BRB No. 91-979

RICHARD KERIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEEKS STEVEDORING COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
NEW JERSEY MANUFACTURERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Walter J. Curtis (Baker, Garber, Duffy & Pedersen), Hoboken, New Jersey, for claimant.

Leonard J. Linden (Linden & Gallagher), New York, New York, for employer/carrier.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (89-LHC-2255) of Administrative Law Judge Ainsworth H. Brown 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 applicable law. *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant began work for employer in 1958 as a mechanic and a year later became a maintenance supervisor, a somewhat sedentary position, which he held until 1985. In November 1985, claimant was assigned duties as an oiler on a crane, a position which involved greater physical demands and exertion than his previous work. In January 1986, claimant visited his physician, Dr. Margie, for a complete physical examination because he was experiencing a feeling of great pressure and weakness. On February 21, 1986, claimant's work involved unusually heavy exertion, and he noticed shortness of breath and chest pain about 3 p.m. When claimant remained symptomatic, he was admitted early the next day to the Overlook Hospital with shortness of breath and complaints of chest pain. He remained hospitalized for 22 days. As a result of extensive cardiovascular testing it was determined that claimant has cardiomyopathy, a generalized enlargement and weakening of heart tissue, but no evidence of a heart attack.

Thereafter, claimant filed a claim for permanent total disability benefits under the Act alleging in his pre-trial statement that while he was performing heavy work for employer on February 21, 1986 he began experiencing shortness of breath and chest pain which aggravated his heart condition. Employer in its pre-hearing statement conceded that claimant is totally disabled but disputed that claimant's disability is causally related to his employment.

At the hearing, the parties' relevant stipulations included that a job-related incident occurred on February 21, 1986 and that claimant is permanently and totally disabled. Tr. at 12.[1] The administrative law judge found that claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), that claimant's disability is work-related but that employer presented sufficient evidence to establish rebuttal of the presumption. The administrative law judge, therefore, weighed the evidence as a whole and rejected the opinion of Dr. Eisenstein that the great exertion required of claimant on February 21, 1986 aggravated and accelerated the pre-existing heart condition causing heart failure and a heart attack. The administrative law judge credited the opinions of Drs. Rosenstock and Seldon that claimant did not have a heart attack on February 21, 1986, and that while he became symptomatic on that date, claimant's longstanding cardiac condition did not develop any permanent damage as a result of the February 21, 1986 symptoms. The administrative law judge consequently concluded that while there was a temporary increase in symptoms, claimant did not sustain any permanent disability or aggravation of his pre-existing heart condition as a result of his work activities of February 21, 1986.

[1] Employer mischaracterizes the parties' stipulation when it states that the parties stipulated claimant is permanently disabled because of his cardiomyopathy. The stipulation of record simply reflects that claimant is permanently and totally disabled and left as the only remaining issue whether such disability is causally related to the employment-related incident of February 21, 1986.

On appeal, claimant contends that the conclusion of the administrative law judge that claimant did not sustain a permanent aggravation of a pre-existing condition, and is not permanently totally disabled as a result of work activity, is not supported by substantial evidence and is not in accordance with law. Employer responds, urging that the administrative law judge's decision is supported by substantial evidence and in accordance with law and should be affirmed.

Specifically, claimant contends that the administrative law judge erred in failing to consider the medical opinions that if claimant were to return to his exertional duties his symptoms would reappear. Claimant contends that this case is indistinguishable from *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115 (CRT)(D.C. Cir. 1984), wherein the United States Court of Appeals for the District of Columbia Circuit held that when a compensable injury consists of disabling symptoms that are temporary in nature,[2] a claimant may be entitled to an award for permanent disability when the symptoms appear to be "permanent." The court, citing *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), defined a disability as "permanent" if it has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988). Moreover, a doctor's opinion that claimant's return to his usual work would aggravate his condition may support a finding of total disability. *Care*, 21 BRBS at 251; *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 1 (1988).

Claimant's contention has merit. In the instant case, both physicians who were credited by the administrative law judge to find no permanent disability nonetheless acknowledged in their respective testimony that claimant's symptoms were likely to recur if he returned to his former job duties. Dr. Seldon testified that the symptoms that claimant experienced on February 21, 1986, were work-related and that if claimant were to return to any kind of exertional activity such as he had performed that day, it would be likely that the symptoms would reappear. Emp. Ex. 8 at 15. Similarly, Dr. Rosenstock testified that given the medical history in the records he reviewed, claimant would be likely to experience the same symptoms as he had on February 21, 1986, if he subsequently returned to performing the same level of activity on the job that he performed on that date. Emp. Ex. 7 at 20.

[2]Chest pains constitute an injury under the Act. *Volpe v. Northeast Marine Terminal Corp.*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982).

As the administrative law judge erred in failing to consider the physicians' testimony with respect to the standard set forth in *Crum*, 738 F.2d at 474, 16 BRBS at 115 (CRT), we vacate the administrative law judge's Decision and Order.[3] On remand, the administrative law judge must consider whether the evidence establishes that claimant's condition satisfies the criteria of *Watson*, 400 F.2d at 654, such that his temporarily disabling symptoms are permanent in nature, and to determine if claimant is unable to return to work due to his work injury. *Care*, 21 BRBS at 251; *Boone*, 21 BRBS at 3.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is vacated, and the case is remanded for further proceedings consistent with this opinion.[4]

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3]We reject employer's contention that the holding in *Crum* is limited to cases arising under the jurisdiction of the United States Court of Appeals for the District of Columbia Circuit. The Board has applied *Crum* generally in cases arising under the Act. *See, e.g., Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

[4]Claimant's counsel has filed a petition for an attorney's fee for worked performed before the Board in connection with this appeal, to which employer has filed objections. We deny the fee request at the present time as claimant has not obtained an award of benefits. If claimant ultimately prevails, he may resubmit a fee petition in accordance with 20 C.F.R. §802.203.