

BRB No. 99-0353

JUDITH MERRITT)
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 Claimant-Petitioner)
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 v.)
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 U.S. NAVY EXCHANGE) DATE ISSUED: Dec. 22, 1999
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 and)
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 CRAWFORD & COMPANY)
)
 Employer/Administrator-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Edward C. Burch,
Administrative Law Judge, United States Department of Labor.

Judith Merritt, Oak Harbor, Washington, *pro se*.

Russell A. Metz (Metz & Associate, P.S.), Seattle, Washington, for employer/
administrator.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative
Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (97-LHC-2864) of Administrative Law Judge Edward C. Burch 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 who is not represented 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. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359

(1965); 33 U.S.C. §921(b)(3).

Claimant was working at an espresso stand on March 25, 1995, at a Navy Exchange, when her right hand became numb and she dropped a pitcher of steaming milk. She consulted Dr. Lycksell, who thought there were three possible causes of claimant's complaints: arthritis, a neck problem, or carpal tunnel syndrome. Claimant was subsequently diagnosed with carpal tunnel syndrome. She underwent two carpal tunnel releases in the summer of 1995. Employer paid temporary total disability benefits from April 14, 1995, through October 4, 1995, when claimant returned to work with a lifting restriction.

Claimant was moved among different departments upon her return. Emp. Ex. 11 at 27. She alleges that her condition improved until February 1996 when she was assigned to work at the "Classic Six" snack bar in Hangar 6, where she had to do lifting, stocking and putting supplies away. Emp. Ex. 11 (Claimant's Deposition) at 27-28. She developed numbness going up her arm, which she attributed to the aftermath of the carpal tunnel surgery and which gradually got worse and went up into her shoulder. Emp. Ex. 2 at 9. Claimant sought treatment from various doctors to whom she complained of pain in her wrists, forearms, neck and shoulders. She was off work from July 8, 1996, until Dr. Lycksell released her to work for four to six hours per day with a 25-pound lifting restriction on November 7, 1996. Employer laid claimant off on November 21, 1996, because she could not perform the work.

Claimant filed "An Associates Notice of Injury" on February 21, 1997, and listed pain to her right hand, right arm, shoulder and neck, and listed the date of injury as "approx. March 1996." Emp. Ex. 1 at 5. Claimant filed a claim with the Department of Labor on April 2, 1997, stating "Still having problems in 1996 from original problem in 1995." Emp. Ex. 1 at 1. Claimant sought temporary total disability compensation from November 21, 1996, to June 1, 1998, and medical, retraining, and other expenses. At the hearing, the parties agreed that all benefits related to the carpal tunnel syndrome have been paid.¹ The administrative law judge found that claimant was aware of a work-related injury in her neck and back in July 1996. He found that her claim was timely filed under Section 13(a), 33 U.S.C. §913(a). He then found that as her February 21, 1997, notice to employer was given more than 30 days after the date of awareness, it was untimely under Section 12(a), 33 U.S.C. §912(a), and that the failure to give timely notice was not excused under Section 12(d), 33 U.S.C. §912(d). The administrative law judge then concluded, in the alternative, that even if claimant established a *prima facie* case with regard to causation, there was sufficient evidence to rebut the *prima facie* case, and upon weighing the evidence as a whole, claimant failed to prove by a preponderance of the evidence that any alleged pain in her neck or back constituted a compensable injury. The administrative law judge therefore denied benefits.

¹At the hearing, the parties, *i.e.*, claimant who was represented by a lay representative and employer's attorney, agreed (off the record), that they would proceed without live testimony, on the written record. Tr. at 14.

On appeal, claimant, representing herself, challenges the administrative law judge's denial of her claim for disability and medical benefits. Employer responds, urging affirmance of the denial of the claim.

Under Section 12(a), 33 U.S.C. §912(a), an employee in a traumatic injury case is required to notify the employer of her work-related injury within 30 days after the date of injury or the time when the employee was aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between her injury and employment, and that the injury will affect her earning capacity. *See Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 585, 10 BRBS 863, 865-66 (1st Cir. 1979); *cf. Paducah Marine Ways v. Thompson*, 82 F.3d 130, 134, 30 BRBS 33, 35 (CRT)(6th Cir. 1996)(interpreting identical language of Section 13). In the absence of evidence to the contrary, it is presumed pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that employer has been given sufficient notice under Section 12. *See Kashuba v. Legion Insurance Co.*, 139 F.3d 1273, 32 BRBS 62 (CRT) (9th Cir. 1998), *cert. denied*, 119 S.Ct. 866 (1999); *Lucas v. Louisiana Insurance Guaranty Association*, 28 BRBS 1, 4 (1994).

The failure to provide timely notice pursuant to Section 12(a) will bar a claim unless such failure is excused under Section 12(d), 33 U.S.C. §912(d)(1988). Section 12(d)(2) provides that failure to give such notice does not bar a claim if employer has not been prejudiced by the delay. *Kashuba*, 139 F.3d 1273, 32 BRBS 62(CRT). Prejudice under Section 12(d)(2) may be established where employer provides substantial evidence that due to claimant's failure to provide timely written notice, it was unable to effectively investigate the claim to determine the nature and extent of the illness or to provide medical services. *Kashuba*, 139 F.3d at 1275, 32 BRBS at 64(CRT); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15, 16 (1999). A conclusory allegation of prejudice is not sufficient. *Id.*; *see also I.T.O. Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989).

The administrative law judge found that claimant began developing pain in her hands, arm, and neck in February or March 1996, but was not at that time aware that this was a new injury unrelated to the carpal tunnel syndrome. He found that claimant became aware of a work-related injury in her neck and back in July 1996, based on the medical reports of Dr. Semon, Dr. McCutchan, and Dr. Haller, but did not give notice until February 1997.

The administrative law judge found that employer was prejudiced by this late notice, because it was unable to investigate the circumstances of claimant's alleged work-related injury, or to provide medical treatment and disability benefits through its workers' compensation insurer. The administrative law judge's stated reason is conclusory. He cites no evidence and accepts at face value employer's unsupported assertion that it was prejudiced by its inability to conduct proper discovery immediately after the injury and to supervise claimant's medical care. Employer does not allege, however, that the medical care she received in the months between her date of awareness and the date she gave notice was

inappropriate. *See Bustillo*, 33 BRBS at 17. Contrary to employer's assertion, the facts are thus distinguishable from those in *Kashuba*, where employer did not receive notice of the claim until four months after the alleged injury and nearly six weeks after claimant had surgery of which employer had no knowledge. 139 F.3d at 1276, 32 BRBS at 64 (CRT). Employer's unsubstantiated assertion that it could not investigate crucial details surrounding the alleged injury which would enable it to sever any presumed connection between the injury and employment is also unpersuasive in view of the lack of evidence to support it. *Bustillo*, 33 BRBS at 17. Moreover, the administrative law judge noted evidence of claimant's doctor informing employer's medical services consultant of claimant's condition and her work restriction. *See* Decision and Order at 6; Emp. Ex. 3 at 17. Employer therefore had an opportunity to participate in claimant's medical care. Further, the hearing in this case was held on April 7, 1998. Employer therefore had over one year after it received formal notice to generate medical evidence in support of its position. *See Steed v. Container Stevedoring Co.*, 25 BRBS 210, 217 (1991). As employer fails to support its generalized assertion of prejudice, we reverse the administrative law judge's determination that claimant's failure to give timely notice is not excused pursuant to Section 12(d)(2). Consequently, we reverse his determination that Section 12 bars claimant's claim.

The administrative law judge next determined, in the alternative, that the claim would fail due to claimant's failure to establish a *prima facie* case that her neck and back conditions were causally related to her employment. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that her condition is causally related to her employment if she shows that she suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that the injury was not caused by the employment. *Conoco, Inc. v. Director, OWCP*, F.3d , 1999 WL 979694 (5th Cir. Nov. 12, 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence, with claimant bearing the burden of persuasion. *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994). In analyzing whether claimant established the "harm" element of her *prima facie* case, the administrative law judge relied on the following to find she did not: claimant's failure to report pain in her neck or back to physicians until more than a year after the initial incident at the Navy Exchange, negative x-rays, and the failure of doctors to diagnose any specific industrial injury.

We reverse the administrative law judge's finding in this respect. The administrative law judge noted claimant's uncontroverted deposition testimony that she began to experience neck and shoulder pain during the early part of 1996, when she began to use her hands more

in a new job assignment. This is sufficient to establish the harm element of a *prima facie* case under Section 20(a), as it establishes that something has gone wrong with the human frame. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). That the pain did not arise until one year after claimant's carpal tunnel injury is not relevant to whether claimant has a "harm." The administrative law judge's reliance on negative x-rays also is misplaced, as objective medical evidence is not required to establish a harm. *See Welch v. Pennzoil*, 23 BRBS 395 (1990). Furthermore, as the administrative law judge notes, the medical reports in the record reference claimant's complaints as well. The fact that the physicians are unsure of the reason for her pain does not negate its existence. Moreover, claimant does not have to establish the "industrial" nature of her injury, as the Section 20(a) presumption serves to link her harm to her employment.² *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT)(D.C. Cir. 1990). Accordingly, we reverse the administrative law judge's finding that the Section 20(a) presumption is not invoked, and hold that it is invoked as a matter of law. *See generally Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

Next, as the administrative law judge's conclusion that even if claimant established a *prima facie* case, the evidence is sufficient to establish rebuttal of the Section 20(a)

²The administrative law judge made no specific finding with regard to the "working conditions" prong of a *prima facie* case. The administrative law judge, however, did not discredit claimant's statement to Dr. Vatter that she had been doing relatively well until February 1996, when she switched her job and began doing more work with her hands. Decision and Order at 4. Claimant is not required to introduce affirmative evidence establishing that her work-related activities actually caused the harm alleged in order to invoke Section 20(a); she need only introduce evidence that it could have done so. *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT)(D.C. Cir. 1990); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). The evidence presented in this case is sufficient to satisfy this limited burden. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

presumption, and that upon weighing the evidence as a whole, claimant has failed to prove by a preponderance of the evidence that any pain in her neck or back constituted a compensable injury, Decision and Order at 13 n.2, is conclusory and unexplained, it does not comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). *See generally Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). We, therefore, must remand this case for necessary findings of fact on these issues, as well as any other remaining issues, should the administrative law judge find a causal relationship between claimant's injury and her employment established.

Accordingly, the administrative law judge's findings that claimant's claim is barred under Section 12 and that claimant did not establish invocation of the Section 20(a) presumption are reversed. The case is remanded for further consideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge