BRB No. 98-1238

LARRY NELSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS CORPORATION	)	DATE ISSUED: June 16, 1999
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
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 of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Larry M. Nelson, Seattle, Washington, *pro se*.

Patricia McKay Clotiaux (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order On Remand (91-LHC-1828) of Administrative Law Judge Paul A. Mapes 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 by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and 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); 20 C.F.R. §§802.211(e), 802.220.

This case is before the Board for the second time. To briefly recapitulate, on October 31, 1989, claimant injured his left knee during the course of his employment for employer. Surgery to repair a torn medial meniscus was performed on November 7, 1989. On November 15, 1989, claimant began physical therapy to rehabilitate his knee. Claimant subsequently experienced back pain, which he alleged is related to his rehabilitation regimen. Employer voluntarily paid claimant temporary total disability compensation from November 1, 1989, to June 12, 1990, and compensation for a five percent permanent partial impairment of the left knee due to the work injury. 33 U.S.C. §908(b), (c)(2), (19). Employer controverted claimant's claim for continuing compensation for temporary total disability due to his back symptomatology, which it maintained is unrelated to claimant's work injury.

In his Decision and Order Awarding Benefits, the administrative law judge applied the Section 20(a) presumption, 33 U.S.C. §920(a), which he found employer rebutted. He then applied the "true doubt rule" to find that the physical therapy prescribed after claimant's left knee surgery aggravated claimant's previous back impairment. Claimant was thus awarded temporary total disability compensation until September 8, 1992, at which time the administrative law judge found that employer established the availability of suitable alternate employment paying $6.85 per hour, and permanent partial disability compensation thereafter at a rate of $49.97 per week. 33 U.S.C. §908(c)(21), (h). Finally, claimant was denied a penalty under Section 14(e), 33 U.S.C. §914(e), and employer was awarded relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Employer appealed to the Board contending that the administrative law judge erred in finding claimant's back condition to be causally related to his left knee injury and in finding that claimant has a residual wage-earning capacity of $6.85 per hour. The Board vacated the administrative law judge's finding that claimant's back pain was due to the work injury, as well as his determination of claimant's residual wage-

earning capacity. The Board held that, pursuant to *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994), the administrative law judge's reliance on the "true doubt rule" to find that claimant's back pain related to the knee injury violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), which requires that the person seeking the award bear the burden of persuasion. Moreover, the administrative law judge's summary conclusion regarding claimant's residual wage-earning capacity was held to be in violation of the APA, which also requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). *See Nelson v. Todd Pacific Shipyards Corp.*, BRB No. 93-1341 (July 29, 1996)(unpublished).

In his Decision and Order On Remand, the administrative law judge incorporated the summary of the evidence and the analysis thereof from his initial Decision and Order. He again found that the evidence as to the work-relatedness of claimant's back symptomatology is evenly balanced. Pursuant to *Greenwich Collieries*, therefore, the administrative law judge concluded that claimant failed to meet his burden of proving a causal connection between his work-related knee injury and his back condition. Decision and Order On Remand at 2. The issue of claimant's residual wage-earning capacity was therefore moot.

In his *pro se* brief, claimant contends he was denied due process of law because he was effectively denied the opportunity to cross-examine physicians whose reports were credited by the administrative law judge in finding that claimant did not establish that his back pain is due to the work-related knee injury Employer responds, urging affirmance of the administrative law judge's Decision and Order On Remand.

We initially address the administrative law judge's finding that claimant's back pain is not related to the October 31, 1989, work-related knee injury. Where, as in the instant case, claimant establishes his *prima facie* case, claimant is entitled to the presumption at 33 U.S.C. §920(a) that his injury or harm arose out of and in the course of his employment. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). An employment injury need not be the sole cause of a disability; rather, if the employment aggravates, accelerates or combines with an underlying condition, the entire resultant condition is compensable. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *see also Mattera v. M/V Mary Antonette, Pacific King, Inc.*, 20 BRBS 43 (1987) (an injury sustained during the course of vocational testing is covered under the Act, because it necessarily arose out of and in the course of claimant's employment); *Weber v. Seattle Crescent Container Corp.*,

19 BRBS 146 (1986)(same rationale for injury occurring during medical examination). Upon invocation of the presumption, the burden shifts to employer to present specific and comprehensive evidence sufficient to sever the casual connection between the injury and the employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

In his Decision and Order On Remand, the administrative law judge incorporated from his initial Decision and Order his analysis of the evidence regarding the causal link between claimant's knee injury and his back pain. Decision and Order On Remand at 2. In his initial Decision and Order, the administrative law judge found that, while no doctor expressly ruled out a connection between claimant's back symptomatology and the physical therapy exercises for claimant's knee injury, employer produced substantial evidence to rebut the Section 20(a) presumption. Specifically, the administrative law judge credited the reports of Drs. Grisham, Cramer and Green, as well as medical evidence that claimant has a pre-existing back impairment and evidence that claimant experienced back pain after his knee surgery but before commencing physical therapy. On remand, the administrative law judge found that the opinions of Drs. Grisham, Cramer, Perkins, and McCornack militate against a finding of causation while the medical opinions favoring a finding of causation rely primarily on claimant's subjective statements.

Contrary to the administrative law judge's statement, the record contains specific evidence that claimant's back pain is not due to the work injury or to the physical therapy therefor. An unequivocal medical opinion severing the link between claimant's injury and his employment is sufficient evidence to rebut the Section 20(a) presumption. *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94, 96 (1988). In the instant case, the administrative law judge credited, *inter alia*, the opinions of Drs. Grisham and McCornack. They examined claimant on July 20, 1992, specifically for back pain, which they noted claimant alleges is due to his physical therapy. EX 27 at 66-67. Their report states in pertinent part: "It is not felt that his [claimant's] low back injury is objectively worsened since his injury to his knee. Specifically, we do not feel that his low back pain and hip pain are related in any way to his knee." *Id.* at 73. This unequivocal medical opinion is sufficient evidence to rebut the Section 20(a) presumption. *See Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995)(Decision on Recon.). Moreover, the administrative law judge's ultimate conclusion, based on his weighing of the relevant evidence as a whole, that claimant failed to establish a connection between the physical therapy for his knee condition and his subsequent back pain by a

preponderance of the evidence is supported by substantial evidence and is accordingly affirmed. *See Santoro v. Maher Terminals, Inc.,* 30 BRBS 171, 173 (1996).

We now address claimant's contention that he was denied due process of law because he was not afforded the opportunity to cross-examine medical providers whose reports were credited by the administrative law judge in finding that claimant failed to establish a causal relationship between his work injury and his back condition. Specifically, on May 20, 1992, claimant, representing himself since May 7, 1992, submitted a subpoena request, which was never ruled on by an administrative law judge.

A discovery error will not be reversed by the Board unless the error is so prejudicial as to deprive a party of due process of law. *See Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40, 43-45, *aff'd mem. sub nom. Olsen v. Director, OWCP,* 996 F.2d 1226 (9th Cir. 1993); *see also Martiniano v. Golten Marine Co.,* 23 BRBS 363, 366-377 (1990). In this case, we hold there is no reversible error in the failure to rule on claimant's May 20, 1992, subpoena motion.[1] Claimant failed to exercise due diligence in seeking testimony from the persons named in the subpoena request. *See generally Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46, 49-50 (1989); *Sam v. Loffland Brothers Co.*, 19 BRBS 229, 230 (1987). Specifically, claimant never renewed the request prior to the November 4, 1992, formal hearing. At the hearing, claimant was advised of his right to call witnesses, Tr. at 26, 53, and he did not object to the admission of employer's documentary evidence, Tr. at 10-11.[2] Claimant also did not raise the unaddressed subpoena motion in his post-hearing brief nor when he submitted additional argument on remand. Instead, claimant raises this administrative oversight for the first time over six years after he first requested the issuance of subpoenas. As claimant had ample opportunity to renew his subpoena request prior to the closing of the record after the formal hearing, claimant was not denied due process by the absence of a ruling on his May 20, 1992, subpoena request. Accordingly, claimant's contention of error is rejected.

[1]We note that the case was twice re-assigned to another administrative law judge after the filing of the subpoena request.

[2]We also note that claimant submitted documentary evidence from four of the nine persons for whom subpoenas were requested and that claimant and employer both submitted evidence from the remaining five persons named on the subpoena request.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge