BRB No. 03-0272

SARAH C. WELLS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE NAVY/NAF	)	
	)	DATE ISSUED:Oct. 31, 2003
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer=s Motion for Reconsideration of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Sarah C. Wells, Elizabethton, Tennessee, *pro se*.

James M. Mesnard (Seyfarth Shaw), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Granting Employer=s Motion for Reconsideration (96-LHC-631) of Administrative Law Judge Mollie W. Neal 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 representation, the Board 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. *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. '921(b)(3); 20 C.F.R. ''802.211(e), 802.220. If they are, they must be affirmed.

This case is before the Board for the second time. Claimant was employed by the Morale, Welfare and Recreation Department at the Pensacola Naval Air Station as a customer service clerk. On September 27, 1985, she attempted to unplug an AM/FM radio

during a hurricane warning and received an electrical shock in her right shoulder, arm and hand. She was diagnosed with reflex sympathetic dystrophy (RSD). The district director awarded claimant permanent total disability benefits in a compensation order dated April 29, 1992. Subsequently, employer sought modification of the order on the ground that the evidence establishes that claimant=s physical and economic conditions have improved to the extent that she does not have any residual disability from the work-related injury. 33 U.S.C. '922.

In her initial Decision and Order, the administrative law judge found that claimant is no longer permanently totally disabled. She concluded that claimant suffers from a 25 percent permanent partial impairment to her right shoulder and arm, and she awarded benefits to claimant pursuant to the schedule. The administrative law judge then denied medical benefits, finding that claimant failed to establish that her numerous problems, including depression, are causally linked to her 1985 injury. Claimant, without the assistance of counsel, appealed the administrative law judge=s decision.

In its decision, the Board affirmed the administrative law judge=s finding that the evidence establishes a change in claimant=s physical and economic conditions, that claimant is no longer totally disabled, and that her entitlement to compensation is limited to permanent partial disability benefits for a 25 percent disability to her right arm pursuant to Section 8(c)(1), 33 U.S.C. '908(c)(1).[1] The Board also affirmed the administrative law judge=s finding that claimant is not entitled to medical treatment for her visual and cardiac conditions. Lastly, the Board vacated the administrative law judge=s finding that claimant is not entitled to medical benefits for her psychiatric condition and chiropractic treatment, stating that the administrative law judge erroneously placed the initial burden on claimant to establish a causal relationship, and remanded the case for the administrative law judge to apply a Section 20(a), 33 U.S.C. '920(a), analysis to this issue. *Wells v. Dep=t of the Navy/NAF*, BRB No. 00-349 (Dec. 15, 2000) (unpub.).

In her Decision and Order on Remand, the administrative law judge found that claimant invoked the Section 20(a) presumption that her psychological condition is causally

[1] The Board noted that claimant=s injury to the shoulder would be compensated under Section 8(c)(21) of the Act, 33 U.S.C. '908(c)(21), as it is an unscheduled injury, but concluded that claimant had no loss in wage-earning capacity based on the administrative law judge=s findings regarding her post-injury earnings.

related to her employment, that employer did not establish rebuttal of that presumption, and that claimant is therefore entitled to medical benefits for treatment of her psychological symptoms. The administrative law judge denied benefits for claimant=s future chiropractic treatment, but awarded all costs, if any, associated with the manual manipulation of claimant=s spine by Dr. Ward. Employer moved for reconsideration of that portion of the decision on remand awarding claimant medical benefits for claimant=s psychiatric condition. In a Decision and Order Granting Employer=s Motion for Reconsideration, the administrative law judge determined that claimant did not establish the harm element of her *prima facie* case necessary for invocation of the Section 20(a) presumption; specifically, the administrative law judge found that claimant failed to establish that she has a psychological disorder. Alternatively, the administrative law judge found that employer rebutted the presumption and that, based on the record as a whole, claimant does not have any psychiatric problems resulting from her September 1985 work injury. Accordingly, the administrative law judge denied medical benefits for claimant=s psychological symptoms.

On appeal, claimant, representing herself, challenges the administrative law judge=s denial of her claim. Employer responds, urging affirmance of the administrative law judge=s decision.

It is well-settled that a psychological impairment which is work-related is compensable under the Act. *American Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996). Furthermore, the Section 20(a) presumption, which provides a presumed causal nexus between the injury and employment, is applicable in psychological injury cases. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 380, 384 n.2 (1990). In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). It is claimant=s burden to establish each element of her *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

Initially, the administrative law judge erred in finding that claimant did not establish the existence of a psychological harm under the Act. Specifically, the opinions of both psychiatrists diagnose an ongoing psychiatric condition. Dr. Coyle, a Board-certified psychiatrist, after an initial evaluation saw claimant several times and diagnosed her as

having a major depressive disorder.[2] EX 63 at 7, 9, 17. Dr. Coyle deposed that it is very common for people such as claimant, who have chronic pain, to have mood and anxiety symptoms, and, consistent with that, they would feel depressed and hopeless. *Id.* at 20. Moreover, Dr. Coyle explained that in psychiatry there are no objective indicators of depression and no laboratory or radiology tests to diagnose the condition, and that in most cases, when trying to treat a patient, he accepts at face value the information the patient provides, as this is the patient=s perspective. *Id.* at 16, 18.

The administrative law judge found that Dr. Coyle=s diagnosis of a major depressive disorder was equivocal because it was based entirely on claimant=s account of her subjective symptoms and was dependent on the accuracy of her reported symptoms, which the administrative law judge discredited in light of a surveillance videotape submitted by employer.[3] The administrative law judge found Dr. Coyle=s equivocation stemmed from the physician=s opinion that if a patient describes an inability to perform activities and then is seen performing those activities, the patient=s credibility is called into question and the diagnosis is less reliable. Decision and Order Granting Employer=s Motion for Reconsideration at 3. The administrative law judge also relied on Dr. Catron=s opinion that given the discrepancy between claimant=s reported symptoms and the activities in which she was observed performing on the surveillance videotape, it was impossible to diagnose whether claimant suffered from either a post-traumatic disorder or a major depressive disorder. *Id.* In this regard, Dr. Catron testified that there is no way to determine, to any degree of certainty, whether claimant has post-traumatic stress syndrome. EX 62 at 12-13. However, Dr. Catron did believe claimant had an anxiety disorder or depression, for which

[2] Two orthopedic surgeons with whom claimant had treated on September 26, 1988, and on August 29, 1989, for her shoulder problem, recommended a pain clinic and psychological treatment. EX 18 at 2-3; EX 20 at 2-3.

[3] On November 3 and November 4, 1995, private investigators retained by employer obtained a videotape of claimant driving, going to a drive-in bank, carrying two babies in car seats, eating in a fast food restaurant and cleaning up the table while holding one baby, pumping gas and shopping. EXs 50, 59. Employer conducted additional surveillance of claimant driving on April 1, 1996, April 2, 1996 and July 1996. EXs 60, 61.

she should be treated. *Id.* at 11, 35-37.

Based upon the foregoing, it is apparent that both doctors diagnosed claimant as suffering from some degree of psychiatric disorder. Such evidence satisfies the Aharm@ element of Section 20(a) invocation. On this record, the administrative law judge=s conclusion to the contrary is not supported by substantial evidence. Her rejection of Dr. Coyle=s diagnosis of major depressive disorder as equivocal and unreliable was based on the administrative law judge=s discrediting claimant=s subjective symptoms because the surveillance videotape showed claimant engaged in physical activities of everyday life which she claimed she could not perform. However, the symptoms noted by Dr Coyle, consistent with his diagnosis of depression, include sleep abnormalities, interest and energy abnormalities, appetite changes, cognitive changes and suicidal thoughts, EX 63 at 17, as well as claimant=s tearfulness, pain and anxiety during their sessions. EX 63 at 25. Dr. Catron also stated claimant had symptoms of anxiety and depression. EX 62 at 35-36. The surveillance videotape, upon which the administrative law judge relied in discrediting claimant=s symptoms shows claimant performing routine activities during the day and thus does not contradict the symptoms reported by the doctors.[4] In addition, it is the role of the medical experts to evaluate the sincerity of claimant=s symptoms, and both doctors agreed she had some symptoms. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). The fact that Dr. Catron could not diagnose a major depressive disorder does not negate his opinion that claimant needs treatment for anxiety and depression.

As the medical experts agree claimant suffers from a psychiatric condition, differing only as to its severity, we reverse the administrative law judge=s finding that claimant did not establish the existence of a harm, *i.e.*, a psychological disorder, sufficient to satisfy the first prong of her *prima facie* case. As it is undisputed that a work-related accident occurred which could have caused or aggravated claimant=s harm, Section 20(a) is invoked as a matter of law. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff=d on recon.*, 32 BRBS 224 (1998).

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant=s injury was not caused or aggravated by her employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O=Kelley v. Dep=t of the Navy/NAF*, 34 BRBS 39 (2000); *Manship*, 30 BRBS 175. It is employer=s burden on rebuttal to present substantial evidence

[4] At best, the videotape showed claimant able to do more than she asserted, which is reflected by Dr. Catron=s conclusion that he could not diagnose post-traumatic stress disorder or major depression. However, the videotape does not controvert the specific symptoms listed above, such as claimant=s difficulties at night.

sufficient to sever the causal connection between the injury and the employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir 1999); *Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs [Shorette]*, 109 F.2d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). If the administrative law judge finds that the Section 20(a) presumption is rebutted, she must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT).

In the instant case, the administrative law judge on reconsideration alternatively found that, if claimant is entitled to the Section 20(a) presumption, employer rebutted it. Specifically, the administrative law judge stated that when she previously found, in her decision on remand, that employer had not established rebuttal, she relied on the decision of the United States Court of Appeals for the Eleventh Circuit in *Brown*, 893 F.2d 294, 23 BRBS 22(CRT), in which the court required employer to present evidence A>ruling out the possibility that there was a causal connection= between claimant=s disability and his work-related accident.@ Decision on Reconsideration at 5. The administrative law judge then stated that she had placed Atoo heavy an emphasis@ on the court=s Arule out@ language, *id.*, citing *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); and *Shorette*, 109 F.3d 53, 31 BRBS 19(CRT). The administrative law judge determined that a strict Aruling out@ standard places a heavier burden on the employer than the Act requires and that, applying the Asubstantial evidence@ standard in the present case, the testimony of Dr. Catron, and to a lesser degree the opinion of Dr. Coyle, are sufficient to establish rebuttal of the Section 20(a) presumption. For the reasons that follow, we hold that the administrative law judge=s finding on this issue cannot be affirmed.

As acknowledged by the administrative law judge, the Eleventh Circuit, within whose jurisdiction the instant claim arises, has espoused a Aruling out@ standard when addressing the issue of rebuttal of the Section 20(a) presumption. *See Brown*, 893 F.2d 294, 23 BRBS 22(CRT). The Board has held that a physician=s opinion, rendered within a reasonable degree of medical certainty, that an employee=s medical condition is not work-related is sufficient to establish rebuttal of the presumption in a case arising in the Eleventh Circuit. *See O=Kelley,* 34 BRBS 39.

In this case, neither Dr. Catron nor Dr. Coyle opined within a reasonable degree of medical certainty that claimant=s psychological condition was not caused or aggravated by her work-injury. In a report dated August 20, 1996, Dr. Catron, a psychiatrist, based on a single psychiatric examination, medical records, claimant=s deposition dated May 17, 1996, and the surveillance videotape dating from November 1995, diagnosed claimant with probable factitious disorder, possible post-traumatic stress disorder, and possible major depressive disorder. EX 46. Dr. Catron concluded that in view of claimant=s unreliable and probably fabricated account of events, the presence of post-traumatic stress disorder cannot be validated or clearly linked to the electrical injury. *Id.* On deposition, he stated that there is no way to determine to any degree of medical certainty whether claimant=s symptoms were caused by her work injury. Dr. Catron=s statements that he was unable to attribute claimant=s symptoms to the electrical injury and that he could not give an opinion to a reasonable degree of medical certainty that claimant=s symptoms were caused by the 1985 shock, EX 62 at 12-13, 36, are insufficient to rebut the Section 20(a) presumption. Where a doctor explicitly states he cannot give an opinion to a reasonable degree of medical certainty that a condition is not related to claimant=s work, that opinion is not substantial evidence rebutting Section 20(a). *See Brown,* 893 F.2d at 297, 23 BRBS at 24(CRT); *O=Kelley,* 34 BRBS 39.

Upon being asked whether claimant=s psychiatric symptoms were caused by her 1985 injury, Dr. Coyle deposed that it is hard to actually gauge a level of medical certainty. Dr. Coyle stated that for people with chronic pain conditions, it is common to have mood and anxiety symptoms, and it would be consistent to feel depressed and helpless. He reported that claimant was not treated with psychiatric medications prior to her injury. When questioned whether claimant=s symptoms could have been caused by childhood sexual abuse and an abusive marriage, his opinion was that each trauma, each stressor adds to the whole equation and makes it more difficult to deal with the problems, and that he did not agree that claimant would have exactly the same psychological symptoms had she not had the electrical injury. EX 63 at 20-22. Dr. Coyle=s opinion does not establish that claimant=s psychological problems were not caused or aggravated by the work injury, and therefore it also cannot rebut Section 20(a). *See O=Kelley,* 34 BRBS 39. It is, moreover, irrelevant that other factors, such as childhood sexual abuse and a difficult marriage, may also have contributed to claimant=s depression, as the well-settled aggravation rule provides that where a work-injury combines with other possible causes, the entire condition is compensable. *See Konno v. Young Bros., Ltd.,* 28 BRBS 57 (1994).[5] As neither Dr. Catron nor Dr. Coyle gave an opinion to any reasonable degree of probability that claimant=s psychological condition was not caused by the work-related injury, their opinions are insufficient to rebut the Section 20(a) presumption under either the Aruling out@ standard or the Asubstantial evidence@ standard.[6] *See Brown*, 893 F.2d at 297, 23 BRBS 24(CRT); *American Grain Trimmers,* 181 F.3d 810, 33 BRBS 71(CRT); *Jones v. Aluminum Co. of America,* 35 BRBS 37 (2001); *O=Kelley,* 34 BRBS 39; *Bridier v. Alabama Dry Dock & Shipbuilding Corp.,* 29 BRBS 84 (1995). Thus, as the opinions of Dr. Catron and Dr. Coyle constitute the only evidence relevant to causation, a causal relationship between claimant=s employment and her

[5] The administrative law judge stated that Dr. Coyle found that claimant=s past histories of sexual and domestic abuse may have also contributed to her depression rather than the electrical shock injury. Decision and Order Granting Employer=s Motion for Reconsideration at 5. However, while Dr. Coyle acknowledged that sexual abuse could cause depression, he clarified that he could not say that claimant=s psychological symptoms would be exactly the same had she not had the electrical injury. EX 63 at 20, 21, 22.

[6] Employer has filed a recently issued decision discussing employer=s burden on rebuttal of the Section 20(a) presumption. *Ortco Contractors, Inc. v. Charpentier,* 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003). As *Ortco* arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, while this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, which has addressed the issue of Section 20(a) rebuttal, the law of the Eleventh Circuit is controlling. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990). In any event, *Ortco* would not affect the disposition of this case in view of employer=s failure to produce evidence that claimant=s condition was not work-related.

psychological condition is established as a matter of law. *See Manship*, 30 BRBS 175; *Bass v. Broadway Maint.*, 28 BRBS 11 (1994). The administrative law judge=s determination to the contrary is therefore reversed, and the case is remanded to the administrative law judge for a determination as to medical benefits for claimant=s psychological condition under Section 7 of the Act, 33 U.S.C. '907.

Accordingly, the administrative law judge=s Decision and Order Granting Employer=s Motion for Reconsideration is reversed, and the case is remanded for further consideration consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge