BRB No. 10-0217

STANLEY W. VANE Claimant-Petitioner v. EAST COAST CRANES & ELECTRICAL c/o CAROTEC SERVICES USA and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/29/2010 DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Dale Vernon Berning, Virginia Beach, Virginia, for claimant.

R. John Barrett and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2008-LHC-00447) 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). 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 worked for employer from 1992 to July 31, 2007, maintaining and operating cranes. Claimant testified that he worked ten- to twelve-hour shifts, which rotated weekly from the day shift to the mid shift to the night shift. Tr. at 8-9. In 2005, claimant reported that he had difficulty sleeping, felt excessively drowsy during his waking hours, and had a motor vehicle accident when he ran off the road due to sleepiness. Claimant was diagnosed with sleep apnea, hypothyroidism and a deviated septum. EXs 5, 6. Claimant underwent surgery for the deviated septum; he was prescribed thyroid medication and a C-PAP machine for his sleep apnea. Tr. at 10-11. Claimant testified that his daytime hypersomnolence did not improve. *Id.* In July 2007, claimant was referred by his treating physician, Dr. Hoffman, to Dr. Ripoll, who specializes in sleep disorders. Tr. at 11-14. Dr. Ripoll diagnosed claimant with obstructive sleep apnea and shift work sleep disorder (SWSD). He opined that claimant's hypersomnolence during working hours was a danger to himself and others. CX 1 at 2. Due to the diagnoses of sleep apnea and SWSD, Dr. Hoffman restricted claimant from returning to shift work that involved operating a crane. CX 2. Claimant has not worked since July 2007.[1] Claimant filed a claim for compensation and medical benefits under the Act, alleging that he is temporarily totally disabled by a work-related injury.[2]

In his decision, the administrative law judge found that the parties agreed that working continuously-rotating shifts could cause SWSD. The administrative law judge found claimant must show that he suffers from a sleep disorder which could have been caused by these working conditions. Decision and Order at 17. The administrative law judge found that claimant has shown only that he suffers from sleep apnea, which claimant did not allege was caused by his working conditions; the administrative law judge found that claimant does not have SWSD. *Id.* at 17-18. Accordingly, the administrative law judge found that claimant failed to present sufficient evidence to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), and the administrative law judge denied the claim for compensation and medical benefits under the Act.

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[1] Claimant was granted a disability pension by the Seafarers Pension Plan at age 49 after an approximately 15-year career on the waterfront. Tr. at 8; CXs 6-7. Claimant also was awarded Social Security disability benefits based on apnea and an affective disorder. CX 8.

[2] Claimant was represented by counsel when he filed his pre-hearing statement. Claimant was not represented by counsel at the formal hearing.

On appeal, claimant challenges the administrative law judge's finding that he is not entitled to the Section 20(a) presumption and the consequent denial of benefits. Employer responds, urging affirmance.

Claimant contends that the administrative law judge erred by finding that he does not have SWSD or other sleep disorder symptoms sufficient to invoke the Section 20(a) presumption. Claimant contends that the documented symptoms related to his sleep disorder are sufficient to establish the harm element. Symptoms that have been attributed to claimant's sleep disorder are daytime hypersomnolence, cognitive impairment, anxiety, and depression. Tr. at 10, 23, 26-27; *see also* CX 3; EX 3 at 8-10, 22-23.

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). A "harm" occurs when something has gone wrong with the human frame. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968).

It is well-established that the Section 20(a) presumption attaches only to the specific claim made. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). For purposes of making a claim under the Act, the physical harm alleged can be an aggravation of a previously existing condition. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). In this case, claimant's LS-18, Pre-hearing Statement alleges, "[C]laimant injured during the course of covered employment." In response to the administrative law judge's request for clarification, claimant's counsel responded in a letter dated February 11, 2008, stating that, "[C]laimant alleges a diagnosis of SWSD which physicians have indicated is related to his employment." At the hearing, the administrative law judge asked claimant, who at that time was not represented by counsel, whether he maintained that his "sleeping disorder is related to his working conditions, the various shifts that you worked." Tr. at 45. Claimant responded, "[M]ost definitely, sir. Fifteen years of changing shifts, my nervous system, my body clock, it's totally out of whack still today." *Id*. In his Post-hearing Brief, claimant stated, "[T]he issue is whether working shift work for the employer caused Mr. Vane's Sleep Disorder; [A]s a result of working erratic shifts for East Coast Cranes, Mr. Vane was diagnosed with a Sleep Disorder;" and, "[I]s Mr. Vanes (*sic*) sleep disorder due to working for the company." Claimant's Post-hearing Brief at 1, 3.

Based on this record of the specific claim made by claimant, the administrative law judge properly required claimant to establish that he has a sleep disorder, other than

apnea, in order to be entitled to the Section 20(a) presumption. *See generally Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989). However, we cannot affirm the administrative law judge's finding that claimant failed to establish that he has a sleep disorder. Irrespective of the diagnosis of SWSD, claimant has complained since 2005 of daytime hypersomnolence. Claimant testified that he sought treatment from Dr. Ripoll in July 2007 because his daytime hypersomnolence had not improved. In his July 2007 report, Dr. Ripoll stated that, "[P]revious diagnostic studies have confirmed the presence of obstructive sleep apnea. . .[I]f the [claimant] has symptoms of excessive daytime hypersomnolence whenever he is subject to shift work, this is a different condition (shift work sleep disorder)." CX 1 at 1. Dr. Ripoll diagnosed SWSD, and based on this diagnosis and the concurring diagnosis of Dr. Hoffman, claimant was deemed permanently unfit for duty as a crane operator. CXs 1, 2. Dr. Sautter conducted a neuropsychological assessment in September 2007. He opined that claimant's cognitive impairment was secondary to obstructive sleep apnea syndrome. Dr. Sautter also stated that, "[I]t is also possible that [claimant's] evening shift work contributed to his excessive daytime sleepiness thus heightening the problem." CX 3 at 5. The reports of Drs. Ripoll and Sautter are sufficient to establish that claimant's complaint of daytime hypersomnolence could have been caused or aggravated by his shift work. *See, e.g., Stevens v. Tacoma Boatbuilding Co.,* 23 BRBS 191 (1990). Therefore, the administrative law judge must address the credibility of claimant's complaints of daytime hypersomnolence in order to determine whether claimant established the harm element for invocation of the Section 20(a) presumption. Thus, we vacate the administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption. On remand, the administrative law judge must address all relevant evidence concerning the existence of daytime hypersomnolence, which is the gravamen of claimant's assertion of a work-related sleep disorder. If claimant has this condition, then the administrative law judge must give claimant the benefit of the Section 20(a) presumption. *Richardson v. Newport News Shipbuilding & Dry Dock Co*., 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F. App'x 249 (4th Cir. 2007). Claimant does not have to establish that the hypersomnolence is, in fact, caused by his shift work. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Moreover, we cannot affirm the administrative law judge's rejection of Dr. Ripoll's diagnosis of SWSD. Dr. Ripoll's diagnosis was rendered in July 2007. CX 1. The administrative law judge erred in relying on the 2005 diagnosis of sleep apnea and hypothyroidism by Drs. Debo and Dawoodjee to undermine Dr. Ripoll's later opinion regarding the cause of claimant's disabling condition. Decision and Order at 18; EXs 5, 6. Dr. Ripoll acknowledged claimant's sleep apnea, but diagnosed an additional condition as well. The fact that the physicians did not diagnose SWSD in 2005 does not establish that claimant did not have it in 2007 and thereafter.

The administrative law judge also erred in finding that Dr. Ripoll's diagnosis of SWSD is inconsistent with the circumstances of claimant's sleep disorder testing. The administrative law judge relied on Dr. Nard's opinion that one does not suffer the effects of SWSD if one has not performed shift work for two weeks. EX 3 at 7. Because claimant reported that he had taken off work for two weeks prior to the administration of the sleep test by Dr. Ripoll, the administrative law judge found that Dr. Ripoll could not have validly diagnosed SWSD based on the results of the test because any of claimant's symptoms related to SWSD should have dissipated prior to the test. *See* Tr. at 16; CX 1. The administrative law judge found it contradictory for Dr. Ripoll to find impairment due to SWSD based in part on hypersomnolence when the sleep study did not show significant hypersomnolence. The administrative law judge also stated that Dr. Ripoll opined that SWSD should be treated by not engaging in shift work, yet he continued to diagnose SWSD in October 2007 after claimant stopped working shifts in June 2007. The administrative law judge found that, if Dr. Ripoll expected that claimant would not suffer from SWSD if he avoided shift work, then his October 2007 diagnosis of SWSD is unfounded. Based on this reasoning, the administrative law judge rejected Dr. Ripoll's opinion. Decision and Order at 18.

Dr. Ripoll acknowledged that claimant had slept well before the test, and stated "[I]f the [claimant] has symptoms of excessive daytime hypersomnolence" then he has SWSD. CX 1 at 1. Therefore, Dr. Ripoll's diagnosis of SWSD is appropriately based on claimant's self-reported long-standing history of daytime hypersomnolence. It was not irrational or contradictory for Dr. Ripoll to reach this conclusion after claimant did not engage in shift work for two weeks prior to the sleep test or for the physician to diagnose the condition in October 2007, even though claimant stopped working in June 2007. Claimant is not required to continually engage in work activities that cause his alleged condition in order to be entitled to disability benefits. *See generally Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). It is sufficient if claimant's symptoms would return if he went back to work. *Id.* In addition, claimant's shift work need not be the only cause of claimant's injury. If shift work is only part of the cause of claimant's injury, the entire disabling condition is compensable. *See generally Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999). On remand, therefore, the administrative law judge must re-evaluate Dr. Ripoll's diagnosis of SWSD based on claimant's complaint of daytime hypersomnolence, as well as the other medical opinions of record addressing whether claimant has SWSD, consistent with the cited precedent. *See* EXs 3 at 4-6, 4 at 1. If the administrative law judge finds claimant has hypersomnolence and/or SWSD, claimant is entitled to the presumption of Section 20(a) that this condition is related to his employment. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). The burden then shifts to employer to produce substantial evidence that claimant's harm is not related to his employment. *Id.*

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge