BRB No. 03-0462

ROLAND S. MUSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
J.A. JONES CONSTRUCTION COMPANY	)	DATED ISSUED: Dec. 22, 2003
	)	
and	)	
	)	
TRAVELERS PROPERTY CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, PC), Savannah, Georgia, for claimant.

Richard J. Harris (Brennan, Harris & Rominger, LLP), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHCA-1631) of Administrative Law Judge Richard E. Huddleston 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, while working for employer on November 6, 1987, sustained an injury to his right leg. Claimant continued working for employer through January 26, 1988. He

subsequently commenced employment with Lockheed Missile and Space Company (Lockheed) on February 2, 1988. On January 10, 1989, claimant underwent surgery for a total right hip replacement for which employer accepted liability. Claimant thereafter sought treatment for various complaints, including depression, related to that surgical procedure. On July 17, 1989, claimant returned to his employment duties with Lockheed, where he developed carpal tunnel syndrome in both hands. Claimant continued to work for Lockheed until he was released in 1994. In 1995, claimant underwent surgical intervention for his carpal tunnel conditions. Thereafter, while undergoing rehabilitation as a result of his right carpal tunnel surgery, claimant allegedly aggravated his right hip. Claimant resumed treatment for his psychological condition, specifically depression, and he filed claims for benefits under the Act against both employer and Lockheed as a result of the aforementioned work-related incidents. On April 28, 2000, a Section 8(i), 33 U.S.C. §908(i), settlement agreement between Lockheed and claimant was approved by the district director. Claimant then proceeded with his claim against employer for benefits for his work-related hip injury and the depression which he averred is a result of that condition.

In his Decision and Order, the administrative law judge determined that while a causal relationship exists between claimant's hip condition and his employment with employer, such a relationship did not exist between claimant's present psychological problems and that employment. Next, the administrative law judge determined that claimant is entitled to temporary total disability compensation from January 26, 1988 to February 22, 1988, and from January 10, 1989 to July 9, 1989, permanent partial disability compensation at a weekly rate of $99.17 from February 23, 1988 to January 6, 1989, and permanent partial disability compensation at a weekly rate of $19.71 from July 10, 1989 and continuing. 33 U.S.C. §908(b), (c)(21). Lastly, the administrative law judge awarded claimant medical expenses for his hip condition. 33 U.S.C. §907.

On appeal, claimant challenges the administrative law judge's finding that employer rebutted the Section 20(a) presumption that claimant's depression is related to his employment with employer, as well as the administrative law judge's calculation of claimant's post-injury wage-earning capacity. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant initially contends that the administrative law judge erred in finding that employer rebutted the presumed causal connection between his ongoing psychological condition and his employment with employer. It is well-established that a psychological impairment which is work-related is compensable under the Act. *American Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964); *Manship v. Norfolk & W. Railway Co.*, 30 BRBS 175 (1996). Furthermore, the Section 20(a) presumption, which provides a presumed causal nexus between the injury and employment, is applicable in psychological injury cases. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 380, 384 n.2 (1990); 33 U.S.C. §920(a). In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing not only that he has a

psychological condition but also that a work-related accident occurred or that working conditions existed which could have caused or aggravated the condition. *See Konno v. Young Bros., Ltd*, 28 BRBS 57 (1994); *Stevens v. Tacoma Boatbuilding Co.,* 23 BRBS 191 (1990). Upon invocation of the presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Brown v. Jacksonville Shipyards, Inc.,* 893 F.3d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). Moreover, as the Section 20(a) presumption applies to link claimant's condition to his employment, the burden of rebuttal is on employer where another cause of claimant's condition, including a subsequent intervening event, is alleged. *See generally Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997); *see also Plappert v. Marine Corps Exch.,* 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997); *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *James v. Pate Stevedoring Co.,* 22 BRBS 271 (1989). Where the subsequent disability is not the natural or unavoidable result of the work injury, but is the result of an intervening cause, employer is relieved of liability for the disability attributable to the intervening cause. *See Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.2d 34 (9th Cir. 1993); *see also Arnold v. Nabors Offshore Drilling, Inc.,* 35 BRBS 9 (2001), *aff'd*, 32 Fed. Appx. 26 (5th Cir. 2002)(table); *Bass*, 28 BRBS 11; *Merril,* 25 BRBS 140. If the administrative law judge finds that the Section 20(a) presumption is rebutted, the presumption no longer controls, and the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the ultimate burden of persuasion. *See Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT)(1994).

Initially, we note that the administrative law judge invoked the Section 20(a) presumption linking claimant's psychological condition to his employment with employer. *See, e.g., Phillips v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 94 (1988). As no party challenges the administrative law judge's finding that claimant is entitled to invocation of the presumption, it is affirmed.

Next, the administrative law judge found rebuttal of the Section 20(a) presumption, as to relates to claimant's psychological condition, established based upon his determination that the psychological problems that claimant had experienced as a result of his 1987 work-related injury resolved by 1990, and that claimant's current psychological condition is the result of the injury which he sustained while working for Lockheed. The administrative law judge found that claimant did not seek psychological treatment between April 1990 and 1995, and that claimant subsequently sought and received psychological treatment for depression which he believed commenced during Christmas 1994. Decision and Order at 60. These findings, however, are insufficient to support rebuttal of Section 20(a). The administrative law judge focused only on the date

he found claimant's depression reappeared to support his conclusion that claimant's employment at Lockheed severed the presumed causal connection between his depression and his hip injury. However, as the Act compensates latent injuries arising due to the natural progression of a prior work injury, the date when claimant's depression reappeared is insufficient to establish that it was related solely to claimant's wrist injuries at Lockheed. Moreover, according to the medical evidence relied upon by the administrative law judge, in 1995 claimant had ongoing complaints regarding his back, hip, legs and right wrist. *See* Clt. Exs. 24 at 24; 26 at 12. Thus, claimant's hip symptoms reoccurred in the same time frame as his depression. While the evidence cited by the administrative law judge may therefore support a finding as to the period of time during which claimant's psychological symptoms reappeared,[1] it cannot establish that claimant's depression was unrelated to his hip injury. We therefore vacate the administrative law judge's finding that Section 20(a) is rebutted. The case is remanded for the administrative law judge to reconsider whether employer has produced substantial evidence to meet its rebuttal burden, *i.e.*, whether employer has rebutted the Section 20(a) presumption by showing that claimant's psychological condition was not caused or aggravated by his work for employer or his hip injury.

Lastly, claimant asserts that the calculations utilized by the administrative law judge to adjust claimant's post-injury wage-earning capacity for inflation are confusing and that, since it is unclear whether the administrative properly rendered such an adjustment, the administrative law judge should be instructed on remand to show his precise calculations regarding this issue. We disagree.

An award for permanent partial disability compensation in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988). In making this calculation, the wages earned in a post-injury job must be adjusted to the wages that job paid at the time of claimant's injury and then compared with his average weekly wage to compensate for inflationary effects. *See Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *LaFaille v. Benefits Review Bd.*, 884 F.2d 54, 22 BRBS 108(CRT)(2d Cir. 1989); *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT)(D.C. Cir. 1986); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *see also Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995)(*Rambo I*)(The Supreme Court noted the administrative law judge's wage-earning capacity analysis in which he properly accounted for inflation.) In *Richardson*, 23 BRBS 327, the Board held that in the absence of evidence concerning the wages paid in the post-injury job at the time

[1] Contrary to the office note of Dr. Lemel, claimant testified at the formal hearing that the depression which he experienced in the late 1980's in fact never ended. *See* Tr. at 156-157.

of injury, the administrative law judge should use the percentage increase in the National Average Weekly Wage (NAWW) to make this calculation.

In the instant case, the administrative law judge's acceptance of the parties' stipulation regarding claimant's average weekly wage at the time of his injury, $498.77, and his determination that claimant post-injury was capable of earning a weekly wage of $548.46, based on claimant's 1992 earnings, are not challenged by either party on appeal; accordingly, those findings are affirmed. In calculating for inflation, the administrative law judge adjusted claimant's post-injury wages downward by the percentage increase in the NAWW between November 6, 1987, the date of his injury while working for employer, and the October 1, 1992 – September 30, 1993 period. *See* Decision and Order at 64. Specifically, the administrative law judge determined that the NAWW rose 16.89 percent during this period of time,[2] and that claimant's post-injury wage earnings adjusted downward by this figure resulted in an inflation-adjusted average wage-earning capacity of $469.17 in 1987 dollars. Based on claimant's average weekly wage in 1987 of $498.77, the administrative law judge next determined that claimant sustained a loss of wage-earning capacity of $29.60 ($498.77 - $469.17; comp. rate = $19.71).

We reject claimant's assertion that the administrative law judge's calculations are "very confusing." The administrative law judge properly adjusted claimant's post-injury wage-earning capacity downward by the percentage increase in the NAWW to the date of claimant's injury, and then compared the resulting figure with claimant's average weekly wage at the time of the injury to determine claimant's loss of wage-earning capacity. *See Hundley,* 32 BRBS 254; *Cook,* 21 BRBS 4. As the administrative law judge's computation of claimant's wage-earning capacity is rational and in accordance with law, it is affirmed. *See generally Rambo I,* 515 U.S. 291, 30 BRBS 1(CRT).

[2] The NAWW for the period October 1, 1987 through September 30, 1988, was $308.48, while the NAWW for the period October 1, 1992 through September 30, 1993, was $360.57.

Accordingly, the administrative law judge's determination that claimant's present psychological condition is unrelated to his employment with employer is vacated, and the case is remanded for reconsideration consistent with this opinion. In all other respects, 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

BETTY JEAN HALL
Administrative Appeals Judge