BRB No. 00-1180

MORRIS A. JACOBS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Sept. 14, 2001
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Motion for Reconsideration of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Ralph Rabinowitz (Rabinowitz, Swartz, Taliaferro, Lewis, Swartz & Goodove, P.C.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason), Newport News, Virginia, for self-insured employer.

Kristin Dadey (Howard M. Radzely, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Motion for Reconsideration (97-LHC-2570) of Administrative Law Judge Richard E. Huddleston 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained a back injury while working for employer on May 15, 1991. Dr. Allen diagnosed and treated claimant for a lumbar back strain, which he opined had completely resolved on July 16, 1991. Claimant thereafter returned to work without restrictions on July 17, 1991.

In September 1992, claimant reported to employer's clinic with symptoms of pain radiating down his right leg into his foot and some tingling in his toes. Dr. Reid diagnosed a trapezius spasm and ordered a cervical spine x-ray and MRI. Dr. Allen thereafter opined that claimant had a very mild degenerative condition in his lumbar and cervical spine, and that his fleeting symptoms might have been more compatible with his underlying idiopathic problem of a syringomyelia or spinal syrinx, which was in no way related to the work injury sustained on May 15, 1991. Dr. Allen therefore discharged claimant from neurosurgical treatment on November 30, 1992, and stated that claimant was capable of work with no restrictions.

On January 30, 1995, claimant sought additional treatment for back and neck pain. Dr. Reid diagnosed a chronic and recurrent lumbosacral sprain, prescribed medication and ultimately referred claimant to Dr. Cook for chiropractic treatment. Dr. Cook reported on April 28, 1995, that his chiropractic treatments of claimant's cervical spine did not alleviate claimant's pain and on May 3, 1995, he referred claimant to Dr. Allen. Based on a cervical MRI on May 10, 1995, Dr. Allen recommended and subsequently performed, on May 24, 1995, a cervical discectomy and fusion at C5-6 for progressive degenerative changes and a disc herniation.

Employer paid compensation to claimant for various periods of temporary total disability.[1] Claimant thereafter sought additional disability benefits based on his herniated

[1]Employer paid temporary total disability benefits from May 17, 1991, through July 17, 1991, September 11, 1992, through November 29, 1992, January 31, 1995, through April 16, 1995, May 4, 1995, through January 29, 1996, and June 17, 1997, through July 27, 1997. Claimant returned to his regular, full-time employment in January 1996, and claimed temporary partial disability for a period thereafter.

cervical disc, lumbar strain, and spinal syrinx. Employer controverted the claim on the ground that claimant's only work-related injury, *i.e.*, his lumbar strain, had completely resolved and thus his subsequent herniated cervical disc and spinal syrinx are not work-related. Alternatively, employer filed a petition for Section 8(f) relief, 33 U.S.C. §908(f), based on back injuries sustained by claimant in 1985 and 1987.

In his decision, the administrative law judge initially determined that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to all three of his claimed injuries; *i.e.*, his lumbosacral strain, herniated cervical disc, and spinal syrinx. He then determined that employer established rebuttal with regard to claimant's spinal syrinx, but could not establish rebuttal with regard to claimant's lumbar strain and herniated cervical disc. Accordingly, the administrative law judge concluded that claimant's lumbar strain and herniated cervical disc are work-related injuries. The administrative law judge denied claimant a period of temporary partial disability benefits, 33 U.S.C. §908(e), but ordered the record reopened for additional evidence on permanent partial disability. 33 U.S.C. §908(c)(21). The administrative law judge also found claimant entitled to medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Finally, the administrative law judge denied employer's request for Section 8(f) relief. Employer's motion for reconsideration was denied.

On appeal, employer challenges the administrative law judge's findings that claimant's cervical disc herniation is work-related and that employer is not entitled to Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds in agreement with employer regarding the administrative law judge's consideration of Section 8(f) in this case. Claimant responds, urging affirmance.

Employer argues that the administrative law judge wrongly applied the Section 20(a) presumption in this case as claimant never alleged that his cervical disc herniation was caused or "aggravated" by the incident that caused the back strain on May 15, 1991, but rather asserted that it is due to the spinal manipulation performed by Dr. Cook unrelated to the subject work injury. Employer maintains that the administrative law judge's application of the Section 20(a) presumption and subsequent determination that employer did not rebut the presumption with regard to claimant's cervical disc herniation is in error as it directly contradicts his prior finding that claimant's only claimed work-related injury, *i.e.*, the back strain sustained on May 15, 1991, had completely resolved without any residual effects by July 1991. Moreover, employer avers that the administrative law judge's determination that claimant's cervical disc herniation is work-related is not supported by the record as there is no credible evidence that a back strain, which resolved by July 1991, aggravated a cervical disc herniation which did not become known until September 1991.[2]

[2]In the instant case, employer does not dispute that claimant has suffered a harm, *i.e.*,

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 his *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). In presenting his case, claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, claimant must show that working conditions existed which could have caused his harm. *See generally U.S. Industries/Federal Sheet Metal, Inc.,* 455 U.S. 608, 14 BRBS 631; *see also Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

---

a cervical disc herniation, and that claimant presented evidence of an accident which occurred on May 15, 1991, during his employment with employer; rather, employer challenges the administrative law judge's invocation of the Section 20(a) presumption on the ground that no credible evidence exists that claimant's work accident on May 15, 1991, could have caused his cervical disc herniation.

Initially, we reject employer's contention that claimant never alleged that his cervical disc herniation was caused or aggravated by the work incident on May 15, 1991, as the record contains sufficient evidence to the contrary. In his Pre-Hearing Statement, LS-18, claimant specifically noted that "[he] sustained injuries on the job of a multiple nature, which required cervical disc surgery with Dr. Allen, and low back discs that are unoperated on." Claimant's LS-18. In addition, the record indicates, and the administrative law judge found, that claimant had neck pain shortly following his work accident on May 15, 1991, which ultimately led to the unsuccessful chiropractic treatment by Dr. Cook and subsequent cervical disc surgery by Dr. Allen.[3] Moreover, although claimant's primary position may have been that Dr. Cook's chiropractic treatment was a causative factor in his need for cervical disc surgery, claimant never alleged that said treatment was the sole cause of his underlying cervical disc condition.[4] Thus, contrary to employer's position, claimant's claim put forth a *prima facie* case of compensability with regard to his cervical disc herniation as he sufficiently raised a causal connection between the herniation and the work-related accident sustained on May 15, 1991. *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631. We therefore hold that the administrative law judge acted properly in applying the Section 20(a) presumption to this case.

[3]In fact, an MRI of claimant's cervical spine on October 7, 1992, indicated a diffuse cervical spondylosis with borderline canal stenosis, central and left-sided disc protrusions at C3-4 and C5-6, left-sided disc protrusions at T2-3, and an 18mm syrinx cavity centered at the C6-7 disc level with no associated abnormal enhancement to suggest the presence of a mass within the cord.

[4]We note that any additional disability sustained as a result of treatment for a work-related condition is compensable. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987).

In his decision, the administrative law judge noted that while employer argues that claimant's cervical disc herniation is not work-related, there is no dispute that claimant, in fact, sustained this injury and that an accident occurred at work on May 15, 1991. Thus, he found claimant entitled to the Section 20(a) presumption. On reconsideration, the administrative law judge further addressed and rejected employer's assertion that the Section 20(a) presumption is inapplicable to claimant's claim of a cervical disc herniation. The administrative law judge found that claimant testified to immediate soreness in his neck after the May 15, 1991, injury,[5] and claimant's history to Dr. Allen on November 10, 1992, states that two days after he had been out of work for the back pain from the May 15, 1991, injury, claimant began to experience right arm pain requiring a cervical MRI scan ordered by the shipyard physician. The administrative law judge therefore concluded that the record is clear that there were cervical spine complaints, and some radiculopathy symptoms (right arm pain) shortly after the work accident on May 15, 1991. In addition, the administrative law judge found that the MRI of the cervical spine, administered on October 7, 1992, indicated "left neck and arm pain" and revealed left-sided disc protrusions at C5-6. Employer's Exhibit (EX) 9. The administrative law judge found this further supported by Dr. Cook, who opined on May 18, 1998, that claimant's cervical disc findings had been present for a long period of time and that the previously existing degenerative disc condition necessitated the need for surgical repair. EX 2. Given this evidence, we reject employer's argument that claimant did not establish a *prima facie* case and affirm the administrative law judge's invocation of the Section 20(a) presumption, as claimant has established a harm and the existence of an accident which could have caused or aggravated that harm. *See Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989).

[5]Employer further argues that the administrative law judge erred, on reconsideration, in crediting claimant's testimony that he had cervical pain since the date of his work-related injury as the administrative law judge did not, in violation of the Administrative Procedure Act, consider the large discrepancy between those statements and others made by claimant denying any cervical pain at the time of the May 15, 1991, injury. In *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997), the Fourth Circuit affirmed the administrative law judge's invocation of the Section 20(a) presumption based on claimant's testimony that he experienced back pain immediately after the work injury as a reasonable exercise of the administrative law judge's discretion, despite the fact that said testimony may "appear incredible" in light of the claimant's other testimony. While, as employer notes, claimant's testimony regarding the development of his neck pain is somewhat equivocal, it nevertheless is sufficient to support a finding that claimant's neck problems commenced shortly after his May 15, 1991, work accident. *See* Hearing Transcript at 35-36; 57-61. Thus, the administrative law judge acted reasonably within his discretion in crediting claimant's testimony on reconsideration. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Employer's contention is therefore rejected.

Employer alternatively asserts that the administrative law judge erred in finding that it did not rebut the Section 20(a) presumption, as the evidence of record conclusively establishes that claimant's cervical disc herniation is in no way related to the work injury which he sustained on May 15, 1991. Upon invocation of the Section 20(a) 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 Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); *Manship*, 30 BRBS 175. It is employer's burden on rebuttal to present substantial evidence sufficient to sever the causal connection between the injury and the 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); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *See, e.g., Cairns v. Matson Terminals*, 21 BRBS 252 (1988). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he 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. at 267, 28 BRBS at 43(CRT).

In his decision, the administrative law judge addressed the opinions of Drs. Cook and Allen, which represent the only evidence relevant to the connection between claimant's injury and his work-related accident. The administrative law judge found that Dr. Cook's statement indicated his treatment could not have caused claimant's injury, while Dr. Allen stated that no traumatic event led directly to claimant's cervical injury. However, as there is no evidence in the record which states that claimant's disc herniation was not aggravated by his injury on May 15, 1991, the administrative law judge concluded that employer failed to establish rebuttal of the Section 20(a) presumption. On reconsideration, the administrative law judge reiterated his conclusion that there is no evidence in the record sufficient to establish that claimant's disc herniation was not aggravated by his injury on May 15, 1991. Rejecting employer's argument that negative evidence was sufficient to establish that the injury did not aggravate claimant's cervical spine, the administrative law judge found the credible evidence, both documentary and testimony, completely supports the finding that claimant's cervical spine was aggravated by his injuries of May 15, 1991. The administrative law judge also rejected employer's argument that Dr. Allen indicated claimant's cervical

spine injury resolved completely by July 1991, noting that the shipyard doctor ordered an MRI in October 1992 and concluding that Dr. Allen found thereafter that claimant's symptoms did not warrant surgical treatment at that time. Thereafter, in 1995, claimant's symptoms worsened, leading to surgery. As the administrative law judge's decisions fully address the medical evidence in this case, and neither doctor stated that claimant's work accident on May 15, 1991, did not aggravate his condition, resulting in his cervical disc herniation, the administrative law judge's finding that the Section 20(a) presumption is not rebutted is affirmed.[6] *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986). Thus, causation is established as a matter of law. *Cairns*, 21 BRBS 252.

Lastly, we agree with employer and the Director that the administrative law judge erred in considering and denying employer's request for Section 8(f) relief. The Board has recognized that the statutory language of Section 8(f) unequivocally limits the Special Fund's liability only to payments of benefits for permanent disability. *Sizemore v. Seal Co.*, 23 BRBS 101 (1989); *Jenkins v. Kaiser Aluminum & Chemical Sales*, 17 BRBS 183 (1985). Thus, the Board has held that it is error for the administrative law judge to consider Section 8(f) where the claimant has been found to only be temporarily disabled. *See Nathenas v. Shrimpboat, Inc.*, 13 BRBS 34 (1981)*; Laput v. Blakeslee, Arpaia, Chapman, Inc.*, 11 BRBS 363 (1979). Consequently, as the administrative law judge did not award any permanent disability benefits, the issue of Section 8(f) relief is not ripe for adjudication at this time. We therefore hold that the administrative law judge's consideration of employer's request for Section 8(f) relief is, at present, erroneous and thus, vacate his denial of Section 8(f) relief.

Accordingly, the administrative law judge's denial of Section 8(f) relief is vacated. In all other respects, the administrative law judge's decisions are affirmed.

---

[6]In fact, Dr. Cook's opinion merely indicates that his spinal manipulations did not cause claimant's disc herniation, and does not address whether there is a relationship between the May 15, 1991, work accident and claimant's cervical disc herniation. EX 2. Similarly, while Dr. Allen's notes and medical reports state that additional lumbar complaints are not related to the May 15, 1991, work accident, they do not address the cause of claimant's cervical disc herniation. EXs 1, 4, 9, 12, 20.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge