BRB No. 12-0226

MYRA TYLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAIN INDUSTRIES, INCORPORATED	)	DATE ISSUED: 12/17/2012
	)	
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.

Myra Tyler, Newport News, Virginia, pro se.

Brian L. Sykes and Lisa L. Thatch (Vandeventer Black LLP), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2011-LHC-00702, 00703) of Administrative Law Judge Kenneth A. Krantz 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). 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).

Claimant, while working for employer as a painter and cleaner, sustained injuries to her tailbone and back, and alleged injuries to her neck and right ankle, as a result of an accident which occurred on July 31, 2008. Claimant also subsequently alleged that her working conditions for employer caused her carpal tunnel syndrome (CTS). Employer paid claimant temporary total disability benefits from August 1, 2008 through December

8, 2008, as compensation for her work-related tailbone and back injuries. Employer, however, controverted claimant's alleged neck and right ankle injuries, as well as the work-relatedness of her CTS and her claim that she remained totally disabled as a result of her work-related tailbone and back injuries.

In his decision, the administrative law judge found that claimant is entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to her neck pain but not for her CTS or alleged injuries to her right ankle, feet, legs, hips, shoulders and knees. The administrative law judge then found that employer established rebuttal of the Section 20(a) presumption with regard to the neck pain and that, based on the evidence as a whole, claimant did not establish that she sustained a neck injury causally related to her accident with employer. Addressing the nature and extent of claimant's work-related tailbone/back injury, the administrative law judge found that claimant reached maximum medical improvement and was released to full-duty status as of December 8, 2008. The administrative law judge thus found that claimant was temporarily totally disabled from August 1, 2008 through December 8, 2008, a period for which employer had fully paid compensation. The administrative law judge awarded claimant medical benefits pursuant to Section 7(a), 33 U.S.C. §907(a), for treatment relating to her work-related tailbone fracture and resulting back pain.

On appeal, claimant, appearing pro se, challenges the administrative law judge's denial of additional benefits. Employer responds, urging affirmance.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after she establishes a prima facie case. To establish a prima facie case, the claimant must show that she sustained a harm or pain and that conditions existed or an accident occurred at her place of employment which could have caused the harm or pain. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In this case, the administrative law judge found that claimant was not entitled to the Section 20(a) presumption with regard to her CTS and alleged injuries to her right ankle, right foot, left shoulder, legs, knees and hips.

Addressing claimant's CTS in terms of the Section 20(a) presumption, the administrative law judge found that, although it is undisputed that claimant established the "harm" element by virtue of the fact that she currently has CTS, claimant did not show the requisite "working conditions" element. Specifically, the administrative law judge found that claimant's testimony regarding the alleged relationship between her work for employer and her CTS is inconsistent and thus, not credible. In this regard, the administrative law judge found that, although claimant testified at least three times that

she never experienced any pain or numbness or CTS symptoms in her hand prior to working for employer on August 17, 2006, the record documents complaints of pain and swelling of the hands in December 2005 and that, on February 14, 2006, Dr. Goldberg diagnosed moderate to severe bilateral CTS. The administrative law judge further found that there is no medical opinion or evidence that claimant's CTS, diagnosed prior to her work for employer, was made worse or aggravated by or during her time with employer. Moreover, the administrative law judge relied on the statements of employer's Safety Manager, Mr. Doherty, that he did not become aware of claimant's CTS until January 2009, and that a corresponding investigation revealed that claimant never reported or complained of CTS, hand pain, wrist pain, or arm pain to anyone with employer during her time as its employee. The administrative law judge thus concluded that claimant did not invoke the Section 20(a) presumption with respect to her CTS.

The administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption with respect to her CTS, "because she did not prove that employment conditions existed that caused her CTS," Decision and Order at 15, cannot be affirmed as it evinces an incorrect legal standard. Contrary to the administrative law judge's finding, claimant is not required to prove that working conditions in fact caused the decedent's harm in order to invoke the Section 20(a) presumption; rather, claimant need establish only the existence of working conditions which *could have* caused the harm. *See, e.g., See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Brown v. I.T.T./Continental Baking Co.*, 901 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *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 v. G.A.T.X. Corp.*, 30 BRBS 71 (1996). Moreover, an injury need not manifest itself during the term of employment in order to be work-related. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

In this case, it is undisputed that claimant had CTS at the time of her work for employer and claimant's use of a grinder for about four hours every other day at work could have aggravated her CTS. While the administrative law judge noted the evidence regarding the tools claimant used,[1] he did not sufficiently discuss it in terms of the appropriate standard for invocation of the Section 20(a) presumption. Decision and Order at 15. The administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption with regard to her CTS is therefore vacated, and the case is remanded for the administrative law judge to reconsider this issue. *Hunter*, 227 F.3d 285,

[1]The administrative law judge did not discredit this testimony and in fact seemingly found it to be true. Decision and Order at 15.

34 BRBS 96(CRT); *Bolden*, 30 BRBS 71. If, on remand, the administrative law judge finds claimant entitled to the Section 20(a) presumption with regard to her CTS, he must then consider whether employer produced substantial evidence that claimant's injury was neither caused nor aggravated by her working conditions.[2] In addressing employer's evidence, we note that mere evidence of pre-existing conditions alone cannot rebut the Section 20(a) presumption in view of the aggravation rule.[3] *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

The administrative law judge's findings that claimant is not entitled to the Section 20(a) presumption with regard to alleged injuries to her right ankle, right foot, left shoulder, legs, knees and hips, however, are affirmed. With regard to claimant's alleged right ankle injury, the administrative law judge stated that, although claimant complained to Drs. Mest and Carlson of right ankle pain related to an alleged fall at work, neither physician found anything wrong with her ankles. EXs 9, 11. Moreover, the administrative law judge rationally rejected claimant's vague statement that she injured her right ankle as a result of a work accident when she fell in a hole, because she did not report this incident to employer or mention it until more than a year after her work with employer ended.[4] *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29

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[2]If the administrative law judge determines that claimant is entitled to the Section 20(a) presumption and that employer did not establish rebuttal with regard to claimant's CTS, claimant's CTS is work-related as a matter of law, and the administrative law judge must address the nature and extent of any disability arising from that condition.

[3]The administrative law judge nonetheless concluded that claimant did not establish, by a preponderance of the evidence, that her CTS was caused or aggravated by her work for employer. The administrative law judge discredited claimant's statements that her CTS was caused by her work for employer, *see* Decision and Order at 21-22, and found that there is no affirmative medical evidence stating that her CTS was aggravated or accelerated by her work for employer. As the administrative law judge's findings are rational, supported by substantial evidence and in accordance with law, his conclusion, upon weighing the evidence on the record as a whole, that claimant did not establish a causal connection between her pre-existing CTS and her work for employer is affirmed. In light of this, if, on remand, the administrative law judge finds claimant entitled to the Section 20(a) presumption with regard to her CTS, and that employer established rebuttal thereof, his denial of benefits for this condition is affirmed. *See generally Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

[4]The administrative law judge rationally found that there is a lack of any objective substantiation of the "hole in the ground" incident. Decision and Order at 19.

BRBS 79(CRT) (5th Cir. 1995); *Mijanjos v. Avondale Shipyards*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). We therefore affirm the administrative law judge's finding that claimant was not able to show either the requisite harm or accident element, and thus, is not entitled to the Section 20(a) presumption with regard to her alleged right ankle injury, as it is rational and supported by substantial evidence. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

Similarly, the administrative law judge found that, although claimant told Dr. Mest in September 2009 that her foot was hurting due to her falling in a hole at work, claimant did not repeat her allegation in her deposition or at the hearing, relating in any way her foot pain to her employment. As Section 20(a) applies only to claims alleging a work injury, *U.S. Industries*, 455 U.S. 608, 14 BRBS 631, we affirm the administrative law judge's rational finding that claimant is not entitled to the Section 20(a) presumption with regard to her right foot condition.

The administrative law judge next found that the record does not support claimant's allegation of a left shoulder injury. The administrative law judge relied on the opinions of Drs. Tapscott and Carlson who opined on October 7, 2009, and on November 10, 2010, that claimant's left shoulder was normal. EXs 9, 11. Thus, finding that there is no diagnosis of any shoulder injury, the administrative law judge rationally concluded that claimant has not met her prima facie burden of alleging a shoulder injury. As this finding is supported by substantial evidence, it is affirmed. *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

As for claimant's legs, knees, and hips, the administrative law judge found that while claimant sufficiently alleged a "harm," at no point did claimant connect the leg, hip, or knee complaints to the July 31, 2008 accident, to any other work-related accident, or to employer's work environment or conditions. The administrative law judge specifically noted that in her January 2010 deposition, claimant testified that no body part other than her tailbone, and possibly her left shoulder, were injured on July 31, 2008.[5] *See* EX 2, Dep. at 9. As claimant did not relate her complaints of pain in her legs, knees, and hips to the July 31, 2008 work accident or to any other incident at work, we affirm the administrative law judge's conclusion that claimant is not entitled to the Section 20(a) presumption with regard to these injuries. *U.S. Industries*, 455 U.S. 608, 14 BRBS 631.

[5]Moreover, the administrative law judge recognized that Dr. Kerner, who first saw claimant on September 3, 2008, with regard to complaints of significant buttock pain, stated that claimant "describes having other symptoms in her neck, arm, back, and leg, but on questioning, these are not related to this injury and pre-exist this [July 31, 2008] fall." EX 8.

Therefore, the administrative law judge's findings that claimant did not establish any work-related injuries to her right ankle, right foot, left shoulder, legs, knees and hips, and the resulting denial of benefits for such alleged injuries, are affirmed. *U.S. Industries*, 455 U.S. 608, 14 BRBS 631; *Bolden*, 30 BRBS 71.

Having found that claimant invoked the Section 20(a) presumption only with respect to her neck pain, the administrative law judge next considered whether employer presented sufficient rebuttal evidence. Once the Section 20(a) presumption is invoked, as here, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT). If the administrative law judge finds 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, with claimant bearing the burden of persuasion. *Id.*; *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge found that, while claimant often reported neck pain, none of the physicians to whom she reported her pain could explain it, and that no physician related the pain to the work accident or to claimant's work for employer in general. Specifically, he found that the reports of Drs. Kerner and Mest, reflecting either no symptomatology connected to work, or any pain at all,[6] sufficient to establish rebuttal, as they show that claimant's neck symptoms are unrelated to her work for employer. CX 1; EXs 8, 9. The administrative law judge's reliance on the opinions of Drs. Kerner and Mest to find a lack of a causal connection between claimant's alleged neck symptoms and her work for employer is affirmed as it is rational and supported by substantial evidence. *See generally Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995).

Weighing the evidence as a whole, the administrative law judge found that claimant's neck pain is not causally related to her employment. The administrative law judge found that the only evidence of any neck problem, other than the documented yet unexplained swelling in October 2009, is claimant's subjective testimony and complaints.

[6]In this regard, the administrative law judge found that Drs. Kerner and Mest expressed an inability to find anything actually wrong with claimant's neck, with Dr. Kerner explicitly describing claimant's illness behavior as inappropriate considering her symptomatology and therapy. CX 1; EXs 8, 9. Moreover, the administrative law judge noted that the record contains only one neck-related symptom confirmed by a physician, i.e., swelling in October 2009, more than a year after the accident, but that the physician, Dr. Tapscott, did not connect the swelling to the accident. EX 9.

In this regard, the administrative law judge rationally found that several physicians from different disciplines were unable to confirm the pain, explain it, or tie it to her employment. Moreover, the administrative law judge found that the numerous inconsistencies and contradictions between claimant's subjective complaints and the whole of the medical evidence rendered her testimony and subjective complaints not "credible enough to establish, by a preponderance of the evidence, that she has a neck injury or that it was causally related to her work with employer." Decision and Order at 21; *see generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We, therefore, affirm the administrative law judge's finding that claimant did not establish that she sustained a work-related neck injury as it is supported by substantial evidence.

Turning to the nature and extent of claimant's work-related tailbone/back injury, the administrative law judge found that Dr. Kerner, who served as claimant's treating physician for her tailbone/back injury, declared claimant to be at maximum medical improvement with regard to that injury on December 8, 2008, a position to which Dr. Aspili deferred and with which Dr. Carlson concurred. CX 1; EXs 6, 9, 11; Decision and Order at 24. He thus concluded that the record supports a finding that claimant's condition reached maximum medical improvement as of December 8, 2008. The administrative law judge's findings accurately reflect the record. CX 1; EXs 6, 9, 11. Therefore, his finding as to the date of maximum medical improvement is affirmed as it is supported by substantial evidence. *See Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

In order to establish a prima facie case of total disability, claimant must prove that she is unable to perform her usual work due to the injury. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Delay*, 31 BRBS 197. In this case, the administrative law judge credited the opinion of Dr. Kerner that claimant was capable of returning to full-duty work status without any restrictions as of December 8, 2008, to conclude that claimant did not establish she was disabled subsequent to that date due to the tailbone/back condition related to her July 31, 2008 work injury. *See* Decision and Order at 23. In reaching this conclusion, the administrative law judge acted within his discretion in giving less weight to the testimony of claimant that she was given restrictions by Drs. Aspili and Kerner in December 2009 and thus is incapable of performing any work, due to the contrary medical opinion evidence and the absence of corroborating objective medical test results. *See generally Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.2d 449, 37 BRBS 7(CRT) (4th Cir. 2003). The opinion of Dr. Kerner, therefore, constitutes substantial evidence supporting the conclusion that claimant was not disabled by her work injuries after December 8, 2008. Therefore, we affirm the administrative law judge's denial of additional disability compensation for

claimant's work-related tailbone/back injury. *See generally Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

Accordingly, the administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption with regard to her CTS is vacated, and the case is remanded for further consideration of this issue consistent with this decision. In all other regards, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge