BRB No. 97-1724

CHARLOTTE M. BARNES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

Betty M. Tharrington and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-1610) of Administrative Law Judge Richard K. Malamphy 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant alleged that she suffered a psychological injury, depression, as a result of her employment. As of February 18, 1994, claimant had cleaned pipe as a pipefitter for the shipyard for over 19 years on the first shift; on that day, she was transferred to a job requiring that she fabricate pipe on the second shift. Claimant informed employer that she could not work the second shift because of her high

blood pressure which required her to take medicine at night. Upon relating this to employer, employer requested that she visit her doctor, Dr. Jones. Dr. Jones referred claimant to Dr. Chessen, a psychiatrist, after diagnosing claimant with depression. Claimant attempted to return to work on March 7, 1994, but was sent home after the shipyard refused to accommodate Dr. Chessen's request that she be allowed to work on the first shift. As a result of her depression, claimant was hospitalized from March 8, 1994, through March 18, 1994. Claimant did not return to work, and retired in 1995. The administrative law judge found that claimant is entitled to invocation of the Section 20(a) presumption that her condition is work-related, and that employer did not rebut this presumption. The administrative law judge thus awarded claimant temporary total disability benefits from February 18, 1994, and continuing, interest, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's award to claimant of temporary total disability benefits for a psychological impairment. Claimant responds in support of the administrative law judge's award.

Employer reiterates the argument it made below that pursuant to *Marino v. Navy Exchange*, 20 BRBS 166 (1988), claimant's psychological problems are not compensable because they resulted solely from employer's legitimate personnel decisions to transfer claimant to a different job on a different shift. Employer alternatively argues that claimant is not entitled to benefits as there are no other working conditions, besides the legitimate personnel actions of the job transfer and shift change, that could have caused claimant's depression. It is well-settled that a psychological impairment which is work-related, even in part, is compensable under the Act. *American National Red Cross v. Hagen,* 327 F.2d 559 (7th Cir. 1964); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989)(decision on remand). The Section 20(a) presumption, which provides a presumed causal nexus between the injury and employment, is applicable in psychological injury cases. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 384 n. 2 (1990); 33 U.S.C. §920(a). In order to be entitled to the Section 20(a) presumption, however, claimant must establish a *prima facie* case by showing not only that she has a psychological condition but also that a work-related accident occurred or that working conditions existed which could have caused the condition. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). In a case involving allegations of stressful working conditions, moreover, claimant is not required to show unusually stressful conditions in order to establish a *prima facie* case; rather, even where stress may seem relatively mild, claimant may recover if an injury results. *See Konno*, 28 BRBS at 61. *See generally Wheatley v.*

Adler, 407 F.2d 307 (D.C. Cir. 1968)(*en banc*); **1B Larson, Workmen's Compensation Law**, §42.25(f), (g)(1996). The issue in such situations is the effect of this stress on claimant. *Id.*

In *Marino*, 20 BRBS at 166, the Board held that a psychological injury due solely to a termination resulting from a reduction in force is not compensable under the Act. The Board stated that, "A legitimate personnel action or termination is not the type of activity intended to give rise to a worker's compensation claim." *Id.* at 168. Although the Board held that a psychological injury resulting from a termination of employment is not compensable, the Board remanded the case to the administrative law judge to address claimant's allegation that his injury was due as well to work-related cumulative stress from supervising a number of locations, insufficient personnel to perform the job, working more than the required hours, and performing the duties of subordinates.[1] More recently, the Board has reversed an administrative law judge's denial of benefits and held the claimant's psychological injury is work-related as a matter of law, where as the claimant suffered a harm, major depression, and working conditions existed, other than disciplinary and termination procedures, which could have caused this harm. These included her supervisor's change in policy regarding serving alcohol as well as his use of an angry tone with her in the presence of bar patrons, his unwelcome touching of her, and his criticism of claimant's shortages in inventory, her over-pouring drinks, and her appearance at work. *Sewell v. Non-Commissioned Officers' Open Mess, McChord Air Force Base,* BRBS , BRB No. 96-1256 (June 27, 1997)(McGranery, J., dissenting), *aff'd on recon. en banc*, BRBS (April 8, 1998)(McGranery and Brown, JJ., dissenting).

In awarding claimant benefits in the instant case, the administrative law judge invoked the Section 20(a) presumption based on claimant's testimony and the opinions of Dr. Chessen, claimant's treating psychiatrist, Dr. Mingione, an independent psychiatrist, and that of an unnamed psychiatrist who reviewed claimant's records. Decision and Order at 9; Cl. Exs. 1, 5, 6; Emp. Exs. 1, 2. The administrative law judge held that the opinion of employer's expert, Dr. Thrasher, did not rebut the Section 20(a) presumption as he was the only physician who suggested that claimant's psychological impairment was present prior to the events at work. Decision and Order at 9; Emp. Ex 3. The administrative law judge also gave greater weight to Dr. Chessen's opinion as Dr. Chessen was claimant's

[1]On remand, the administrative law judge awarded claimant benefits after finding that claimant's general working conditions were a cause of his psychological injury. The Board affirmed the administrative law judge's award of benefits on remand in an unpublished case.

treating physician and was more familiar with claimant's clinical history. Decision and Order at 9. Consequently, the administrative law judge found that claimant's depression is work-related. Decision and Order at 9-10.

After review of the administrative law judge's Decision and Order in light of the record evidence and employer's arguments on appeal, we affirm his finding that claimant sustained a compensable psychological injury because it is rational, in accordance with law, and supported by the medical opinions of Drs. Chessen, Mingione, and an unnamed psychiatric medical reviewer. Initially, we need not address employer's argument regarding *Marino* as we hold, contrary to employer's second contention, that claimant established her *prima facie* case based on working conditions other than her job transfer and shift change. *See Sewell*, slip op. at 7 (June 27, 1997). Claimant testified that her supervisor talked meanly to her on February 18, 1994, when she told him she could not work second shift and that she still has flashbacks of the way her supervisor talked to her on March 7, 1994, when she tried to return to work under her physician's restrictions. Decision and Order at 4; Tr. at 22-23, 39, 42-43. Dr. Chessen noted that claimant was being treated because of work-related stress after being assigned new supervisors who themselves were recently demoted as part of shipyard cutbacks, in addition to having had to go through job retraining and then a change of assignment. Decision and Order at 6; Cl. Ex. 1; Emp. Ex. 1. The reports generated during claimant's hospitalization note claimant's source of job stress as the recent layoffs resulting in a new supervisor who does not seem to care about her and whom she experiences as being devaluing and hypercritical. Cl. Ex. 3; Emp. Ex. 1. Dr. Mingione stated that claimant's difficulty was job stress which arose from thoughts about returning to her job, feeling that she would not be able to perform adequately because of her difficulties and that she had been treated unfairly though she had been employed for some 20 years. Emp. Ex. 2; Cl. Ex. 5. The unnamed psychiatric medical reviewer found claimant's depression was precipitated by a personality conflict with her foreman in addition to a change in job description on second shift after 20 years on day shift. Decision and Order at 8; Cl. Ex. 6.

Claimant's testimony and the medical opinions support the administrative law judge's conclusion that claimant established a *prima facie* case, even if the changes in shift and job duties are not considered. *See generally Brown v. ITT/Continental Baking Co.,* 921 F.2d 289, 24 BRBS 75 (CRT)(D.C. Cir. 1990); *Sewell*, slip op. at 7 (June 27, 1997); *Konno*, 28 BRBS at 61. Moreover, we affirm the administrative law judge's finding that claimant suffered a work-related psychological injury inasmuch as employer does not challenge the administrative law judge's finding that Dr. Thrasher's opinion does not establish rebuttal of the Section 20(a) presumption.[2]

[2]Dr. Thrasher's opinion that claimant's depression was exacerbated by

See generally Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976); *Manship*, 30 BRBS at 178-179; Decision and Order at 9; Emp. Ex. 3. Claimant's condition thus is work-related as a matter of law and, consequently, we affirm the administrative law judge's award of benefits. *Sewell,* slip op. at 8 (June 27, 1997).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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employer's rejection of her request for day shift work is insufficient to rebut the Section 20(a) presumption as a matter of law as it does not rule out aggravation, *i.e.*, that her pre-existing bipolar disorder was not aggravated by the events which occurred at work. *See Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); Emp. Ex. 3.