BRB No. 92-801

THEODORE R. BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONTINENTAL STEVEDORING	)	
	)	
and	)	
	)	DATE ISSUED:
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of E. Earl Thomas, Administrative Law Judge, United States Department of Labor.

Theodore R. Brown, Miami, Florida, *pro se*.

Lawrence B. Craig, III (Nicklaus, Valle, Craig & Wicks), Miami, Florida, for employer/carrier.

BEFORE: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (89-LHC-2561) of Administrative Law Judge E. Earl Thomas denying benefits 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 reviewing this *pro se* appeal, 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220.

Claimant sought benefits for a lower back injury and for carpal tunnel syndrome in both his wrists, allegedly resulting from an incident at work on April 6, 1990. Claimant asserts that the injuries occurred when he was unloading a bag of dirty linen from a cruise ship. On March 30, 1990, prior to the work incident, claimant was involved in an automobile accident involving a three or four car collision which claimant described as a "minor fender bender" and which Sharon Dabila, the driver of the car claimant struck, described as somewhat severe. On April 14, 1990, claimant

voluntarily admitted himself to the Southern Winds Psychiatric Hospital where he was treated for approximately one month for depression brought on by a breakup with his girlfriend.

The administrative law judge denied benefits finding that claimant did not suffer either a herniated disc or carpal tunnel syndrome arising from the April 6, 1990 incident. The issues on appeal are whether the administrative law judge rationally concluded that claimant does not have a herniated disc caused by his employment, whether, such a finding notwithstanding, claimant made a claim for a work-related back injury in general, and whether the administrative law judge rationally concluded that claimant does not have carpal tunnel syndrome. Further, claimant contends that the administrative law judge erred in admitting the psychiatric records into evidence. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

The administrative law judge found that claimant did not have a herniated disc based on Dr. Bader's opinion to that effect which he credited over the contrary opinions of Drs. Marfisi, Moya and Lustgarten that claimant suffered a herniated disc. The administrative law judge found that Dr. Bader's opinion was corroborated by objective data consisting of an MRI dated April 30, 1990, and a CT scan and myelogram dated September 4, 1990. The administrative law judge also found that Dr. Bader's opinion that claimant did not have a herniated disc was supported by his negative findings on his neurological and mechanical examinations.

The administrative law judge found that Dr. Marfisi's opinion was entitled to less weight because he is a chiropractor, whereas Dr. Bader is a Board-certified neurologist. He found Dr. Lustgarten's opinion was entitled to less weight because he did not review the actual MRI or CT scan but merely read the reports accompanying the tests. Moreover, the administrative law judge found that to the extent Drs. Marfisi, Moya and Lustgarten relied on claimant's subjective complaints, their opinions are unreliable because claimant lacked credibility. The administrative law judge noted that claimant admitted at the hearing that he lied in his deposition that he had not been convicted of a felony when in fact he had, that the weight of the linen claimant claimed he lifted was discrepant with the weight given by other witnesses, and that claimant's description of the March 1990 car accident--stating it was merely a "fender-bender"-- was discrepant with the pictures of his car in evidence and with Ms. Dabila's account of the accident.

Moreover, the administrative law judge found that even if claimant had suffered a back injury, the back injury might have been caused by the March 1990 car accident. The administrative law judge also found that claimant's playing basketball at the psychiatric hospital on April 22 and April 23, 1990 which was associated with the onset of claimant's complaints of back pain as recorded in the hospital's notes also could have caused the injury.

In establishing that an injury arises out of his employment, claimant is aided by the Section 20(a) presumption which applies to the issue of whether an injury is causally related to his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). Before Section 20(a) is applicable, however, claimant must establish his *prima facie* case, *i.e.*, that he has sustained some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that working conditions existed or an accident occurred which could have caused the harm or pain. *See Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993). Claimant need not show that he has

a specific illness or disease in order to establish that he has suffered a harm under the Act, rather, claimant need only establish some physical harm, *i.e.*, that something has gone wrong with the human frame. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). Moreover, claimant need not introduce medical evidence establishing that the conditions of his employment in fact caused his injury; claimant need only establish the existence of working conditions which could have caused the harm. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Lastly, it is well-established that if the circumstances of a claimant's employment aggravate, accelerate, or combine with an underlying condition, the entire resultant disability is compensable. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

We hold that the administrative law judge acted within his discretion in determining that the evidence of record establishes that claimant did not suffer a herniated disc. The administrative law judge rationally credited Dr. Bader's opinion over the opinions of Drs. Marfisi, Moya and Lustgarten due in part to Dr. Bader's superior qualifications. He also relied on the fact that the objective tests consisting of the April 30, 1990 MRI and the September 4, 1990 myelogram support Dr. Bader's opinion that claimant does not have a herniated disc, and his finding that the positive subjective tests, such as the straight leg raising, were unreliable because claimant lacked credibility. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, we affirm the finding that claimant does not have a herniated disc.

We hold, however, that because claimant need only establish some harm and not a specific condition to invoke the Section 20(a) presumption, the administrative law judge erred in failing to invoke the Section 20(a) presumption with regard to claimant's back injury in general, as the administrative law judge accepted Dr. Bader's opinion that claimant has retrolisthesis.[1] Moreover, all of the physicians of record found some type of back abnormality, and claimant has repeatedly sought treatment for back pain. Further, the administrative law judge accepted claimant's testimony that he lifted a bag of linen, despite his discrediting claimant's testimony as to how much the linen weighed, and therefore claimant established working conditions which could have caused the harm or aggravated a pre-existing back condition. In his decision, the administrative law judge did not consider whether claimant's back condition in general was caused or aggravated by his employment, and Dr. Bader's opinion that the retrolisthesis is "probably" congenital or degenerative or pre-existed the April 1990 injury does not preclude a finding that claimant's employment aggravated his back condition. It therefore is necessary to remand the case for the administrative law judge to determine whether employer has established rebuttal by producing evidence that claimant's back condition was not caused, aggravated or accelerated by the work incident. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990). We note that on remand the administrative law judge cannot rely on claimant's lack of credibility, or attribute claimant's back condition to the automobile accident or basketball games to establish rebuttal, without medical corroboration. *See generally James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If rebuttal is established, the

[1]Dr. Meagher explained that claimant's L5 vertebra was retrolisthesed, *i.e.*, pushed back, upon the S1 vertebra.

administrative law judge must weigh all the evidence of record to determine if claimant's back condition is work-related.[2] *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990).

We next address the issue of whether the administrative law judge rationally concluded that claimant does not have carpal tunnel syndrome. The administrative law judge found that claimant does not have carpal tunnel syndrome, relying on Dr. Bader's opinion which he credited over Dr. Lustgarten's opinion. Dr. Bader opined that claimant does not have carpal tunnel syndrome, noting that claimant had a positive Tinel sign in his left hand but no atrophy of the abductor poilus brevis muscle, and that the November 6, 1990 nerve conduction study was normal.[3] In contrast, Dr. Lustgarten diagnosed bilateral left greater than right post-traumatic carpal tunnel syndrome based on the May 1990 nerve conduction studies and the positive results from mechanical findings as in the Tinel test, weakness in the thenar eminence muscles of the left hand, and abnormalities of sensation in the median nerve innervated areas of both hands.

The administrative law judge also found that Dr. Macksoud did not diagnose carpal tunnel syndrome in the May 18, 1990, nerve conduction study; he merely did not rule it out. The administrative law judge stated that claimant did not inform Drs. Moya or Marfisi, then his treating doctors, of his pain, and first expressed having pain in his wrists eight months after the April 6, 1990 incident. Further, the administrative law judge noted that the November 1990 nerve conduction studies and the November 6, 1990 somatosensory tests were normal.

We affirm the administrative law judge's finding that claimant does not have carpal tunnel syndrome based on his rational crediting of Dr. Bader's opinion over Dr. Lustgarten's opinion, based on Dr. Bader's negative objective findings and his opinion that the Tinel sign is subjective. *See generally Avondale Shipyards*, 914 F.2d at 88, 24 BRBS at 46 (CRT). The administrative law judge also rationally found that Dr. Macksoud's nerve conduction study does not establish that claimant has carpal tunnel syndrome.

Lastly, claimant's contention regarding the admission of the psychiatric hospital records is rejected. The administrative law judge did not abuse his discretion in admitting into evidence the psychiatric hospital records. *See Olsen v. Triple A Machine Shop, Inc.*, 25 BRBS 40, 44 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, No. 91-70642 (9th Cir. June 15, 1993); *Champion v. S & M Traylor Brothers*, 14 BRBS 251 (1981), *rev'd on other grounds*, 690 F.2d 285, 15 BRBS 33 (CRT)(D.C. Cir. 1982); 20 C.F.R. §§702.338, 702.339.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for the administrative law judge to address the issues regarding the cause of claimant's back pain. The administrative law judge's findings that claimant does not have a work-related

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[2]If claimant's back condition is work-related, he is entitled to medical benefits at employer's expense provided he has complied with Section 7 of the Act, 33 U.S.C. §907. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 388 n.5 (1990).

[3]In contrast, the nerve conduction studies performed by Dr. Macksoud on May 18, 1990 suggested bilateral median sensory neuropathy from which a carpal tunnel syndrome cannot be excluded.

herniated disc or carpal tunnel syndrome are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge