BRB No. 09-0657

FRANK CHELKONAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ITT CORPORATION	)	DATE ISSUED: 03/30/2010
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNYSLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Kurt A. Gronau, Evergreen, Colorado, for claimant.

Jerry R. McKenney (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2008-LDA-00254) of Administrative Law Judge Stuart A. Levin 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 began work for employer as a force protection specialist at Camp Bondsteel, a military base in Kosovo, on or about April 7, 2007. Tr. at 37-38, 89-90; EXs 2, 18 at 18, 38. At approximately 4:00 a.m. on February 12, 2008, claimant, who had been sleeping in the barracks, got out of bed to go to the bathroom. After taking a step, he felt his back "tighten up," and thereafter experienced intense pain in his lower back radiating down his right leg. Tr. at 57; EXs 6; 18 at 39-43, 66. Claimant was seen by a medic that day and, on the following day, underwent a CT scan, which was interpreted at showing disc herniations at L3/L4 and L4/L5 and a bulging disc at L5/S1.[1] Tr. at 58-61; EXs 7, 18 at 47-49, 66-67. Shortly thereafter, employer placed claimant on medical leave and sent him back to the United States. Tr. at 63-69; EX 18 at 49-50. On February 20, 2008, claimant filed a formal claim (Form LS-203) seeking benefits under the Defense Base Act, asserting that he sustained a back injury on February 12, 2008, when he got out of bed and took a step.[2] CX 1. After the claim was controverted by employer, claimant obtained treatment for his back injury at the Veterans Affairs (VA) Hospital in Tampa, where he had been treated for various back injuries that occurred prior to the commencement of his employment with employer in Kosovo.[3] Claimant has not worked since his return to the United States. Tr. at 13.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), but that employer rebutted the presumption. Weighing the evidence as a whole, the

[1] Claimant completed an injury report on February 14, 2008, in which he stated as follows: "Woke up to use the bathroom, took a step and felt my lower back tighten up. I then sat back down to recover, then stood back up and felt the pain shoot down my right leg." EX 6.

[2] The compensation claim contains the following description of claimant's February 12, 2008 injury: "Woke up to use the latrine, I got out of bed, took a step and felt my lower back tighten up doubleing [sic] me over." The nature of injury was described as "lower back, sharp pain shooting down my legs into my thighs, calves, and feet." CX 1.

[3] Prior to being hired by employer, claimant underwent a pre-employment physical on March 5, 2007, at which time he denied a history of back pain, back treatments, sciatic or disc problems. EX 5; *see also* Tr. at 41-43, 69, 90, 93-95; EX 18 at 22-23, 61-65. The VA Hospital records reveal, however, that claimant was treated for episodes of lower back pain on February 16, 2005, June 19, 2005, June 19-20, 2006, and February 22, 2007. EX 9 at 94-101, 103-110, 118, 124-125, 145-149. An x-ray taken on February 22, 2007 was read a showing mild grade I anterolistesis at L5 on S1 with facet stenosis and mild intervertebral space narrowing at L5-S1. *Id.* at 13-14.

administrative law judge found that the incident involving the onset of back pain on February 12, 2008, was the result of a natural progression of claimant's pre-existing back injuries, and did not constitute an aggravation of his pre-existing condition. The administrative law judge further considered the applicability of the "zone of special danger" doctrine, and concluded that it did not bring a non work-related injury within the scope of the Act. Accordingly, claimant's claim for benefits was denied.

On appeal, claimant challenges the administrative law judge's denial of his claim. Employer responds, urging affirmance.

Once, as in the instant case, the presumption of Longshore Act coverage set forth at Section 20(a) is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's injury was not caused or aggravated by his employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Jones v. Aluminum Co. of America,* 35 BRBS 37 (2001); *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000). Where aggravation of a pre-existing condition is at issue, employer must submit substantial evidence that work events did not aggravate the pre-existing condition. *See, e.g., Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *Cairns v. Matson Terminals*, 21 BRBS 252 (1988). If employer rebuts the Section 20(a) presumption, the issue of causation must be resolved on the whole body of proof, 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).

In the present case, the administrative law judge found the Section 20(a) presumption invoked based on the February 12, 2008, incident in which claimant had an onset of back pain after getting out of bed and taking a step toward the bathroom. *See* Decision and Order at 9-10. On appeal, claimant contends that the administrative law judge erroneously focused on the events of February 12, 2008, and failed to consider "the cumulative effects the physical rigors of claimant's job could have on his back condition." Cl. Memorandum in Support of Petition for Review (Petition for Review) at 14. Claimant avers in this regard that substantial evidence establishes that his performance of a physically rigorous job for 11 months aggravated his pre-existing back condition resulting in the manifestation of symptoms on February 12, 2008. *See* Petition for Review at 7, 9-15. This argument, however, represents a different theory of recovery than that raised by claimant before the administrative law judge. As noted above, claimant sought benefits under the Act for a back injury sustained in a specific incident occurring on February 12, 2008, in which claimant experienced radiating back pain after he got out of bed and took a step. *See* n.2, *supra;* CX 1. Moreover, claimant's counsel explicitly stated at the formal hearing that there was no dispute that the "mechanism of

injury" in this case was claimant's act of getting out of bed and taking a step.[4] *See* Tr. at 12. Additionally, the arguments presented in claimant's post-hearing brief were premised on the occurrence of a definitive incident on February 12, 2008, which aggravated claimant's pre-existing back condition. At no time while the case was before the administrative law judge did claimant assert a cumulative trauma claim based on the performance of rigorous physical work activities while in the course of his employment with employer.

In *U.S. Industries*, 455 U.S. 608, 14 BRBS 631, the Supreme Court held that the Section 20(a) presumption attaches only to the claim made by the claimant, and that the administrative law judge is not required to address and an employer is not required to rebut every conceivable theory of recovery. Thus, where the claimant alleged that he was injured at work while lifting and the administrative law judge found that this incident did not occur, the Supreme Court held that the Court of Appeals erred in addressing whether a neck injury claimant sustained at home was "employment-bred." *Id.*, 455 U.S. at 614-615, 14 BRBS at 632. In this case, the administrative law judge properly found that the claimant's compensation claim was based solely on the occurrence of the specific February 12, 2008 incident. *See* Decision and Order at 9-10. We therefore reject

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[4] At the hearing, the following exchange took place between claimant's attorney and the administrative law judge:

> MR. GRONAU: So, the mechanism of injury here, I don't think from an evidentiary standpoint is really in dispute. So, what is the Carrier left with in which to defend its claim?
>
> JUDGE LEVIN: When you say mechanism of injury, Mr. Gronau, are you referring to the circumstance of Claimant simply getting out of bed and walking to the bathroom?
>
> MR. GRONAU: I am, Your Honor.
>
> JUDGE LEVIN: So, it was that movement or occurrence that triggered the difficulty and that's what you're calling the mechanism?
>
> MR. GRONAU: That's what I'm -- using Dr. Shortt's words, Your Honor.
>
> JUDGE LEVIN: Okay.
>
> MR. GRONAU: There's no dispute….

Tr. at 12.

claimant's contention that the administrative law judge erred by failing to address a cumulative trauma theory of recovery based on claimant's general working conditions. *See U.S. Industries*, 455 U.S. 608, 14 BRBS 631; *Brown v. Pacific Dry Dock*, 22 BRBS 284, 286 n.2. Moreover, as claimant may not advance a new theory of the case on appeal, the Board will not consider the argument raised for the first time on appeal that claimant's pre-existing back condition was aggravated by the cumulative effects of the physical rigors of his employment with employer while in Kosovo. *Id.; see also Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 1222-1223, 43 BRBS 21, 25(CRT) (11th Cir. 2009); *Fox v. West State Inc.*, 31 BRBS 118, 121 n.3 (1997).

On appeal, claimant does not specifically challenge the administrative law judge's finding that employer produced evidence sufficient to rebut the Section 20(a) presumption that claimant's back condition is causally related to the February 12, 2008 incident.[5] In finding that employer rebutted the Section 20(a) presumption, the administrative law judge rationally relied on Dr. Richmond's opinion that claimant's March 28, 2008, MRI is more consistent with degenerative changes than with trauma, that there is no evidence of anything acute or any pathology that could be attributed to claimant's employment, and that claimant's onset of symptoms during the February 12, 2008 incident "cannot be viewed as an injury, but as the natural history of disc degeneration." EX 10 at 3-4, 6-7. As Dr. Richmond's opinion represents substantial evidence that the February 12, 2008 incident neither caused nor aggravated claimant's back condition, the administrative law judge's finding of rebuttal is affirmed. *See* Decision and Order at 16; *Brown*, 893 F.2d 294, 23 BRBS 22(CRT).

In considering the evidence on the record as a whole, the administrative law judge found that there was no causal relationship between claimant's back condition and the February 12, 2008, incident. In this regard, the administrative law judge rationally found the opinion of Dr. Richmond, as supported by the opinions of Drs. Kandiyil, EX 7, and Springstead, EXs 11, 19, to be better documented and reasoned and more persuasive than the opinion of Dr. Shortt. *See* Decision and Order at 15-16; *see generally Del Monte*, 563 F.3d at 1219-1220, 43 BRBS at 22-23(CRT). The opinions of Drs. Richmond, Kandiyil and Springstead constitute substantial evidence supporting the conclusion that the February 12, 2008, incident was not a cause of claimant's back condition and that his onset of back pain on that date resulted from the natural progression of his pre-existing back injuries. We therefore affirm the denial of benefits based on the lack of a causal

[5] Rather, as discussed *supra*, claimant on appeal asserts as error the administrative law judge's failure to find causation based on claimant's general working conditions.

relationship between the February 2008 incident and claimant's back condition.[6] *See* Decision and Order at 16; *see generally Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003).

Lastly, claimant's counsel has requested a fee for services performed in this appeal. As claimant was unsuccessful on appeal, his attorney is not entitled to a fee for work performed before the Board. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order Denying Benefits 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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REGINA C. McGRANERY
Administrative Appeals Judge

[6] As we affirm the finding that claimant's back condition did not arise out of the February 2008 incident, we need not address claimant's argument that this event occurred within the "zone of special danger." *See O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951). The fact that claimant experienced pain in Kosovo is insufficient alone to bring this claim within the Act. There must also be a medical relationship between claimant's harm or pain and the event alleged to cause it, and the administrative law judge's finding that this relationship did not exist is, as we have explained, supported by substantial evidence.