BRB No. 11-0730

WILLIAM R. BILLINGSLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHECCHI AND COMPANY CONSULTING, INCORPORATED	)	
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY/CNA INTERNATIONAL	)	DATE ISSUED: 07/26/2012
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Order Granting Motion for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Javerbaum, Wurgaft, Hicks, Kahn, Wikstrom & Sinins), Hoboken, New Jersey, for claimant.

Robyn A. Leonard and Lisa Wilson (Laughlin, Falbo, Levy & Moresi LLP), San Francisco, California, for employer/carrier.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order and Order Granting Motion for Reconsideration (2009-LDA-00167) of Administrative Law Judge Daniel A. Sarno, Jr., 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 Defense Base Act, 42 U.S.C. §1651 *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, following a pre-employment physical wherein he disclosed that he suffered from Stiff-Person Syndrome (SPS) but stated that his health was good as long as he complied with prescribed treatment,[1] was hired in July 2007 to work for employer as Deputy Chief of Party in Kabul, Afghanistan.[2] Claimant's position involved assisting the Chief of Party to direct logistics for the United States Agency for International Development (USAID) meeting-place compound and to implement USAID's information system. Within 11 days of his arrival in Afghanistan, claimant became the acting Chief of Party, despite, as claimant stated, not having had any orientation or adequate preparation for the position. On October 2, 2007, employer notified claimant in writing that his performance was unsatisfactory and that unless it improved he would be terminated within 30 days. Not long thereafter, employer brought in a new Chief of Party, Hoppy Mazier. Claimant stated that after meetings with Mr. Mazier on October 13 and 14, 2007, in which Mr. Mazier allegedly threatened to terminate claimant's employment, claimant came to the realization that he was being pushed out of his job. On the evening of October 14, 2007, claimant experienced significant SPS symptoms.[3]

[1]Claimant stated he first experienced Stiff-Person Syndrome (SPS) symptoms in 1973 and that his symptoms have gradually progressed over the years. It was not until 2002, that, following an EMG, Dr. Reynolds diagnosed claimant with SPS. Claimant was subsequently prescribed Valium to deal with his symptoms. Notwithstanding his condition, and occasional episodes of recurring symptoms, claimant continued to work, including successful stints in Afghanistan for Shelter for Life International, from December 2002 to April 2003, and from 2004 until March 2006.

[2]The examining physician for claimant's pre-employment physical, Dr. Grunwald, recorded that claimant suffered from SPS, but assessed claimant's health as "normal." EX 13.

[3]Claimant's symptoms consisted of a myclonic episode, i.e., jerking movements of a muscle or muscle group without loss of consciousness, followed by an opisthotonus episode, i.e., "a tightening of the muscles in a particular way" in which the head and heels

As a result, claimant was taken to the Czech Field Hospital where he was treated with Valium. Two days later claimant was air-lifted out of Afghanistan to the intensive care unit at a hospital in Dubai. After two weeks, his condition having stabilized with medication, claimant was flown back to the United States under a doctor's escort.

Upon his return from Afghanistan, claimant's symptoms grew worse. During 2008, he was taken to the hospital at least 59 times because of SPS attacks. As a result of the frequency of the attacks, an intravenous catheter was inserted into claimant's chest to enable him or a family member to directly inject Valium in the event of an episode. He has not worked since the October 14, 2007 episode and is no longer capable of driving a car. Alleging that the October 14, 2007, episode and ensuing deterioration of his underlying SPS were brought about by the stressful work environment with employer in Afghanistan, claimant filed a claim under the Act. Employer controverted the claim, alleging that claimant had sustained, at most, a temporary exacerbation of his pre-existing SPS which had completely resolved by November 14, 2007. Alternatively, employer sought Section 8(f) relief, 33 U.S.C. §908(f), from continuing compensation liability.

In his decision, the administrative law judge found that claimant is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his disabling SPS is related to his stressful work environment with employer in Afghanistan, and that employer did not rebut the presumption. The administrative law judge thus concluded that claimant is entitled to a continuing award of permanent total disability from October 15, 2007,[4] 33 U.S.C. §908(a), and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907(a). The administrative law judge denied employer's application for Section 8(f) relief finding that, while employer established that claimant's SPS was a pre-existing permanent partial disability which was manifest to employer prior to the October 2007 work-related injury, it could not establish that the "ultimate permanent partial disability materially and substantially exceeded the disability that would have resulted in the absence of the pre-existing disability." Decision and Order at 12.

In his July 7, 2011, Order Granting Motion for Reconsideration, the administrative law judge reaffirmed his conclusion that employer did not rebut the Section 20(a) presumption and modified his award of benefits to reflect claimant's entitlement to temporary total disability benefits from October 15, 2007 through November 14, 2007, and to permanent total disability benefits thereafter. The administrative law judge also

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arch backward in extreme hyperextension and the body forms a reverse bow. CX 68, Dep. at 12-13, 29.

[4]The parties stipulated that claimant is not capable of returning to any type of work, and that he is permanently and totally disabled due to his SPS. ALJX 1.

acknowledged that he had applied an incorrect contribution standard in denying employer's request for Section 8(f) relief but, nonetheless, affirmed that denial following a review of the evidence in light of the appropriate standard.

On appeal, employer challenges the administrative law judge's findings that it did not rebut the Section 20(a) presumption or establish the requisite contribution element for its entitlement to Section 8(f) relief. Claimant and the Director, Office of Workers' Compensation Programs (the Director), each respond, with the former urging affirmance of the award of benefits and the latter urging affirmance of the denial of Section 8(f) relief.

Employer first asserts that the administrative law judge erred in finding that claimant's permanent total disability is due, at least in part, to the October 14, 2007 work incident. In this regard, employer contends that Dr. Terry's opinion is sufficient to establish rebuttal of the Section 20(a) presumption.

Where the claimant establishes a prima facie case and Section 20(a) applies to relate the disabling injury to the employment, as here,[5] the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If a work-related injury contributes to, combines with, or aggravates or accelerates a pre-existing condition, the entire resultant condition is compensable. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc); *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (5th Cir. 1949). When aggravation of a pre-existing condition is claimed, the employer must produce substantial evidence that work events neither directly caused the injury nor aggravated the pre-existing condition to result in injury. *Ortco Contractors*, 332 F.3d 283, 37 BRBS 35(CRT); *Gooden*, 135 F.3d 1066, 32 BRBS 55(CRT). If, however, the claimant's disability is due solely to the natural progression of a prior injury or condition, employer is not liable for the disabling condition. *Id.*

[5]The opinions of Drs. Reynolds and Terry establish, and the parties do not dispute, that claimant's October 14, 2007, argument with his supervisor aggravated his underlying SPS to the point that he suffered a myoclonic episode followed by a full opisthotonic episode. The administrative law judge's finding that claimant is entitled to the Section 20(a) presumption is thus affirmed.

The administrative law judge found that employer did not offer any evidence to rebut the Section 20(a) presumption. Decision and Order at 10. Contrary to the administrative law judge's finding, employer offered the report and deposition testimony of a neurologist, Dr. Terry, who stated that although claimant's SPS is unrelated to his work for employer, his work environment in Afghanistan was very stressful such that "it caused a temporary aggravation of his Stiff Person Syndrome to the point that he had to be hospitalized and treated." EXs 25, 33 (emphasis in original). In his report dated January 10, 2009, Dr. Terry specified that only claimant's disability from October 14 through November 1, 2007, was due to his work for employer, and that the temporary condition created by claimant's October 14, 2007 work incident had completely resolved by no later than November 15, 2007. *Id.* Dr. Terry added that while claimant continued to have episodic and frequent muscle spasms and dyspnea after his return from Afghanistan, this was due to his underlying SPS and unrelated to his work for employer.[6] *Id.*

While Dr. Terry's opinion cannot rebut the Section 20(a) presumption with regard to claimant's condition for the period between the work incident, October 14, 2007, through November 15, 2007, the physician's opinion is relevant to rebuttal from that date forward. In this case, the administrative law judge set out Dr. Terry's opinion in his decision, Decision and Order at 7-9, but he did not discuss whether it is substantial evidence that rebuts the Section 20(a) presumption. Nevertheless, the administrative law judge's error is harmless as he weighed the evidence as a whole pursuant to the aggravation rule and relevant case law. *See generally Staftex Staffing v. Director,*

[6]At his deposition, Dr. Terry reiterated the statements made in his report dated January 10, 2009. EX 33. Specifically, Dr. Terry opined that the work incident of October 14, 2007, caused a temporary exacerbation of claimant's underlying SPS, and that claimant's condition had returned to the "baseline" no later than November 15, 2007. Dr. Terry stated that "I don't believe [the episodes triggered by the October 14, 2007 incident] accelerated [claimant's] disease. I think it precipitated a breakdown of the disease, if you will, or an exacerbation temporarily." EX 33, Dep. at 32. Dr. Terry thus concluded that if claimant's condition is worse today than it was in October 2007, it would be attributable exclusively to the progressive nature of his underlying disease. EX 33, Dep. at 48.

OWCP, 237 F.3d 404, 34 BRBS 44(CRT) (5th Cir. 2000). Addressing employer's temporary aggravation argument,[7] the administrative law judge, citing *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir.), *cert. denied*, 440 U.S. 911 (1970), concluded that while the work incident in Afghanistan "may well have been a temporary aggravation of [c]laimant's underlying Stiff-Man Syndrome . . .," claimant, following that work episode, was never able to work again and his sensitivity to stimuli which triggered his myoclonic and opisthotonic attacks became much worse and more frequent than before the work incident. Decision and Order at 11. Thus, the administrative law judge concluded, both in his initial decision and upon reconsideration, that claimant's permanent total disability is due, at least in part, to the work-related injury he sustained on October 14, 2007. We affirm that determination.

In *Cordero*, 580 F.2d 1331, 8 BRBS 744, the Ninth Circuit addressed a case in which the medical evidence established that the claimant's condition, COPD, was due to smoking; three days of occupational exposures to fumes and odors of nitrogen temporarily aggravated the claimant's symptoms and, to some extent, contributed to a permanent irritation; thereafter, he was unable to work. The court conceded to employer that the record established that factors other than the welding fumes contributed to claimant's disability, but stated that,

> we are bound by the rule that the presence of other contributing factors do (sic) not control the determination of applicability under the "aggravation rule." In fact, the "aggravation rule" is only relevant when other factors are present.

Id., 580 F.2d at 1335, 8 BRBS at 747. The Ninth Circuit quoted its prior decision in *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 815 (9th Cir. 1966):

> If an employee is incapacitated from earning wages by an employment injury which accelerates a condition which would ultimately have become incapacitating in any manner, the employee is incapacitated "because of"

[7]Specifically, the administrative law judge stated that "employer argues that the exacerbation or aggravation was only temporary and the natural progression of claimant's SPS would have resulted in total disability even if the work place injury had not occurred," such that claimant's present "permanent total disability cannot be attributed to his work injury." Decision and Order at 10-11.

> the employment injury, and the resulting "disability" is compensable under the Act.

Id., 580 F.2d at 1334-1335, 8 BRBS at 746.[8] The Ninth Circuit concluded that substantial medical and other evidence supported the administrative law judge's finding that claimant suffered from a permanent total disability caused by a pulmonary impairment arising out of his employment as a welder. The court held that the administrative law judge had relied on witness credibility in reaching his decision and stated that the court would interfere only where the credibility determinations conflict with the clear preponderance of the evidence. *Id.*, 580 F.2d at 1335, 8 BRBS at 746.

Similarly, in this case, the administrative law judge found that following the October 14, 2007 work incident, claimant was never able to work again and that his sensitivity to stimuli which triggered his myoclonic and opisthotonic attacks became more frequent and much worse than before that event. Claimant testified that the frequency and severity of his attacks increased upon his return from Afghanistan, that he had been hospitalized at least 59 times since returning from Afghanistan, CX 69, Dep. at 18, 24; EX 29, and that the increased hospitalizations prompted the surgical insertion of an intravenous catheter in his chest. CX 69, Dep. at 17-18, 24-25. Dr. Reynolds stated that the severe aggravation of claimant's SPS due to the work incident contributed to the worsening of claimant's condition in that it thereafter increased claimant's sensitivity to stressors. CX 68, Dep. at 39.[9] The administrative law judge properly viewed the work incident in the context of claimant's medical history: prior to the work incident, claimant had suffered temporary flare-ups of his SPS; the work incident constituted an acute aggravation of his SPS; after the work incident, claimant was unable to work and his condition irreversibly declined to become totally disabling. In finding that claimant's permanent total disability was "due to" the work incident, the administrative law judge reasonably inferred that the work incident was the event which precipitated the sequence of events resulting in claimant's permanent total disability. Decision and Order at 11. Hence, substantial medical and other evidence of record supports the finding that claimant's workplace incident is "a cause" of claimant's inability to work. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 193, 33 BRBS 65, 67(CRT) (5th Cir. 1999) ("the only legally relevant question is whether the [work] injury is *a cause* of that disability").

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[8]In *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517, 18 BRBS 45, 50(CRT) (5th Cir. 1986) (en banc), the Fifth Circuit cited *O'Leary* with approval.

[9]In addition, Drs. Reynolds and Terry each stated that claimant could not return to work for employer in Afghanistan because such employment would result in a continued aggravation of his underlying SPS. CX 68, Dep. at 36; EX 33, Dep. at 29, 40.

The administrative law judge rationally rejected the argument employer reiterates on appeal. Because the administrative law judge relied on witness credibility, and reasonable inferences drawn from claimant's medical and work histories, his decision must be affirmed. As the Fifth Circuit declared in *Lennon v. Waterfront Transport*, 20 F.3d 658, 663, 28 BRBS 22, 26(CRT) (5th Cir. 1994), the "credibility findings of administrative law judges can be reversed only if they are patently unreasonable" (citation omitted). Similarly, the Fifth Circuit clearly stated in *Ceres Marine Terminal v. Director, OWCP [Allred]*, 118 F.3d 387, 391, 31 BRBS 91, 94(CRT) (5th Cir. 1997) that an administrative law judge may take into account a claimant's history and "when the facts in a case could support a finding in favor of either party, the choice between reasonable inferences is left to the ALJ," citing *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Consequently, we affirm the administrative law judge's finding that claimant's total disability is related to his work injury, and the resultant award of total disability benefits from October 15, 2007.

Employer next contends that the administrative law judge erred in denying its application for Section 8(f) relief. Employer argues that the administrative law judge's finding that claimant's disabling condition results from an aggravation of his pre-existing SPS necessarily establishes that the current injury by itself would not have led to the ultimate level of disability, i.e., employer argues that an emotionally-charged disagreement with a supervisor did not, on its own, cause claimant's permanent total disability.

Section 8(f) shifts liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes: (1) that the employee had a pre-existing permanent partial disability prior to the employment injury; (2) that the disability was manifest to the employer prior to the employment injury; and (3) that his permanent total disability is not due solely to the second injury. *See* 33 U.S.C. §908(f)(1); *Allred*, 118 F.3d 387, 31 BRBS 91(CRT); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). In order to establish the contribution element of Section 8(f) in cases of permanent total disability (as well as permanent partial disability) employer must show, by medical or other evidence, that claimant's subsequent injury alone would not have caused his permanent total disability. *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Two "R" Drilling Co.*, 894 F.2d at 750, 23 BRBS at 35(CRT); *see also Allred*, 118 F.3d at 389-90, 31 BRBS at 93(CRT). The Fifth Circuit, within whose jurisdiction this case arises, has declined to require that an employer present medical testimony which provides a rote recitation of the legal standard for establishing contribution. *See Director, OWCP v. Ingalls Shipbuilding, Inc.*

[*Ladner*], 125 F.3d 303, 307, 31 BRBS 146, 148-149(CRT) (5th Cir. 1997); *Allred*, 118 F.3d 387, 31 BRBS 91(CRT). It is not sufficient, however, for employer merely to establish that the disability is related to both claimant's pre-existing SPS and the work injury. *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997).

The administrative law judge denied employer's application for Section 8(f) relief as he initially found that employer did not show that claimant's ultimate permanent partial disability materially and substantially exceeded the disability that would have resulted in the absence of claimant's SPS.[10] In reaching this conclusion, the administrative law judge found that the weight of the evidence indicates that the October 2007 work incident was so severe that it precipitated a major decline in claimant's SPS causing his permanent total disability virtually immediately. Specifically, the administrative law judge observed that claimant's SPS was under control and he was able to perform his regular work up until the time of his work incident in Afghanistan but that subsequent to the October 2007 incident claimant's condition rapidly deteriorated, in that his sensitivity to stimuli increased dramatically and the intensity and duration of his SPS attacks worsened, such that he was never capable of working in any capacity again. The administrative law judge added that even employer's expert, Dr. Terry, answered "no" when asked, "[d]oes any prior condition, injury or disability combine with the claimed injury which is materially and substantially greater than that which would have resulted from the industrial injury alone?" Decision and Order at 13.

On employer's motion for reconsideration, the administrative law judge acknowledged that he incorrectly used the contribution standard for a claimant who is permanently partially disabled rather than, as claimant is in this case, permanently totally disabled. Applying the correct standard, the administrative law judge nevertheless again denied employer's request for Section 8(f) relief. In this regard, the administrative law judge recited, verbatim, the finding from his initial decision, that employer did not meet the contribution element. Order on Recon. at 2-3. Additionally, the administrative law judge rejected employer's contention that he incorrectly relied upon the opinion of Dr. Terry in denying Section 8(f) relief, explaining that he merely cited Dr. Terry's answer to the question to show that even employer's physician recognized the significance of claimant's recent injury. The administrative law judge thus concluded that employer offered no evidence to demonstrate that claimant's compensable disability is not due solely to the most recent injury.

[10]The administrative law judge's finding that claimant's SPS constituted a manifest, pre-existing, permanent partial disability for purposes of Section 8(f) is affirmed as unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

We cannot affirm the denial of Section 8(f) relief in this case as the administrative law judge did not give sufficient consideration to the evidence in light of relevant law.[11] In *Allred*, 118 F.3d 387, 31 BRBS 91(CRT), the Fifth Circuit affirmed the administrative law judge's determination that the contribution element was satisfied where the evidence was sufficient for the administrative law judge to have inferred both that claimant's pre-existing permanent partial disabilities combined with his employment injury to increase what would otherwise have been a partial disability into a total disability and that claimant's current disability was not due solely to the employment injury. *Allred*, 118 F.3d at 391-392, 31 BRBS at 93(CRT). The court stated that the contribution element may be satisfied by the claimant's history of existing injuries that combine to increase his disability, i.e., "when the pre-existing injuries are necessary to push the claimant 'over the hump' from partial to total disability."[12] *Allred*, 118 F.3d at 391, 31 BRBS at 93(CRT). The court stated that the absence of "magic words" to this effect by a physician does not preclude the administrative law judge from reaching the conclusion that claimant's permanent total disability is not due solely to the work injury. In contrast, in *Methe*, 396 F.3d 601, 38 BRBS 99(CRT), there was no evidence to suggest that claimant suffered any long-term effects from his prior 1987 back injury, or any evidence that would tend to show that the claimant's current permanent total disability was not due solely to the 2000 work injury; hence, the Fifth Circuit held that the administrative law judge properly denied Section 8(f) relief. *See also Two "R" Drilling Co.*, 894 F.2d 748, 23 BRBS 39(CRT).

We vacate the administrative law judge's denial of Section 8(f) relief and remand this case for reconsideration of the contribution element in light of the foregoing law. In this case, claimant's work injury was the stress and resulting physical symptoms brought on by his October 14, 2007 meeting with Mr. Mazier, which aggravated his pre-existing SPS. Employer's claim for Section 8(f) relief need not fail merely because employer did

[11]We note that this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. *See generally McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011). The administrative law judge, however, did not cite to any Fifth Circuit precedent in addressing employer's application for Section 8(f) relief.

[12]The Fifth Circuit observed that Allred suffered from numerous pre-existing disabilities, including hypertension, diabetes, and severe arm, elbow, neck and shoulder, and back injuries such that "[claimant's] current employment injury appears relatively minor when viewed in light of his medical record as a whole." *Allred*, 118 F.3d at 391 n. 2, 31 BRBS at 94 n. 2(CRT). The court found "significant" that a doctor who had reviewed claimant's medical records predating the employment injury had "predicted that '[s]ignificant disability is likely to develop in cases of this kind.'" *Id.*

not elicit "magic words" from a physician to the effect that claimant's total disability is not due solely to the work injury. In *Allred*, the court observed that where, as here, the magic words are absent, the contribution issue "must of necessity be resolved by inferences based on such factors as the perceived severity of the pre-existing disability and the current employment injury, as well as the strength of the relationship between them." *Allred*, 118 F.3d at 391, 31 BRBS at 94(CRT).

Accordingly, the administrative law judge's finding that claimant is entitled to permanent total disability benefits is affirmed. The administrative law judge's findings that employer did not establish the contribution element and thus, is not entitled to Section 8(f) relief are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully disagree with my colleagues' disposition of employer's contention that the administrative law judge erred in addressing the cause of claimant's permanent total disability. I do not believe the administrative law judge's error is harmless. Although the administrative law judge set out Dr. Terry's opinion in his decision, Decision and Order at 7-9, he did not discuss the sufficiency of his opinion to rebut the Section 20(a) presumption. The administrative law judge merely stated that employer offered no evidence to rebut the presumption. In fact, Dr. Terry stated that claimant's work for employer resulted in a temporary aggravation of his underlying SPS which had completely resolved by November 15, 2007, and that any disability thereafter is not a

result of claimant's work for employer but rather is attributable exclusively to the progressive nature of his underlying disease. This opinion can be found to be legally sufficient to rebut the Section 20(a) presumption. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003). Moreover, the administrative law judge did not describe his weighing of the evidence, the basis on which he resolved conflicting evidence or set forth the evidence upon which he relied in finding that claimant's permanent total disability is due, at least in part, to his work-related injury on October 14, 2007. *See* 5 U.S.C. §557(c)(3)(A). I would, therefore, remand this case for the administrative law judge to reconsider these issues. *See generally Ceres Gulf, Inc. v. Director, OWCP*, 683 F.3d 225 (5th Cir. 2012); *Gelinas v. Electric Boat Corp.*, 45 BRBS 69 (2011). If employer has presented substantial evidence to rebut the Section 20(a) presumption that claimant's disabling condition is related to the work injury, then the administrative law judge must weigh the record as a whole to determine whether claimant's present permanent total disability is work-related and the administrative law judge must state which evidence supports his findings. *See Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In all other respects, I concur in my colleagues' decision.

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JUDITH S. BOGGS
Administrative Appeals Judge