BRB No. 05-0134

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| DAMITA JO GARNER | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| STEVEDORING SERVICES OF AMERICA | ) | DATE ISSUED: 09/30/2005 |
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| and | ) | |
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| HOMEPORT INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

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

Damita Jo Garner, Jacksonville, Florida, *pro se*.

Donovan A. Roper (Roper & Roper, P.A.), Apopka, Florida, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2003-LHC-0759) of Administrative Law Judge Richard K. Malamphy 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 counsel, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed.

Claimant, whose work for employer involved driving vehicles from ships to storage areas, sustained a fracture of the left fifth metatarsal (pinkie toe), as a result of an accident on January 4, 2002. She also alleged that this accident caused additional injuries to her right knee, right hip, low back, and neck. Claimant reported that she previously sustained injuries to her neck and back from a series of accidents, including an on-the-job injury in 1993, and automobile accidents in 1995 and 1999, and that, as a result, she underwent a neck fusion in 1994, and obtained ongoing treatment for her neck and back pain from Drs. Nabizadeh and Elage up through the January 4, 2002, work accident.

On January 10, 2002, Dr. Muenz diagnosed a fracture of the left fifth metatarsal, which he subsequently opined had completely resolved as of March 8, 2002. Dr. Muenz also stated that claimant did not sustain any new problems with her back, and he reported that her right foot, ankle and knee were normal. Employer voluntarily paid temporary total disability benefits from January 5, 2002, through March 8, 2002, the date upon which Dr. Muenz released claimant to return to her regular work without any restrictions. Claimant thereafter filed the instant claim seeking compensation for alleged work injuries to her neck, back and side, as well as authorization for a change in treating physicians.

In his decision, the administrative law judge found that claimant established invocation of the Section 20(a) presumption, but that employer established rebuttal thereof. He then rejected claimant's request for a change in physician from Dr. Muenz to Dr. Yant as he found that Dr. Yant "is not a specialist who can provide the necessary treatment for the residuals of claimant's on-the-job foot injury." Decision and Order at 9. Based on these findings, the administrative law judge denied benefits.

On appeal, claimant, appearing *pro se*, challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's decision.

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). As the administrative law judge determined, employer "conceded that [claimant] sustained an on the job injury in January 2002 that resulted in the fracture of a metatarsal." Decision and Order at 8. The administrative law judge additionally gave claimant the benefit of the Section 20(a) presumption with regard to her alleged neck, back and side injuries, as evidenced by his

consideration of rebuttal with regard to the alleged work-related aggravation of these pre-existing conditions. *Id.* at 9.

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 her employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996). 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, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied*, 528 U.S. 1187 (2001); *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); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). 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.[1] *See, e.g., Cairns v. Matson Terminals*, 21 BRBS 252 (1988). In establishing rebuttal of the presumption, however, proof of another agency of causation is not necessary. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982)(Kalaris, J., concurring and dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984). Rather, the testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). 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. 267, 28 BRBS 43(CRT).

At the outset, we hold that the administrative law judge's overall consideration of the Section 20(a) presumption in this case is flawed as his query into causation ceased upon his determination that employer established rebuttal of the Section 20(a) presumption. Absent from his decision is any specific consideration of the issue of

[1] Under the aggravation rule, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant condition is compensable. *See Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *see also Wheatley v. Adler*, 407 F.2d 307 (D.C. 1968); *Clark v. Todd Shipyards Corp.*, 20 BRBS 30 (1987), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 848 F.2d 125, 21 BRBS 114(CRT) (9th Cir. 1988).

causation based on the record as a whole.[2] In the instant case, claimant sought benefits based on two distinct alleged work-related injuries, *i.e.*, continued complaints of pain in her left foot, and an aggravation of her pre-existing neck and back conditions, and the administrative law judge has separately considered the Section 20(a) presumption to varying degrees with regard to both of these alleged conditions.

With regard to the left foot injury, the administrative law judge determined that employer established rebuttal, based on Dr. Muenz's opinion that claimant's work-related fracture of the left fifth metatarsal had completely resolved as of March 8, 2002, coupled with the fact that Dr. Yant, who saw claimant about a year after Dr. Muenz, did not clearly relate claimant's current foot problem to the injury in 2002. As the administrative law judge found, Dr. Muenz's opinion states that the left foot injury which claimant sustained as a result of her January 4, 2002, work injury had completely resolved by March 8, 2002. EX 6. As such, it is sufficient to rebut the presumption with regard to claimant's current foot complaints. Consequently, we affirm the administrative law judge's finding of rebuttal with regard to claimant's present complaints of left foot pain, as that finding is supported by substantial evidence. *O'Kelley*, 34 BRBS 39.

Moreover, although the administrative law judge did not explicitly consider the evidence as a whole regarding the work-related nature of claimant's left foot pain, this error is harmless as claimant has not established a causal relationship. Dr. Muenz's opinion, on which the administrative law judge relied in addressing rebuttal, establishes that claimant's work-related fracture of the left fifth metatarsal had completely resolved without any permanent impairment, as of March 8, 2002. Moreover, there is no medical report tying claimant's present foot condition, as diagnosed by Dr. Yant on April 15, 2003, to the January 4, 2002, work accident. Dr. Yant, in fact, suggested that claimant's present foot problems probably stem from an old sprain. EX 12. As Dr. Yant did not relate claimant's existing left foot problems to the January 4, 2002, work accident or resulting fractured toe, his opinion cannot meet claimant's burden of proof to establish a causal nexus. We thus affirm the administrative law judge's denial of benefits with regard to claimant's continued complaints of left foot pain.[3]

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[2] In fact, we note that the administrative law judge's recitation of the Section 20(a) standard is limited to claimant's burden to establish her *prima facie* case, Decision and Order at 8, and employer's burden to establish rebuttal. Decision and Order at 8-9. There is no mention of the requirement that he resolve the causation issue based on the record as a whole once the Section 20(a) presumption is rebutted. *See generally Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43.

[3] In light of our affirmance of the administrative law judge's finding that claimant's work-related left foot injury completely resolved as of March 8, 2002, coupled with the fact that the administrative law judge concluded that Dr. Yant, a podiatrist, is not

In considering rebuttal relevant to claimant's alleged work-related aggravation of her pre-existing neck and back conditions, the administrative law judge concluded that Dr. Nabizadeh's statements in June 2003 that claimant's accident on January 4, 2002, "has significantly exacerbated her cervical and lower back pain," EX 5, cannot be credited as evidence of a causal tie between those conditions and the work accident on January 4, 2002, "as the post incident medical reports do not reflect any change in the underlying spinal disorders or in the chronic pain syndrome." Decision and Order at 9. The administrative law judge therefore concluded that "the presumption of aggravation of these disorders is rebutted." *Id.*

In so finding, the administrative law judge misconstrued employer's burden in rebutting the Section 20(a) presumption. Initially, Dr. Nabizadeh's opinion that claimant's accident "significantly exacerbated" her condition does not sever the causal connection between claimant's pre-existing neck and back conditions and his work injury, but actually supports the existence of a causal relationship. The finding that this opinion cannot be credited is not determinative of rebuttal in light of employer's burden of production.[4] *See Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *Manship*, 30 BRBS 175. We must therefore vacate the administrative law judge's finding that the presumption was rebutted, and remand this case for further consideration of rebuttal with regard to the issue of aggravation of claimant's pre-existing neck and back conditions. *Hargrove v. Strachan Shipping Co.*, 32 BRBS 224 (1998), *aff'g on recon.* 32 BRBS 11 (1998). On remand, it is employer's burden to establish that work events did not aggravate claimant's pre-existing condition resulting in injury, *Cairns*, 21 BRBS 252, and the fact that claimant received treatment for her neck and back prior to the January 4, 2002, subject injury, does not, in and of itself, rebut under the aggravation rule.[5] The administrative

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a specialist who can provide the necessary treatment for the residuals of the on-the-job foot injury, we affirm the administrative law judge's denial of claimant's request for a change of treating physician from Dr. Muenz to Dr. Yant. *See* 20 C.F.R. §702.406(a); *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995)(table).

[4] In evaluating Dr. Nabizadeh's opinion, the administrative law judge relied on the fact that his treatment records do not indicate a change in claimant's underlying spinal disorders or chronic pain syndrome. However, whether claimant's underlying condition was affected is not determinative, as an aggravation of symptoms is compensable. *See Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986); *see generally Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981).

[5] By definition, an aggravation rule case involves a pre-existing injury or condition. *See* n. 1, *supra.*

law judge must consider all of the evidence relevant to the cause of claimant's neck and back injuries, including Dr. Muenz's January 10, 2002, report, and the hospital records subsequent to the January 4, 2002, work injury, to discern whether the relevant evidence is sufficient to sever the causal connection between claimant's pre-existing neck and back conditions and his work injury.[6] If, on remand, the administrative law judge determines that employer's evidence is insufficient to establish rebuttal under the proper standard, then causation is established. If the administrative law judge determines that the record contains evidence sufficient to rebut Section 20(a) by establishing that work events did not aggravate claimant's pre-existing conditions, then he must resolve the issue of causation with regard to the work-related aggravation of claimant's pre-existing conditions based on a consideration of the record as a whole.

[6] Claimant apparently sought regular treatment from Dr. Elage between June 26, 2000, and April 3, 2003, for a number of ailments including low back pain. EX 9. Dr. Elage however did not provide any opinion regarding the etiology of claimant's low back pain, and much like Dr. Nabizadeh, his pre- and post-January 4, 2002, reports do not reveal any significant change in claimant's lower back condition. EX 9.

Accordingly, the administrative law judge's finding that claimant's present left foot condition is not work-related and consequent denial of benefits for that condition are affirmed. The administrative law judge's finding of rebuttal and resulting denial of benefits with regard to claimant's claim for aggravation of her pre-existing neck and back conditions is vacated, 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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JUDITH S. BOGGS
Administrative Appeals Judge