

BRB No. 98-0194

THOMAS H. BRAME)
)
 Claimant-Petitioner) DATE ISSUED: _____)
 v.)
)
 NORFOLK SHIPBUILDING &)
 DRY DOCK CORPORATION)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr.,
Administrative Law Judge, United States Department of Labor.

John H. Klein and Matthew H. Kraft (Rutter & Montagna, L.L.P.),
Norfolk, Virginia, for claimant.

Gerard E.W. Voyer and Donna White Kearney (Taylor & Walker, P.C.),
Norfolk, Virginia, for self-insured employer.

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

Claimant appeals the Decision and Order (96-LHC-2324) of Administrative
Law Judge Fletcher E. Campbell, Jr., rendered on a claim filed pursuant to the
provisions of the Longshore and Harbor Worker's 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. *O'Keeffe v. Smith, Hinchman, &
Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On December 1, 1994, claimant, a first class welder, sustained a work-
related slag burn to his left ear, which required surgery by Dr. Crane on May 1, 1995.
Prior to the surgery, claimant complained of mild balance problems. EX 14 at 9-1.
Subsequent to the surgery, claimant reported disequilibrium to Dr. Crane, who stated
its etiology was unknown. EX 14 at 12. Although Dr. Crane stated that claimant
reached maximum medical improvement on October 20, 1995, with no need for work

restrictions, claimant treated after that date with Dr. Prass for his complaints of dizziness and vertigo. Employer complied with the work restrictions imposed by Dr. Prass limiting claimant to thirty hours per week with no height and ladder work.

Claimant was discharged on November 1, 1996, for violation of a company rule. Thereafter, when employer denied the work-relatedness of claimant's vertigo and dizziness and refused to pay benefits, including medical benefits for treatment by Dr. Prass, claimant filed a claim for benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant is entitled to invocation of the presumption of Section 20(a) of the Act, 33 U.S.C. §920(a), but that employer produced sufficient evidence to establish rebuttal. Thus, the administrative law judge weighed the evidence as a whole, concluded that the vertigo and dizziness problems alleged by claimant are not work-related, and denied benefits.¹

On appeal, claimant contends that the administrative law judge erred in finding that employer presented sufficient evidence to rebut the Section 20(a) presumption, and in failing to address employer's liability for continuing medical care and compensation for lost overtime. Employer responds, urging affirmance, and alternatively, requests remand to the administrative law judge if the Board holds that the administrative law judge erred in concluding employer established rebuttal of the Section 20(a) presumption.

¹The administrative law judge thus did not reach the issues of claimant's entitlement to temporary partial disability benefits for lost overtime and continuing medical benefits.

If claimant establishes his *prima facie* case, by establishing the existence of a bodily harm and an accident or working conditions that could have caused the harm, Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment.² See *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); see also *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused, contributed to or aggravated by his employment. See *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *Bridier v. Alabama Dry Dock & Shipbuilding Co.*, 29 BRBS 84 (1995). It is employer's burden on rebuttal to present specific and comprehensive evidence to sever the causal connection between the injury and 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 generally *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all the evidence and resolve the causation issue based on the record as a whole. *Universal Maritime*, 126 F.3d at 262-263, 31 BRBS at 123 (CRT); see also *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In the instant case, claimant correctly contends that the administrative law judge erred in finding the opinion of Dr. Prass sufficient to establish rebuttal of the Section 20(a) presumption. The administrative law judge erred in finding rebuttal based on the doctor's statements regarding possible causes for claimant's condition and his inability to affirmatively link the condition to claimant's employment accident. He also omitted relevant portions of Dr. Prass's opinion which clearly demonstrate that Dr. Prass did not eliminate the work accident as a potential contributing cause of claimant's condition.

In finding the Section 20(a) presumption rebutted, the administrative law judge relied on this portion of Dr. Prass's opinion: "This condition [vertigo] and present symptoms can occur totally in the absence of any trauma, surgical or otherwise. Thus, I cannot specifically link his apparent inner ear disorder to his original trauma or to his surgery, at least in a direct way." Even if this statement accurately represented the full opinion of Dr. Prass, it does not state that claimant's work played no role in his condition. Whether the doctor could directly link claimant's condition to his work accident and its sequelae is relevant to claimant's ability to

²The administrative law judge found that claimant established his *prima facie* case based on the parties' stipulation that claimant sustained a work injury on December 1, 1994, and Dr. Prass's opinion of December 1, 1995, that claimant's vertigo is possibly related to early endolymphatic hydrops.

affirmatively prove his case; however, as Section 20(a) was invoked, employer bore the burden of presenting substantial evidence that the condition was not causally related to claimant's work. Moreover, the administrative law judge omitted the remaining portion of Dr. Prass's statement of December 1, 1995, which could support a finding of an indirect causal relationship. The physician's opinion continues as follows: "Often during periods of extreme stress, a latent inner ear disorder can emerge. He certainly has had a fair amount of stress since his accident."

Inasmuch as claimant complained of dizziness after his accident both before and after the ear surgery, Dr. Prass's opinion, viewed in its totality, cannot meet employer's burden of severing the connection between the work injury and claimant's equilibrium problems, and therefore is insufficient to support rebuttal of the Section 20(a) presumption. See *Bridier*, 29 BRBS at 90; *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). Moreover, the administrative law judge improperly relied on Dr. Prass's suggestions of alternate ways that claimant's symptoms could have occurred in finding rebuttal established. Although the physician stated that a major portion of claimant's problems stemmed from inflated expectations and depression, and that substance abuse also could have contributed to claimant's problems, this opinion does not establish that claimant's dizziness is not also related, at least in part, to the work accident and stress thereafter. See *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Inasmuch as the evidence on which the administrative law judge relied is not sufficient to rebut the Section 20(a) presumption,³ and there is no other evidence

³We note that the facts in this case are distinguishable from those presented to the Fourth Circuit in *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In *Moore*, the claimant had an existing back condition prior to the work injury to his right knee, and he did not complain of back pain allegedly related to the accident until six months after the injury. The court found that the administrative law judge used the Section 20(a) presumption as evidence, weighing the presumption against employer's evidence and concluding it was not rebutted because "the reports of Dr. McConnell and Dr. Shutte are given less weight than those of Dr. Brilliant." *Moore*, 126 F.3d at 261, 31 BRBS at 122 (CRT). The court went on to explain the proper reach of Section 20(a), *i.e.*, that once employer presents evidence which could support a finding against claimant, the presumption is rebutted and drops out of the case. In *Moore*, the court found Section 20(a) was rebutted by evidence claimant did not suffer back pain for a period after the injury and the affirmative statement of a doctor. In contrast, in this case, claimant complained of dizziness only after the work accident, and both before and after the surgery. Although Dr. Prass stated he could not specifically link the dizziness to the

of record establishing that claimant's dizziness is not due to the work injury, a causal relationship between claimant's employment injury and his condition is established as a matter of law.⁴ *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). Consequently, we reverse the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption, and we remand the case to the administrative law judge to address any unresolved issues.

work injury and surgery in a direct way, he never affirmatively stated that a causal relationship was absent; indeed, he stated that this type of condition can be related to stress and that claimant has experienced such stress since the work injury.

⁴Dr. Crane's note of July 7, 1995, states that claimant's disequilibrium post-surgery is of unknown etiology.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge