BRB No. 92-1921

JOHN W. EASTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TEXACO, INCORPORATED	)	DATE ISSUED: _____)
	)	
and	)	
	)	
INA/AETNA INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Decision on Motion for Reconsideration of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

James E. Cazalot (Law Offices of H. Edward Sherman), New Orleans, Louisiana, for claimant.

Michael D. Whalen and Thomas M. Beverly (Bedell, Dittmar, DeVault & Pillans, P.A.), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Decision on Motion for Reconsideration (90-LHC-2288) of Administrative Law Judge Ben H. Walley 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a roustabout for employer from 1980 to 1988. Claimant filed a claim under the Act for compensation for a back injury sustained in the course of his employment with employer. The parties stipulated that if claimant suffered any compensable injury, it occurred in the course of his employment on one or more of the following dates: December 12, 1986, October 14,

1987, November 10, 1987, and May 28, 1988.[1] Claimant's employment with employer was terminated on July 4, 1988, for failure to report for work; claimant testified he was unable to work due to back pain. Employer has paid medical benefits in the amount of $540, but has not voluntarily paid compensation to claimant.

The administrative law judge found that claimant failed to prove that an injury occurred, and therefore concluded that claimant had failed to establish a *prima facie* case entitling him to the Section 20(a), 33 U.S.C. §920(a), presumption linking his back complaints to his employment. Accordingly, the administrative law judge found that claimant was entitled to neither compensation nor medical benefits. In subsequently denying claimant's motion for reconsideration, the administrative law judge, *inter alia*, rejected claimant's arguments with respect to his determination concerning claimant's credibility.

On appeal, claimant challenges the administrative law judge's finding that claimant failed to establish a *prima facie* case sufficient to invoke the Section 20(a) presumption, arguing that the weight of the evidence establishes that claimant suffered physical harm as a result of the four alleged accidents. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

In order to avail himself of the Section 20(a) presumption, claimant must show that he sustained an injury, *i.e.*, that he sustained some harm or pain, *Murphy v. SCA/Shayne Bros.*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that an accident occurred or working conditions existed that could have caused the harm. *See Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990), *vacated in part on other grounds on recon.*, 24 BRBS 63 (1990); *Clophus v. Amoco Production Co.*, 21 BRBS 261, 265 (1988); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once claimant establishes these elements of his *prima facie* case, the Section 20(a) presumption applies to link the harm with claimant's employment. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Sam v. Loffland Brothers Co.*, 19 BRBS 228, 231 (1987). If an employer produces specific and comprehensive evidence sufficient to sever the causal connection between the injury and claimant's employment, the presumption drops out of the case and the administrative law judge must weigh all the evidence and resolve the causation issue based on the record as a whole. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976).

We agree with claimant that the administrative law judge's conclusion that claimant has not established that he sustained an injury cannot be affirmed. Initially, we note that the administrative

[1]According to claimant's hearing and deposition testimony, the first of these injuries occurred on December 12, 1986, when he fell down stairs on an offshore platform. The second injury occurred on October 14, 1987, when claimant aggravated his back condition while lifting an angle iron. The third injury occurred on November 10, 1987, when claimant's back condition was aggravated by riding in a crew boat on 8-12 foot seas. The last injury occurred on May 28, 1988, when claimant became dizzy as a result of pain medication and slipped down the platform stairs.

law judge's statement that, in order to establish a *prima facie* case, the claimant must demonstrate a "physical or mental impairment," Decision and Order at 9, reflects a misstatement of the law. It is well-established that a claimant need only establish some physical harm, *i.e.*, that something has gone wrong with the human frame, in order to establish that he has suffered an injury under the Act. *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968) (*en banc*); *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 59 (1989); *Kelaita*, 13 BRBS at 329. The administrative law judge's use of the word "impairment" and his subsequent evaluation of the evidence relevant to the question of whether claimant sustained an injury suggest that he did not employ the proper legal standard for determining whether claimant suffered an injury under the Act for purposes of establishing his *prima facie* case. Furthermore, our review of the evidence in this case compels the conclusion that several of the administrative law judge's findings regarding the medical evidence and claimant's subjective complaints are not supported by substantial evidence. Specifically, we note that the administrative law judge's conclusion that claimant failed to demonstrate an injury is based on his determinations that the medical evidence showed no objective signs of injury and that claimant's subjective complaints do not constitute credible evidence of an injury. As discussed *infra*, we are unable to affirm either of these determinations and, therefore, must remand the case for reconsideration of the totality of the relevant evidence in accordance with the applicable legal standards.

Pursuant to the uncontradicted objective medical evidence that claimant has a bulging disc, we initially vacate the administrative law judge's finding that there is no objective evidence of injury. While acknowledging that claimant's CAT scan revealed bulging at the L4-5 disc space, the administrative law judge implicitly found, based on the physicians' testimony regarding the CAT scan, that the scan was normal. Specifically, the administrative law judge relied on Dr. Bomboy's opinion that the CAT scan results were normal for a 30-year old man and that the bulging was not caused by trauma, on Dr. Giles' interpretation of the CAT scan as normal for claimant's age, and on Dr. Llewellyn's testimony that the bulging was of little significance. Initially, we note that this evidence of a bulging disc must be reevaluated, as it may demonstrate a harm under the correct legal standard even if it results in no impairment; whether the disc is "normal" for a man of claimant's age goes to the degree of impairment. Moreover, whether the bulging disc was caused by trauma is relevant to rebuttal of Section 20(a), and not the existence of a harm.

In addition, the administrative law judge failed to adequately address additional testimony by Drs. Giles and Llewellyn which, if credited, could support a finding that the disc bulge revealed by claimant's CAT scan and MRI study does represent objective evidence of an injury. In this regard, we note that, although Dr. Giles testified that the development of bulging discs is, in part, a normal physiological process of aging, *see* Cl. Ex. 20 at 14-15, 32-33, he also indicated that trauma can cause a disc to bulge, *id.* at 50, and that he was unable to ascertain whether claimant's bulging was the result of injury or the aging process. *Id.* at 21. Dr. Giles further acknowledged that a bulging disc can be uncomfortable and can produce pain, *id.* at 21, 33, and that trauma can bring on symptoms. *Id.* at 34. Similarly, Dr. Llewellyn testified that bulging discs are a sign of injury and can cause pain. *See* Cl. Ex. 18 at 46-49.[2]

[2]While the administrative law judge characterized Dr. Llewellyn's opinion as being that the

In view of this testimony by Drs. Giles and Llewellyn which, if credited, could establish a harm under the Act, we vacate the administrative law judge's reliance on these physicians' characterizations of claimant's bulging disc as normal for his age, *see Romeike*, 22 BRBS at 59; *see also Crawford v. Director, OWCP*, 932 F.2d 152, 154, 24 BRBS 123, 127-28 (CRT)(2d Cir. 1991); *Wheatley*, 407 F.2d at 313, as well as the administrative law judge's finding that there is no objective evidence of injury, and we remand the case to the administrative law judge for a determination as to whether the physicians' opinions, considered in their entirety, establish that something has gone wrong with claimant's frame.[3]

Secondly, we hold that the administrative law judge committed error in his evaluation of the credibility of claimant's subjective complaints. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965). It is well-established that credible complaints of subjective symptoms and pain are sufficient to establish the element of physical harm. *Sylvester v. Bethlehem Steel Corp*, 14 BRBS 234, 236 (1981), *aff'd* 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). In the present case, we agree with claimant that the administrative law judge's decision to discredit claimant's complaints on the basis of purported inconsistencies in these complaints is neither reasonable nor supported by substantial evidence. The administrative law judge's first finding that claimant's subjective complaints are inconsistent with the notes from Dr. Bomboy's initial visit with claimant on January 2, 1987, has no basis in the record; Dr. Bomboy's office notes do not contradict claimant's account of the pain that he experienced immediately following his December 12, 1986 injury. Moreover, the administrative law judge's decision to discredit claimant's subjective complaints based on inconsistencies among the examining physicians' reports as to whether claimant complained of radicular pain is unreasonable in light of the weight of the evidence. Our review of the record reveals that Dr. Bomboy is the sole examining physician who fails to note that claimant complained of right leg problems; all of the remaining physicians report that claimant experienced occasional problems with right leg pain or numbness. *See* Cl. Exs. 1, 2 (Dr. Peavey); Cl. Ex. 20 at 5, 50 (Dr. Giles); Emp. Ex. 9, Cl. Ex. 17 at 363 (Dr. Llewellyn); Emp. Ex. 8 (Dr. Schumacher); Emp. Ex. 6 (Dr. Brown). We also are unable to affirm the administrative law judge's discrediting of claimant's complaints on the basis of claimant's failure to report the three injuries occurring subsequent to the initial December 12, 1986 injury to Drs. Bomboy and Giles,[4] in view of the

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bulging "*could be* the residual of an injury" (emphasis added), *see* Decision and Order at 11, we note that Dr. Llewellyn expressed no equivocation in his opinion that the modest bulges in claimant's disc were a reaction to injury rather than a normal product of aging. *See* Cl. Ex. 18 at 15, 48-49.

[3]We note that Dr. Bomboy's diagnosis of mild lumbosacral strain syndrome, *see* Cl. Ex. 19 at 9, and Dr. Llewellyn's diagnosis of a muscle ligament sprain, *see* Cl. Ex. 18 at 30, could, if credited, also establish a harm under the Act. *See, e.g., Romeike v. Kaiser Shipyards*, 22 BRBS 57, 59 (1989).

[4]Dr. Giles stated that, because he originally did not plan on treating claimant, a patient of his associate Dr. Bomboy, he did not take a complete history when he first saw claimant on December

administrative law judge's failure to address evidence that the second injury, occurring on October 14, 1987, was reported to three other physicians. The record reflects that both of employer's examining physicians, Drs. Brown and Schumacher, noted claimant's October 14, 1987 injury, *see* Emp. Exs. 6, 8, as did Dr. Llewellyn. *See* Emp. Ex. 9; Cl. Ex. 18 at 21-23, 41. Next, the administrative law judge acknowledged that Drs. Bomboy, Giles and Llewellyn did not question the credibility of claimant's complaints,[5] but the administrative law judge nonetheless discredited claimant's complaints on the basis that they are inconsistent with the diagnoses and prognoses rendered by Drs. Bomboy, Giles and Llewellyn. The administrative law judge's reasoning does not support his ultimate conclusion that claimant's complaints do not establish an injury under the Act. The administrative law judge's finding that claimant's testimony of constant pain which restricted his ability to work and increased with the subsequent injuries is inconsistent with Dr. Bomboy's opinion regarding the causation, severity and prognosis with respect to claimant's condition may be relevant to the issue of the nature and extent of claimant's disability, *see generally Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989), but is not probative of whether claimant's complaints are sufficient to establish a harm. Similarly, any inconsistencies which exist between Dr. Llewellyn's testimony regarding claimant's ability to return to work and claimant's testimony that his pain precluded his return to work relates to the issues of the nature and extent of claimant's disability, and not to the fact of injury. Lastly, we note that the administrative law judge's statement that claimant's continuing complaints confounded Dr. Giles' projection on January 6, 1988, that claimant's problem would not be recurrent reflects a misstatement of Dr. Giles' testimony. Dr. Giles' January 6, 1988, office note states his belief that claimant's problem would be recurrent, *see* Emp. Ex. 7, and his deposition testimony indicates that it is impossible to ascertain whether claimant's condition is permanent or might resolve in the future. *See* Cl. Ex. 20 at 55. Based upon the foregoing, the administrative law judge on remand must reconsider whether claimant's subjective complaints of pain, which were credited by the treating physicians, are sufficient to establish a harm under the Act. *See Sylvester*, 14 BRBS at 234.

16, 1987, and never took a detailed history thereafter. *See* Ex. 7; Cl. Ex. 20 at 3-5.

[5]Dr. Bomboy expressly testified that he never had any question about whether claimant had credible complaints. *See* Cl. Ex. 19 at 34. Dr. Llewellyn characterized claimant's subjective findings as "impressive." *See* Emp. Ex. 18 at 23. Dr. Giles testified that he assumed claimant had pain and would not have prescribed pain medication if he did not think he was hurting, adding that there is no way to measure how much pain claimant experiences, or even to tell if he has pain. *See* Cl. Ex. 20 at 42, 51-52.

We therefore vacate the administrative law judge's determination that claimant failed to establish an injury, and remand the case for the administrative law judge to reconsider whether claimant established a harm and an accident or working conditions that could have caused the harm.[6] *See Hartman,* 23 BRBS at 201; *Clophus*, 21 BRBS at 265; *Kelaita*, 13 BRBS at 326. If the administrative law judge finds the Section 20(a) presumption invoked, he must proceed to consider rebuttal. *See Sam,* 19 BRBS at 228. Lastly, if the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

Accordingly, the Decision and Order and Decision on Motion for Reconsideration of the administrative law judge denying benefits are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[6]We note that the parties disagree as to whether the administrative law judge reached the issue of whether an accident or accidents occurred that could have caused any harm suffered by claimant. *See* Claimant's Petition for Review and Brief at 2; Employer's Response Brief at 24-25 n.6. If, on remand, the administrative law judge must finds that claimant suffered a harm, he must make an explicit determination as to whether the stipulations of the parties and evidence of record establish the occurrence of an accident or accidents that could have caused the harm.