BRB No. 10-0253

BILFORD L. GRIFFIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BAE SYSTEMS/NORFOLK SHIP REPAIR, INCORPORATED	)	DATE ISSUED: 08/30/2010
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Ralph Rabinowitz (Rabinowitz, Swartz, Taliaferro, Swartz and Goodove), Norfolk, Virginia, for claimant.

Gerald E. W. Voyer and Audrey Marcello (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2008-LHC-00848) of Administrative Law Judge Kenneth A. Krantz 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, 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, an outside machinist for employer, experienced numbness and tingling in his left arm and fingers after he had been cleaning diesel parts with a pencil grinder on May 10, 2006. After informing a co-worker and his supervisor about his symptoms, claimant was sent to employer's first aid clinic. A nurse at that clinic instructed claimant to see his family physician; claimant immediately proceeded to that physician who, after

examining claimant, hospitalized him between May 10 and May 17, 2006. Claimant underwent back surgery in August 2006, and was subsequently diagnosed with cervical spondylosis with myelopathy. He has not returned to gainful employment since the onset of his symptoms on May 10, 2006.

In his Decision and Order, the administrative law judge found that although timely notice of his injury was not given by claimant to employer, such failure was excused pursuant to Section 12(d), 33 U.S.C. §912(d), of the Act. The administrative law judge invoked the Section 20(a) presumption with regard to causation, found that employer did not rebut that presumption, and concluded that claimant's present condition is related to his employment with employer. The administrative law judge also determined that claimant is incapable of returning to his regular employment duties with employer, that employer established the availability of suitable alternate employment as of June 4, 2007, and that claimant's conditions reached maximum medical improvement on August 8, 2007. The administrative law judge thus awarded claimant temporary total disability benefits for the period of May 11, 2006, through June 3, 2007, temporary partial disability benefits for the period of June 4 through August 7, 2007, and permanent partial disability benefits from August 8, 2007, and continuing.

On appeal, employer challenges the administrative law judge's finding that it was not prejudiced by claimant's failure to provide timely notice of his injury pursuant to Section 12 of the Act. Additionally, employer contends that the administrative law judge erred in finding that claimant sustained a compensable injury that is related to his employment with employer. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Section 12

The administrative law judge found that claimant was, or should have been, aware of the relationship between his injury and employment as of September 6, 2006. Employer did not receive notice of claimant's alleged work-related injury until January 18, 2007, when it received claimant's LS-203, Employee's Claim for Compensation. Accordingly, the administrative law judge determined that claimant did not provide timely formal notice of his injury to employer under Section 12(a), 33 U.S.C. §912(a).[1]

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[1] In a traumatic injury case such as this one, Section 12(a) provides that claimant must give employer written notice of his injury within 30 days of the injury or of the date claimant is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury and his employment. *See Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.,* No. 08-72267 (9th Cir. Apr. 23, 2010).

Claimant's failure to give employer timely notice of his injury pursuant to Section 12 of the Act is excused, *inter alia,* where employer was not prejudiced by the claimant's failure to give proper notice. 33 U.S.C. §912(d)(2). Section 20(b) of the Act, 33 U.S.C. §920(b), provides claimant with a presumption that notice was timely; thus, it is employer's burden to produce evidence that it was prejudiced by claimant's failure to give formal notice. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.,* 23 BRBS 140 (1989). Prejudice under Section 12(d)(2) is established where employer provides substantial evidence that due to claimant's failure to provide timely written notice, it was unable to effectively investigate the injury to determine the nature and extent of the illness or to provide medical services. A conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet employer's burden. *See Kashuba v. Legion Ins. Co.,* 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999); *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989); *Vinson v. Resolve Marine Services,* 37 BRBS 103 (2003).

The administrative law judge found that employer questioned all of the lay witnesses who spoke with claimant following his alleged work accident and that employer did not allege with specificity how its investigation of claimant's claim was hindered by the delay in receiving notice or how claimant's medical treatment would have differed had it received timely notice. The administrative law judge thus concluded that employer did not meet its burden of demonstrating that it was prejudiced by claimant's failure to provide it with timely notice. In challenging this finding, employer avers that as a result of its failure to receive timely notice, it could not effectively question witnesses, investigate the circumstances surrounding claimant's alleged work injury, or gather medical evidence sufficient to establish that claimant's condition is unrelated to his employment.

Employer's conclusory allegation on appeal that it could not "effectively" question witnesses or investigate the circumstances surrounding claimant's work-injury, *see* Employer's br. at 20, is unsupported by the record since, as the administrative law judge correctly found, employer at the formal hearing questioned every employee who spoke to claimant on May 10, 2006, and employer has not specifically identified any way in which its investigation was hindered by the delay in receiving notice of claimant's claim. Moreover, while employer summarily states that it was prejudiced "with respect to gathering medical information," *id.*, it does not state how it was hindered in acquiring medical evidence regarding claimant's present medical conditions nor does it allege that the medical care received by claimant prior to its receiving notice on January 18, 2007, was inappropriate. Rather, employer avers only that given proper notice, it might have been able to rebut the statutory presumption that claimant's injury was related to his employment.

This lack of evidence distinguishes the present case, from *Kashuba,* 139 F.3d 1273, 32 BRBS 62(CRT), on which employer relies. In *Kashuba,* the Ninth Circuit stated that a claim of prejudice must be supported with evidence, "[e]vidence that lack of timely notice did impede the employer's ability to determine the nature and extent of the injury or illness or to provide medical services is sufficient; a conclusory allegation of preduce is not." 139 F.3d at 1276, 32 BRBS at 64(CRT). In *Kashuba,* employer did not receive notice until four months after the injury and six weeks after claimant had surgery, and there were credibility problems with claimant's claim. On these facts the court held employer was prejudiced as timely notice would have allowed the employer to participate in claimant's medical care, to obtain a second opinion and perhaps, to produce evidence establishing a lack of causation. In this case, as the administrative law judge found, employer has not established it was precluded from gathering medical or other evidence regarding claimant's condition, and it does not assert that claimant's medical treatment would have been altered if timely notice had been given. We thus reject employer's assertion that the Ninth Circuit's decision in *Kashuba* leads to a different result in this case. As employer's conclusory allegation is insufficient to establish that it was prejudiced by claimant's delayed notice, we affirm the administrative law judge's determination that Section 12 does not bar claimant's claim.

Causation

Claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish a *prima facie* case. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996); *Konno v. Young Bros., Ltd.,* 28 BRBS 57 (1994). It is claimant's burden to establish each element of his *prima facie* case. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). If these elements are established, the Section 20(a), 33 U.S.C. §920(a), presumption applies to link claimant's injury or harm with his working conditions. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

Employer does not challenge the administrative law judge's finding that claimant suffers from a cervical spine condition and associated numbness in his left arm and fingers. Decision and Order at 29. Employer contends, however, that the administrative law judge erred in invoking the Section 20(a) presumption because claimant, while informing his supervisor and co-workers on May 10, 2006, that he was experiencing tingling and numbness in his left arm, did not specifically state that these symptoms occurred when he was picking up and cleaning engine parts for employer. *See*

Employer's br. at 11. Additionally, in arguing that claimant has not met his burden of establishing the existence of working conditions that could have caused his present condition, employer relies on claimant's May 24, 2006 Claim for Accident and Sick Benefits form, wherein claimant checked a box stating that a workers' compensation claim had not and would not be filed, and claimant's failure to present contemporaneous medical records linking his condition to his employment with employer. We reject employer's contentions of error.

Contrary to employer's argument, claimant is not required to prove that working conditions in fact caused his harm in order to invoke the presumption; rather, claimant must show the existence of working conditions which *could have* potentially caused the harm alleged. *See Stevens v. Tacoma Boatbuilding Co.,* 23 BRBS 191 (1993). Thus, the "working conditions" prong of a claimant's *prima facie* case requires that the administrative law judge determine whether employment events which could have caused the harm sustained by claimant in fact occurred. *See Bolden*, 30 BRBS 71. Moreover, a claimant's credible testimony is substantial evidence sufficient to support invocation of the presumption. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

In this case, the administrative law judge relied on the testimony of claimant and claimant's co-worker, Mr. Faulk, that claimant was engaged in cleaning engine parts and moving expansion joints for employer on May 10, 2006, when he experienced symptoms, to find that claimant established the existence of working conditions which could have caused or aggravated his medical condition. Decision and Order at 27 – 29. Employer has cited no evidence that claimant was not engaged in these work activities on May 10, 2006, immediately prior to his informing his supervisor and a co-worker that he was experiencing symptoms of tingling and numbness in his left arm and fingers.[2] On these facts, we affirm the administrative law judge's finding that Section 20(a) was invoked.

Employer next contends that, if claimant is entitled to invocation of the Section 20(a) presumption, the lay and medical evidence of record rebuts the presumption. Employer's brief at 14 – 19. We disagree. Upon invocation of the Section 20(a) presumption, the burden shifts to employer to produce substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). If the administrative law judge finds that the Section 20(a) presumption is

[2] Contrary to the statement contained in employer's brief that claimant acknowledged on his May 24, 2006 Claim for Accident and Sickness Benefits form that "no accident occurred," *see* Employer's brief at 12, the form itself, signed by claimant, indicates that the etiology of claimant's condition was "unknown." *See* Employer's Ex. 5 at 1.

rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *See Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43(CRT); *Moore,* 126 F.3d 256, 31 BRBS 119(CRT).

We affirm the administrative law judge's finding that employer did not establish rebuttal in this case. While employer argues that the evidence of record establishes that claimant had previously complained of numbness and tingling, evidence of a pre-existing condition alone cannot rebut the presumption, in view of the aggravation rule.[3] *See generally Holiday*, 591 F.3d 219, 43 BRBS 67(CRT). Next, employer maintains that the lack of contemporaneous evidence of a work incident or working conditions which could have caused claimant's medical conditions rebuts the presumption. The administrative law judge specifically addressed these contentions in his decision and properly found that claimant's failure to immediately disclose the details of his injury alone is not sufficient to establish that claimant's condition was not caused or aggravated by his employment. Decision and Order at 29. Employer also asserts that Dr. Chandi's May 21, 2006, report, wherein the physician check-marked a box "No" in response to the question of whether claimant's condition arose out of his employment, *see* Employer's Ex. 5 at 2, rebuts the presumption. The administrative law judge considered this evidence and, after finding that Dr. Chandi subsequently opined on April 10, 2008, that claimant "had underlying cervical spondylosis; but it seems that his work injury exacerbated the underlying present condition which subsequently required surgery," *see* Claimant's Ex. 4 at 23, determined that Dr. Chandi's opinion regarding causation was equivocal at best and thus was insufficient to constitute substantial evidence sufficient to rebut the presumption. Decision and Order at 30. The administrative law judge acted within his discretion as the trier-of-fact when addressing Dr. Chandi's opinion, and his finding that it does not constitute substantial evidence rebutting the presumption is affirmed. In the absence of any evidence that claimant's condition was not caused or aggravated by his work, the administrative law judge's determination that the Section 20(a) presumption was not rebutted must be affirmed. *Holiday,* 591 F.3d 219, 43 BRBS 67(CRT). Consequently, claimant's condition is causally related to his employment with employer. As employer does not challenge the administrative law judge's findings regarding the nature and extent of claimant's work-related disability nor claimant's entitlement to medical benefits, the administrative law judge's award of disability and medical benefits to claimant is also affirmed.

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[3] Under the aggravation rule, where a claimant's employment aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Newport News Shipbuilding & Dry Dock Co. v. Fishel,* 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge