

HENRY W. CLEMENS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MIDWEST MACHINERY MOVERS)	
INCORPORATED)	
)	DATE ISSUED: _____
and)	
)	
FIREMAN'S FUND INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

H. Thomas Lenz (Spector & Lenz, P.C.), Chicago, Illinois, for claimant.

Paul McCambridge (Keck, Mahin & Cate), Chicago, Illinois, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (87-LHC-544) of Administrative Law Judge Robert G. Mahony 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). 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. Claimant worked for employer as a foreman in charge of unloading raw sugar from barges.¹ In November 1983, he suffered a severe inflammation of chronic eczematous dermatitis, primarily on his legs. Claimant continued to work and to suffer pain, swelling, itching, cracking, bleeding, discoloration, and weeping on his legs. He was hospitalized in January 1984. Thereafter, he returned to work, but due to his condition, he was unable to continue working after April 10, 1984. Cl. Ex. 1 at 17; Tr. at 34-35, 41-42. According to undisputed testimony from claimant's treating physician, Dr. Wygant, claimant is permanently totally disabled from his usual work as a result of blindness in his left eye, insulin-dependent diabetes, hypertension, and severe eczema. Cl. Ex. 1 at 32.

Claimant filed a claim for temporary total disability benefits from April 10 through December 9, 1984, and for permanent total disability benefits thereafter, alleging that exposure to raw sugar aggravated his underlying eczematous dermatitis and combined with his other health conditions to render him totally disabled. The administrative law judge credited the opinion of Dr. Wygant and determined that claimant's exposure to raw sugar caused a work-related injury, severe inflammation of eczematous dermatitis, and resulted in hospitalization for approximately one week in January 1984. Decision and Order at 6. The administrative law judge concluded that claimant was temporarily totally disabled for this period, and for the period between April 11 and December 10, 1984, and is entitled to disability benefits and medical expenses. 33 U.S.C. §§907, 908(b). Although the administrative law judge was persuaded that claimant is permanently totally disabled, he was not persuaded that such disability was caused by claimant's employment. Consequently, he denied permanent total disability benefits. Decision and Order at 8-9.

Claimant appealed the administrative law judge's decision to the Board. In a Decision and Order issued March 26, 1990, the Board stated that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption as a matter of law. Therefore, it vacated the administrative law judge's finding that claimant suffered no permanent work-related disability and remanded the case for him to invoke the presumption and to determine whether employer rebutted it. *Clemens v. Midwest Machinery Movers, Inc.*, BRB No. 87-3755 (March 26, 1990). In accordance with the Board's order, the administrative law judge applied the Section 20(a) presumption to the question of whether claimant's employment caused his diabetes. He credited Dr. Wygant's opinion, determined that the presumption is rebutted, and he concluded that claimant's diabetes was not caused by his working conditions. Decision and Order on Remand at 4. Further, he reiterated his conclusion that claimant's disability was temporary, and he denied permanent total disability benefits. Decision and Order on Remand at 4-5. Claimant again appeals the denial of permanent total disability benefits. Employer responds, urging affirmance.

¹Employer went out of business in 1984.

Claimant contends the administrative law judge erred in failing to invoke the Section 20(a), 33 U.S.C. §920(a), presumption linking his injury to his employment and in finding he is not permanently totally disabled. Initially, he maintains that he has never claimed that his employment caused his diabetes.² He contends that exposure to raw sugar caused the temporarily disabling eczematous infection which in turn permanently aggravated his diabetic condition rendering him permanently totally disabled.³ Claimant's contentions have merit.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a *prima facie* case.⁴ *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). To establish a *prima facie* case, claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at employer's facility which could have caused that harm or pain. In the instant case, Dr. Wygant's opinion, which was credited by the administrative law judge, states that claimant's eczematous dermatitis infection was caused by his employment-related exposure to raw sugar. *See* Cl. Ex. 1 at 31. Dr. Wygant further stated that the infection aggravated claimant's diabetic condition. *Id.* Therefore, as a matter of law, claimant has established a *prima facie* case and is entitled to invocation of the Section 20(a) presumption linking his injury to his employment.

Once the presumption is invoked, an employer may rebut it by producing facts to show that a claimant's employment did not cause, aggravate or contribute to his condition. *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). The medical evidence of record indicates that the infection claimant suffered as a result of exposure to raw sugar, as well as his diet, age and hypertension, played a role in the increase in his blood sugar level, and Dr. Wygant stated that the exposure worsened claimant's diabetes. Cl. Ex. 1 at 31, 36-38, 76. As this evidence is uncontradicted, employer has failed to rebut the Section 20(a) presumption. The administrative law judge's conclusion that the medical evidence of record severs the connection between claimant's employment and his exacerbated diabetic condition is erroneous. Consequently, as a matter of law,

²We note that the Board's prior decision resulted in some confusion by identifying claimant's diabetes as the "harm" necessary to establish a *prima facie* case. *See Clemens*, slip op. at 3 n. 2. A review of Dr. Wygant's records clearly reveals that, prior to November 1983, claimant was blind in his left eye and suffered from diabetes and hypertension. Jt. Ex. 2. Consequently, claimant's work-related "harm" could not have been his diabetic condition, but rather was the eczematous infection alleged to have aggravated his diabetes to result in a permanent total disability.

³Claimant contends the infection hastened the onset of the debilitating effects of diabetes rendering him permanently totally disabled. He cites his need for increased dosages of insulin as proof that his condition has worsened. *See* Cl. Ex. 1 at 9, 29, 38; Tr. at 27-28, 38.

⁴Claimant argues that proper application of the Section 20(a), 33 U.S.C. §920(a), presumption requires a finding that he is permanently totally disabled. Contrary to that argument, however, the Section 20(a) presumption does not aid claimant in establishing the nature and extent of his disability. *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981).

claimant has established that his employment aggravated his diabetic condition. *See Obert*, 23 BRBS at 160. Thus, as Dr. Wygant stated that claimant is disabled, in part from diabetes and eczema, claimant's disability also is work-related pursuant to the aggravation rule. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

Next, claimant contends the administrative law judge erred in denying permanent total disability benefits. The administrative law judge determined that, as to any work-related condition, claimant was only temporarily totally disabled. Crediting Dr. Wygant's opinion, he found that once claimant was removed from the irritant, the inflammation subsided and the eczematous condition was no longer of disabling proportions; thus, the work-related aggravation ceased. Despite such a finding, according to the administrative law judge, claimant is permanently totally disabled as a result of blindness in one eye, diabetes and hypertension, all non-work-related factors, and claimant's blood sugar level remained high after the infection healed because of an inability to maintain a controlled diet. Decision and Order on Remand at 5. Thus, the administrative law judge interpreted Dr. Wygant's opinion as indicating that any work-related aggravation of claimant's diabetes was strictly temporary in nature. Decision and Order on Remand at 4.

A permanent disability is one which has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988). When a compensable injury consists of disabling symptoms that are temporary in nature, the disability may be permanent if it meets the *Watson* criteria. *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115 (CRT) (D.C. Cir. 1984); *see also Obert*, 23 BRBS at 157; *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 151 (1989); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 1 (1988). With regard to the permanency of the effect claimant's work injury had on his pre-existing conditions, Dr. Wygant stated that although the once-disabling infection no longer persists, claimant will have eczema, and remain on medication for it, for the rest of his life. Cl. Ex. 1 at 52, 54, 74, 79. Further, he testified that the chronic eczematous condition could become very severe, and disabling, if claimant again came into contact with raw sugar. Cl. Ex. 1 at 32.

Claimant's eczema satisfies the definition for permanency, as it is of lasting duration. *See Watson*, 400 F.2d at 649. Although the infection, the disabling aspect of claimant's skin condition, has healed, the eczema is chronic, and the potential for further infection exists upon exposure to irritants such as raw sugar. Thus, claimant's disability is of indefinite nature. In accordance with *Crum* and its progeny, we reverse the administrative law judge's finding that claimant's work-related disability was only temporary, and we hold, as a matter of law, that it is permanent. *See Crum*, 738 F.2d at 474, 16 BRBS at 115 (CRT); *Obert*, 23 BRBS at 157; *Sinclair*, 23 BRBS at 148; *Cairns*, 21 BRBS at 252; *Care*, 21 BRBS at 248; *Boone*, 21 BRBS at 1.

With regard to the extent of claimant's permanent disability, we hold that claimant has established a *prima facie* case of total disability. In order to establish a *prima facie* case of total disability, claimant must show that he is unable to return to his usual work. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Claimant has done so, in that Dr. Wygant clearly opined that future exposure to raw sugar would cause a flare-up of claimant's eczema and "could be a very serious threat to . . . his diabetes." Cl. Ex. 1 at 32. As a doctor's opinion that an employee's return to his usual work would aggravate his condition may support a finding of total disability, *Care*, 21 BRBS at 251; *Boone*, 21 BRBS at 3, we hold that claimant has met his initial burden.

Once a claimant shows he is unable to return to his usual work, an employer must establish the availability of other job opportunities claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *Turner*, 661 F.2d at 1031, 14 BRBS at 156. We note that employer presented evidence on the issue of suitable alternate employment before the administrative law judge, and that he discussed such evidence in his recitation of the facts. Tr. at 72 *et seq.*, 94 *et seq.*; Decision and Order at 3-6. Because the administrative law judge concluded that claimant's permanent disability was not caused or aggravated by his employment, it was not necessary to evaluate the vocational evidence submitted by employer. As we now hold that claimant established a causal nexus between his disability and his work, and that he established a *prima facie* case of total disability, on remand, the administrative law judge must determine whether employer established that claimant's disability is only partial by presenting evidence of suitable alternate employment. Additionally, employer raised its entitlement to Section 8(f), 33 U.S.C. §908(f), relief as an issue before the administrative law judge. On remand, the administrative law judge must consider the merits of employer's request, as well as any other relevant issues. *See Jt. Ex. 13; Care*, 21 BRBS at 252.

Accordingly, the administrative law judge's Decision and Order on Remand denying permanent total disability benefits is vacated, and the case is remanded for further consideration in accordance with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge