BRB No. 14-0045

REX E. LILLIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WISCONSIN CENTRAL, LIMITED as successor in interest to CN/DM & IR RAILWAY	)	DATE ISSUED: Sept. 24, 2014
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

Steven T. Moe (Petersen, Sage, Graves, Layman & Moe, P.A.), Duluth, Minnesota, for claimant.

Larry J. Peterson and Krista L. Hiner (Peterson, Logren & Kilbury, P.A.), St. Paul, Minnesota, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-LHC-02135, 02177) of Administrative Law Judge Stephen M. Reilly 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, rational, 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).

Claimant sustained a bilateral shoulder injury on May 26, 2003, during the course of his employment for employer as an electrician. MRI and x-ray imaging showed pre-existing bilateral degenerative arthritis and degenerative tears of the labrum. CX 13; EX 9 at 9. Claimant received treatment and returned to work for employer on February 4, 2004, with a 40-pound lifting restriction and limitations on overhead work. CX 14 at 27, 31. Claimant testified that he was able to resume his usual employment; however, he stated that he had increasing shoulder pain beginning in 2008, particularly when working overhead. Tr. at 47-50. Claimant was examined in March 2010 by Dr. Mark, who recommended that claimant refrain from climbing ladders and lifting items above chest height. CX 16 at 2. Employer refused to accommodate these restrictions, and claimant stopped working on March 16, 2010. Claimant underwent left shoulder surgery in September 2010 and right shoulder surgery in December 2010. Claimant sought continuing compensation for total disability from March 16, 2010.

In his decision, the administrative law judge found that claimant failed to show he sustained a second work injury to his shoulders after he returned to work in February 2004. Decision and Order at 12. Alternatively, the administrative law judge found that, had claimant established a prima facie case, employer rebutted the Section 20(a) presumption of a work-related injury, 33 U.S.C. §920(a), and that claimant did not carry his burden of proof to establish a work-related injury, based on the record as a whole.[1] *Id*. at 13. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that he did not establish bilateral shoulder injuries related to his work for employer between 2004 and 2005. Employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding that he did not establish a prima facie case of a work-related injury. The aggravation rule provides that employer is liable for the totality of the claimant's disability if working conditions aggravate a pre-existing condition. *See Ridgley v. Ceres, Inc.*, 594 F.2d 1175, 9 BRBS 948 (8th Cir. 1979); *see also Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (en banc); *see also Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982). In order to be entitled to the Section 20(a) presumption linking his harm to his employment, claimant must establish a prima facie case by showing that he suffered a harm and that either a work-related accident occurred or that working

[1]After the hearing, the parties settled claimant's claim for compensation from the May 26, 2003 work injury. Decision and Order at 2. Employer agreed to pay claimant compensation for temporary total disability from June 4, 2003 to January 4, 2004. *See* 33 U.S.C. §908(b). Thus, we need not address claimant's contention that he had a loss in wage-earning capacity prior to 2010 resulting from the 2003 injury.

conditions existed which could have caused or aggravated the harm. *Meehan Seaway Service, Inc. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998). Claimant is not required to affirmatively prove that his working conditions in fact caused or aggravated the harm; rather, claimant need establish only that the working conditions could have caused or aggravated the harm alleged. *See generally Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

In this case, the MRI evidence establishes that claimant has a bilateral shoulder condition, for which he underwent surgery, and claimant's treating physician, Dr. Klassen, testified at his deposition that claimant's working conditions from 2004 to 2010 contributed to this condition. CXs3 at 8-9, 13, 16 at 4-9. Given this evidence that claimant's working conditions could have aggravated his pre-existing shoulder condition, the administrative law judge erred in finding that claimant is not entitled to the Section 20(a) presumption.[2] *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). However, this error is harmless if substantial evidence supports the administrative law judge's alternative finding that employer rebutted the Section 20(a) presumption. *See Burson v. T. Smith & Son*, 22 BRBS 124 (1989); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *see also generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010) (harmless error where administrative law judge erred in weighing the evidence at rebuttal).

Claimant contends the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption. Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's harm was not caused or aggravated by the work accident. *See Ridgley*, 594 F.2d 1175, 9 BRBS 948; *see also Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810,

[2]The administrative law judge also found that claimant's reports of pain are not credible because a surveillance video shows him engaging in activities that contradicted his complaints of pain. Decision and Order at 13. However, this surveillance was undertaken after claimant's condition reached maximum medical improvement in April 2011, and thus cannot prevent application of the Section 20(a) presumption. The administrative law judge also found claimant's complaints of pain suspect because he set up a medical appointment in 2010 shortly after he was terminated for falsifying his time sheet. Claimant was later reinstated to his employment. This finding is somewhat undermined by claimant's undergoing surgery on both shoulders later in 2010. Any error, however, is harmless for the reasons discussed *infra.*

33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). 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).

The administrative law judge found there is no evidence in claimant's medical records to support Dr. Klassen's opinion that claimant's shoulder condition was aggravated by his work, as there is no documentation that claimant sought treatment for his shoulder between 2004 and 2010. The administrative law judge found more credible Dr. Carlson's deposition testimony that the degenerative changes in claimant's shoulders after he returned to work are not work-related, given the absence of evidence of acute injury or aggravation after claimant returned to work[3] and that the MRI imaging in 2010 was essentially unchanged from the 2003 MRI testing. EX 9 at 17-18, 20, 30. The administrative law judge also found credible Dr. Carlson's July 22, 2011 report that any disability from claimant's 2003 injury was temporary and did not contribute to the subsequent injury. EX 8 at 9. We hold that Dr. Carlson's testimony and report are substantial evidence to rebut the Section 20(a) presumption, *see generally Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Manente v. Sea-Land Service*, 39 BRBS 1 (2004), and therefore the administrative law judge's failure to apply the Section 20(a) presumption is harmless error. *Cairns*, 21 BRBS 252.

In weighing the evidence as a whole, the administrative law judge summarized the opinions of Drs. Klassen and Carlson. He found Dr. Carlson's opinion that claimant's shoulder condition was not caused by a post-2004 acute work injury or by his working conditions better reasoned, given the absence of objective evidence indicating that claimant sustained any injury or aggravation as a result of his work for employer from 2004 to 2010.[4] Decision and Order at 12-13; *see* EXs 1, 2, 8, 9. The administrative law

[3]We note that claimant did not allege an acute injury after his return to work. The gravamen of the claim was that his working conditions from February 2004 to March 2010 aggravated his pre-existing bilateral shoulder condition. *See* Claimant's Post-Hearing Brief at 3-4, 21, 24-26. Nonetheless, at his deposition, Dr. Carlson was asked whether claimant "sustained an injury to or aggravation of his bilateral shoulder condition as a result of his work activities between 2004 and March 15, 2010." EX 9 at 17-18. He replied, "there is no evidence to indicate that [claimant] sustained any type of injury as a result of his work on the railroad from the dates you mentioned." *Id*. at 18.

[4]The administrative law judge found further support for his conclusion that claimant did not establish a work-related bilateral shoulder injury after he returned to

judge is entitled to weigh the evidence and to draw his own inferences therefrom. The Board may inquire only whether substantial evidence supports the administrative law judge's conclusions; the Board may not reweigh the evidence. *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998). The administrative law judge's decision is supported by the opinion of Dr. Carlson. Therefore, we affirm the administrative law judge's conclusion that claimant did not sustain a post-2004 work-related injury and his consequent denial of benefits. Decision and Order at 13; *see Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

work in 2004 in the reports of vocational consultants Scott Campbell and Richard Van Wagner. The opinion of a vocational consultant is not competent evidence on the cause of an injury. *See generally Warren v. Nat'l Steel & Shipbuilding, Co.*, 21 BRBS 149 (1988). Nonetheless, this error is harmless as the administrative law judge credited substantial evidence to support his conclusion that claimant did not establish a work-related bilateral shoulder injury in the form of Dr. Carlson's medical opinion.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge