BRB No. 98-1083

DELORIS POSEY	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: May 3, 1999
	)	
NAVY EXCHANGE	)	
	)	
and	)	
	)	
CRAWFORD AND COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision and Order Denying Motion for Reconsideration of Daniel L. Stewart, Administrative Law Judge, United Department of Labor.

Deloris Posey, *pro se*, National City, California.

Eugene L. Chrzanowski (Littler Mendelson), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant, representing herself, appeals the Decision and Order Awarding Benefits and Decision and Order Denying Motion for Reconsideration of Administrative Law Judge Daniel L. Stewart 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a security guard, suffered two injuries to her left knee on June 26 and July

29, 1991; she also alleged a psychological stress condition arising out of a confrontation with her supervisor on January 11, 1993, during the course of her employment. Claimant's position with this employer was abolished December 9, 1993, and she remained unemployed at the time of the initial hearing in July 1994. Following that hearing, Administrative Law Judge Lindeman found that claimant's left knee condition became permanent and stationary before January 1993, and that claimant was not entitled to any permanent partial disability compensation for her knee due to the absence of a permanent impairment rating. He found claimant entitled to compensation for a temporary total disability from May 3 to June 23, 1993, for a work-related stress condition, as well as payment for treatment provided by Dr. Fernandez, unpaid hospital bills, psychotherapy until December 18, 1993, and the contemplated knee surgery. He also concluded that claimant suffered no discrimination under Section 49 of the Act, 33 U.S.C. §948. The administrative law judge denied employer's subsequent motion for reconsideration.

Claimant underwent the knee surgery authorized by Administrative Law Judge Lindeman on March 28, 1995. On March 17, 1995, she obtained employment as a security guard with the San Diego Job Corps, a position which she held until she was terminated December 6, 1995, at the end of her probationary period. Claimant worked as a certified nurses' assistant for Castle Manor from December 31, 1995 until January 13, 1996, when she injured her back and knee and quit.[1]

In the current proceeding, claimant sought compensation for a permanent total disability from December 6, 1995, and continuing, except for her brief period of employment as a certified nurses' assistant, as well as payment of past and future medical bills, including a rehabilitation program and specified knee and abdominal tests. In his decision, Administrative Law Judge Stewart (the administrative law judge) determined that claimant was entitled to compensation from March 28 to July 7, 1995, when she returned to her pre-surgery position as a security guard with the Job Corps, and that she suffered no permanent disability arising from her knee surgery after August 11, 1995, the date of maximum medical improvement. He further found that claimant's psychiatric and/or gastrointestinal problems, if any, were unrelated to her knee condition, and any treatment associated with these conditions was, therefore, not compensable under the Act. He also stated that he could not address claimant's contentions under Section 14(f), 33 U.S.C. §914(f), because this issue must be first raised before the district director. Finally, he denied claimant's attorney a fee.

[1]Claimant was also employed as a certified nurses' assistant at Fredericka, where she took her nurses' training during January and February 1995.

On reconsideration, the administrative law judge refused to admit into evidence the opinions of Drs. Soliman and Kumar, as he found they were submitted too long after the record had been closed, as well as not being probative of the issues. He further found that the factual disputes raised by claimant did not provide a legal basis to amend or set aside his prior decision.

Claimant now appeals without legal representation, contending that the administrative law judge erred in denying her continuing disability compensation.[2] Employer responds, urging affirmance.

In his Decision and Order, the administrative law judge initially concluded that claimant was not totally disabled subsequent to July 7, 1995, and that she had no permanent impairment to her left knee. He based this conclusion upon the credited opinions of Drs. Fernandez and Dodge who, after finding no anatomical impairment to claimant's knee, opined that claimant could return to work as a security guard. The administrative law judge also noted that Dr. Kellerhouse stated that claimant's 1996 MRI was basically normal.

With regard to claimant's ability to work, both Drs. Fernandez and Dodge opined that claimant was capable of performing her pre-injury and pre-surgery jobs as a security guard, as well as the nurses' assistant position, and that any restrictions claimant may have do not limit either her work or life activities. *See* CXS 26, 47. Claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant must establish that she is incapable of returning to her regular or usual employment due to her work-related injury. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In the instant case, the administrative law judge's finding that claimant is capable of performing her prior job as a security job is supported by the opinions of Drs. Dodge and Fernandez. An administrative law judge is entitled to evaluate the testimony of all witnesses, including medical experts, and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean*

[2]Claimant has submitted additional evidence which was not before the administrative law judge. The Board will not consider such evidence on appeal. *See Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). If claimant has evidence of a change in condition or mistake in fact, she must file a petition under Section 22 of the Act, 33 U.S.C. §922, in order for it to be considered.

Stevedoring, Inc., 21 BRBS 33 (1983). As it is supported by substantial evidence, we affirm the administrative law judge's determination that claimant was capable of resuming her work as a security guard as of July 7, 1995, and his consequent denial of benefits for total disability.

We hold, however, that the administrative law judge erred in finding no permanent impairment based on these opinions and thus in failing to specifically address claimant's entitlement to an award under the schedule for a permanent partial disability to her lower left extremity. A schedule award for loss of use of the leg, 33 U.S.C. §908(c)(2), is the exclusive remedy for permanent partial disability to this member. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). Awards under the schedule are based on medical impairment; economic loss is not considered. *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15 (CRT)(4th Cir. 1998).

In the instant case, both Drs. Fernandez and Dodge opined that claimant suffered a rateable impairment. Specifically, Dr. Fernandez opined that claimant had sustained a 3 percent impairment rating to the whole person based upon a 7 percent impairment rating of her lower extremity. CX 77. Dr. Dodge opined that claimant had a 1 percent impairment of the whole person pursuant to a 2 percent impairment of the lower extremity. EX 92. Thus, the medical opinions credited by the administrative law judge support an award under Section 8(c)(2). The fact that these ratings were based on other factors than anatomical impairment is irrelevant, as the schedule is not limited in this manner. *See Pimpinella v.Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). We therefore vacate the administrative law judge's finding that claimant has no permanent disability due to her knee injury and remand this case for reconsideration of claimant's entitlement to disability and medical benefits for her knee.

Next, the administrative law judge determined that claimant's gastrointestinal complaints and psychiatric condition are unrelated to her work injury and/or her consequent knee surgery and therefore are not compensable. In so concluding, the administrative law judge failed to apply the Section 20(a), 33 U.S.C. §920(a), presumption with regard to causation. Claimant has the burden of proving the existence of an injury or harm, and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to invoke Section 20(a). *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). It is claimant's burden to establish the prerequisites for invoking Section 20(a) by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). Once she does so, the Section 20(a) presumption applies to link the harm or pain with claimant's employment. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Under Section 20(a), the burden then shifts to employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 20 (1976). If employer

rebuts the presumption, it falls from the case, and the administrative law judge must weigh the relevant evidence in the record as a whole. *See Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

With regard to her gastrointestinal complaints, claimant asserts that due to her knee injury and surgery, she takes prescription and over-the-counter medications for pain, and these medications have caused her gastrointestinal problems. Claimant's physicians of record, Drs. Fernandez, CX 77, Wiener, CXS 53-54, and Greenberger, HT 249-50, concurred that claimant's prescribed pain medication could cause such gastrointestinal problems. Claimant has thus demonstrated a *prima facie* case for invocation of the Section 20(a) presumption, as she has demonstrated both a harm, *i.e.*, gastrointestinal problems, and a potential work-related cause, *i.e.*, her knee surgery and resulting pain medications, which could have caused this harm. The administrative law judge erred by failing to consider this issue in light of the Section 20(a) presumption. Moreover, the administrative law judge, after stating that claimant's doctors opined that claimant's medications for her knee could have caused her problems, inexplicably concluded that because claimant is taking medications for "nonindustrial illnesses," Decision at 45, any side effects sustained are not compensable. As a result of his failure to analyze the issue in accordance with Section 20(a) or to reach a conclusion supported by the cited evidence, the administrative law judge's determination that claimant's gastrointestinal problems are unrelated to her work injury is vacated. The case is remanded for reconsideration consistent with Section 20(a) and the evidence.

The administrative law judge also erred in his consideration of claimant's psychiatric condition. Initially, he again did not apply Section 20(a). In addition, he considered only whether the psychological condition was related to her knee injury and/or surgery. In her initial claim, however, claimant sought and was awarded compensation for an emotional stress condition arising out of her previous employment. With regard to her psychological problems, claimant also established the elements necessary to invoke Section 20(a), as the condition constitutes a harm, and she established two separate work events which could have caused it, *i.e.*, the knee injury and workplace stress. Thus, the case must be remanded for Section 20(a) to be applied.

In addition, although the administrative law judge noted claimant's long history of emotional problems pre-dating her stress injury of 1993, he failed to properly apply the aggravation rule, which provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. This rule applies not only where the underlying condition itself is affected but also where the injury "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.* 18 BRBS 212, 214 (1986). Thus, the case is remanded for the administrative law judge to reconsider whether claimant's current psychological condition is related to either the earlier stress incident or to her knee injury in accordance with Section 20(a), and the aggravation rule. Accordingly, we vacate the administrative law judge's findings that claimant's psychiatric condition is unrelated to her knee surgery and thus not compensable and remand for reconsideration under the proper standards.[3]

[3]Claimant's current psychological condition, however, would not be compensable if it were the result of a legitimate personnel action, *i.e.*, the original reduction in force, *Marino v.*

We will next address the administrative law judge's decision not to admit into evidence reports which claimant attempted to submit post-hearing; specifically, the administrative law judge declined to admit the evidence at issue because it was submitted well after the record had closed. The Act's regulations, 20 C.F.R. §§702.338, 702.339, afford administrative law judges considerable discretion in ruling on requests for the admission of evidence into the record. *Wayland v. Moore Dry Dock*, 21 BRBS 177, 180 (1988). Moreover, a party seeking to have evidence admitted must exercise diligence in developing its claim. *See Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46, 50 (1989); *Sam v. Loffland Brothers Co.*, 19 BRBS 228, 230 (1987). In the instant case, we hold that the administrative law judge did not abuse his discretion in declining to admit claimant's post-hearing evidence into the record; accordingly, claimant's contention of error is rejected. *See Smith*, 22 BRBS at 50.

Additionally, we hold that the administrative law judge committed no reversible error in failing to address claimant's allegation that employer is liable for a penalty under Section 14(f), 33 U.S.C. §914(f). In the instant case, the administrative law judge properly stated that a request for a Section 14(f) penalty must first be directed to the district director. *See Richard v. General Dynamics Corp.*, 19 BRBS 48 (1986). Accordingly, we affirm the administrative law judge's conclusion that he could not address claimant's contentions under Section 14(f), as that issue was raised for the first time before him. *See generally Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989).

Finally, claimant alleges that the administrative law judge demonstrated prejudicial bias in his handling of her case. We disagree. Adverse rulings alone are insufficient to demonstrate bias. *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986). Moreover, claimant's references to alleged instances of the administrative law judge's unfriendliness toward her witnesses fail to rise to the level necessary to indicate prejudicial bias by the administrative law judge. *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). Thus, we hold that claimant has failed to demonstrate that the administrative law judge's actions in the instant case were arbitrary, capricious, or an abuse of discretion. *See O'Keeffe*, 380 U.S. at 359.

Navy Exchange, 20 BRBS 166 (1988), or of subsequent non-related intervening events. *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd*, 8 F.3d 34 (9th Cir. 1993).

Accordingly, the administrative law judge's findings regarding permanent impairment to claimant's knee and the cause of her gastrointestinal and psychological conditions are vacated, and the case is remanded for reconsideration consistent with this opinion. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge