BRB No. 00-0379

PAULA M. RICHARDSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMY & AIRFORCE EXCHANGE SERVICE	)	DATE ISSUED: Dec. 18, 2000
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Paula M. Richardson, Seaside, California, *pro se.*

Roger A. Levy (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for self-insured employer.

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

PER CURIAM:

Claimant, representing herself, appeals the Decision and Order on Remand (93-LHC-2659) of Administrative Law Judge Alexander Karst, 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law; if they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220.

This is the second time this case is before the Board. To recapitulate the facts,

claimant, on August 23, 1987, injured her left knee, hip, back and head when she tripped and fell over an electrical cord while working for employer. Employer voluntarily paid temporary total disability compensation from August 31 through September 11, 1987, and from September 16 through October 12, 1987. Claimant, after receiving treatment, returned to her usual employment duties as a cafeteria cashier on October 13, 1987. In December 1988, claimant was transferred from employer's main cafeteria to a snack bar. On May 9, 1989, claimant quit work, allegedly due to her ongoing neck and back pain. Claimant filed a claim for benefits under the Act alleging that the August 1987 injury aggravated a pre-existing psychiatric condition and either caused or aggravated her pre-existing neck and back conditions.

In his initial Decision and Order Denying Benefits, the administrative law judge found that claimant's pre-existing psychiatric condition was not aggravated by the August 1987 fall. He next credited, without specificity, the "rather overwhelming contrary evidence" demonstrating that claimant is neither emotionally nor physically impaired as a result of the work injury, because claimant received extensive medical treatment for the same psychological and physical complaints both before and after the work injury. Accordingly, the claim for compensation was denied. Claimant's subsequent motion for reconsideration was summarily denied by the administrative law judge. Claimant thereafter, without legal representation, appealed the administrative law judge's decision to the Board, and filed a petition for modification under Section 22 of the Act, 33 U.S.C. §922, with the administrative law judge.

On appeal, the Board vacated the administrative law judge's decisions, holding that the administrative law judge erred in determining whether claimant's neck, back and psychological problems are causally related to her work injury without considering whether claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption. In its decision, the Board held that claimant established her *prima facie* case and is entitled to the Section 20(a) presumption that her neck, back and psychological conditions are causally related to her employment, and remanded the case for the administrative law judge to consider whether employer rebutted the presumption with specific and comprehensive evidence. The Board instructed the administrative law judge that if he found 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. Lastly, the Board noted that its decision did not affect claimant's right to pursue her petition for modification filed with the administrative law judge. *Richardson v. Army & Air Force Exchange Service*, BRB No. 97-1107 (May 5, 1998)(unpublished).

On remand, the administrative law judge granted claimant an additional hearing with regard to her petition for modification; claimant appeared without representation, testified and submitted additional evidence. Thereafter, the administrative law judge conducted a *de novo* review of all the evidence in view of the Board's remand order and claimant's modification petition. In his Decision and Order on Remand, the

administrative law judge found that employer established rebuttal of the Section 20(a) presumption with regard to claimant's physical injuries, and that the preponderance of the medical evidence showed that her cafeteria fall on August 23, 1987, did not cause any physical disability which extended beyond October 12, 1987. With regard to claimant's psychological condition, the administrative law judge determined that employer established rebuttal of the Section 20(a) presumption, and, weighing the evidence as a whole, that the August 23, 1987, work-accident did not aggravate claimant's pre-existing psychological condition. The administrative law judge further found that a settlement which claimant and employer had entered into under Section 8(i) of the Act, 33 U.S.C. §908(i), for a previous claim against employer barred any claim for a psychological injury due to the cafeteria incident. Lastly, the administrative law judge found that any psychological injury due to harassment by claimant's supervisors subsequent to the August 23, 1987, cafeteria fall need not be considered, as claimant did not allege this theory at the hearing. Assuming such a claim was not barred, the administrative law judge determined that the opinion of Dr. Zeitz, that behavior by claimant's supervisors did not aggravate her psychological condition, would rebut the Section 20(a) presumption and would carry the day if the record were considered as a whole.

On appeal, claimant, representing herself, challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance.

Where, as in the instant case, a claimant establishes her *prima facie* case , the burden shifts to employer to present substantial evidence that claimant's injuries were not caused or aggravated by her employment *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999), *aff'g* 31 BRBS 98 (1997); *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dep't of Labor [Peterson]*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45, 46-47 (1996). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established with claimant bearing the burden of persuasion. *See, e.g., Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114 (CRT)(8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In finding that employer rebutted the Section 20(a) presumption with regard to claimant's physical injuries, the administrative law judge relied on the opinion of Dr. Lewis, who opined that claimant's fall on August 23, 1987, was a relatively insignificant

[1]In an Order issued on January 11, 2000, the Board denied claimant's request to reinstate her original appeal, as the Board issued a final decision addressing the issues raised in that appeal.

event, that there was no objective evidence to suggest claimant had any residual effects from the incident, and that she was not in need of any diagnostic or therapeutic measures with regard to her injury. *See* Emp. Ex. 12. Dr. Lewis concluded that claimant's disability is due solely to her psychological condition. *Id.* As the administrative law judge reasonably interpreted Dr. Lewis's opinion as establishing that claimant's physical condition was not caused or aggravated by her August 23, 1987, accident, we affirm the administrative law judge's determination that employer satisfied its burden of establishing rebuttal of the Section 20(a) presumption. *See Duhagon*, 169 F.3d at 615, 33 BRBS at 1 (CRT); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Next, after considering the evidence as a whole, the administrative law judge found that the opinions of Drs. Lewis, Howard and Oda are more reliable on the issue of whether claimant's cervical back complaints are related to her work injury, than the testimony of claimant and the opinions of Drs. Schmitz, Helman and Thorngate. In his October 11, 1990, report, Dr. Lewis stated that he found no evidence of significant cervical or lumbar nerve root compression or other sign of significant neurological or neurosurgical disability. He further stated that the objective tests showed only normal aging changes and that there was no evidence of a medical problem which might be responsive to surgical intervention. *See* Emp. Ex. 12. The administrative law judge credited Dr. Lewis's report and found that it directly contradicted claimant's testimony that Dr. Lewis was hostile in insisting on performing surgery. *See* Decision and Order on Remand at 7-9. Dr. Oda, an orthopedist who examined claimant in 1989 and 1995, opined that claimant had mild degenerative disc disease of the cervical and lumbar spine without radiculopathy, that her fall did result in temporary disability, but that as of her examination on December 4, 1989, claimant was capable of returning to her former employment as a cashier. *See* Emp. Ex. 8; Emp. Ex. 23 at 21. Dr. Oda's opinion was unchanged in 1995. *See* Emp. Ex. 8. Dr. Howard, who initially opined that claimant's neck complaints were related to her August 23, 1987, fall, testified that he was uncertain as to whether she was disabled from performing her usual work. *See* Cl. Ex. 11, at 10. The administrative law judge interpreted Dr. Howard's testimony, taken as a whole, to be largely in agreement with the opinions of Drs. Lewis and Oda. In contrast to these opinions, the administrative law judge gave little weight to Dr. Thorngate's opinion on June 27, 1989, that claimant was to avoid heavy work due to back pain, *see* Cl. Ex. 6, as Dr. Thorngate did not provide any basis for this conclusion. The administrative law judge agreed with Dr. Oda's assessment that since Dr. Thorngate did not order any diagnostic tests at that time, he was not overly concerned about her headaches and other pains. *See* Decision and Order on Remand at 6-7; Emp. Ex. 8. The administrative law judge further rejected the opinion of Dr. Schmitz that claimant cannot return to her former employment, finding his examination cursory and his testimony confusing, uncertain and mistaken about her medical history, specifically, that he was unaware that claimant had neck complaints prior to her fall in 1987 and that she did not complain of neck pain in the first ten months after the fall. *See* Tr. at 130-131; Cl. Ex. 9. Lastly, the administrative law judge found that Dr. Helman's opinion of October 10, 1990, was internally inconsistent

with regard to the issue of causation. *See* Emp. Ex. 13; Decision and Order on Remand at 11. Thus, the administrative law judge found that claimant's fall at work on August 23, 1987, caused superficial injuries, bringing on symptoms which dissipated after October 12, 1987, and that claimant suffered no disability beyond this date.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). As the administrative law judge acted within his discretion in crediting the opinions of Drs. Lewis, Oda and Howard over those of Drs. Thorngate, Schmitz and Helman, we affirm the administrative law judge's determination that claimant's cervical back condition is not related to the work-related fall on August 23, 1987. *See, e.g., Rochester v. George Washington University*, 30 BRBS 233 (1997).

With regard to claimant's psychological condition, the administrative law judge initially found that claimant's 1988 Section 8(i) settlement of her claim arising from a scalding incident in 1977 barred any claim for aggravation of her psychological condition. *See* Decision and Order on Remand at 16. In the Section 8(i) settlement, the parties agreed to a lump sum of $50,000, and in return claimant agreed to waive any entitlement to benefits attributable to either the 1977 scalding incident, the varicose vein condition, or the psychological injury as of the date the settlement was approved, and that employer would not be liable for any medical costs for future psychological care, unless claimant was injured to a greater degree. *See* Emp. Ex. 7. Claimant's claim for aggravation of her psychological condition in the instant case, if true, would represent a greater injury. Moreover, contrary to the administrative law judge's finding, the Section 8(i) settlement was intended to finalize claimant's claim of physical and psychological injuries as a result of the 1977 scalding incident, and thus, discharged employer's liability for that event. The settlement, which references solely the 1977 incident, does not contain the specific information required by the regulatory criteria for a proper settlement of claimant's allegations concerning the August 23, 1987, incident. *See* 20 C.F.R. §702.242; *see Clark v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 121 (1999)(McGranery, J., concurring). Accordingly, we hold that the administrative law judge's determination in this regard is in error.

Considering the issue of whether claimant's psychological condition was aggravated by her fall on August 23, 1987, the administrative law judge found that employer established rebuttal of the Section 20(a) presumption based on the opinion of Dr. Zeitz. In his December 2, 1987 report, Dr. Zeitz diagnosed claimant as suffering from probable mixed personality disorder with depressive, paranoid and schizoid features. Dr. Zeitz agreed with his earlier assessment in April 1987, that if it was concluded that

claimant's pre-existing vascular problem was aggravated by her employment, then her psychological condition would be job related in part, but that if her employment did not aggravate her vascular problem, it was his opinion that claimant's psychological disability was non-industrial in origin and represents a progression of her pre-existing psychological condition. *See* Emp. Ex. 17. The administrative law judge credited the opinion of Dr. Beach, who opined on August 27, 1988, that claimant's varicose vein condition was unaffected by her cafeteria fall on August 23, 1987. *See* Emp. Ex. 19. The administrative law judge then determined that the combination of the opinions of Drs. Zeitz and Beach constitutes substantial evidence that claimant's August 23, 1987, cafeteria fall did not aggravate her pre-existing psychological condition. *See* Decision and Order on Remand at 13. As the administrative law judge rationally credited the opinions of Drs. Zeitz and Beach, and their opinions constitute substantial evidence that claimant's psychological condition was not aggravated by her cafeteria fall, we affirm the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption in this regard. *See Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995).

Weighing the evidence as a whole, the administrative law judge credited the opinion of Dr. Zeitz, finding that his opinion was supported by the opinions of Drs. Detrick and Fennel. Dr. Detrick opined that claimant is inclined to have "persecutory" ideas and that she shows chronic depression in the form of a dysthemic order, but he did not address the issue of causation. *See* Emp. Ex. 18. Similarly, Dr. Fennell, in his notes written five weeks after the August 23, 1987, accident, acknowledged claimant's general complaints about employer and her obsessiveness about her previous workers' compensation claims but made no mention of the August 23, 1987, cafeteria fall. *See* Cl. Ex. 14. In 1989, Dr. Fennell commented that claimant's obsessive behavior had not changed, but noted that not working had been otherwise beneficial. *Id.* The administrative law judge credited the opinions of Drs. Zeitz and Fennell, and viewed in light of Dr. Beach's records which ruled out an aggravation of claimant's varicose vein condition from the cafeteria fall, the administrative law judge concluded that claimant's cafeteria fall on August 23, 1987, did not aggravate her psychological condition. As the administrative law judge acted within his discretion in crediting the opinions of Drs. Zeitz, Fennell and Beach, we affirm the administrative law judge's determination that claimant's psychological condition is not related to her August 23, 1987, work accident. *See Calbeck*, 306 F.2d at 693; *John W. McGrath Corp.*, 289 F.2d at 403.

Lastly, the administrative law judge determined that since claimant failed to allege, either before or during the initial hearing, that she suffered an aggravation of her psychological condition due to harassment by her supervisors subsequent to her transfer from the cafeteria to the snack bar, such a contention need not be addressed. *See* 20

[2]In her brief to the administrative law judge following the initial hearing, claimant, who was then represented by counsel, implied that the transfer from the cafeteria to the snack

C.F.R. §702.336(b). Nevertheless, the administrative law judge, who had granted claimant a *de novo* review pursuant to her request for modification under Section 22 of the Act, 33 U.S.C. §922, evaluated the medical evidence and determined that Dr. Zeitz's opinion on December 2, 1987, would rebut the Section 20(a) presumption in this regard. In his report, Dr. Zeitz stated that it was not medically probable that the behavior of employer is a reasonable explanation for her feelings of being abused or harassed, and specifically, that the behavior by claimant's supervisors did not aggravate her pre-existing psychological condition. *See* Emp. Ex. 17. The administrative law judge noted that this opinion was made prior to the transfer to the snack bar, but found that it was applicable because of the claimant's assertion that this harassment mirrored the harassment that occurred subsequent to the 1977 scalding. The administrative law judge then determined that since Dr. Zeitz's opinion was the only evidence submitted in this regard, claimant could not establish that any harassment by employer aggravated her pre-existing psychological condition. *See* Decision and Order at 17. We hold that the administrative law judge properly found the opinion of Dr. Zeitz is sufficient to rebut the Section 20(a) presumption, *see Phillips*, 22 BRBS at 94, and to establish the lack of a causal connection between claimant's alleged harassment by her supervisors and her psychological condition. *See Rochester*, 30 BRBS at 233. We therefore affirm the administrative law judge's finding that claimant's current psychological condition is not related to her employment.

Accordingly, the Decision and Order on Remand of the administrative law judge is affirmed.

SO ORDERED.

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bar in December 1988 resulted in harassment by her supervisor, and that such harassment mirrored her difficulties following the 1977 scalding incident. At the second hearing, claimant testified that her supervisor, on at least one occasion, made threatening remarks and threw a staple gun at her, though it is unclear when this alleged incident occurred. *See* December 3, 1998 Hearing Transcript at 23. Claimant also submitted a statement alleging harassment by her supervisor following her transfer to the snack bar, although she did not submit any medical evidence that links this harassment with an aggravation of her psychological condition. *See* Bundle 2.

[3]Under 20 C.F.R. §702.336(b), the administrative law judge has the discretion to consider a new issue at any time prior to the filing of a compensation order. *See Lewis v. Todd Pacific Shipyards*, 30 BRBS 154 (1996). The Board has held that the administrative law judge may refuse to consider a contention raised in a post-hearing brief following the initial hearing. *See, e.g., Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge