BRB Nos. 99-373
and 99-373A

JUAN B. MARTINEZ	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
v.	)	
	)	
WBP SHRIMP PRODUCERS	)	
CORPORATION	)	DATE ISSUED: Dec. 22, 1999
	)	
and	)	
	)	
LIBERTY MUTUAL	)	
INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order and the Supplemental Decision and Order - - Motion for Reconsideration of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Phil Watkins, Corpus Christi, Texas, for claimant.

Andrew Z. Schreck (Galloway, Johnson, Tompkins & Burr), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order and the Supplemental Decision and Order - Motion for Reconsideration (96-LHC-27) of Administrative Law Judge Donald W. Mosser 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 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).

Claimant injured his back while unloading shrimp from a vessel and onto a truck on September 4, 1989. ALJ Ex. 5. Employer paid temporary total disability benefits from September 5, 1989, through April 19, 1990. Cl. Exs. 2, 5. Claimant, however, has not returned to work and is still undergoing treatment for this injury. He filed a claim for permanent total disability benefits which employer disputed. The administrative law judge determined that claimant is unable to return to his usual work and that employer failed to demonstrate the availability of suitable alternate employment; therefore, he found that claimant's disability is total. Because doctors stated that claimant's condition could improve with weight loss, the administrative law judge determined that, despite the length of time claimant's condition has lasted, the prognosis for improvement exists and his condition is, therefore, temporary. Consequently, the administrative law judge awarded claimant temporary total disability benefits from September 4, 1989, and continuing, at a compensation rate of $149.98 per week. Decision and Order at 9-10. He also held employer liable for a Section 14(e), 33 U.S.C. §914(e), penalty, medical expenses and interest. Decision and Order at 10-11. In a supplemental decision on claimant's uncontested motion for reconsideration, the administrative law judge amended the compensation rate to $159.08 per week, as 66_ percent of claimant's average weekly wage fell below the minimum compensation rate permitted for that period. 33 U.S.C. §906(b)(2); Supp. Decision and Order at 2.

Employer appeals the administrative law judge's decision awarding temporary total disability benefits, arguing that it rebutted the Section 20(a), 33 U.S.C. §920(a), presumption and that claimant's continuing disability is not work-related. Claimant responds, urging affirmance. Claimant cross-appeals the decision awarding temporary benefits, asserting that his condition is permanent.

Initially, we reject employer's contention that claimant's condition is not work-related. In determining whether a disability is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after he establishes a *prima facie* case. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). To establish a *prima facie* case, a claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at the employer's facility which could have caused that harm or pain. Once the presumption is invoked, an employer may rebut it by producing facts to show that a claimant's employment did not cause, aggravate or contribute to his condition. *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Obert v. John T.*

Clark and Son of Maryland, 23 BRBS 157 (1990). If the employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

As the administrative law judge stated in this case, claimant suffered a back injury at work, and that fact is undisputed. Decision and Order at 7. Moreover, the record contains no evidence of an intervening injury which could sever the relationship between claimant's condition and his employment. *See, e.g., Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997). Although there is contradictory evidence as to the cause of claimant's continued back pain, the administrative law judge credited those doctors and chiropractors who believed the pain is related, at least in part, to the work injury.[1] *Id.* at 8. Specifically, he stated that "the vast majority of doctors expressing an opinion found that the back injury played some role" in claimant's condition, and he noted that "[o]nly Dr. Reis found the continuing pain caused purely by obesity." *Id.* For example, Dr. Adobbati, who reported his findings on August 8, 1991, stated that claimant's back injury, compounded by his obesity, limited claimant's recovery and his ability to work. Cl. Ex. 6. Dr. Ross and Roy Beller, a chiropractor, stated that claimant's back condition prevents him from returning to work. Cl. Exs. 7-8.

The administrative law judge analyzed this evidence in terms of the nature and extent of claimant's disability. Although the dispute goes to the cause of claimant's condition, an issue to which Section 20(a) applies, any error is harmless as the administrative law judge fully weighed the relevant medical opinions of record.[2] In this regard, the administrative law

[1]Claimant, age 49, has been obese since he was a teenager. Tr. at 12. He also suffers from diabetes. Cl. Ex. 6.

[2]Thus, the result is no different than if Section 20(a) had been invoked by the administrative law judge, and he had found Dr. Reis's opinion rebutted it. Moreover, although the administrative law judge did state, as employer notes, that none of the opinions other than that of Dr. Reis addresses the cause of claimant's continued pain, the administrative law judge discussed ample evidence regarding the cause of

judge credited substantial evidence which supports his finding that claimant's continuing disability is related, at least in part, to his work injury. Consequently, we reject employer's contention, and we affirm the administrative law judge's finding that claimant's total disability is related to his employment. *Plappert*, 31 BRBS at 109; *Kubin*, 29 BRBS at 117.

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claimant's inability to work.

In his cross-appeal, claimant contends the administrative law judge erred in finding that his condition is temporary and not permanent. Specifically, claimant avers that his condition has continued for a lengthy period and meets the standard for being considered "permanent" under *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).[3] Under *Watson*, a claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. The administrative law judge concluded that claimant's condition does not meet this standard and is temporary because, although it has continued for a lengthy period, doctors have predicted that his condition would improve if claimant were to lose weight. Decision and Order at 9.

Claimant's injury, which occurred in September 1989, was nearly nine years old at the time of the hearing in May 1998. This alone establishes it has continued for a lengthy period and is of lasting duration. *SGS Control Servs. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Watson*, 400 F.2d at 649. Moreover, a prognosis of future improvement does not prohibit a finding of permanency. *Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989). Additionally, the Board has stated that weight loss, as a basis for the improvement of a claimant's condition, is too speculative to foreclose a determination of permanency if the claimant has been obese all his life. *Vogle v. Sealand Terminal, Inc.*, 17 BRBS 126, 130 n.9 (1985). Based on this case precedent, we hold that the administrative law judge erred in finding claimant's disability to be temporary. For this reason, we vacate his finding that claimant's disability is temporary, and we remand the case to him for reconsideration of the nature of

[3]A disability becomes permanent when the condition reaches maximum medical improvement. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In this case, the administrative law judge correctly found that no doctor deemed claimant's condition to have reached maximum medical improvement. Decision and Order at 9.

claimant's disability and a determination of if and when claimant's condition became permanent.[4]

[4]The administrative law judge may reconsider medical evidence of record which may indicate when claimant's condition stabilized, or he may opt to re-open the record for submission of additional information. 20 C.F.R. §802.405.

Accordingly, the administrative law judge's determination that claimant's disability is temporary is vacated, and the case is remanded for further consideration. In all other respects, the Decision and Order and the Supplemental Decision and Order are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge