BRB No. 98-0258

RONALD A. BOURG	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
HALLIBURTON ENERGY SERVICES	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

David B. Allen (Samanie, Barnes & Allen), Houma, Louisiana, for claimant.

Thomas C. Fitzhugh III and Matthew H. Ammerman (Fitzhugh & Elliott, P.C.), Houston, Texas, and Joseph B. Guilbeau (Juge, Napolitano, Leyva, Guilbeau & Ruli), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-1815) of Administrative Law Judge C. Richard Avery 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.*, as extended by the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §1331 *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).

Claimant, who successfully completed a pre-employment physical examination on April 22, 1993, began working for employer on May 5, 1993 as a cementer/mixer. On May 24, 1993, claimant traveled from his assigned rig, the H&P 108, to another rig, the H&P 101, to assist in a cement pumping and mixing job; claimant's assignment involved the unloading of approximately 30 buckets of cargo weighing 40 to 45 pounds each into a tank containing several barrels of cement. Though claimant experienced chest pain and dizziness while performing this job, he completed this assignment then told the service operator on H&P 101, Lester Chaisson, that he had a medical problem and needed to return to H&P 108. After reaching H&P 108 by boat, claimant was forced to climb several levels of stairs while carrying his clothes bag and briefcase, which totaled 60 to 70 pounds, to get to his living quarters. Suffering from severe chest pain and swollen feet, claimant was evacuated from the rig at 11:00 p.m. on May 24, 1993, and taken to the hospital where he was treated for symptoms of congestive heart failure. Thereafter, claimant was diagnosed as suffering from cardiomyopathy, a disease of the heart muscle, and eventually underwent a procedure whereby a defibrillator was implanted in his heart on two separate occasions. Claimant, who has been unable to perform any work since the May 24, 1993 incident, sought permanent total disability compensation and medical benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption. The administrative law judge further determined that employer failed to introduce any evidence sufficient to establish that claimant's employment did not accelerate the time at which claimant's cardiomyopathy became disabling and, therefore, failed to rebut the Section 20(a) presumption. Inasmuch as employer stipulated that claimant cannot return to any employment, the administrative law judge awarded claimant temporary total disability compensation from May 24, 1993 until December 9, 1996, and permanent total disability compensation thereafter. Lastly, the administrative law judge denied employer's request for Section 8(f), 33 U.S.C. §908(f), relief

because, although he found that claimant's cardiomyopathy and diabetes constituted pre-existing permanent partial disabilities, he concluded that claimant's heart disease was not manifest to employer prior to May 24, 1993.[1]

On appeal, employer challenges the administrative law judge's findings regarding causation and the extent of claimant's disability. Additionally, employer challenges the administrative law judge's denial of its request for Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's decision. Employer has filed a reply brief, reiterating its contentions that claimant's condition is not related to his employment, that he should not be entitled to an award of permanent total disability compensation, and that employer is entitled to Section 8(f) relief. The Director, Office of Workers' Compensation Programs, has not filed a brief in this case.

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Konno v. Young Bros., Ltd.,* 28 BRBS 57 (1994); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Once claimant has established his *prima facie* case, he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment; the unequivocal testimony of a physician that no relationship exists between the injury and a claimant's employment is sufficient to rebut the presumption. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). If employer establishes rebuttal of the presumption, the administrative law judge must weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

[1]The administrative law judge denied employer's motion for reconsideration on October 1, 1997.

Initially, employer contends that claimant did not sustain an injury as defined by the Act, as claimant's shortness of breath and abnormal fatigue were temporary symptoms of his cardiomyopathy. Employer's contention is without merit. A harm has been defined as something that has unexpectedly gone wrong with the human frame. *Perry*, 20 BRBS at 90. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary to establish a claimant's *prima facie* case. *See Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). Specifically, chest pains constitute an injury under the Act. *See Volpe v. Northeast Marine Terminal Corp.*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). In the instant case, claimant, after undergoing acts of physical exertion while working for employer on May 24, 1993, complained of shortness of breath, chest pain and swollen feet such that he required evacuation from the rig on which he was stationed and admission to a hospital. Thereafter, on May 25, 1993, claimant was treated for congestive heart failure, which required extensive medication, a left heart catheterization, a left ventriculogram and a coronary angiogram. *See* Cl. Ex. 11. Thus, contrary to employer's contention, claimant has established the existence of a harm under the Act for purposes establishing his *prima facia* case. Accordingly, as the "working conditions" element of claimant's *prima facie* case is not challenged on appeal, we affirm the administrative law judge's invocation of the Section 20(a) presumption. *See Sinclair v. United Food and Commercial Workers,* 23 BRBS 148 (1989).

Employer further argues that claimant's symptoms were not caused or aggravated by his employment, but, rather, were due to his underlying cardiomyopathy. We disagree. In the instant case, both Drs. Abben and Giles agreed that while claimant's work for employer did not cause damage to claimant's heart, the physical stress experienced by claimant on May 24, 1993, aggravated and accelerated his underlying heart condition causing claimant to experience symptoms sooner than he otherwise would have. *See* Cl. Exs. 8, 11 at 29-34; Emp. Ex. 12 at 40, 42, 62. Thus, as the two doctors rendering relevant opinions regarding the issue of causation specifically related claimant's injury to his work-related physical exertion on May 24, 1993, employer has not demonstrated by substantial evidence that claimant's work-related physical exertion did not aggravate or accelerate his heart condition; accordingly, employer has failed to meet its burden of proof on rebuttal.[2]

[2]Dr. Ellender, a board-certified internist and pulmonary disease specialist, provided testimony with regard to claimant's third-party action against claimant's previous employer. Dr. Ellender opined that claimant's exposure to ammonia did not cause his congestive heart failure, but rather, related claimant's condition to his cardiomyopathy, which was caused in part by diabetes. *See* Emp. Ex. 9 at 16, 28,

We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption and his consequent finding that claimant's present medical condition is causally related to his employment.

We further reject employer's contention that any disability claimant suffered after his discharge from the hospital on June 4, 1993, cannot be attributable to employer. Our review of the record reveals that since the May 24, 1993 incident, claimant has undergone numerous hospitalizations for his heart condition, including the implantation of defibrillators on two separate occasions. *See* Cl. Ex. 11. It is well-established that if claimant's employment played a role in the manifestation of his disease, the entire resultant disability is compensable. *See Bechtel Associates, P.C. v. Sweeney*, 824 F.2d 1029, 20 BRBS 49 (CRT)(D.C. Cir. 1987); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986); *Obert v. John T. Clark & Sons of Maryland*, 23 BRBS 157 (1990). Consequently, as claimant's present medical condition is causally related, at least in part, to his employment with employer, and as it is undisputed that claimant is not capable of any type of work, *see* Tr. at 88-89, we affirm the administrative law judge's award of total disability benefits to claimant.

Employer's final argument challenges the administrative law judge's finding that it failed to establish entitlement to relief pursuant to Section 8(f) of the Act; specifically, employer contends that the administrative law judge erred in finding that claimant's pre-existing cardiomyopathy was not manifest to employer. Section 8(f) of the Act, 33 U.S.C. §908(f), shifts the liability to pay compensation for permanent total disability after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. In a case where claimant is permanently totally disabled, an employer may be granted Special Fund relief if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that this permanent total disability is not due solely to the subsequent work-related injury. *See Ceres Marine Terminal v. Director, OWCP,* 118 F.3d 387, 31 BRBS 91 (CRT)(5th Cir. 1997); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990).

30-32.

In the instant case, the administrative law judge initially determined that claimant's cardiomyopathy and diabetes constituted pre-existing permanent partial disabilities for purposes of Section 8(f). *See* Decision and Order at 20. However, noting that claimant passed his pre-employment physical examination, the administrative law judge found that there were no strong indications in the record that claimant had any underlying heart disease. Thus, the administrative law judge concluded that employer failed to meet the manifest element required for Section 8(f) relief. Contrary to employer's assertions, the evidence of record supports the administrative law judge's finding that claimant's cardiomyopathy was not manifest to employer. While claimant's pre-existing diabetes is well documented in the records, *see* Emp. Ex. 17, and Drs. Abben, Giles, and Dr. Ellender testified that the probable cause of claimant's cardiomyopathy was his long-standing diabetic condition, *see* Cl. Ex. 11 at 17-18, 52-53; Emp. Ex. 9 at 30-32; Emp. Ex. 12 at 56-59, the mere presence of certain risk factors is not legally sufficient to establish the manifest requirement. Without a documented diagnosis, there must be "sufficient unambiguous, objective, and obvious indication of a disability . . . reflected by the factual information contained in the available records so that the disability should be considered manifest even though actually unknown to the employer." *Ceres Marine Terminal*, 118 F.3d at 392, 31 BRBS at 95 (CRT), *quoting Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 1224, 22 BRBS 11, 14 (CRT)(5th Cir. 1989); *see also Transbay Container Terminal v. U.S. Dept. of Labor*, 141 F.3d 907, 32 BRBS 35 (CRT)(9th Cir. 1998). In the instant case, there is no evidence in the record that claimant's diabetes had any effect on his employment; moreover, there is no indication in the record that claimant's heart condition was diagnosed prior to the May 24, 1993 work incident, or that his condition could be diagnosed from the objective records that existed prior to May 24, 1993, based on the extant medical records.[3] We therefore affirm the administrative law judge's determination that employer failed to establish the manifest requirement necessary for Section 8(f) relief, and his consequent conclusion that employer is not entitled to Section 8(f) relief.

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[3]Employer notes that Dr. Giles testified that claimant's symptoms of coughing and shortness of breath as a result of his ammonia exposure prior to working for employer were symptoms of heart failure. Emp. Ex. 12 at 32. However, claimant was diagnosed with allergy bronchitis when he was treated for this exposure, and thus, Dr. Giles's testimony does not constitute an unambiguous, obvious indication of heart disease. Emp. Ex. 29 at 22, 25-26. In addition, contrary to employer's assertion, Dr. Giles testified that claimant's previous erectile dysfunction with traces of blood in his urine exhibited prostate problems and kidney malfunction, not heart failure. Emp. Ex. 12 at 21-22.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge