BRB No. 09-0170

M.G.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 09/23/2009
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Randall A. Ortega (The Law Offices of Scott N. Roberts, LLC), Groton, Connecticut, for claimant.

Mark P. McKenney and Jeffrey E. Estey, Jr. (McKenney, Quigley, Izzo & Clarkin), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2007-LHC-01968) of Administrative Law Judge Colleen A. Geraghty 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 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 for employer as an electrical supervisor in the ship testing department. On April 26, 2006, claimant saw Dr. Doherty, a board-certified neurosurgeon, for complaints of neck and back pain. In March 2007, Dr. Doherty took claimant off work for six months. CX 3 at 2. Claimant returned to work for one week, January 14 -18, 2008, but did not return thereafter because his job was too physically demanding.

Claimant was diagnosed with cervical, thoracic, and lumbar osteophyte spurring of the spine due to Forestier's disease, also known as diffuse idiopathic skeletal hypertosis. This condition is osteoarthritic in nature and causes neck and back pain. It also has caused claimant to suffer pulmonary and swallowing problems. Claimant filed a claim, alleging that his osteoarthritic condition was aggravated by his employment. CX 1 at 3; Tr. at 14-15.

In her Decision and Order, the administrative law judge found claimant entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), as claimant established a harm to his spine and that his working conditions for employer could have caused this harm. Specifically, the administrative law judge found that claimant's work required that he climb ladders and into and out of vessels, and Dr. Doherty opined that these work activities aggravated claimant's axial osteoarthritis.[1] Decision and Order at 10.

The administrative law judge found that employer produced substantial evidence to rebut the Section 20(a) presumption. The administrative law judge credited Dr. McLennan's opinion that claimant does not suffer from two separate conditions. Rather, Dr. McLennan stated that axial osteoarthritis is descriptive of the results of claimant's condition, which is due to Forestier's disease. *Id.* at 13. The administrative law judge found, *inter alia*, that as Dr. McLennan stated that claimant's Forestier's disease is a process that is not caused or contributed to by his employment, employer rebutted the Section 20(a) presumption. *Id.* Upon weighing the evidence as a whole, the administrative law judge found that claimant failed to carry his burden of establishing by a preponderance of the evidence that his Forestier's disease is causally related to his employment, as she gave greatest weight to the opinion of Dr. McLennan. Thus, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge failed to consider whether claimant's work duties aggravated his underlying disease process. Claimant contends, therefore, that the administrative law judge erred in finding the Section 20(a) presumption rebutted and in finding that claimant does not have a work-related injury based on the record as a whole. Employer responds, urging affirmance of the administrative law judge's decision. Claimant filed a reply brief.

[1] The administrative law judge did not credit claimant's testimony that he suffered repetitive head trauma from hitting his head when he failed to "duck" sufficiently through entry ways. Claimant admitted he had reported only two such incidents to the Yard Hospital, one in 1996 and another in 1997, in his 30 years with employer. Decision and Order at 10.

Once, as here, claimant establishes his *prima facie* case, Section 20(a) applies to relate the claimant's harm to his employment. Employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied*, 528 U.S. 1187 (2000). When aggravation of a pre-existing condition is at issue, employer must produce substantial evidence that work events neither directly caused the injury nor aggravated the pre-existing condition. *C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If a work-related injury contributes to, combines with, or aggravates a pre-existing condition, the entire resultant condition is compensable. *Independent Stevedore Co. v. Leary*, 357 F.2d 812 (9th Cir. 1966).

Claimant contends the administrative law judge erred in failing to apply the aggravation rule, asserting that the evidence establishes that his underlying condition was aggravated by his employment.[2] We reject this contention. The administrative law judge recognized the application of the aggravation rule and required employer to produce substantial evidence that claimant's condition was not aggravated by his employment in order to rebut the Section 20(a) presumption. Decision and Order at 11. The administrative law judge found that Dr. McLennan's opinion rebuts the Section 20(a) presumption because he stated that claimant's disease was not caused or contributed to by his employment.

We affirm the administrative law judge's finding that employer produced substantial evidence that claimant's condition was not caused or aggravated by his employment, as it is supported by substantial evidence and in accordance with law.[3] It

[2] We reject employer's contention that claimant is raising for the first time on appeal the issue of whether his Forestier's disease was aggravated by his employment. Claimant's claim form explicitly alleges "work in the shipyard aggravating and exacerbating a pre-existent neck condition." CX 1 at 3. The aggravation issue was discussed at the hearing, Tr. at 14-15, and the doctors addressed aggravation. *See, e.g.*, EX 1; CX 2. Claimant's claim was not limited to aggravation of axial osteoarthritis as a separate condition, but included the claim that work aggravated the arthritic condition, whatever its cause. CX 1 at 3.

[3] The administrative law judge properly discussed the facts and holding in the Second Circuit's decision in *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). The administrative law judge erred, however, in stating that, in light of *Rainey*, the Board "requires" the administrative law judge to weigh the evidence as a whole in order to determine if the Section 20(a) presumption is rebutted and has stated that an opinion given to a reasonable degree of medical certainty cannot rebut the

was within the administrative law judge's discretion to credit Dr. McLennan's opinion that claimant's Forestier's disease and axial osteoarthritis are not separate conditions, as asserted by Dr. Doherty, but that the latter is merely descriptive of the effects of the former. EX 20 at 24-25; *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). Dr. McLennan stated that claimant's Forestier's disease was not caused by his employment. EX 20 at 21. He also stated that, "There is no conceivable way that work so-called aggravated [the degenerative] process as it has a life of its own and is not related to activity," that "his work did not exaggerate (sic) this process," and that "I do not believe there is any injury that is relative to this man's symptomatology." EX 1.[4] This evidence is legally sufficient to rebut the Section 20(a) presumption taking into account employer's burden to produce substantial evidence that claimant's injury was neither caused nor aggravated by his employment.[5] *Duhagon v. Metropolitan Stevedore Co*., 31 BRBS 98

Section 20(a) presumption. *See* Decision and Order at 11-12. The Board has stated only that the *Rainey* decision requires that an opinion offered as support for rebuttal must be internally consistent, given to a reasonable degree of medical certainty, and not inconsistent with other findings of fact by the administrative law judge. *B.L. v. Electric Boat Corp.*, BRB No. 07-0709 (May 14, 2008) (unpub). In *Rainey*, the court explicitly held that the opinion of a doctor who opined that claimant's asbestos exposure was "indirect and clinically insignificant" was directly contrary to the administrative law judge's finding that claimant had significant asbestos exposure, and thus was not substantial evidence of the lack of a causal connection between the employee's harm and the exposure. *Rainey*, 517 F.3d at 636-637, 42 BRBS at 13-14(CRT). Moreover, the court stated that the administrative law judge erred in relying on a medical opinion based on a theory she found "widely discredited," as such a report is not "substantial evidence." The court stated that, while employer's burden is one of production, not persuasion, it cannot be met "simply by submitting any 'evidence' whatsoever." *Id.* Thus, the administrative law judge must review the evidence relied upon by employer to determine whether it is sufficient to rebut under *Rainey.*

[4] Contrary to claimant's contention, the fact that Dr. McLennan stated that claimant's physical condition would make it difficult for him to perform his work does not establish that his condition is related to his employment.

[5] The administrative law judge also noted that Drs. Druckenmiller and Gaccione stated that claimant's Forestier's disease is not caused by his employment. *See* EXs 2; 8. The administrative law judge further stated that Dr. Doherty's opinion rebuts the Section 20(a) presumption because he stated that claimant's Forestier's disease was not caused or contributed to by his employment. Decision and Order at 12-13. Although Dr. Doherty stated that Forestier's disease is not caused by claimant's employment, he did not state it was not contributed to or aggravated by claimant's employment. He also opined that claimant's axial osteoarthritis is a separate condition that was aggravated by his

(1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

Once the Section 20(a) presumption is rebutted, it falls from the case and the administrative law judge must weigh all the relevant evidence as a whole in order to determine if claimant established by a preponderance of the evidence that his condition is related to his employment. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Claimant contends the administrative law judge misinterpreted Dr. Doherty's opinion and erred in failing to credit it over the opinion of Dr. McLennan.

As stated above, the administrative law judge acted within her discretion in crediting Dr. McLennan's opinion that claimant suffers from only one condition, Forestier's disease, which was not caused or aggravated by employment, over the opinion of Dr. Doherty that, in addition to Forestier's disease, claimant has axial osteoarthritis that was aggravated by his employment. Moreover, the administrative law judge rationally gave greater weight to the opinion of Dr. McLennan on the ground that he is a professor at Brown University's medical school and was the first to recognize claimant's need to be evaluated by a rheumatologist. The Board is not empowered to reweigh the evidence, but must respect the rational findings and inferences of the administrative law judge. *See, e.g., Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993). Any mistake the administrative law judge made with respect to Dr. Doherty's opinion regarding the relationship between claimant's job activities and his condition is harmless in view of her rational decision to accord dispositive weight to the opinion of Dr. McLennan. As substantial evidence supports the administrative law judge's finding that claimant did not establish the work-relatedness of his condition, we affirm the denial of benefits. *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

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employment. CX 2; CX 6 at 9, 24. Thus, Dr. Doherty's opinion is insufficient to rebut the Section 20(a) presumption. *C & C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008). The administrative law judge's error in this regard, however, is harmless as Dr. McLennan's opinion is sufficient to rebut the Section 20(a) presumption.

Accordingly, the administrative law judge's Decision and Order Denying 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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JUDITH S. BOGGS
Administrative Appeals Judge