claim for injuries to his hips and back consistent with Section 20(a).[1] *U.S. Industries*, 455 U.S. 608, 14 BRBS 631; *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989); *see* discussion, *infra*.

We next address claimant=s claims for injuries to his knees. Claimant alleged that he fell and injured his right knee on July 5, 2000, Cl. Ex. 10 at 272, and also that he suffered injuries to both knees through gradual onset due to the conditions of his employment. Cl. Ex. 10 at 274. In determining whether an injury is work-related, claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima* facie case. To

[1] On remand, the administrative law judge must discuss in his decision the relevant opinions of the nurse practitioners, physician=s assistants, and physical therapists, but also may determine the weight to be accorded to these opinions. *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

establish a *prima facie* case, claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain or aggravated a pre-existing condition. *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT)(1st Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT)(5th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries*, *4*55 U.S. 608, 14 BRBS 631. Once claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not caused or aggravated by the employment. *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). If 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 claimant bearing the burden of persuasion. *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).

Initially, we affirm the administrative law judge=s rational finding that claimant did not establish that an accident occurred at work on July 5, 2000, because there is no mention of such a fall in the medical records after July 10, 2000, and there are inconsistencies in claimant=s testimony regarding the occurrence of an accident. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT)(9th Cir. 1988); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); Decision and Order at 9-10; Cl. Exs. 1-3, 4 at 95-99, 141-145, 218-219, 221-226, 230-233, 255, 290-292; Tr. at 24, 27. Consequently, we affirm the administrative law judge=s finding that the Section 20(a) presumption is not invoked on the basis of an accident=s occurring on July 5, 2000. *Bolden*, 30 BRBS 71.

We cannot affirm, however, the administrative law judge=s findings with regard to the issue of whether claimant=s general working conditions caused harm to claimant=s knees or aggravated his pre-existing knee condition. The administrative law judge found that the Section 20(a) presumption is not invoked because there Ais no credible evidence linking [claimant=s] current condition to his work@ with employer, because there is no objective evidence that claimant=s knees worsened since January 2000 when claimant started working for employer, and because no doctor unequivocally opined that claimant=s knees were aggravated by his employment. Decision and Order at 11. These statements are inconsistent with law as they impose too heavy a burden on claimant.

With regard to the issue of whether claimant established a harm, the administrative law judge erroneously combined the two elements of claimant=s *prima facie* case B harm and working conditions. To establish a harm, claimant need only establish that something has gone wrong Awithin the human frame.@ *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (*en banc*). Moreover, claimant need not additionally establish that his underlying condition worsened or progressed; the manifestation of symptoms is sufficient evidence of an injury within the meaning of the Act. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101

(1st Cir. 1981). In addition, contrary to the administrative law judge=s statement, claimant does not have to introduce medical evidence affirmatively establishing that his working conditions in fact caused the alleged harm or aggravated his pre-existing condition, but only that the working condition *could have* caused or aggravated the harm. *See Brown*, 194 F.3d 1, 33 BRBS 162(CRT); *see also Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

We reverse the administrative law judge=s finding that claimant did not establish a harm within the meaning of the Act. Dr. Boucher, whom the administrative law judge credited, diagnosed osteoarthritis of the left knee. Cl. Ex. 3 at 22. Dr. Baker noted that claimant had had a partial medial menisectomy of his left knee, and has mild post-traumatic osteoarthritis of the medial compartment. Cl. Ex. 4 at 145, 219. Dr. Butler diagnosed mild patellofemoral crepitation and quadriceps weakness in the right knee. Cl. Exs. 4 at 141-143, 12 at 290-292. Nurse Practitioner Muller diagnosed mild effusion in both knees. Cl. Ex. 2. As this objective evidence is sufficient to establish that something has gone wrong within the human frame, apart from claimant=s discredited subjective complaints, and as claimant need not establish the work-related nature of this harm in order to invoke the presumption, we hold that claimant established the Aharm@ element of his *prima facie* case.

Moreover, we reverse the administrative law judge=s finding that claimant did not establish the existence of working conditions which could have caused his harm. The actual requirements of claimant=s job are not at issue.[2] Claimant thus need only establish that his working conditions *could have* caused his harm in order to invoke the Section 20(a) presumption. *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990). Dr. Boucher stated that claimant=s pre-existing osteoarthritis in his left knee could be temporarily aggravated by kneeling, which is required of claimant=s job. Cl. Ex. 3 at 22. Dr. Watanabe reasoned that claimant=s work activities aggravated his pre-existing left knee injuries because claimant was able to work without significant problems until July 2000. Cl. Ex. 15 at 60. Dr. Watanabe also stated that anybody=s knee would become more painful performing claimant=s work activities of constant standing on a hard floor and that claimant=s progression of knee problems would have been slower if he had done sedentary work. Cl. Ex. 15 at 62, 64-65. This evidence is sufficient to take claimant=s claim Abeyond mere fancy.@ *Champion*, 690 F.2d 285, 15 BRBS 33(CRT); *Wheatley*, 407 F.2d 307. Consequently, as claimant has produced sufficient evidence that his working conditions could have aggravated his knee condition, we hold that the Section 20(a) presumption is invoked as a matter of law. *O=Kelley v. Dep=t of the Army/NAF*, 34 BRBS 39 (2000).

[2] Claimant=s job as welder/laborer required him to kneel on concrete and stand on steel rebar. Cl. Ex. 3 at 19.

The administrative law judge determined that employer established rebuttal of the Section 20(a) presumption, assuming, *arguendo*, that the Section 20(a) presumption was invoked. In finding that employer established rebuttal, the administrative law judge relied on the opinions of Drs. Boucher and Antonucci. Dr. Boucher stated in mid-August 2000 that there is no causal relationship between claimant=s *current* complaints and his reported injury. Cl. Ex. 3 at 22. However, Dr. Boucher acknowledged that claimant=s pre-existing left knee osteoarthritis could have been temporarily aggravated by kneeling. *Id.* Furthermore, Dr. Boucher also stated that claimant never had a significant aggravation of his underlying condition and if he had any minor aggravation of his underlying osteoarthritis it had long resolved. *Id.* Dr. Boucher=s opinion does not constitute substantial evidence in support of rebuttal, as he does not state that claimant=s condition was not at all aggravated by his employment, only that any aggravation was minor and had ceased by the time of his examination.[3] *Shorette*, 109 F.3d 53, 31 BRBS 19(CRT). Dr. Antonucci=s opinion also is insufficient to establish rebuttal of the Section 20(a) presumption, as he diagnosed intermittent claudication of the legs due to heart disease, but he did not state that claimant=s knee condition was not caused or aggravated by his employment.[4] *Sinclair*, 23 BRBS at 156; Cl. Ex. 4 at 226. The opinions of Drs. Boucher and Antonucci therefore do not constitute substantial evidence that claimant=s knee condition is not work-related, and thus we reverse the administrative law judge=s finding that employer established rebuttal of the Section 20(a) presumption. *See Shorette*, 109 F.3d 53, 31 BRBS 19(CRT).

[3] Dr. Boucher=s opinion could, however, support a finding that claimant=s knee condition was not permanently aggravated by his work injury, which is relevant to the extent of disability. *See generally Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981).

[4] Dr. Watanabe, whom the administrative law judge did not credit, appears to support both the view that claimant=s work activities aggravated his pre-existing left knee injuries based on claimant=s subjective complaints, and that they did not due to the lack of objective medical evidence of aggravation. Cl. Ex. 15 at 61.

In light of our reversal of the administrative law judge=s finding that employer established rebuttal of the Section 20(a) presumption, we need not address the administrative law judge=s weighing of the evidence as a whole. Causation with regard to claimant=s claim for injuries to his knees is established as a matter of law. *Id.; Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). Consequently, we vacate the administrative law judge=s denial of benefits for claimant=s injuries to his knees and remand the case to the administrative law judge for further consideration of this claim. On remand, the administrative law judge must address any remaining issues regarding claimant=s knee injuries.[5] In this regard, we deny claimant=s request that Ms. Tolman=s labor market survey be stricken from the record as she did not interview him. Labor market surveys performed by a vocational expert who does not interview a claimant are relevant evidence and may support employer=s burden of establishing the availability of suitable alternate employment if the expert is aware of claimant=s age, education, work history, and physical limitations. *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990); *Southern v. Farmers Export Co*., 17 BRBS 64, 66-67 (1985); Decision and Order at 7; Emp. Ex. 1; Cl. Ex. 16; Tr. at 95.

Accordingly, the administrative law judge=s Decision and Order denying benefits is vacated. The case is remanded for consideration of claimant=s claim for injuries to his back and hips. We modify the administrative law judge=s decision to hold that claimant=s knee injuries are work-related as a matter of law, and the case is remanded for consideration of the remaining issues regarding this claim.

SO ORDERED.

_____

[5] Any error in the administrative law judge=s deeming claimant=s military career as other than honorable is harmless as the administrative law judge did not weigh this evidence in questioning claimant=s credibility. *See Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff=d mem.*, 32 Fed. Appx. 126 (5th Cir. 2002)(table); Decision and Order at 3, 7-9; Cl. Ex. 4 at 161, 163, 166. Moreover, claimant=s counsel admitted this evidence into the record; thus, claimant voluntarily disclosed this information.

ROY P. SMITH
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I concur in my colleagues= decision to remand this case to the administrative law judge for consideration of claimant=s claims for injuries to his hips and back. However, I must respectfully dissent from their holding that claimant=s knee injuries are work-related.

I would affirm the administrative law judge=s finding that in his claim for benefits for knee injuries, claimant did not establish invocation of the Section 20(a) presumption in that he did not establish an essential element of his *prima facie* case B a harm. There is no objective evidence that claimant was injured at work or that his employment worsened his pre-existing condition, and the administrative law judge rationally discredited claimant=s subjective complaints as to his symptomotology and pain. *See Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988). The evidence is undisputed that claimant has had a ten percent disability rating for his left knee since 1993 and that he has suffered pain in his right knee since 1982. There is no credible evidence that claimant=s problems with either knee increased during his months of employment in 2000. To find a work injury established as a matter of law, the majority relies upon claimant=s manifestation of symptoms; but that reliance is misplaced because it is based upon claimant=s testimony which the administrative law judge properly rejected. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). As claimant failed to establish an essential element of his claim for benefits for a knee injury, I would affirm the administrative law judge=s denial of benefits on that part of his claim.

REGINA C. McGRANERY
Administrative Appeals Judge