BRB No. 11-0605

STANLEY W. VANE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EAST COAST CRANES & ELECTRICAL c/o CAROTEC SERVICES USA	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	DATE ISSUED: 04/19/2012
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Dale Vernon Berning, Virginia Beach, Virginia, for claimant.

R. John Barrett and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2008-LHC-00447) of Administrative Law Judge Richard K. Malamphy 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).

This case is before the Board for the second time. To recapitulate, claimant worked for employer from 1992 to July 31, 2007, maintaining and operating cranes. Claimant testified that he worked ten to twelve hour shifts, which rotated weekly from the day shift to the mid shift to the night shift. Tr. at 8-9. In 2005, claimant reported that he had difficulty sleeping, felt excessively drowsy during his waking hours, and had a motor vehicle accident when he ran off the road due to sleepiness. Claimant was diagnosed with sleep apnea, hypothyroidism and a deviated septum. EXs 5, 6. Claimant underwent surgery for the deviated septum; he was prescribed thyroid medication and a C-PAP machine for his sleep apnea. Tr. at 10-11. Claimant testified that his daytime hypersomnolence did not improve. *Id*. In July 2007, claimant was referred by his treating physician, Dr. Hoffman, to Dr. Ripoll, who specializes in sleep disorders. Tr. at 11-14. Dr. Ripoll diagnosed claimant with obstructive sleep apnea and shift work sleep disorder (SWSD). He opined that claimant's hypersomnolence during working hours was a danger to himself and others. CX 1 at 2. Due to the diagnoses of sleep apnea and SWSD, Dr. Hoffman restricted claimant from returning to shift work that involved operating a crane. CX 2. Claimant has not worked since July 2007. Claimant filed a claim for compensation and medical benefits under the Act, alleging that he is temporarily totally disabled by a work-related injury. Employer controverted the claim and requested Section 8(f) relief, 33 U.S.C. §908(f), from continuing compensation liability.

In his initial decision, the administrative law judge found that claimant established only that he suffers from sleep apnea, which claimant did not allege was caused by his working conditions, and that claimant does not have SWSD. *Id*. at 17-18. The administrative law judge concluded that claimant failed to present sufficient evidence to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), and he denied the claim for compensation and medical benefits under the Act.

Claimant appealed the administrative law judge's finding that he is not entitled to the Section 20(a) presumption and the consequent denial of benefits. *Vane v. East Coast Cranes & Electrical*, BRB No. 10-0217 (Jul. 29, 2010) (unpub.) The Board vacated the administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption and remanded the case for the administrative law judge to address all relevant evidence concerning the existence of daytime hypersomnolence, including whether that condition could have been caused or aggravated by claimant's shift work,

which the Board stated is the gravamen of claimant's assertion of a work-related sleep disorder.[1] *Vane*, slip op. at 4.

On remand, the administrative law judge found claimant entitled to the Section 20(a) presumption, as claimant established the physical harm of hypersomnolence and that his shift work for employer could have caused this harm. Decision and Order on Remand at 14. The administrative law judge found that employer established rebuttal of the Section 20(a) presumption based on the diagnoses of obstructive sleep apnea and hypothyroidism, which can cause hypersomnolence, and because claimant continued to experience sleep troubles after he quit shift work. The administrative law judge also found that there is no evidence that shift work aggravated or contributed to claimant's sleep disorder, and that the SWSD diagnosis of Dr. Ripoll is not well-documented by the evidence of record. *Id*. at 15-16. In weighing the evidence as a whole, the administrative law judge concluded that the evidence does not establish that claimant's shift work caused or contributed to his hypersomnolence and that it is "more likely that sleep apnea and hypothyroidism caused and continue to cause his sleep problems." *Id*. at 16-17.

On appeal, claimant challenges the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption that claimant's daytime hypersomnolence was caused or aggravated by his shift work with employer. Claimant also challenges the administrative law judge's rejection of the SWSD diagnosis of Dr. Ripoll, and his crediting, in part, of the opinion of Dr. Mansheim as support for his conclusion, based on the record as whole, that claimant's hypersomnolence is not work-related. Employer responds, urging affirmance of the administrative law judge's decision on remand.

Claimant contends that the administrative law judge erred in finding that employer established rebuttal of the Section 20(a) presumption that his daytime hypersomnolence is related to his shift work for employer. Where, as here, the Section 20(a) presumption is invoked and aggravation of a pre-existing condition is at issue, employer must produce substantial evidence that the employment neither directly caused or contributed to the

[1]Additionally, the Board vacated the administrative law judge's rejection of Dr. Ripoll's diagnosis of SWSD, as the administrative law judge erred in relying on the 2005 diagnosis of sleep apnea and hypothyroidism by Drs. Debo and Dawoodjee to undermine Dr. Ripoll's 2007 opinion, and in finding that Dr. Ripoll's diagnosis of SWSD is inconsistent with the circumstances of claimant's sleep disorder testing. *Vane*, slip op. at 4-5.

injury nor aggravated the pre-existing condition resulting in the injury.[2] *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *see also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Thus, it is employer's burden to produce substantial evidence that claimant's SWSD was not caused by his employment and that the other causes of hypersomnolence, apnea and hypothyroidism, were not aggravated by claimant's employment. *Holiday*, 591 F.3d at 226, 43 BRBS at 69-70(CRT).

In his decision on remand, the administrative law judge found that there is no evidence that shift work was a contributing cause of claimant's sleep disorder. Specifically, the administrative law judge found that claimant's daytime hypersomnolence did not coincide with the onset of claimant's shift work; claimant testified that he began working for employer in 1992 but his sleep troubles did not begin until 2005. *See* Tr. at 8-11. The administrative law judge also found that Dr. Ripoll's diagnosis of SWSD is not "well-documented or well-reasoned" given the lack of medical evidence and subjective testimony from claimant showing how shift work affected "his hypersomnolence and other sleep problems." Decision and Order on Remand at 16. The administrative law judge further found that the facts of shift work and claimant's tiredness are insufficient to connect the shift work to claimant's sleep troubles, "particularly given his other diagnosed explanations in this case, including sleep apnea and hypothyroidism." *Id*. The administrative law judge thus concluded that employer met its burden to rebut the Section 20(a) presumption, since doctors attributed claimant's hypersomnolence and other sleep problems to sleep apnea and hypothyroidism and there is no evidence that claimant's shift work aggravated or contributed to his hypersomnolence.

We must reverse the administrative law judge's finding that employer rebutted the Section 20(a) presumption, as the finding is not in accordance with law. In stating that there is no evidence that shift work was a contributing cause of claimant's sleep disorder,

[2]In this regard, we reject employer's contention that claimant is improperly raising for the first time on appeal the contention that his pre-existing sleep apnea was aggravated by shift work. Emp. Response Brief at 9-10. It is well-documented in the record that claimant was diagnosed with sleep apnea and hypothyroidism in 2005 prior to his stopping shift work in July 2007 and prior to Dr. Ripoll's 2007 diagnosis of apnea and SWSD. CXs 1, 2; EXs 5, 6. The pre-existing conditions also can cause daytime hypersomnolence. *Id*. As the Board stated in its initial decision, claimant's claim is that he has a work-related sleep disorder. *Vane*, slip op at 4; *see* Tr. at 22, 30. This claim implicates the aggravation rule, as Section 20(a) applies to presume that claimant's apnea and/or hypothyroidism was aggravated by his shift work, as well as to presume that claimant's SWSD is related to his employment.

the administrative law judge erroneously placed the burden on claimant to produce evidence that shift work in fact aggravated or contributed to his hypersomnolence; rather, the burden on rebuttal requires employer to produce substantial evidence that shift work did not cause, aggravate or contribute to claimant's hypersomnolence. *See Holiday*, 591 F.3d at 226, 43 BRBS at 69-70(CRT); *see also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Burley v. Tidewater Temps*, 35 BRBS 185 (2002). In this case, the administrative law judge found that physicians attributed claimant's hypersomnolence and other sleep problems to sleep apnea and hypothyroidism. The administrative law judge stated that shift work "was not the cause or at least the sole cause of" claimant's problems because he continued to experience sleep problems after he stopped working.[3] Decision and Order on Remand at 16. However, the fact that claimant's symptoms may be due, in part, to his pre-existing sleep apnea and hypothyroidism does not rebut the Section 20(a) presumption that his symptoms are due to a combination of sleep apnea, hypothyroidism and SWSD or that SWSD aggravated these pre-existing conditions. *See Holiday*, 590 F.3d at 226, 43 BRBS at 69-70(CRT); *Burley*, 35 BRBS at 189.

Thus, the evidence that claimant has pre-existing conditions of sleep apnea and hypothyroidism cannot, by itself, rebut the Section 20(a) presumption. In *Holiday*, the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, held that employer cannot rebut the Section 20(a) presumption with evidence addressing only a pre-existing condition as such evidence does not address the aggravation rule. *Holiday*, 591 F.3d at 226, 43 BRBS at 69-70(CRT). Accordingly, the 2005 reports of Drs. Debo and Dawoodjee that diagnose sleep apnea and hypothyroidism, but do not address SWSD, are insufficient to rebut the presumed connection between claimant's work and his sleep disorder. *See* EX 5, 6.

Moreover, there are no medical reports stating that claimant's daytime hypersomnolence was not caused, contributed to, or aggravated by his work. The reports of Drs. Ripoll, Nard, Sautter, and Hoffman attribute claimant's symptoms, in part, as being caused by, or possibly caused by, SWSD. These reports, therefore, cannot rebut the Section 20(a) presumption. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). Dr. Ripoll, who examined claimant and conducted a sleep study in July 2007, and Dr. Nard, a psychiatrist, each diagnosed obstructive sleep apnea and SWSD. CX 1; EXs 3 at

[3]In his initial decision, the administrative law judge found that "Drs. Debo and Dawoodjee, who diagnosed sleep apnea in 2005, only mentioned sleep apnea and hypothyroidism as causes for claimant's problems sleeping." Decision and Order at 18; *see* EXs 5, 6.

4-6, 4. Dr. Nard added that SWSD is a "major contributor" to claimant's symptoms and prevents his returning to work for employer. EX 3 at 13. Dr. Sautter opined that claimant's cognitive deficits are consistent with a diagnosis of obstructive sleep apnea, and he stated that, "[I]t is possible that his evening shift work contributed to his excessive daytime sleepiness thus heightening the problem." CX 3 at 5. Dr. Hoffman completed disability forms stating that claimant is unfit for work due to excessive daytime somnolence; he also diagnosed sleep apnea and SWSD. CXs 3 at 1, 3; 7 at 1. Moreover, although Dr. Mansheim stated in 2008 that if SWSD is claimant's primary problem, it would not be in evidence in 2008 as claimant had stopped working, *see* EX 1 at 7-8, Dr. Mansheim did not state that claimant's work was not a cause of claimant's condition. Thus, as there is no medical evidence of record stating that claimant's daytime hypersomnolence was not caused, contributed to, or aggravated by his employment, we reverse the administrative law judge's finding that employer rebutted the Section 20(a) presumption. *Holiday,* 590 F.3d at 226, 43 BRBS at 69-70(CRT); *see also Fields,* 599 F.3d at 56-57, 44 BRBS at 17(CRT). Claimant's hypersomnolence thus is work-related as a matter of law. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). Consequently, we vacate the denial of the claim for benefits and we remand this case for the administrative law judge to address the remaining issues raised by the parties.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded for the administrative law judge to address the remaining issues.

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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BETTY JEAN HALL
Administrative Appeals Judge