

BRB No. 03-0259

LARRY L. SHANNON)
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 Claimant-Petitioner)
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 v.)
)
 I. M. C. GLOBAL) DATE ISSUED: Nov. 25, 2003
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 and)
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 TRAVELERS PROPERTY)
 CASUALTY CORPORATION,)
 d/b/a CONSTITUTION STATE)
 SERVICE COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Anthony V. Cortese, Tampa, Florida, for claimant.

William C. Cruse (Blue Williams, L.L.P.), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-LHC-0429) of Administrative Law Judge Daniel F. Solomon 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).

The facts of this case are not disputed. Claimant was injured on September 28, 1999, while riding in a golf cart on employer's premises with his supervisor. The brakes failed, and the cart crashed into a steel beam, collapsing the canopy. Claimant was struck by the beam and the canopy and rendered unconscious. He suffered a number of physical and psychological injuries as a result of the accident, including a cerebral concussion, chronic cervical, thoracic and lumbosacral strain, broken ribs, and anxiety, depression and panic disorders.¹ Cl Exs. 1 at 10; 3 at 6; 14; Emp. Ex. 9. Employer paid temporary total disability benefits from the date of injury and medical benefits for claimant's various injuries. Prior to the hearing, employer accepted claimant as being permanently totally disabled. ALJ Ex. 9. Also prior to the hearing, claimant developed increasing problems with ambulation and mobility, and he avers that this problem is work-related. The only issues before the administrative law judge were the cause of the ambulatory problems and the extent of claimant's entitlement to medical benefits, specifically to the treatment and apparatus recommended by Ms. Rothman, a registered nurse, in her life-care planning report (the Rothman report).²

After summarizing the voluminous record in this case, the administrative law judge found that the work injury caused both physical and mental injuries, but it did not cause claimant's current problems with ambulation and mobility. Rather, he found that claimant's ambulation problems were caused by his pre-existing peripheral vascular

¹Claimant also suffers from a number of pre-existing conditions, including coronary arteriosclerosis, hypertension, chronic obstructive pulmonary disease, obesity, and peripheral vascular disease. Emp. Ex. 1 at exh. 2.

²Ms. Rothman reviewed the history of claimant's work accident and injuries discussed in the doctors' medical reports, and she interviewed claimant. She determined that claimant is severely limited and needs assistance with many of his daily living needs. Ms. Rothman's recommendations for claimant's life-care plan included: a motorized wheelchair; ramps, lifts and other accessories and architectural renovations associated with the wheelchair; other independent living items such as a raised toilet seat, a jar opener, and a clip board; inpatient rehabilitation evaluation; further neuropsychological treatment; home attendant care; a walker; a lift chair; a hospital bed; a smoke detector; a fire alarm; a computer; assignment to a physiatrist; additional types of therapy; counseling; wrist supports; a back brace; and an abdominal brace. Cl. Ex. 5. Claimant's psychiatrist, Dr. DeVine, originally prescribed the motorized wheelchair. Cl. Ex. 1 at 9. He, Dr. Kabaria, claimant's pain management specialist, and Dr. Martinez, claimant's neurologist, all agreed on the need for the motorized chair. Drs. DeVine and Martinez also gave blanket endorsements to the Rothman report. Cl. Exs. 1 at 12; 3 at 7; 4 at 15. Dr. Eichberg, employer's expert, also agreed with the recommendation for a motorized wheelchair, stating it would help claimant's vascular and respiratory problems. Emp. Ex. 1 at 33.

disease and pulmonary condition and not by the back, neck or psychological injuries caused by the work injury. Decision and Order at 24. After considering the entire Rothman report, the administrative law judge awarded medical benefits for family and marital counseling, an abdominal brace, and a back brace, and he denied the remaining recommended items, concluding they were to alleviate claimant's mobility problems or were not necessary or reasonable for the treatment of his work-related injuries. *Id.* at 27-32. Claimant challenges the finding that his mobility problems are not related to his work injury, and he appeals the denial of the recommended medical items and treatments.³ Employer responds, urging affirmance.⁴

Claimant first contends the administrative law judge erred in not addressing or considering the post-hearing affidavits from he and his wife regarding the results of his post-hearing vascular surgery. These documents were submitted to the administrative law judge after the record closed and were attached to counsel's amended fee petition. The administrative law judge did not request, accept or consider the post-hearing affidavits in addressing the cause of claimant's ambulation problems. Decision and Order at 36. Because the affidavits purported to establish that claimant continued to suffer mobility problems despite the success of the vascular surgery, claimant argues that these documents should have been admitted into evidence and considered on the matter of whether claimant's mobility problems were related to his work injuries. Contrary to claimant's assertion, the administrative law judge has wide discretion in the admission of evidence. *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153, 155 n.1 (1985); *Smith v. Ceres Terminals*, 9 BRBS 121 (1978). Once the record is closed, he is fully within his authority to decline to re-open the record or accept further evidence. *See generally Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986). Even assuming, *arguendo*, that claimant submitted the additional evidence at the earliest possible time, the evidence consists of the opinions of claimant and his wife and does not constitute expert medical evidence

³Claimant also argued that the administrative law judge erred in not awarding a penalty under Section 14(e), 33 U.S.C. §914(e), but he withdrew the issue from consideration on appeal in the cover letter of his reply brief. Accordingly, we will not address the issue.

⁴Employer filed a response brief to claimant's reply brief (the second response brief). Thereafter, claimant filed another reply brief, and employer filed a third response brief, and both contained references to the second response brief. Although the second response brief was not filed with the Board, it was sent to claimant and was purportedly filed with the Director, Office of Workers' Compensation Programs, the Office of Administrative Law Judges, the Solicitor of Labor and the regional district directors. We shall, therefore, accept this document into the record before the Board. 20 C.F.R. §802.215.

addressing the causation issue. Accordingly, we shall not disturb the administrative law judge's decision on this matter. If claimant believes the administrative law judge has made a mistake in the determination of a fact, then he may file a motion for modification of the decision pursuant to the provisions of Section 22 of the Act, 33 U.S.C. §922. *O'Keeffe v. Aerojet-General Shipyards, Inc.* 404 U.S. 265 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968).

Claimant next contends the administrative law judge erred in failing to discuss and invoke the Section 20(a), 33 U.S.C. §920(a), presumption, and in failing to consider whether claimant's work-related injuries aggravated his pre-existing conditions to ascertain whether his ambulation and mobility problems are related to his work injuries. Claimant is correct in asserting that the administrative law judge did not address or invoke the Section 20(a) presumption. In this case, there is no dispute that claimant sustained work-related injuries when the golf cart crashed into a steel beam. It is also undisputed that claimant has back, neck, and psychological injuries, and that he also has trouble ambulating. Thus, as claimant established a number of harms and an accident that could have caused them, so the Section 20(a) presumption should have been invoked. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

Upon invocation of the Section 20(a) presumption, the burden shifts to the employer to rebut the presumption with substantial evidence demonstrating that the claimant's condition was not caused or aggravated by his employment. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000), *petition for review denied*, No. 02-12758 (11th Cir. Feb. 5, 2003). Where aggravation of a pre-existing condition is at issue, the employer must establish that the work events neither directly caused the injury nor aggravated the pre-existing condition, resulting in the injury. *O'Kelley*, 34 BRBS at 41; *see also Cairns v. Matson Terminals*, 21 BRBS 262 (1988). The employer need not establish proof of another agency of causation to rebut the presumption; a medical opinion given to a reasonable degree of medical certainty that no relationship exists between the injury and the employment is sufficient to rebut the Section 20(a) presumption. *O'Kelley*, 34 BRBS at 41. Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Kubin v. Pro-Football, Inc.* 29 BRBS 117 (1995). If the employer rebuts the presumption, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *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).

Although the administrative law judge did not invoke the Section 20(a) presumption or discuss rebuttal, his error is harmless with regard to the causal connection between claimant's employment and his back, neck and psychological injuries. Substantial evidence supports the administrative law judge's conclusion that those injuries are work-related, and no party challenges the findings. Decision and Order at 25-27. Thus, in addition to the treatment claimant has been receiving from his doctors for these respective injuries, the administrative law judge also rationally awarded the back brace, abdominal brace, and the family and marital counseling recommended in the Rothman report. *Id.* at 31. Those findings are, therefore, affirmed. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

The real dispute here concerns whether claimant's ambulation and mobility problems are related to his work injuries. To sever the causal relationship, employer presented evidence to show that the pain in claimant's legs is claudication and is the result of his pre-existing peripheral vascular disease. Emp. Exs. 1 at 22-23, 26; 2 at 14, 20-21, 45. Dr. Nagamia, claimant's cardiovascular surgeon, testified that claimant has chronic obstruction of his iliac arteries from years of plaque build-up and that there is no evidence to show that claimant's condition arose from an acute onset following the work accident. The blockage causes claudication, pain when walking, and if it becomes severe enough, advances to pain at rest. Emp. Ex. 2 at 5, 14, 20-21, 45. Dr. Eichberg, employer's expert on physical medicine and rehabilitation, testified that there is no neuromuscular reason for claimant to have pain while ambulating and that the problem is primarily due to claimant's cardiovascular and pulmonary problems. Given claimant's history of episodes of low blood pressure, Dr. Eichberg opined that the pain could be secondarily related to a condition called orthostatic hypotension. He concluded that the pain related to ambulation is vascular and is not related to the work accident. Emp. Ex. 1 at 4, 22-23, 26, 31. These opinions are sufficient to rebut the Section 20(a) presumption with regard to a direct causal connection between claimant's injury and his ambulatory problems. *Rochester v. George Washington University*, 30 BRBS 233 (1997).

Thereafter, the administrative law judge credited the opinions of Drs. Eichberg and Nagamia and found that claimant's problems with ambulation and mobility were caused by his pre-existing cardiovascular and pulmonary conditions. Decision and Order at 24. In light of his thorough recitation of the record and his detailed reasons for giving greater weight to the opinions of these doctors over the opinions of others, we affirm the administrative law judge's determination that claimant's problems with ambulation and mobility were not directly caused by his work accident. Thus, his error in failing to discuss Section 20(a) in this regard was harmless. *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd and modified on other grounds on recon.*, 22 BRBS 430 (1989); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

However, where aggravation has been raised, the Section 20(a) presumption also applies to relate the injury to the work accident. Thus, application of Section 20(a) presumes that the work injury aggravated the pre-existing condition, and the presumption must be rebutted specifically. *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982). In this case, claimant contends the work injury and the sequela thereof aggravated, accelerated, exacerbated, contributed to or combined with his pre-existing conditions and resulted in his ambulation and mobility problems. The administrative law judge did not address aggravation and, indeed, stated only “[i]t is interesting that the Claimant did not develop whether his ambulation problems were pre-existing, or were aggravated or exacerbated by the compensable injury.” Decision and Order at 24. Contrary to the administrative law judge’s statement, and employer’s arguments on appeal, claimant raised the issue of aggravation at the hearing and in his Final Amended Memorandum in Support of Claimant’s Contentions for Final Hearing (claimant’s post-hearing brief). At the hearing, claimant’s counsel stated that claimant’s cardiovascular condition, including both the conditions in his heart and in his legs, was aggravated by claimant’s inability to exercise after the work injury and also to the stress and anxiety claimant suffered following the work injury. Tr. at 29-30. In his post-hearing brief, claimant asserted that lack of exercise and stress accelerated the accumulation of plaque in claimant’s arteries and aggravated his vascular disease. Claimant asserted his cardiac condition was aggravated for the same reasons. Cl. Post-Hearing Brief at 9-10. Claimant also raised the possibility that the work-related musculoskeletal conditions aggravated, accelerated or combined with his pre-existing conditions to limit his mobility. *Id.* at 11.

To support his assertions, claimant relied on the opinion of Dr. Nagamia, who stated that claimant’s inability to exercise after the work injury could have contributed to an accumulation of plaque in his leg arteries. He also stated that claimant’s stress could play a role in contributing to the development of plaque, as could his anxiety, panic attacks, and severe depression.⁵ Emp. Ex. 2 at 75-76. Dr. Eichberg stated that, while he would normally encourage a patient to exercise to improve the health of his legs, he would not encourage exercise in this case because claimant has too many other things wrong with him. Emp. Ex. 1 at 33. Claimant and his wife testified as to the stress they have felt since this injury and to the decline in claimant’s level of activity since the accident. Tr. at 47-50, 55-60, 86-88, 101-103, 106-107. The administrative law judge specifically credited claimant and his wife as to the stress they have been under since the accident as a result of claimant’s failing health, Decision and Order at 18, and there is no contradictory evidence regarding claimant’s decline in activity. If credited, Dr. Nagamia’s testimony could support a finding that claimant’s work injury, and its sequela,

⁵Dr. Nagamia also stated that trauma could aggravate claimant’s chronic vascular condition if the trauma directly involved the arteries. Emp. Ex. 2 at 84. There is no evidence that claimant suffered injuries directly to his iliac arteries.

aggravated or exacerbated claimant's pre-existing vascular condition, resulting in his ambulation problems. As the administrative law judge did not discuss aggravation, we must vacate his determination that claimant's ambulation and mobility problems are not work-related, and we remand the case to the administrative law judge for further consideration of this issue consistent with Section 20(a). *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002); *see, e.g., Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998); *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986).

Claimant next contends he is entitled to medical benefits as recommended in the Rothman report. Section 7 of the Act, 33 U.S.C. '907, authorizes coverage of medical expenses for the reasonable and necessary treatment of a claimant's work-related injury.⁶ The claimant has the burden of establishing the elements of a claim for medical benefits.⁷ *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996). In this case, the administrative law judge denied many of the recommendations made in the Rothman report because he found they pertained to claimant's ambulation and mobility problems. In light of our decision to vacate the administrative law judge's finding that claimant's ambulation problems are not related to his work injury and to remand the case for consideration of whether the work injury aggravated a pre-existing condition, resulting in the ambulation problems, we must also vacate his denial of the medical recommendations made in the Rothman report that he found were related to the ambulation problems. This would include, among other things, the need for the motorized wheelchair and related accessories and architectural renovations, as well as the need for a walker, and home care. On remand, if the administrative law judge determines that claimant's vascular condition was not aggravated by the work injuries, then his reasons for rejecting the mobility-related treatments are rational, and claimant is not entitled to those items under the Act. If, however, the administrative law judge finds that the work injury and/or its sequela aggravated, accelerated or contributed to claimant's current ambulation problems, then the administrative law judge must reconsider the need for each requested item that he denied solely because it related to claimant's ambulation problems. *See generally Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986).

⁶Section 7(a) of the Act, 33 U.S.C. '907(a), states:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

⁷We reject claimant's argument that Section 20(a) of the Act, 33 U.S.C. §920(a), applies to presume that a treatment is reasonable or necessary for a work injury. *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996).

Claimant also contends the administrative law judge erred in denying the use of a physiatrist to coordinate claimant's medications and treatments. The administrative law judge denied this request because he concluded claimant failed to offer a medical opinion addressing the need for such a specialist. Decision and Order at 30. Claimant contends Ms. Rothman's recommendation received blanket endorsement from Drs. DeVine and Martinez and that Dr. Eichberg also supported the services of a physiatrist. Contrary to claimant's assertion, the evidence he cites does not warrant interfering with the administrative law judge's finding on this matter. First, it is clear the administrative law judge did not give great weight to the doctors who gave blanket endorsements to these recommendations. Decision and Order at 28-29. This is reasonable because, for example, when asked to address the need for specific items, Dr. Martinez, at least, stated that certain of those items were not "necessary." Cl. Ex. 3. Further, although Dr. Eichberg agreed that claimant would benefit from the services of a physiatrist, he noted that claimant had managed for three years without one. Emp. Ex. 1 at 35. As claimant bears the burden of establishing that medical expenses are reasonable and necessary, we affirm the administrative law judge's determination that he has not done so with regard to the need for the services of a physiatrist.⁸ See generally *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

⁸We affirm the administrative law judge's denial of the recommendations for: independent living needs, in-patient rehabilitation, additional neuropsychological evaluations, a computer, additional therapies and nursing needs, modalities other than family/marital counseling, and wrist supports. See Decision and Order at 28-31. The administrative law judge denied these requests because claimant failed to establish they were reasonable or necessary for the treatment of his work injuries. Although Ms. Rothman suggested them, and Drs. DeVine and Martinez gave blanket endorsements to the need for these items, when questioned on specific items, Dr. Martinez admitted the items would be "nice to have" but were not necessary to treat claimant. Moreover, claimant does not specifically challenge the administrative law judge's determinations with regard to these requests.

Accordingly, the administrative law judge's finding that claimant's ambulation and mobility problems are not work-related and his denial of the items in the Rothman report he found to be related to the ambulation problems are vacated and the case is remanded for further consideration in accordance with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge