

BRB No. 01-0942

NILES RICKER)
)
 Claimant-Petitioner)
)
 v.)
)
 UNIVERSAL MARITIME) DATE ISSUED: Sept. 9, 2002
 SERVICE CORPORATION)
)
 and)
)
 SIGNAL MUTUAL)
 INDEMNITY ASSOCIATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order on Remand of Paul H. Teitler,
Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Baker, Garber, Duffy & Pedersen), Hoboken, New
Jersey, for claimant.

Mark E. Solomons and Laura Metcoff Klaus (Greenberg Traurig LLP),
Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (97-LHC-02589) of
Administrative Law Judge Paul H. Teitler denying benefits 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359
(1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time, and it is necessary to recount its

history in some detail. Claimant worked for employer as a longshoreman from 1979 until he retired on January 30, 1995, due to chronic obstructive pulmonary disease (COPD) and cor pulmonale. He testified that during the course of his employment he was exposed to diesel fumes and noxious dust. Tr. 1 at 63-77. Claimant also has a smoking history of approximately 45 pack years, he is obese, and he has sleep apnea. At the formal hearing, claimant alleged that his working conditions contributed to his present disability and/or that a return to his usual employment as a dockman would exacerbate his disability. Tr. 1 at 7, 12.

In his initial Decision and Order, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), based on the testimony of claimant and Dr. Nahmias and the reports of Dr. Eisenstein. These doctors stated that claimant's COPD was aggravated by his exposures to injurious substances at work. CX 2; Tr. 2 at 57. Dr. Nahmias stated that claimant initially noted an increase in his symptoms after a day's work, and that the progression of the disease eventually led to increased symptoms even when claimant was not working. Tr. 2 at 42-43, 113-115. With regard to claimant's work place exposures, the administrative law judge found that claimant credibly testified as to the presence of various dusts and exhaust fumes in the hold of ships and in the terminal. The administrative law judge found, however, that employer established rebuttal of the Section 20(a) presumption based on the testimony and report of Dr. Adelman. The administrative law judge concluded that claimant failed to establish, based on the record as a whole, that his disability is in part work-related, and he denied benefits. He credited the opinion of Dr. Adelman that claimant's COPD is due to smoking and aggravated by sleep apnea.

Claimant appealed, contending that employer failed to rebut the Section 20(a) presumption as Dr. Adelman's opinion does not state that claimant's work exposures did not aggravate his COPD or contribute to his disability. The Board held that Dr. Adelman's opinion is not sufficient to rebut the Section 20(a) presumption as he does not state that claimant's COPD was not exacerbated by his employment or that claimant's disability is not due in part to his work exposure to dust and fumes. Although Dr. Adelman stated claimant's COPD is not caused by work place exposures but is due to cigarette smoking, Dr. Adelman did not state that claimant's work exposures did not aggravate his COPD. In fact, he testified that the exposures increased claimant's symptomatology while he was at work. The Board therefore vacated the administrative law judge's finding that Dr. Adelman's opinion rebuts the Section 20(a) presumption, and, in the absence of any other evidence of record that could rebut the Section 20(a) presumption, remanded the case for the administrative law judge to address the remaining issues. *Ricker v. Universal Maritime Serv. Corp.*, BRB No. 99-0564 (March 1, 2000) (unpub.).

Employer filed a motion for reconsideration of the Board's decision. In addition, the Board granted the motion of the American Shipbuilding Association and the National Association of Waterfront Employers to participate as *amici curiae*, and accepted the brief filed on behalf of these organizations that supported employer's position. Employer

contended claimant did not make a claim based on “aggravation” or “exacerbation,” and that the Board therefore erred in holding Dr. Adelman’s opinion insufficient to rebut the Section 20(a) presumption. Employer contended that Dr. Adelman stated that claimant’s condition is not caused in whole or in part by conditions of employment, and thus is sufficient to rebut the Section 20(a) presumption. The *amici* argued that in addressing the issue of rebuttal, the Board required employer to “rule out” claimant’s employment as a cause of his COPD, rather than applying the “substantial evidence to the contrary” statutory standard.

The Board denied employer’s motion for reconsideration. The Board detailed the several ways in which claimant raised the theory that his underlying pulmonary condition was aggravated by his employment exposures. *Ricker v. Universal Maritime Serv. Corp.*, BRB No. 99-0564 (Nov. 30, 2000) (*en banc*) (unpub.), slip op. at 4. The Board next quoted the rebuttal standard it used in its decision, and rejected the contention that it had required employer to “rule out” any possibility that claimant’s condition was work-related. *Id.* at 5.

The Board then addressed the substance of the contention that Dr. Adelman’s opinion is sufficient to rebut the Section 20(a) presumption because there is no evidence that claimant’s symptoms increased while he was working. Dr. Adelman stated that claimant “certainly was irritated by these things [occupational exposures] and had industrial bronchitis where he had cough and sputum production from being in these environments,” Tr. 2. at 161, but that these exposures are not associated with functional loss over time (*i.e.*, claimant’s pulmonary function studies did not worsen). *Id.* at 161-162. He stated that when such individuals are removed from the irritating environment, their airways revert to their prior state. *Id.* at 185. Dr. Adelman referred to this condition as industrial bronchitis. *Id.* at 161. Moreover, the Board observed that claimant’s extensive medical records are in evidence, and some refer to acute exacerbations of claimant’s underlying condition. *See, e.g.*, CX 7. The Board stated, “That these records do not explicitly relate the exacerbations to the work environment is insufficient to establish the absence of a work connection; in order to rebut the Section 20(a) presumption, employer must produce substantial evidence of the absence of such a connection.” *Ricker*, slip op. at 6 (decision on recon.).

With regard to the issue concerning claimant’s functional disability, the Board stated that if claimant’s symptoms are irritated while he is at work, claimant has sustained an injury under the Act, citing *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT)(D.C. Cir. 1984), and *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). Dr. Adelman’s opinion specifically stated that claimant’s symptoms are work-related, and thus his opinion cannot rebut the Section 20(a) presumption. As claimant sustained an “injury” within the meaning of the Act, the issue for the administrative law judge on remand concerned the nature and extent of any disability sustained as a result of his work injury. The Board stated that,

Claimant is thus entitled to benefits for any disability due to the exacerbation of his symptomatology. In this regard, as Dr. Adelman stated that claimant's functional disability is not work-related . . . any disability which is due solely to this condition is not compensable. However, claimant is entitled to benefits for any disability resulting from the aggravation of this underlying condition, including the exacerbation of his symptomatology.

Ricker, slip op. at 7 (decision on recon.). The Board directed the administrative law judge's attention to *Crum* and *Gardner*, cases in which the claimants were awarded benefits for the work-related aggravation of symptoms.

On remand, the administrative law judge did not adhere to the Board's instructions, and instead indulged in a lengthy criticism of the Board's decision. The administrative law judge stated that the Board raised the aggravation rule, and incorrectly applied the "ruling out" standard to its rebuttal analysis. Decision and Order on Remand at 3-4. He stated that the Board effectively overruled the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), by allowing a claimant to prevail by virtue of the Section 20(a) presumption. The administrative law judge further found that claimant was barely exposed to injurious substances; he stated that claimant testified he spent at most 10 days per year in the holds of ships, and that claimant worked primarily in open areas of the yard driving hustlers and top loaders. The administrative law judge concluded "there is at best only a scintilla of evidence that Claimant's exposure to dust, diesel, and other fumes added to his disability, because of the containerization at the dock." Decision and Order on Remand at 4. He specifically contradicted his first decision by stating "the exposures alleged by Claimant are not creditable," *id.*, and that the medical evidence is devoid of claimant's complaints of such exposures. The administrative law judge again concluded that Dr. Adelman's testimony is sufficient to rebut the Section 20(a) presumption and to establish the absence of a causal connection between claimant's disability and his employment. Therefore, he denied benefits.

Claimant appeals, contending that the administrative law judge erred by failing to follow the Board's instructions on remand, and by "reversing" his decision regarding the credibility of claimant's testimony for purposes of establishing he was exposed to injurious substances. Employer responds, urging affirmance of the denial of benefits. Claimant has filed a reply brief.

For the reasons that follow, we must remand this case again, and due to the administrative law judge's recalcitrance in following the Board's remand order, we direct that the case be assigned to a different administrative law judge. See *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989). In the first instance, the administrative law judge is not free to disregard the Board's instructions. The regulation at 20 C.F.R. §802.405(a) provides that, on remand, the administrative law judge shall take the action ordered by the

Board. *See Randolph v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 443 (1989); *see also Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986) (mandate rule applies to agency proceedings). The Board remanded for the administrative law judge to determine the extent of “any disability resulting from the aggravation of this underlying condition, including the exacerbation of his symptomatology.” *Ricker*, slip op. at 7 (decision on recon.). The administrative law judge did not undertake this analysis but reiterated his opinion that Dr. Adelman’s opinion is sufficient to rebut the Section 20(a) presumption and that claimant has not established the work-relatedness of his condition.

Furthermore, the administrative law judge, without providing any justification for his action, reconsidered the credibility of claimant’s testimony regarding the extent of his industrial exposures. He specifically credited claimant’s testimony in his first decision and invoked the Section 20(a) presumption, in part, based on this testimony.¹ *See* Decision and Order at 12. In his decision on remand, the administrative law judge discredited claimant’s testimony regarding the extent of his exposures.² Decision and Order on Remand at 4-5. Contrary to the administrative law judge’s implication, claimant need not initially prove that the exposures in fact caused his harm or aggravated a pre-existing condition, but only that the exposures *could have* done so. *See generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982). Upon such a showing, Section 20(a) presumes a causal connection between the harm and the employment. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998). The Section 20(a) presumption applies with equal force to a claim based on aggravation of a pre-existing condition as it does to a claim of an initial injury. *See Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). Having invoked the Section 20(a) presumption in his first decision, the administrative law judge was not free to reconsider this finding on remand given the limited nature of the Board’s remand order.

Furthermore, the administrative law judge’s statement that the Board “overruled”

¹The administrative law judge stated in his first decision, “[Claimant’s] testimony is uncontradicted, and I find it to be credible.” Decision and Order at 12.

²In his decision on remand, the administrative law judge stated, “The exposures alleged by Claimant are not creditable.” Decision and Order on Remand at 4.

Greenwich Collieries by allowing claimant to prevail on the strength of the Section 20(a) presumption alone is without foundation. While the Supreme Court held in *Greenwich Collieries* that the proponent of an order bears the ultimate burden of persuasion under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), the Court acknowledged the provisions of the Act that provide claimants the “benefit from certain statutory presumptions easing their burden.” *Greenwich Collieries*, 512 U.S. at 280, 28 BRBS at 47(CRT), citing 33 U.S.C. §920. Clearly, a claimant can prevail on the basis of a presumption, such as Section 20(a), when the employer fails to produce “substantial evidence to the contrary.” See *Bath Iron Works v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), cert. denied, 528 U.S. 1187 (2000).

Finally, as discussed in the Board’s decision on reconsideration, claimant, and not the Board, raised the theory that his pre-existing pulmonary condition was aggravated by his employment exposures. *Ricker*, slip op. at 4 (decision on recon.). Upon invocation of the Section 20(a) presumption, the burden shifted to employer to produce substantial evidence that claimant’s employment did not aggravate his pre-existing condition. See *American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). We reiterate that the Board did not hold that employer must “rule out” the possibility that claimant’s work exposures aggravated his condition. See *Ricker*, slip op. at 2; *Ricker*, slip op. at 5 (decision on recon.). As the Board has held in two decisions, Dr. Adelman’s opinion does not constitute substantial evidence that claimant’s condition was not aggravated by his employment. Dr. Adelman stated that claimant “certainly was irritated by these things [occupational exposures] and had industrial bronchitis where he had cough and sputum production from being in these environments.”³ Tr. 2. at 161. Thus, Dr. Adelman’s opinion does not rebut the Section 20(a) presumption with regard to aggravation, and the administrative law judge erred in once again finding to the contrary.

³As the Board also acknowledged, Dr. Adelman stated that claimant’s functional capacity was not worsened by his work place exposures. Tr. 2 at 161-162.

The work-related manifestation of symptoms of an underlying condition constitutes an “injury” under the Act, *see Crum*, 738 F.2d at 478, 16 BRBS at 120-121(CRT); *Gardner*, 640 F.2d at 1385, 13 BRBS at 101; *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986), and claimant is thus entitled to benefits for any disability due to the aggravation of his underlying condition, including the exacerbation of his symptomatology. On remand, therefore, the new administrative law judge must determine the nature and extent of the disability due to claimant’s work-related condition.⁴

Accordingly, the administrative law judge’s Decision and Order on Remand denying benefits is vacated, and the case is remanded for assignment to a new administrative law judge and a decision in accordance with this and our prior opinions.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴As discussed in the Board’s decision on reconsideration, claimant is not entitled to benefits for any disability resulting from the functional impairment due to his COPD. He is entitled to benefits for any disability due to the aggravation of his symptoms. The issues to be addressed thus concern whether the aggravation of his symptoms precludes his return to his former job and, if so, whether suitable alternate employment is available. In this regard, as we previously discussed, the appellate decisions in *Gardner*, 640 F.2d at 1390-1391, 13 BRBS at 107-108, and *Crum*, 738 F.2d at 479-480, 16 BRBS at 123(CRT), are on point. *Ricker*, slip op. at 7 & n.3 (decision on recon.).