BRB No. 08-0322

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| G.V. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| KELLOG, BROWN & ROOT/SERVICE EMPLOYERS INTERNATIONAL, INCORPORATED | ) | DATE ISSUED: 09/29/2008 |
| | ) | |
| and | ) | |
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| INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Dennis L. Brown and Mike N. Cokins (Dennis L. Brown, P.C.), Houston, Texas, for claimant.

Jerry R. McKenney and James L. Azzarello, Jr. (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2007-LDA-00080) of Administrative Law Judge Lee J. Romero, Jr., 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 Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they 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).

Claimant worked as a logistics coordinator in Iraq. His duties included dispatching fuel to the armed services and maintaining the adaptor hoses on the fuel trucks. He was injured on August 14, 2004, when he was called to address a malfunctioning adaptor hose on a truck. The adaptor hose blew off a truck from the pressure of the fuel and struck claimant on the arm, throwing him up and backwards. Claimant sought medical attention for injuries to his arm. He was diagnosed with multiple fractures, and he returned to Texas for reconstructive surgery.

Claimant returned to Iraq on January 1, 2005, where his job now entailed moving wrecked trucks and vehicles from Iraq to Kuwait. Claimant testified that he worked for the next five or six months in excruciating pain and that he was prescribed opium for the pain. H. Tr. at 43. In April or May 2005, claimant suffered a gastrointestinal illness that lasted for four or five days. Claimant returned to Texas on recreational leave, and in the latter part of August 2005, sought treatment with Dr. Sessions for his continued arm problems. Claimant was found to have peripheral neuritis, carpal tunnel syndrome and ulnar nerve entrapment at the elbow. He underwent a carpal tunnel release with minimal effect. Dr. Sessions referred claimant to Dr. Vaughn, a neurophysiologist, who diagnosed claimant with chronic idiopathic degenerative polyneuropathy (CIDP). Claimant underwent an additional operation on his left elbow in January 2007. He has not returned to his employment and sought permanent total disability benefits under the Act.

In his decision, the administrative law judge found invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's CIDP is work-related based on Dr. Vaughn's opinion that claimant's gastrointestinal illness could have caused his neuropathy and that claimant's work-related arm injury and multiple surgeries could have precipitated his CIDP. The administrative law judge also found claimant's complaints of symptoms and pain credible. In reviewing the evidence on rebuttal of the Section 20(a) presumption, the administrative law judge found that Dr. Mauldin's finding that claimant's polyneuropathy is not work-related is sufficient to rebut the presumption that the arm injury caused claimant's condition. The administrative law judge found, however, that Dr. Mauldin did not address the effect of claimant's gastrointestinal illness or the surgeries or medical procedures for claimant's work-related arm injury on the development of claimant's CIDP; thus, the Section 20(a) presumption linking this condition to claimant's employment was not rebutted. The administrative law judge also found that claimant cannot perform his regular duties as of August 9, 2005, as a result of his orthopedic and CIDP condition, and he credited the opinion of Dr. Sessions that claimant is unable to return to any work. In addition, the administrative law judge found that claimant has not reached maximum medical improvement as his condition continues

to deteriorate and a treatment claimant can tolerate has yet to be identified. Therefore, the administrative law judge awarded claimant temporary total disability benefits from August 9, 2005, and continuing.

On appeal, employer contends the administrative law judge erred in finding the evidence sufficient to invoke the Section 20(a) presumption that claimant's CIDP is work-related and in finding the evidence insufficient to establish rebuttal of the presumption. Moreover, employer contends that claimant recovered from his arm injury and, as his CIDP is not work-related, that claimant has no further loss in wage-earning capacity due to the injury of August 14, 2004. Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

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. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). 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). 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. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see generally U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631. Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Under the aggravation rule, if a work-related injury contributes to, combines with, accelerates, or aggravates a pre-existing condition, the entire resultant disability is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986)(*en banc*). Thus, application of Section 20(a) gives claimant a presumption that the work injury aggravated or contributed to the pre-existing condition, and the employer

must present evidence addressing aggravation or contribution in order to rebut it. *See Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982).

In the present case, the administrative law judge appropriately found that the gastrointestinal illness claimant suffered in April or May 2005 was work-related since the facts establish that claimant became ill during the course of his employment in Iraq. *See generally Kalama Services, Inc. v. Director, OWCP [Ilaszczat]*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir.), *cert. denied*, 543 U.S. 809 (2004)(need not establish a causal relationship between employment and the exposure/accident that caused injury in order for zone of special danger to apply). Moreover, the administrative law judge found that Dr. Vaughn's opinion that claimant's neuropathic condition occurred while claimant was employed in Iraq, combined with his opinion that that the "more likely culprit" of claimant's condition was the gastrointestinal illness claimant suffered in Iraq, is sufficient to establish that claimant's gastritis could have precipitated his CIDP.[1] Cl. Ex. 29 at 26-27, 32. In addition, the administrative law judge credited Dr. Vaughn's opinion that the traumatic event to claimant's arm on August 14, 2004, and subsequent surgeries therefor, could have exacerbated an underlying immune condition. *Id.* at 43.

Contrary to employer's contention on appeal, Dr. Vaughn did not testify unequivocally that claimant's CIDP was not causally related to his employment in Iraq. Rather, he stated that the traumatic injury caused by the hose incident in August 2004 combined with the gastrointestinal illness claimant contracted while in Iraq may have started the problem. Cl. Ex. 29 at 12. Dr. Vaughn also stated that claimant's left ulnar neuropathy started because of the surgery or fracture and that this condition has progressed. *Id.* at 15. He stated that the left arm injury may have played a role in claimant's current condition. *Id*. at 27. He did testify that while the neuropathic condition came about while claimant was employed in Iraq, he could not say with "reasonable medical probability" that a condition of the work environment actually caused the neuropathic condition. *Id*. at 36. However, Dr. Vaughn testified that a traumatic event, such as the initial injury or subsequent surgeries, can exacerbate an underlying immune condition. *Id.* at 43.

We affirm the administrative law judge's finding that claimant invoked the Section 20(a) presumption that his neuropathy and CIDP are related, at least in part, to his work-related injury on August 14, 2004, and the subsequent related surgeries, as well as to the gastrointestinal illness claimant suffered in Iraq. Claimant produced sufficient

[1] Dr. Vaughn did not attempt to identify the cause of claimant's gastrointestinal illness.

evidence that his current condition could have been caused by his arm fracture, and the surgeries he had therefor, and/or by the gastritis he suffered in Iraq. *See Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Champion v. S&M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT)(D.C. Cir. 1982). Claimant need not actually prove a causal connection between his harm and his employment in order to invoke the Section 20(a) presumption. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990). As Dr. Vaughn stated that claimant's surgeries and gastrointestinal illness could have caused claimant's CIPD, his opinion constitutes substantial evidence in support of the administrative law judge's finding of invocation. *Id.* Therefore, we reject employer's contention of error in this regard.

We also affirm the administrative law judge's finding that employer did not introduce substantial evidence that claimant's CIDP is not related, at least in part, to his work-related surgery or to the gastrointestinal illness claimant contracted while employed in Iraq. Dr. Mauldin stated that claimant's CIPD is not related to his arm fracture. He did not, however, address whether the CIPD is related to the surgeries claimant underwent for the fractures or to the gastrointestinal illness he suffered in Iraq. The administrative law judge thus found his opinion insufficient to rebut the Section 20(a) presumption. This finding is supported by substantial evidence. A medical opinion that does not address all the conditions of employment which are alleged to have caused the injury may be found insufficient to rebut the Section 20(a) presumption. *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1987); *Sinclair v. United Fund & Commercial Workers*, 23 BRBS 148 (1989). Therefore, we affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption, and that claimant's CIDP is compensable under the Act. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

Employer also contends that the administrative law judge erred in finding claimant entitled to ongoing total disability benefits as he has fully recovered from his work-related arm injury. A claimant establishes his *prima facie* case of total disability if he is unable to perform his usual employment duties due to a work-related injury. *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

Contrary to employer's contention that claimant fully recovered from his left arm injury, Dr. Mauldin noted that claimant continued to have restricted range of motion in his elbow and pain and discomfort in his wrist and hand. Emp. Ex. 17. He opined that claimant may be restricted from repetitive heavy use of his left upper extremity. Moreover, Dr. Sessions opined that claimant is unable to be gainfully employed due to his neuropathic condition. Emp. Ex. 15; Cl. Ex. 9. Therefore, the administrative law judge found that claimant is not able to perform his usual duties due to a combination of

his orthopedic condition and CIDP. We affirm this finding as it is rational and supported by substantial evidence. *See Preston*, 380 F.3d 597, 38 BRBS 60(CRT). Where the administrative law judge finds that claimant cannot perform any employment, claimant is totally disabled. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). In this case, the administrative law judge rationally credited Dr. Sessions's opinion that claimant is disabled from seeking any gainful employment due to his work injuries. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). We therefore affirm the administrative law judge's finding that claimant is entitled to total disability benefits.

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

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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BETTY JEAN HALL
Administrative Appeals Judge