BRB No. 08-0284

M.T.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND OPERATING COMPANY, INCORPORATED	)	DATE ISSUED: 09/25/2008
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

M.T., Kelly, Louisiana, *pro se.*

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (2007-LHC-0681) of Administrative Law Judge C. Richard Avery 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). In an appeal by a claimant without legal representation, we will review the findings of fact and conclusions of law of the administrative law judge to determine if they are rational, supported by substantial evidence, and 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, an offshore "A" operator, felt a popping in his right knee while stepping over pipes at work on January 6, 2006. Claimant reported the incident and sought medical care. Claimant returned to work and was given light-duty clerical work in employer's onshore facility. Claimant's left knee became painful as well, which claimant attributed to his altered gait. When claimant stopped reporting to work after May 16, 2006, he was terminated in June 2006. Claimant has not worked since that time. On July 27, 2006, claimant underwent arthroscopic surgery on both knees. Claimant sought disability and medical benefits associated with the alleged injury to his knees.

In his Decision and Order, the administrative law judge found claimant entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption based on the incident at work and his current knee condition, chondromalacia. The administrative law judge further found that employer established rebuttal of the Section 20(a) presumption and, upon weighing all the evidence, concluded that claimant failed to establish a causal relationship between the incident and his bilateral knee injury. Accordingly, he denied benefits.

Claimant, representing himself, appeals the administrative law judge's denial of benefits. Employer responds, urging affirmance.

In its response brief, employer contends that the administrative law judge erred in invoking the Section 20(a) presumption on the ground that claimant did not sustain an accident at work by virtue of stepping over a pipe.[1] We reject this contention. It is uncontested that claimant stepped over the pipe in the course and scope of his employment. In invoking the Section 20(a) presumption, the administrative law judge relied on Dr. Liles's statement that claimant's initial physical symptoms originated with the right knee injury that occurred when he stepped over the pipe. EX 5 at 16. "It is sufficient [for purposes of establishing an accidental injury] if the particular strain was too great for the individual employee in his singular condition." *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863, 868 (5th Cir. 1949). Thus, that stepping over a pipe is not "traumatic" in general does not establish that this action was not harmful to claimant. We therefore affirm the administrative law judge's finding that claimant is entitled to the

[1] We will address this contention, which is raised in a response brief, as it presents an alternate method of affirming the administrative law judge's decision. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998), *modifying on recon.* 32 BRBS 118 (1998).

benefit of the Section 20(a) presumption that his knee condition is work-related as the finding is supported by substantial evidence and in accordance with law. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Moreover, as the physicians stated that claimant had pre-existing chondromalacia, the aggravation rule applies, and claimant's knee problems are thus work related unless employer establishes that his pre-existing condition was not aggravated by the work accident. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *see also Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*).

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition is not due to the work accident. *See, e.g., Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). As claimant had a pre-existing knee condition, employer also must establish that the work accident did not aggravate or render symptomatic claimant's condition. *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT); *see Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). If the Section 20(a) presumption is rebutted, claimant bears the burden of establishing, based on the record as a whole, that his knee condition is work-related. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

We cannot affirm the administrative law judge's finding that employer produced substantial evidence to rebut the Section 20(a) presumption. The administrative law judge found rebuttal established because claimant is suffering "only" from chondromalacia, a form of arthritis caused by age and general wear and tear. The administrative law judge also relied on the medical evidence, noting the absence of a "traumatic" injury at work and the physicians' inability to ascertain an objective cause of claimant's subjective pain. Decision and Order at 11-12. This evidence is not sufficient to rebut the Section 20(a) presumption as it does not establish that claimant's condition was not caused or aggravated by the work incident. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

The administrative law judge did not address whether employer produced substantial evidence that claimant's pre-existing condition was not aggravated by the work incident. In fact, none of the physicians was specifically asked this question, and two physicians stated that the onset of claimant's pain occurred in the work incident. Dr. Liles, in addressing claimant's stepping over the pipe, stated that there was "no question" that claimant suffered an injury to his right knee and that his altered gait resulted in problems with his left knee. EX 5 at 16-17. Dr. Shulte stated that the incident exacerbated claimant's knee pain. EX 9 at 6. Evidence that the work incident caused claimant's condition to become symptomatic is not substantial evidence of the absence of

a connection between the injury and the employment. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). Thus, the absence of a "traumatic" injury cannot establish rebuttal of the Section 20(a) presumption. *See generally Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). In addition, none of the physicians stated that claimant's underlying condition was not aggravated by the work incident, *see Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002), and evidence that claimant is not disabled or is exaggerating his present condition is relevant to whether he is disabled, but is not relevant to the rebuttal analysis. In the absence of any evidence, much less substantial evidence, that claimant's knee condition was not caused or aggravated by the work accident, claimant's injury is work-related as a matter of law by operation of Section 20(a). *Preston*, 380 F.3d 597, 38 BRBS 60(CRT). Therefore, we reverse the administrative law judge's finding that claimant's knee condition is not work-related. We vacate the denial of benefits and remand the case for the administrative law judge to address any remaining issues.[2]

Accordingly, the Decision and Order denying benefits is vacated. The administrative law judge's finding that claimant's bilateral knee condition is not work-related is reversed. The case is remanded for consideration of the remaining issues.

SO ORDERED.

[2] On remand, the administrative law judge must address the nature and extent of claimant's disability, if any, as well as the work-relatedness, reasonableness, and necessity of any contested medical treatment, pursuant to Section 7, 33 U.S.C.§907.

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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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BETTY JEAN HALL
Administrative Appeals Judge