BRB No. 10-0379

EDWARD REDDEG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	DATE ISSUED: 12/29/2010
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Jeffrey Winter, San Diego, California, for claimant.

Barry W. Ponticello (England, Ponticello & St. Clair), San Diego, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2009-LHC-00375, 2009-LHC-00376) of Administrative Law Judge Gerald M. Etchingham rendered on claims 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).

On August 11, 2005, claimant injured his lower back while pushing an electrical panel during the course of his employment for employer. Claimant was examined by Dr. Adsit on August 17, 2005, who diagnosed a sprain or strain that aggravated claimant's pre-existing degenerative disc disease. Employer placed claimant on light-duty work

providing parking lot security. Thereafter, claimant resumed his regular work for two weeks, which exacerbated his back condition, prompting his return to light-duty security work for employer. Dr. Adsit treated claimant's back until January 20, 2006, when, following claimant's complaints of pain, the doctor referred claimant to Dr. Raiszadeh, an orthopedic surgeon. Dr. Raiszadeh opined, on February 23, 2006, that claimant's lower back injury had reached maximum medical improvement and he imposed a permanent work restriction of no heavy lifting. At the request of the parties and based on their stipulations, the district director, on May 6, 2006, issued a compensation order awarding claimant $7,920 in permanent partial disability compensation for his August 2005 back injury.[1]

In July 2006, claimant was assigned to perform electrical installation work on board ships. Claimant's duties included working on the "big cable crew," which was responsible for threading by hand three and one-half inch cable throughout a ship under construction. Tr. at 105, 107. Claimant returned to Dr. Raiszadeh on August 2, 2006, complaining of worsening back symptoms, which claimant attributed to working on the "big cable crew." Dr. Raiszadeh recommended that claimant return to modified work. Employer removed claimant from the "big cable crew" and provided him with lighter duty work, Tr. at 96-97, which claimant successfully performed until his discharge for cause by employer on December 14, 2006. Tr. at 120-121. Claimant subsequently filed a claim under the Act alleging cumulative back trauma caused by his work duties for employer, particularly on the "big cable crew."[2] ALJX 10; CX 1.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption linking his current back condition to his employment after August 2005. 33 U.S.C. §920(a). The administrative law judge found that employer produced substantial evidence to rebut the presumption and that, based on the record as a whole, claimant failed to establish he sustained a cumulative trauma injury from his work for

[1] The parties agreed that employer would receive a credit for previously paid permanent partial disability compensation, 33 U.S.C. §914(j), and that claimant is entitled to future medical care for his back condition. EX 2.

[2] To support his claim, claimant provided the opinions of his treating physician, Dr. Cleary, who testified that claimant sustained a cumulative trauma back injury after he returned to full-duty electrical work in January 2006. Tr. at 375. His testimony was disputed by claimant's initial treating physician, Dr. Adsit, who opined that, although claimant's post-August 2005 work duties caused flare-ups of claimant's back pain, claimant did not suffer a cumulative trauma injury as claimant's job duties did not cause further damage to his spine. Tr. at 474; EX 6 at 23, 29.

employer. The administrative law judge also addressed the extent of claimant's back disability from the initial August 11, 2005 work injury. The administrative law judge found that claimant's work restrictions had not increased since Dr. Raiszadeh opined on February 23, 2006, that claimant's back had reached maximum medical improvement with a 25 percent loss of his pre-injury lifting capacity. CX 25 at 297-298. The administrative alternatively found that claimant was not entitled to any additional total or partial disability benefits since employer provided suitable alternate employment to claimant at all relevant times, including from August to December 2006, until claimant was terminated for misconduct. The administrative law judge also rejected claimant's contention that he is entitled to compensation for the period from November 2007 to September 2008 when he underwent vocational training, and moreover, found that employer remains liable for medical care for pain and symptoms related to claimant's initial work injury on August 11, 2005.

On appeal, claimant challenges the administrative law judge's finding that he did not sustain any additional back injury due to his work for employer after August 2005. Claimant also asserts his entitlement to a *de minimis* award. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant first argues that the administrative law judge erred by finding that employer established rebuttal of the Section 20(a) presumption. 33 U.S.C. §920(a). In this case, the administrative law judge properly found the Section 20(a) presumption invoked. The administrative law judge relied on claimant's complaints of continued back pain to his physicians, Drs. Cleary and Raiszadeh, and his MRI results to find that claimant had a harm to his back after August 2005. He further relied on the nature of claimant's work on the "big cable crew" to find that this work could have caused additional trauma to claimant's back. *See generally Albina Engine & Machine v. Director, OWCP*, ___ F.3d ___, No. 09-70592, 2010 WL 5029538 (9th Cir. Dec. 10, 2010). Where, as here, 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 by his work, or that his pre-existing back condition was not aggravated or contributed to by his employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). The aggravation rule provides that where an employment injury aggravates, accelerates, or combines with a pre-existing impairment, the entire resultant disability is compensable. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *see also Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). In this case, claimant sought benefits under the Act based on the aggravation rule by asserting he sustained cumulative

trauma during the course of his employment from August 12, 2005 to July 12, 2006.[3] *See generally Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990).

In his decision, the administrative law judge found that claimant's lack of credibility undermines Dr. Cleary's diagnosis of a cumulative trauma injury and constitutes substantial evidence to rebut the Section 20(a) presumption. Decision and Order at 19. The administrative law judge additionally found that the opinions of Drs. Adsit and Raiszadeh rebut the presumption. We cannot affirm the administrative law judge's findings that the reports and testimony of Drs. Adsit and Raiszadeh establish rebuttal of the Section 20(a) presumption. The administrative law judge relied on Dr. Adsit's statement that claimant did not sustain a cumulative trauma injury because there is no evidence of additional spinal damage. Decision and Order at 19; *see* Tr. at 474. However, Dr. Adsit also opined that the temporary flare-ups of back pain claimant experienced at work were related to the natural progression of the original work injury, as well as to claimant's work activities for employer after his return to work. Tr. at 476; EX 6 at 23, 29. Employer must produce substantial evidence of the absence of a connection between claimant's condition and his work for employer. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Since Dr. Adsit opined that claimant's work activities caused a temporary flare-up of claimant's back symptomatology, his opinion does not rebut the Section 20(a) presumption. *See generally Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984). Moreover, contrary to the administrative law judge's finding, Dr. Raiszadeh's opinion, that claimant did not sustain a cumulative trauma injury as a result of his continued work for employer, cannot rebut the presumption since the physician did not address whether claimant's pre-existing back condition was aggravated by his continued employment.[4] *See Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *Jones v. Aluminum Company of America*, 35 BRBS 37 (2001). Where a claim is based on aggravation, employer must produce substantial evidence that claimant's condition

[3] Additionally, the district director noted, by correspondence dated January 7, 2009, that claimant's original claim for benefits remained viable such that "he is entitled to pursue additional compensation and medical benefits," EX 7, and the administrative law judge also addressed the issue of additional disability due to claimant's initial work injury. *See* Decision and Order at 21-23.

[4] Moreover, Dr. Raiszadeh's imposition of additional work restrictions on claimant in August 2006, and again in September 2006, suggest a belief that claimant's work activities aggravated his back condition. CX 32.

was not aggravated by his employment in order to rebut the Section 20(a) presumption. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). In the absence of medical evidence legally sufficient to rebut the Section 20(a) presumption, claimant's lack of credibility alone is insufficient to constitute substantial evidence sufficient to rebut the Section 20(a) presumption. *See Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995); *Craig v. Maher Terminal, Inc.*, 11 BRBS 400 (1979); *see generally Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Consequently, as employer did not present substantial evidence that claimant's pre-existing back condition was not aggravated by his employment with employer, we reverse the administrative law judge's determination that the Section 20(a) presumption was rebutted and the conclusion that claimant's working conditions did not aggravate his prior back condition.[5] Claimant's back condition is, therefore, work-related as a matter of law. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

Claimant next contends that he is entitled to a *de minimis* award.[6] A nominal award under Section 8(h), 33 U.S.C. §908(h), is appropriate when a worker's work-related injury has not diminished his current wage-earning capacity but there is a significant potential that the injury will cause a reduced wage-earning capacity in the future. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Keenan v. Director, OWCP*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004). The Supreme Court stated that, in such cases, a nominal award gives full effect to Section 8(h)'s admonition that the future effects of an injury must be considered when assessing an employee's post-injury wage-earning capacity. *Rambo II*, 521 U.S. at 131-132, 136-137, 31 BRBS at 57-58, 60-61(CRT).

[5] Nonetheless, we affirm the administrative law judge's conclusion that claimant is not entitled to any additional disability benefits based on a present loss of wage-earning capacity as it is not challenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *see* discussion, *infra*.

[6] Claimant's failure to explicitly raise his entitlement to a *de minimis* award before the administrative law judge does not preclude consideration of that issue in this case given that the parties disputed the "nature and extent of disability" and claimant sought total disability benefits. A claim for total disability includes a claim for any lesser degree of disability. *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996), *aff'd and remanded sub nom. Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

In *Rambo II*, the claimant injured his back and leg at work. Following his recuperation, he was released to return to work with permanent physical restrictions. He trained to become a crane operator, and he returned to work in that job making three times the amount he had made prior to his injury. The Supreme Court remanded the case to the administrative law judge for a determination of whether there was a significant possibility that Rambo's injury would cause a reduction in his wage-earning capacity in the future. If so, the Court stated that it would be proper to award nominal compensation, which would preserve Rambo's right to file a motion for modification under Section 22, 33 U.S.C. §922, in the future. *Rambo II*, 521 U.S. at 136-137, 31 BRBS at 60-61(CRT).

Similarly, in *Keenan*, a longshoreman injured his right shoulder and underwent two surgeries, but residual symptoms and permanent impairment persisted. Keenan was unable to perform heavy or repetitive overhead work, and he had to limit his lifting activities above chest level. He returned to work with restrictions and worked as a marine clerk, earning more than he had made as a longshoreman. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, stated that Keenan's situation is precisely analogous to Rambo's, and the court remanded the case for the administrative law judge to address whether Keenan satisfied the relevant factors in *Rambo II*. Specifically, the Ninth Circuit stated:

> The Court could not have made it clearer that present employment in which the worker is able to avoid using the impaired body part, far from removing the basis for a *de minimis* award, is exactly the circumstance for which nominal compensation is designed. * * * If there is a chance of future changed circumstances which, together with the continuing effects of Keenan's injury, create a "significant potential" of future depressed earning capacity, then Keenan is entitled to the possibility of a future modified award under *Rambo II*.

Keenan, 392 F.3d at 1047, 38 BRBS at 94(CRT).

The administrative law judge in this case acknowledged that he was not "able to identify – any evidence within the record demonstrating that claimant did *not* sustain some level of permanent impairment following the August 11, 2005 injury." Decision and Order at 21 n.6 [emphasis in original]. In addressing claimant's permanent restrictions, the administrative law judge credited Dr. Raiszadeh's permanent work restriction of "no very heavy lifting," and corresponding opinion that claimant has a "25% loss of pre-injury capacity to lift." EX 12. Additionally, the record establishes that claimant sought and successfully completed vocational rehabilitation, which is available

only to injured workers with permanent impairments.[7] 20 C.F.R. §702.501; CXs 4, 17. As the record contains evidence that claimant has some permanent impairment relating to his work injury, we must remand this case for the administrative law judge to address whether claimant established the significant potential of a future loss of wage-earning capacity due to his impairment such that he is entitled to a *de minimis* award. *Rambo II*, 521 U.S. at 131-132, 136-137, 31 BRBS at 57-58, 60-61(CRT); *Keenan*, 392 F.3d at 1047, 38 BRBS at 94(CRT).

Accordingly, the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption is reversed and claimant therefore has a work-related back condition. The denial of additional disability is vacated and the case remanded for the administrative law judge to determine claimant's entitlement to a *de minimis* award for his back condition.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[7] Specifically, claimant's initial request for training as a truck driver was rejected by a Department of Labor (DOL) vocational rehabilitation counselor as being beyond claimant's permanent restrictions. CX 17. However, claimant's subsequent request for training in customer service and as an information clerk was recommended by the DOL vocational rehabilitation counselor, CX 4, and the record reflects that claimant successfully completed this training. Tr. at 141-142,. 325-326.