BRB No. 05-0195

BRUCE L. ROBINSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 11/07/2005
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks, Gibbons, Kittrell, Olsen, Walker & Hill, P.C.), Mobile, Alabama, for claimant.

Donald P. Moore (Franke, Rainey & Salloum, P.C.), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-849) of Administrative Law Judge C. Richard Avery 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).

Claimant worked at employer's facility as a shipfitter, welder, carpenter, and burner from 1979 until he injured his left foot in April 2002. Emp. Ex. 6; Tr. at 23-26. His treating orthopedist, Dr. Fontana, diagnosed claimant as having fractured the second metatarsal of his left foot, and he treated claimant with medication, a walker-boot, and therapy. Cl. Ex. 6. Because of other problems with his feet, Dr. Fontana referred

claimant to Dr. Elmore, a neurologist. On August 1, 2002, Dr. Elmore diagnosed claimant as having a progressive hereditary disorder called Charcot Marie Tooth disease (CMT) which can cause muscular weakness and atrophy, as well as deformities of the hands and feet. Dr. Elmore stated that claimant was totally disabled from sedentary work and manual labor as a result of this condition. Decision and Order at 3; Cl. Ex. 7. Dr. Fontana stated, and the parties agreed, that claimant's work-related condition reached maximum medical improvement on January 21, 2003. Cl. Ex. 6; Jt. Ex. 1. At that time, employer voluntarily paid claimant permanent partial disability benefits under Section 8(c)(4), 33 U.S.C. §908(c)(4), for a two percent impairment to the left foot. Claimant filed a claim for permanent total disability benefits, contending his fracture combined with his pre-existing CMT to prevent him from returning to work.

The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption; however, he found that employer rebutted the presumption, and on the record as a whole, he found that claimant's work-related fracture did not cause, aggravate or contribute to the progression of claimant's CMT which prevents him from returning to his usual job. Decision and Order at 5-6. Claimant appeals the administrative law judge's decision, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in failing to acknowledge that claimant's work-related injury combined with his CMT, rendering him totally disabled, because the work injury resulted in permanent work restrictions and these restrictions combined with the restrictions related to his hereditary disease. Specifically, claimant argues that Dr. Fontana restricted claimant from long-distance walking and climbing as a result of his work-related fracture, and that the administrative law judge failed to acknowledge these restrictions. Employer responds, urging affirmance of the administrative law judge's decision, arguing that claimant has no restrictions related to his work injury and that claimant is totally disabled solely as the result of his hereditary disease.

It is undisputed that claimant is disabled by his pre-existing hereditary CMT condition and that this condition was not caused by his employment. However, under the aggravation rule, if a work-related injury "worsens or *combines with* a pre-existing impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resultant condition is compensable." *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517, 18 BRBS 45, 49(CRT) (5th Cir. 1986) (*en banc*) (emphasis added). The employment injury need not interact with the underlying condition to produce a worsening of the underlying impairment. It is sufficient under the aggravation rule if the pre-existing condition and the work injury combine in only an additive way. Under such circumstances, the overall impairment is compensable. *Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 839, 24 BRBS 137, 141(CRT) (9th Cir. 1991). Thus, in order to determine whether claimant's work injury combined with

his pre-existing condition to render him totally disabled, we must first address claimant's contention that he is impaired due to his work-related injury.

Claimant alleges he was restricted from certain activities as the result of his work injury and that the administrative law judge did not acknowledge those restrictions. Specifically, claimant contends Dr. Fontana restricted him from walking long distances and climbing because of the soreness remaining from the work-related foot injury. The administrative law judge acknowledged claimant's reported soreness with walking long distances, but concluded that claimant had no work-related restrictions.[1] Decision and Order at 4, 7. As claimant argues, the administrative law judge did not fully address the evidence concerning whether claimant has any residual impairment or work restrictions as a result of his work injury.

In discussing claimant's work restrictions, following a functional capacity evaluation, Dr. Fontana stated in July 2003: "we have given [claimant] restrictions as far as his work injury from his work capacity evaluation of no walking on unprotected heights and no climbing due to his fracture sustained at work." Cl. Ex. 6 at 19. Two months later, the doctor reported that claimant is "restricted from no (sic) climbing or walking on unprotected heights. I feel his balance problems are due to Charcot Marie Tooth disease." *Id.* at 20. In November 2003, Dr. Fontana stated that claimant has soreness in his foot related to his work-related fracture and that this soreness "would keep him from walking or standing for long distances or possibly climbing." *Id.* at 20-21; Emp. Ex. 7. Drs. Rutledge and Millette concluded that claimant had fully recovered from his work injury, and Dr. Rutledge concluded that claimant had no residual impairment as a result of that injury. Emp. Exs. 9-10.

Because the administrative law judge did not fully address the evidence or explain why he concluded claimant has no residual impairment or restrictions as a result of his work injury, and because the determination of whether claimant has work-related restrictions is critical to claimant's claim based on the combination of his conditions, we must vacate the administrative law judge's denial of benefits and remand the case for further consideration of this issue. If, on remand, the administrative law judge determines that claimant has no restrictions related to the work injury, then nothing could have "combined with" the pre-existing condition, and the analysis need proceed no further. Claimant would not be entitled to additional benefits, as claimant's inability to return to work would be due solely to his hereditary disease. *See Peterson v. Washington Metropolitan Area Transit Authority*, 13 BRBS 891 (1981). If, however, the

[1]The administrative law judge concluded that Dr. Fontana's reports placed the blame for claimant's other symptoms on the CMT. Decision and Order at 4, 7. This finding is supported by substantial evidence of record. Cl. Ex. 6; Emp. Exs. 7, 10.

administrative law judge finds that claimant has work-related restrictions, then he must determine whether claimant's work and hereditary conditions combined to render claimant totally disabled.

In determining whether a claimant's disabling condition is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. When, as here, a claimant alleges that a work incident combined with a pre-existing condition, to establish a *prima facie* case he must show that he has sustained a disabling condition and that conditions existed or an accident occurred at his place of employment which could have combined with his prior condition to result in his ultimate disability. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *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). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the disabling condition to the employment, and the employer can rebut this presumption by producing substantial evidence that the disabling condition 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); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). Where the aggravation rule is at issue, the employer must establish that the work events or conditions neither directly caused the injury nor aggravated, contributed to or combined with, the pre-existing condition. *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT). 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).

It is undisputed that claimant sustained a work-related injury to his left foot and that he suffers from a non-work-related pre-existing progressive hereditary disease that affects his hands and his feet. Claimant, however, contends that the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption and that the work-related fracture did not combine with the underlying hereditary condition to result in claimant's total disability. The administrative law judge relied on the opinions of Dr. Elmore, Dr. Rutledge, who examined claimant once in January 2003, and Dr. Millette, who reviewed claimant's records in May and June 2004, to establish rebuttal. In addressing the causation issue, the administrative law judge stated only:

> still and all a reading of [Dr. Fontana's] records reveal Claimant's hereditary disorder is the cause of his current problems and unrelated to and unaffected by his industrial accident, an opinion which is shared by Drs.

> Millette, Elmore and Rutledge. Therefore . . . Employer has rebutted the presumption with substantial evidence, and when the evidence is weighed as a whole it does not support a finding that Claimant's foot fracture caused, aggravated or contributed to the progression of Claimant's disorder which now prevents him from returning to the shipyard.

Decision and Order at 6. Thus, the administrative law judge found that claimant's CMT is not related to or affected by the work injury. Decision and Order at 6; Cl. Ex. 7; Emp. Exs. 8-10.

We cannot affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption, and we must remand the case for reconsideration of this issue. Initially, as we have discussed, the administrative law judge addressed this issue in terms of whether claimant's foot fracture "caused, aggravated or contributed to the progression of his disorder," but he did not address whether the work injury "combined with" the pre-existing condition to cause claimant's disability. *See Ronne I,* 932 F.2d 836 at 839, 24 BRBS at 141(CRT). Moreover, he must reconsider the medical evidence in this regard. Dr. Elmore diagnosed CMT in August 2002, and he stated that this condition will deteriorate. He did not discuss the work injury or whether it had any relationship to the hereditary condition. Cl. Ex. 7; Emp. Ex. 8. This opinion is, therefore, legally insufficient to rebut the Section 20(a) presumption. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). In January 2003, Dr. Rutledge stated that claimant's work injury fully healed with no residuals and that claimant was permanently totally disabled as the result of his CMT. Emp. Ex. 9. This opinion mirrored that of Dr. Fontana at that time. That is, prior to obtaining the results of the functional capacity evaluation (FCE), Dr. Fontana agreed with Dr. Rutledge's opinion, stating that claimant's work-related condition reached maximum medical improvement, leaving a permanent disability but no work-related restrictions, and that claimant cannot return to work as a result of his CMT. Cl. Ex. 6; Emp. Ex. 7. After the FCE, Dr. Fontana stated that the "current symptoms" in claimant's foot that "relate to some soreness with walking long distances is related to his work-related injury. . . ." Emp. Ex. 7 (Nov. 11, 2003 report). Dr. Fontana also opined: "I feel that his foot and (sic) combined with his neurologic disease do make him overall worse." Cl. Ex. 6 at 20; *see also* Cl. Ex. 6 at 82. Dr. Millette reviewed claimant's records in May and June 2004, and he concluded that claimant fully recovered from his on-the-job injury and that the CMT was not work-related. Emp. Ex. 10.

As the administrative law judge did not address whether employer rebutted the Section 20(a) presumption by establishing that the work injury did not *combine with* his pre-existing condition to cause disability, we vacate the administrative law judge's finding of rebuttal and remand this case for further consideration. On remand, the administrative law judge must reconsider the evidence and address whether employer has

rebutted the Section 20(a) presumption that claimant's work-related injury combined with his CMT to cause his disability. If the administrative law judge finds that employer rebutted the presumption, then he must weigh the evidence on the record as a whole to determine whether claimant's conditions combined to result in his ultimate disability. If the administrative law judge finds that employer failed to establish rebuttal, then the ultimate disability is work-related as a matter of law. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

If the administrative law judge finds that claimant's conditions "combined," then he must address whether claimant established that his foot impairment prevents him from returning to his usual employment. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). If so, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). On remand, if the administrative law judge finds that claimant has work-related foot restrictions and that his work injury combined with his hereditary CMT to prevent him from returning to his usual work, then the administrative law judge must address whether employer established suitable alternate employment in light of the totality of claimant's restrictions.[2] *See generally Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, __ BRBS __, BRB No. 04-742 (June 21, 2005); *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004). If employer fails to establish the availability of suitable alternate employment, then claimant is entitled to permanent total disability benefits. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

[2]If employer establishes suitable alternate employment, then claimant is entitled to benefits under the schedule, 33 U.S.C. §908(c)(4), for the totality of his foot impairment and not just the amount attributed to his work injury. *See Ronne I*, 932 F.2d 836, 839-840, 24 BRBS 137, 141-142(CRT).

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge