BRB No. 07-0647

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| R.S. | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| ELECTRIC BOAT CORPORATION | ) | DATE ISSUED: 01/31/2008 |
| | ) | |
| Self-Insured | ) | |
| Employer-Petitioner | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry & Neusner), Groton, Connecticut, for claimant.

Mark P. McKenney (McKenney, Quigley, Izzo & Clarkin, L.L.P.), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2005-LHC-2528) of Administrative Law Judge Colleen A. Geraghty 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 testified that he began working for employer in 1967 as a clerk, and he worked his way up the ranks until he was supervising in excess of 1000 people in the electrical and electronic departments in the 1980's. He worked long hours and was rewarded with the opportunity to work in a newly-created planning department on a new class of submarines called the Seawolf in the 1990's. After two years, the Navy reduced its order from 30 to two Seawolf subs. Claimant was assigned to work on the two Seawolf subs and then on the next new class of submarines, the Virginia class. When

that project was completed, claimant and his co-workers had to be absorbed by other divisions at employer's facility. In 2001, claimant was asked to fill in for the second-shift superintendent who was soon to retire. Following the incumbent's return from an illness, claimant opted to stay on the second shift in a lower-grade job and, effectively, be "groomed" for that superintendent position, filling in when necessary. When the position was officially posted in 2002, claimant applied and interviewed for but did not get the promotion. Despite his "humiliation" and surprise, he opted to continue working in the lower-grade, second-shift position. In January 2005, new management announced a plan to better use the skills and talents of its employees, and claimant "became rejuvenated" thinking this meant he would get a supervisory position. Within three weeks of the announcement, claimant and his counterpart were called into their supervisor's office to learn that a lead person would be placed "above" them to coordinate priorities for completion of the ship's construction. For the next four days, claimant's co-workers expressed their surprise that claimant had not gotten the lead man position; however, when he gave them directions for work, they "questioned his authority" by asking whether the lead man knew or approved of those instructions. Claimant testified that he could not eat or sleep for days because the questioning of his authority "reinforced his sense of demoralization, humiliation and worthlessness."[1] Decision and Order at 2-5; Tr. at 2-69, 81-82. Claimant, suffering an increased heart rate and chest pains, called Dr. Linden, his treating physician.[2] Although the physical symptoms diminished, he did not return to work after February 26, 2005. Claimant was referred to a psychiatrist, Dr. Reich, who diagnosed severe major depression and anxiety; claimant is unable to return to any work. Cl. Ex. 1. Employer's expert, Dr. Harrop, agreed that claimant is disabled by his psychiatric condition. Emp. Ex. 1. Claimant filed a claim for benefits under the Act.

[1]Although this was not a true "demotion," claimant stated that it felt like one, and the administrative law judge agreed this was a reasonable interpretation. Decision and Order at 9 n.4.

[2]Claimant has treated with Dr. Linden since 1982 for hypercholesterolemia and hypertension. After the co-workers' comments in 2005, Dr. Linden reported that claimant had major problems handling the situation and suffered from insomnia, nightmares, depression, elevated blood pressure and pulse, and chest pains, and he showed "subtle but new changes" on his EKG. A repeat of the EKG was normal. Dr. Linden concluded that stress at work caused claimant's symptoms but that there was no need to impose any physical restrictions on claimant. Cl. Ex. 1. The administrative law judge specifically found that claimant's depression was the cause of his total disability. Decision and Order at 16.

The administrative law judge found that claimant has a psychological injury and aggravated physical symptoms related to the psychological injury and therefore has established the "harm" element of a *prima facie* case. In addressing whether claimant established the occurrence of working conditions or an incident at work which could have caused his harm, the administrative law judge found that she is bound by the Board's decision in *Marino v. Navy Exch.*, 20 BRBS 166 (1988), and that any psychological injury resulting from either the failure to be promoted in 2002 or the appointment of a lead man over him in 2005 is not compensable because those were legitimate personnel actions.[3] However, in light of the Board's decisions in *Sewell v. Noncommissioned Officers Open Mess, McCord Air Force Base*, 32 BRBS 127 (1997) (McGranery, J., dissenting), *aff'd on recon. en banc*, 32 BRBS 134 (1998) (Brown and McGranery, JJ., dissenting); *see also Marino*, 20 BRBS 166 (case remanded for consideration of general working conditions), the administrative law judge found that there were general working conditions, specifically, the questioning and teasing during the four days following the lead man's appointment that humiliated and embarrassed claimant, contributing to his stress, depression, and physical symptoms. Decision and Order at 8-12. The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption and found that employer had not rebutted it with Dr. Harrop's opinion; therefore, she awarded claimant permanent total disability and medical benefits under the Act. Decision and Order at 15-17.[4] Employer appeals the administrative law judge's award of benefits, contending she erred in finding that there were working conditions, other than the legitimate personnel actions, that caused claimant's disabling psychological condition. Claimant responds, urging affirmance of the award of benefits.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S.*

[3]The administrative law judge rejected claimant's assertions that he suffered permanent biological changes to his brain, and that the presence of physical symptoms removes his situation from the *Marino* family of cases. Decision and Order at 13-14.

[4]The administrative law judge granted employer's motion for reconsideration to correct the maximum compensation rate and order the payment of interest. Order Granting Emp. M/Recon.

*Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In this case, it is undisputed that claimant has a psychological disability. The issue is whether it was caused or aggravated by general working conditions as opposed to employer's "legitimate personnel actions." The administrative law judge found that claimant's condition was caused or aggravated by the questions, comments and actions of his co-workers during the four days that followed the lead man's appointment over claimant. The administrative law judge relied on testimony from claimant which she deemed credible. Decision and Order at 12.

Employer contends claimant's testimony is insufficient to support the administrative law judge's finding, as it is not corroborated by medical evidence or other testimony in the record. Specifically, employer argues that the administrative law judge erred in stating that claimant's testimony was uncontradicted as Mr. Alu, claimant's supervisor, testified that he did not know of any harassment or heckling of claimant. Employer also asserts that claimant never reported heckling to the doctors. Employer's assertions are unpersuasive. Although Mr. Alu stated he was not aware of any heckling or humiliation, he also stated that he was not present during claimant's entire shift and that heckling could have taken place without his knowledge whether he was there or not. Tr. at 119-120, 148. Thus, Mr. Alu's lack of awareness does not contradict claimant's credible testimony that heckling occurred. Additionally, while claimant did not specifically report the heckling to his doctors when he sought treatment, Dr. Reich opined that claimant's overall psychological condition is work-related. He stated in his deposition that claimant's basic problem was that he felt he had been demoted and that his co-workers began questioning him, which was humiliating to him. Although Dr. Reich said the co-worker issue was "not so much of the cause," he did not deny it was a factor. Cl. Ex. 4 at 39-40. Further, contrary to Dr. Harrop's comments, *see* discussion *infra*, a psychological condition need not have been caused by "greater than normal stress;" rather, it is the effect of the events on claimant that is significant.[5] *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). In this case, comments that may have been harmless to others were found to be harmful to claimant.

[5]For working conditions to be "stressful" to a claimant, they need not be circumstances universally recognized as "stressful;" they need only be occurrences that are stressful to that claimant. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). It is his reaction to the conditions and events that is relevant. *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994). Employers must accept "the frailties that predispose" their employees to injury. *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-148 (D.C. Cir. 1967); *Vandenberg v. Leicht Material Handling Co.*, 11 BRBS 164, 169 (1979).

Questions of witness credibility are for the administrative law judge as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). A claimant's credible testimony is sufficient to establish the working conditions element of a *prima facie* case. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT); *Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998); *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000). The administrative law judge found claimant to be a credible witness and claimant's testimony supports the finding that he was questioned and/or heckled following the lead man's appointment. Contrary to employer's assertions, *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989), is distinguishable. Specifically, in *Sanders*, credible co-worker testimony directly conflicted with the claimant's testimony and established that the working conditions described by the claimant did not exist. In conjunction with a supporting medical opinion, the administrative law judge concluded that the claimant's psychological condition was not work-related. As it was supported by substantial evidence, the Board affirmed the decision. *Sanders*, 22 BRBS at 343. In this case, however, there is no evidence that claimant's co-workers did not question or tease him. Therefore, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant established general working conditions that could have caused his psychological impairment.[6] *Sewell*, 32 BRBS 127.

Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the disabling injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *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).

[6]Claimant also argues that *Marino* should be revisited and abandoned. Employer contends this argument exceeds the scope of the appeal. Contrary to employer's assertion, claimant need not file a cross-appeal to raise an issue that provides an alternate avenue of affirming the administrative law judge's decision. *See Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004). Nevertheless, in light of our decision herein, we decline to revisit *Marino*.

Employer contends the administrative law judge erred in finding that it failed to rebut the Section 20(a) presumption. Specifically, employer asserts that Dr. Harrop's opinion provides substantial rebuttal evidence. Dr. Harrop stated that it is never possible to draw a direct link between depression and one particular episode and that nothing indicated that claimant was under greater-than-normal stress. Though he agreed with Dr. Reich's diagnosis and treatment, he concluded that claimant's depression was not work-related, as he found there were other stressful situations in claimant's life that he had weathered without becoming depressed, as claimant acknowledged that his supervisors had the authority to make their decisions and as claimant's symptoms have not resolved during the period he has been out of work. Emp. Ex. 1; Emp. Ex. 2 at 12-27. The administrative law judge rejected the bases for Dr. Harrop's opinion, Decision and Order at 14, and, thus, found that employer failed to rebut the Section 20(a) presumption. *Id.*

A doctor's opinion, given to a reasonable degree of medical certainty, that a condition is not work-related is sufficient to rebut the Section 20(a) presumption. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Accordingly, Dr. Harrop's opinion that claimant's depression was not work-related is sufficient to meet the standard for rebuttal. *See Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998). Nevertheless, any error was harmless as the administrative law judge addressed the record as a whole and found in favor of claimant. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988); *Reed v. The Macke Co.*, 14 BRBS 568 (1981). The administrative law judge specifically stated her reasons for rejecting Dr. Harrop's opinion, and they are rational.[7] Absent Dr. Harrop's opinion, there is no evidence of record supporting employer's contention that claimant's condition is not work-related. As claimant's evidence supports the administrative law judge's decision, we hold that any error she may have made in finding no rebuttal is harmless and that there is substantial evidence to support her finding that claimant's disability is work-related and compensable. Consequently, we affirm the administrative law judge's award of benefits. *Sewell*, 32 BRBS 127.

[7]The administrative law judge stated that the fact that claimant has experienced loss in his life prior to this job incident and did not develop depression does not support the conclusion that his depression is not work-related. Further, she stated that Dr. Harrop acknowledged that claimant's work was extremely important to him, but he did not explain why the lack of recognition would not affect claimant negatively and be a key factor in the development of his depression. Finally, she stated that the fact that claimant's condition had not improved since he left work did not establish that it was not work-related, but, rather, established the severity of his condition. Decision and Order at 14.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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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