BRB No. 04-0145

DONALD W. DURANT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BAYOU FLEET, INCORPORATED	)	DATE ISSUED:Oct. 20, 2004
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

Donald W. Durant, Jr., Slidell, Louisiana, *pro se*.

Travis R. LeBleu (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (00-LHC-1827, 3034, 3035, 3036, 3037, 3038) 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).

This case is before the Board for the third time. To reiterate, claimant, who was employed as a port engineer by employer, filed a claim under the Act based on a series of injuries which he alleged aggravated his underlying back condition, and which

culminated on August 16, 1999, the day employer terminated him because he was no longer physically able to perform his job duties. CX 1. As a result of his alleged work-related condition, claimant sought temporary total disability compensation and medical benefits.

In his original Decision and Order, the administrative law judge, after noting that claimant provided no evidence that his work for employer caused, aggravated or accelerated his pre-existing back condition, stated that claimant blamed unwitnessed, undocumented and unmentioned accidents at work for his present medical condition and declined to accept claimant's testimony without corroboration. The administrative law judge thus concluded that claimant failed to establish his *prima facie* case and consequently was not entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a). Accordingly, the administrative law judge denied benefits. Claimant appealed to the Board, without the assistance of counsel.

The Board held the administrative law judge erred in concluding that claimant presented insufficient evidence to establish his *prima facie* case, and, therefore, erred by not invoking the Section 20(a) presumption. Specifically, the Board held that, although the administrative law judge found that claimant established a harm, a chronic back condition,[1] he erred in finding claimant did not establish the existence of working conditions which could have aggravated this back condition. With respect to the working conditions element of claimant's *prima facie* case, the Board stated that claimant's testimony that he performed heavy labor and regularly experienced back pain and discomfort while working for employer is indeed corroborated by other evidence regarding claimant's work activities.[2] *Durant v. Bayou Fleet, Inc.*, BRB No. 01-0455

[1]Employer did not dispute that claimant established the harm element of his *prima facie* case, *i.e.*, claimant has chronic back pain, disc degeneration at L4-5, spinal stenosis of L4-5 with bilateral foraminal narrowing, and bilateral L4-5, spondyloslisthesis. In this regard, the administrative law judge specifically stated that "[c]laimant's long standing back discomfort is well documented both by his testimony at trial and the medical records and testimony received into evidence." Decision and Order at 11.

[2]The parties agreed that claimant's work for employer was physically strenuous, requiring him to move pipe, pull chain, build blocks and tackles, set up cranes, rig buckets, generally without assistance. Tr. at 93-95, 99-100; EXs 6, 7. Mr. Toups, employer's controller, testified that claimant consistently complained of back pain while he was at work and that he had "no doubt" that working aggravated claimant's back condition, Tr. at 33, 40-42, that employer had offered claimant light-duty work at approximately half his salary, Tr. at 34, and that claimant would start the work day, work for two hours, lay down for four hours, then work for two hours. Tr. at 36. Employer

(Jan. 11, 2002)(unpub.). Thus, the Board held that this evidence is sufficient to establish that working conditions existed which could have caused, aggravated or accelerated claimant's back pain, in that claimant need not prove that a specific accident occurred or relate his harm to a specific event or time, but may base his claim upon general working conditions over a period of time. *Id.* at 4. Moreover, the Board held that the administrative law judge erred in requiring claimant to affirmatively establish that his working conditions aggravated or accelerated his chronic back condition. Specifically, the Board stated that once claimant establishes a harm and the existence of working conditions which *could* have caused it, Section 20(a) applies to link the harm to the work activities. *Id.* Therefore, the Board held that the Section 20(a) presumption applies as a matter of law. Accordingly, the Board remanded the case to the administrative law judge to consider whether employer rebutted the presumption with substantial evidence that claimant's back condition is not related to his employment.

On remand, the administrative law judge found that employer rebutted the Section 20(a) presumption with negative, circumstantial evidence. The administrative law judge noted that, in June 1999, claimant reported to Dr. Salone that his pain was not work-related. EX 5 at 25. The administrative law judge also determined that claimant presented the same symptoms before and after his employment with employer. EX 3 at 22. The administrative law judge relied on Dr. Kaufman's report that he saw no objective change in claimant's condition after his employment with employer. The administrative law judge further found that claimant's testimony that his work increased or aggravated his symptomotology is not credible, and the administrative law judge therefore declined to rely on the deposition testimony of Dr. Bourgeois that claimant's work aggravated claimant's condition, as Dr. Bourgeois's opinion was based on the history claimant provided. Decision and Order on Remand at 3-4; CXs 5, 6. Finally, the administrative law judge relied on the testimony of claimant's co-workers that claimant never reported an accident until after his employment was terminated, and he additionally relied on surveillance videotape of claimant depicting him allegedly engaged in activities beyond his stated capabilities. EX 8. On weighing the evidence as a whole, the administrative law judge concluded that claimant did not meet his burden of establishing that he sustained a work-related injury. Accordingly, the administrative law judge again denied benefits. *See* Decision and Order on Remand at 2. Claimant, without the assistance of counsel, again appealed to the Board.

The Board held that the negative evidence relied on by the administrative law judge was insufficient to rebut the Section 20(a) presumption on the facts of this case. *Durant v. Bayou Fleet, Inc.*, BRB No. 02-0536 (Apr. 24, 2003)(unpub.) *(Durant II)*. In

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terminated claimant because the physical demands of his position were beyond his abilities. *Id.*; CX 1 at 9.

so holding, the Board stated that the overriding error in the administrative law judge's analysis was his insistence on framing the issue in terms of the occurrence of a discrete accident at work, rather than in terms of whether claimant's overall employment aggravated his back condition or symptomotology. *Id.* at 4. Thus, the Board held that the fact that claimant did not report the occurrence of an injury at work until after his termination cannot be grounds for finding the presumption rebutted in the face of the co-workers' testimony that claimant's work was heavy and likely aggravated his back pain and the fact that claimant was terminated because he was physically unable to perform his work.[3] *Id.* Moreover, the Board stated that Dr. Kaufman admitted in his deposition testimony that claimant on occasion would complain that his work would aggravate his discomfort, EX 3 at 20, and he placed claimant on light duty work restrictions in February 1999 while claimant was employed with employer. *Id.* at 12-13. In this regard, the Board also stated that claimant's remarks to Dr. Salone in June 1999 that his pain was not work-related does not negate the presumed causal relationship between claimant's employment after that date and claimant's back pain. Finally, the Board stated the videotape evidence relates to claimant's ability to work, which is properly addressed in the context of the extent, if any, of claimant's disability. *Durant II*, slip op. at 5. In sum, the Board held that, as a matter of law, the negative evidence relied on by the administrative law judge does not constitute substantial evidence sufficient to rebut the Section 20(a) presumption, in light of the facts that gave rise to the presumption in the first instance. In this regard, the Board stated that employer did not offer any "affirmative" evidence that claimant's work did not aggravate his back condition, which may have bolstered the negative evidence, and thus claimant's condition is work-related as a matter of law. Accordingly, the Board vacated the administrative law judge's denial of benefits and remanded the case for the administrative law judge to consider the remaining issues raised by the parties. *Id*.

In his Decision and Order on Second Remand, the administrative law judge found that claimant reached maximum medical improvement on September 2, 2000, based on claimant's visit to Dr. Bourgeois on that date, and the doctor's opinion that until further specific treatment was provided claimant was at maximum medical improvement.[4] Next, the administrative law judge found that claimant established his *prima facie* case of total disability by submitting the opinions of Drs. Bourgeios and Kaufman that he is unable to return to his former employment. The administrative law judge then found that employer

[3]Employer's termination notice specified that claimant's discharge was based on his physical inability to perform his duties as port operator for employer. CX 1 at 9.

[4]The administrative law judge also based his finding of maximum medical improvement on the fact that claimant had declined past surgical recommendations by doctors at Oschner Hospital.

failed to establish evidence of suitable alternate employment, and, therefore, the administrative law judge found that claimant is entitled to temporary total disability from August 16, 1999, until September 2, 2000, continuing permanent total disability from September 2, 2000, medical expenses under Section 7 of the Act, 33 U.S.C. §907, excluding the treatment by Dr. Bourgeois, a credit to employer for part-time wages claimant earned as a self-employed worker in 2000, interest to claimant for past-due sums, and a penalty under Section 14(e), 33 U.S.C. §914(e), against employer for failure to timely controvert the claim. On claimant's motion for reconsideration, the administrative law judge affirmed his finding that employer is not liable for the medical treatment provided by Dr. Bourgeois, as claimant had not obtained the required prior approval from employer to treat with that doctor.

On appeal, employer challenges only the conclusion that claimant's current condition is causally related to claimant's employment.[5] Specifically, employer contends that claimant did not present sufficient evidence to invoke the Section 20(a) presumption of causation, that employer submitted sufficient evidence to establish rebuttal of the Section 20(a) presumption, and that the Board imposed on it an improper evidentiary burden to establish rebuttal of the Section 20(a) presumption, by requiring that it produce "affirmative" evidence, a higher burden than the statutory "substantial evidence" standard. Thus, employer argues that claimant is entitled to neither disability compensation nor medical benefits. Employer avers that claimant's current back condition is caused by his pre-existing back condition and was not affected by his work for it.

Initially, employer argues that claimant failed to establish a *prima facie* case for invocation of the Section 20(a) presumption. Specifically, employer contends that the Board's focus on the "working conditions" element of claimant's *prima facie* case constitutes reversible error because it is claimant who alleged that a discrete accident occurred at work, as opposed to general working conditions. Emp. br. at 13-14.[6] The

[5]In an Order dated January 12, 2004, the Board granted claimant's December 5, 2003, request to withdraw his appeal, BRB No. 04-0145A.

[6]Employer states that although claimant alleges six separate accidents, the only accident he ever reported to either employer or his medical providers was the alleged August 16, 1999 incident and only after employer fired claimant because of his "attitude problems." Emp. br. at 13. Employer also states that prior to his termination, claimant specifically denied injuring himself at Bayou Fleet. *Id.* Employer, however, also states that claimant's medical records do not support a work-related accident, but instead support only that claimant has had a long standing history of back pain dating back to 1976, which is aggravated by activity and relieved by rest.

Board's decision on this issue constitutes the law of the case, and, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice, the Board will adhere to the doctrine. *See, e.g.*, *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992). We hold that with respect to invocation of the Section 20(a) presumption, employer has not established a basis for departure from the law of the case doctrine, as there has been no change in the factual situation and employer has failed to demonstrate any error in the Board's decision. *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002), *denying recon. of* 36 BRBS 47 (2002). Consequently, we affirm our prior holding that claimant presented sufficient evidence to establish his *prima facie* case and invoke the Section 20(a) presumption that his current back condition is causally related to his employment with employer.[7]

As to the Board's holding that employer presented insufficient evidence to establish rebuttal of the Section 20(a) presumption, employer argues that the Board held it to a higher evidentiary standard on rebuttal than the statutory "substantial evidence" rebuttal standard by requiring that it produce "affirmative evidence" to rebut the Section 20(a) presumption of causation. Therefore, employer argues that the Board's holding that it failed to establish rebuttal is not in accordance *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35 (CRT) (5th Cir. 2003), in which the Fifth Circuit held that employer need only submit substantial evidence that the injury was not work-related. In so holding, the court stated that requiring medical opinions that "affirmatively state" or "unequivocally state" the absence of a causal relationship creates a higher evidentiary standard than that stated in the Act. In *Ortco*, the court held that the administrative law judge properly found rebuttal, as the decedent's heart attack began at home and the credited evidence stated that it would have progressed regardless of where he was or what he was doing.

[7]In any event, the record reflects that on September 30, 1999, claimant filed five claims for work-related injuries with employer, which were consolidated for hearing. Claimant alleged that in January 1998, he injured his low back while repairing a section of crane boom on a crane barge; that in June 1998 he injured his back and neck (felt pain) while cutting up scrap and bending pipes; that in June 1999 he felt back and neck pain while repairing a buoy; that in July 1999, "while fabricating a pan for pulley block in shop, felt pain in back and neck;" and that on August 6, 1999, he injured his low back while rigging up clamshell bucket and while pulling a come-along. EX 2. These claims of record, as well as claimant's hearing testimony and *pro se* appeals, reflect that claimant alleged general working conditions with employer which, in addition to the alleged August 6, 1999, accident, caused, contributed to or aggravated his pre-existing back-condition to form his current neck and back conditions.

Contrary to employer's contention, the Board's decision is not in contravention of *Ortco.* The Board clearly stated in both of its prior decisions that employer must rebut the Section 20(a) presumption with "substantial evidence." *Durant I,* slip op. at 2; *Durant II,* slip op. at 4. The Board properly stated that in a case such as this, which implicates the aggravation rule, employer must present evidence addressing aggravation in order to rebut the Section 20(a) presumption. *See, e.g., Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The Board observed that negative or circumstantial evidence may be sufficient to rebut the presumption, but only if that evidence is tailored to the aggravation rule. The Board held the negative evidence on which the administrative law judge had relied was legally insufficient to rebut the Section 20(a) presumption, in view of employer's burden to produce substantial evidence that claimant's condition was not *aggravated* by his working conditions.

Having held that the "negative evidence" was insufficient to establish rebuttal, the Board further stated that employer did not offer any "affirmative evidence" that claimant's work did not aggravate his back condition. *Durant II,* slip op. at 5. In context, it is clear that this statement does not run afoul of *Ortco* as it refers to the complete absence of *any* evidence, much less substantial evidence, stating that claimant's condition was not aggravated by his employment; most importantly, Dr. Kaufman, on whom employer relies, did not state that claimant's back condition was not aggravated by his employment.[8] Therefore, this medical evidence cannot constitute substantial evidence rebutting the Section 20(a) presumption, and claimant's injury is work-related as a matter of law. *See Conoco,* 194 F.3d 684, 33 BRBS 187(CRT). Consequently, *Ortco* does not require that the Board deviate from the law of the case doctrine. *Jones,* 25 BRBS 355. Thus, we affirm the holding that employer has not produced sufficient evidence to establish rebuttal of the Section 20(a) presumption. As employer does not otherwise challenge the award of benefits, we affirm the award of temporary and permanent total disability benefits.

[8]Dr. Kaufman's records indicate claimant's complaints of increased back and neck pain over the course of Dr. Kaufman's treatment. EX 3. Dr. Kaufman placed claimant on a light-duty restriction in February 1999, *id.* at 12, and on a sedentary-duty restriction on March 30, 1999. *Id.* at 32. Dr. Kaufman did not state that claimant's increased symptomotology was not related to his employment or that claimant's cervical and lumbar conditions were not aggravated by claimant's employment. *Id.* at 34. Therefore, his opinion does not constitute "substantial evidence" sufficient to rebut the Section 20(a) presumption. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter,*227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. (2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

Finally, we reject claimant's contention that he is entitled to an employer-paid "representative's fee" for work performed before the Board representing himself, in addition to any benefits to which he is entitled. Claimant is not an attorney and, consequently, he is not entitled to a fee payable by employer, as there is no provision in the Act for holding employer liable for such a fee. 33 U.S.C. §928; *Todd Shipyards Corp. v. Director, OWCP [Hilton]*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976). Furthermore, awarding claimant a fee out of his own benefits would involve a meaningless exercise. *See generally Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001).

Accordingly, the administrative law judge's Decision and Order on Second Remand is affirmed. Claimant's petition for an attorney's fee is denied.

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