BRB No. 04-0512

GARY NITSCHKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COASTAL TANK CLEANING	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL ADJUSTMENT COMPANY	)	DATE ISSUED: FEB 3, 2005
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Additional Compensation and Medical Benefits and Reducing the Amount of the Attorney's Fees of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gary Nitschke, Pacific, Washington, *pro se*.

Raymond H. Warns, Jr., and Robert J. Burke, Jr., (Holmes Weddle & Barcott), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand Denying Additional Compensation and Medical Benefits and Reducing the Amount of the Attorney's Fees (2001-LHC-2330) of Administrative Law Judge Richard K. Malamphy 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). In an appeal filed by a claimant without representation, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are 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).

This case is before the Board for the second time. Claimant alleged that he was physically and psychologically injured at work on January 25, 1990, after falling 20 feet into a tank on the *U.S.S. Nimitz.* The administrative law judge found that claimant injured both knees, but no other parts of his body, in the fall at work, and that claimant's psychological disorders are not work-related. The administrative law judge found that claimant's knee injuries reached maximum medical improvement on May 15, 1991, and that claimant's treatment by Dr. O'Neill was unauthorized and thus that employer is not responsible for the payment of Dr. O'Neill's medical bills. The administrative law judge ordered employer to pay claimant temporary total disability benefits from January 25, 1990, through May 22, 1991, and permanent partial disability benefits for a five percent impairment to each leg, 33 U.S.C. §908(c)(2), as stipulated by the parties. *See* Decision and Order at 2. The administrative law judge awarded claimant's counsel an attorney's fee of over $22,000.

Claimant appealed the decision on the merits, and employer appealed the attorney's fee award. The Board vacated the administrative law judge's decision and remanded for further consideration of claimant's contention that he injured other body parts in the fall at work, as the administrative law judge did not afford claimant the benefit of the Section 20(a) presumption, 33 U.S.C. §920(a), to link claimant's alleged injuries to his fall, nor did he discuss and weigh the conflicting medical evidence of record. *Nitschke v. Coastal Tank Cleaning*, BRB Nos. 02-799/A, slip op. at 3-4 (Aug. 12, 2003) (unpublished). The Board affirmed the finding that employer is not liable for the cost of the treatment provided by Dr. O'Neill. The Board vacated the fee award and remanded for the administrative law judge to reconsider the amount of the fee pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), as well as the criteria at 20 C.F.R. §702.132, and in light of any additional benefits claimant may obtain on remand. *Nitschke*, slip op. at 6-7.

On remand, the administrative law judge applied the Section 20(a) presumption to claimant's contention that he injured his back, hips, thighs, feet, ankles, shoulder, neck, and wrist in the fall at work, and that he aggravated a pre-existing psychological

condition. The administrative law judge found sufficient evidence to rebut the presumption. The administrative law judge concluded, based on the record as a whole, that claimant's alleged injuries are not related to his January 25, 1990, fall at work. Decision and Order on Remand at 4. The administrative law judge further found that the previous fee award was disproportionate to claimant's overall success, and he awarded counsel a fee of $7,000, payable by employer. *Id*. at 6-7.

On appeal, claimant, without the assistance of counsel, appeals the administrative law judge's denial of additional compensation. Employer responds, urging affirmance.

In his decision on remand, the administrative law judge credited the opinions of Drs. Brooks and Williamson-Kirkland to find that employer established rebuttal of the Section 20(a) presumption. *Id*. at 4. Employer must produce substantial evidence that claimant's injuries are not due to the work accident in order to rebut the Section 20(a) presumption. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), *aff'g* 31 BRBS 98 (1997). In his testimony, Dr. Brooks stated that only claimant's knee injuries are related to the work accident. Tr. at 174. In his November 16, 2001, report, Dr. Brooks, who examined claimant and reviewed with claimant his medical record, extensively addressed the cause of claimant's numerous physiological complaints. EX 23 at 379-394; *see* Tr. at 163-164. Dr. Brooks specifically opined that claimant's alleged hand tremors, headaches, and neck, back, and right shoulder complaints are not related to the work injury. EX 23 at 384-387. Dr. Brooks also opined that symptoms which appeared weeks or months after the January 25, 1990, work injury are probably unrelated to the fall, and that claimant's right arm and right hip complaints were first reported two and a half years after the date of injury. *Id*. at 381, 384. Dr. Brooks stated he does not know the cause of claimant's right lower-abdomen/groin pain, and left shoulder complaints, but that only knee treatment was required for claimant's fall at work, and that no medical treatment after May 15, 1991, was related to this work injury. *Id*. at 380, 395-396. Dr. Williamson-Kirkland examined claimant on June 5, 2001. In his November 7, 2001, deposition, he opined that claimant has no ongoing disability related to the January 1990 work injury, and that he could not find any evidence that there is anything physically wrong with claimant. EX 24 at 10-1, 13-14. Dr. Williamson-Kirkland also opined that claimant's psychological difficulties are mostly a congenital problem that was not caused by the work injury.[1] *Id*. at 12. Inasmuch as these

[1] The record also contains the opinion of Dr. Vandenbelt that claimant's psychological condition pre-existed the work injury. EX 21 at 279-280. Dr. Vandenbelt stated that the injury may have resulted in some depression or anxiety in the following months due to pain and physical limitation, but that claimant does not have any psychological disorder which is causally related to or currently aggravated by the occupational injury of 1990. *Id*. at 280. Dr. Vandenbelt's opinion is substantial evidence to rebut the Section 20(a) presumption with regard to the period after which total

opinions constitute substantial evidence severing the connection between claimant's alleged injuries and the January 25, 1990, fall at work, we affirm the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption. *See Duhagon*, 31 BRBS at 100; *see also Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

We cannot, however, affirm the administrative law judge's finding on remand, based on the record as a whole, that claimant injured only his knees in the work accident, as the administrative law judge erred in discrediting Dr. O'Neill's medical reports, and he failed to discuss and weigh all the relevant medical evidence. Once the Section 20(a) presumption is rebutted, all relevant evidence must be weighed to determine if a causal relationship has been established, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Employer is liable for claimant's entire disability if it is due at least in part to the work-related aggravation of a pre-existing condition. *See, e.g., Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

In this case, the administrative law judge summarily found that none of claimant's physiological complaints are related to the work injury because Dr. O'Neill, who intermittently treated claimant from January 1991 to January 2001, did not diagnose any chronic impairments to body parts other than the knees. Decision and Order on Remand at 4. This finding is erroneous. In a letter dated March 26, 2001, Dr. O'Neill opined that claimant's fall at work injured his knees and back "which has continued to give him difficulties ever since the time of the injury." CX 8 at 102. In her deposition testimony on November 16, 2001, Dr. O'Neill stated that over the course of 10 years claimant exhibited consistent muscle tightness of the back and legs, and chronic soft tissue complaints and joint pain. CX 19 at 40. Therefore, the administrative law judge's finding that Dr. O'Neill did not diagnose any chronic impairment is not supported by substantial evidence.[2] *McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136, 138 (2002); *see generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994).

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disability benefits ceased in May 1991. *See Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

[2] As there is no medical opinion of record linking claimant's current psychological condition to the work injury, we affirm the administrative law judge's conclusion that claimant failed to establish that any psychological condition was caused or aggravated by the work injury. *See generally Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd and modified on other grounds on recon.*, 22 BRBS 430 (1989).

The administrative law judge, moreover, did not discuss all the relevant evidence addressing the cause of claimant's long-standing physiological complaints. *See Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon.*, 32 BRBS 224 (1998). The administrative law judge recited claimant's other alleged ailments. He stated that the "diagnoses are scattered in variety and are not made with consistency." Decision and Order on Remand at 4. Therefore, he concluded that "it is not reasonable to relate such complaints to [sic] work related injury." *Id.* This conclusion cannot be affirmed, as the administrative law judge did not cite to any evidence supportive of his finding.

In this regard, Dr. O'Neill opined in her report dated February 26, 2001, that claimant's fall aggravated his pre-existing right shoulder and upper back conditions, and she reiterated that claimant's fall at work injured his lower back. *Id*. at 99-100. In her deposition testimony, Dr. O'Neill also linked claimant's ankle complaints to the work injury. CX 19 at 52. Dr. Billett has been claimant's family physician since September 1999. CX 18 at 3-4. He opined that that claimant has physical complaints related to his work injury that limit claimant from lifting over 50 pounds. CX 18 at 8-10. Finally, in addition to the aforementioned opinions of Drs. Brooks and Williamson-Kirkland refuting a connection between the work accident and claimant's numerous complaints, the record contains medical opinions from Drs. Kay and Ratcliffe that claimant's alleged back condition is not related to claimant's fall at work. EXs 11 at 190; 12 at 197. Therefore, we vacate the administrative law judge's finding that claimant's conditions are not work-related. The administrative law judge must weigh all this evidence in order to determine if claimant met his burden of establishing that he has additional work-related injuries. *See generally Dodd v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 245 (1989). If the administrative law judge finds that claimant has any additional work-related conditions, he must discuss whether claimant is disabled by them in terms of the medical and vocational evidence of record.[3]

Accordingly, the administrative law judge's Decision and Order on Remand Denying Additional Compensation and Medical Benefits and Reducing the Amount of the Attorney's Fees is vacated with respect to the administrative law judge's findings that none of claimant's alleged physical injuries, except his knees, is work-related, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

[3] If claimant is awarded additional permanent disability benefits, the administrative law judge must consider employer's claim for Section 8(f) relief. 33 U.S.C. §908(f).

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge