BRB Nos. 93-1047
and 93-1047A

MOSES MENCHACA	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
CERES TERMINALS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
GALLAGHER BASSET COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Robert T. Newman (Sweeney and Riman, Ltd.), Chicago, Illinois, for claimant.

Mark A. Braun (Braun, Lynch, Smith & Strobel, Ltd.), Chicago, Illinois, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order on Remand (84-LHC-449) of Administrative Law Judge Robert G. Mahony 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).

This case is on appeal to the Board for the second time. On August 18, 1982, claimant, while breaking dunnage aboard a ship, fell and injured both knees. Employer voluntarily paid

temporary total disability benefits from August 19, 1982, through November 1, 1982, and claimant returned to work on November 2, 1982. At the first hearing in this case, claimant sought temporary partial disability compensation from November 2, 1982, and continuing or alternatively permanent partial disability compensation for both his right and left legs under Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2). In addition, claimant sought authorization for arthroscopic surgery and related medical expenses pursuant to Section 7 of the Act, 33 U.S.C. §907.

In his initial Decision and Order dated October 15, 1984, the administrative law judge denied benefits. Relying on Dr. Vachout's opinion, the administrative law judge determined that any knee problems claimant suffered following his return to work on November 2, 1982 were related only to his pre-existing arthritic knee condition and not to the August 18, 1982, work accident, from which he found claimant had fully recovered. The administrative law judge also credited Dr. Vachout's opinion that claimant's diffused tenderness indicated that he had not torn the cartilage in his knees and that accordingly he did not require arthroscopy. On November 2, 1984, claimant filed a motion for reconsideration which was denied by the administrative law judge in an Order dated November 16, 1984. Claimant appealed these decisions to the Board. While his appeal was pending before the Board, claimant filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922. In an Order dated April 1, 1987, the Board dismissed claimant's appeal and remanded the case to the administrative law judge for a decision on the petition for modification.

In the modification proceedings, claimant sought reimbursement for medical expenses associated with an operation on each knee in 1985 and 1986, temporary total disability benefits following each operation, and schedule awards for impairment to each leg. In his Decision and Order on modification dated May 3, 1988, the administrative law judge, relying on Dr. Loughran's opinion, again determined that the condition of claimant's knees was caused by his pre-existing arthritic condition and not by the work accident of August 18, 1982, and therefore denied claimant's request for disability compensation and reimbursement of medical expenses. Claimant then filed a motion for reinstatement of the first appeal with the Board and an appeal of the administrative law judge's Decision and Order on modification. On December 8, 1988, the Board issued an Order reinstating claimant's first appeal, acknowledging receipt of claimant's appeal of the Decision and Order on modification, and consolidating the appeals. On appeal, claimant challenged the administrative law judge's findings that his knee condition is not, at least in part, related to the work accident of August 18, 1982. Additionally, in his appeal of the administrative law judge's Decision and Order on modification, claimant argued that he was entitled to 20 weeks of temporary total disability benefits for the period he was absent from work due to his knee operations, permanent disability benefits for loss of use of the right and left legs following the surgeries, and reimbursement of medical expenses.

In *Menchaca v. Ceres Terminals, Inc.*, BRB Nos. 85-659 and 88-1902 (July 31, 1990)(unpublished), the Board reversed the administrative law judge's finding that there is no causal relationship between claimant's knee conditions and resultant surgeries and his employment, holding that the opinions of Drs. Vachout and Loughran are insufficient to establish rebuttal of the Section 20(a), 33 U.S.C. §920(a), presumption. Causation was thus established as a matter of law, and the Board remanded the case to the administrative law judge for consideration of the nature and extent of claimant's disability, as well as claimant's entitlement to medical benefits and an attorney's fee.[1]

In the Decision and Order on Remand dated January 8, 1993, the administrative law judge awarded temporary total disability benefits from May 14, 1985 to July 22, 1985 and from February 4, 1986 to April 1, 1986, for claimant's periods of recuperation following his operations, noting his disagreement with the Board's holding on the causation issue. The administrative law judge also awarded claimant a 40 percent scheduled award for loss to the right leg and a 35 percent scheduled award for loss to the left leg. 33 U.S.C. §908(c)(2), (19). The administrative law judge further awarded claimant the requested medical expenses.

In the current appeal, employer challenges the administrative law judge's award of benefits on remand. BRB No. 93-1047. In his response brief, claimant contends that the administrative law judge's award of temporary total disability benefits from May 14, 1985 to July 22, 1985 and from February 4, 1986 to April 1, 1986 should be affirmed. In his cross-appeal, claimant contends the administrative law judge's Decision and Order on Remand should be modified to reflect an award of permanent total disability benefits beginning September 7, 1988, the date claimant ceased working. BRB No. 93-1047A. Claimant also contends that he is entitled to penalties pursuant to Section 14, 33 U.S.C. §914, interest on the temporary total disability benefits, an attorney's fee, and medical benefits for knee replacement surgery in accordance with the administrative law judge's orders on remand.

We first address employer's challenge to the administrative law judge's award of benefits. Employer contends that the Board exceeded its scope of review in its prior opinion in holding that the opinions of Drs. Vachout and Loughran are insufficient to establish rebuttal of the Section 20(a) presumption. Employer therefore contends that the awards of disability and medical benefits are in error.

Section 20(a) applies to the issue of whether an injury or disability is work-related. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). The presumption is invoked if claimant establishes the existence of a harm and working conditions that could have caused the harm. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). In order to rebut the presumption, employer must produce specific and comprehensive evidence that claimant's condition was not caused or aggravated or contributed to by the work accident. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990). A medical opinion that is equivocal as to the cause of claimant's impairment is insufficient to rebut the presumption. *Phillips v. Newport News Shipbuilding & Dry*

[1]Employer's appeal to the United States Court of Appeals for the Seventh Circuit was dismissed.

Dock Co., 22 BRBS 94 (1988).

We agree with employer that the Board erred in its prior decision in holding that Dr. Vachout's opinion is insufficient to rebut the Section 20(a) presumption regarding the cause of claimant's knee condition at the time of the initial proceedings resulting in the administrative law judge's 1984 Decision. While Dr. Vachout admitted on cross-examination that it was possible that claimant's underlying arthritic condition may have progressed faster after the work accident than it might have otherwise, Dr. Vachout stated on direct and re-direct examination, with a reasonable degree of medical certainty, that there was no evidence to indicate that claimant's arthritic condition in fact progressed more rapidly since the date of the work-related injury than before. Emp. Ex. 3 at 28, 32-33. After reviewing Dr. Vachout's testimony, we conclude that his testimony, taken as a whole, supports the conclusion that claimant had no work-related disability and no work-related need for knee surgery through the time of the first hearing on the claim. The fact that Dr. Vachout stated it was possible that claimant's condition could have progressed more rapidly after the work accident does not render equivocal his testimony that in his judgment claimant's condition did not in fact progress. As Dr. Vachout's testimony is sufficient to establish rebuttal of the Section 20(a) presumption, the Board erred in not affirming the administrative law judge's initial denial of benefits.

Any error in the Board's decision, however, is harmless, as claimant subsequently obtained new evidence in support of a petition for modification under Section 22 of the Act, 33 U.S.C. §922. The modification request was filed after claimant underwent surgery on his knees in 1985 and 1986, and the current dispute concerns claimant's condition post-surgeries. Dr. Vachout's opinion is not relevant to claimant's request for disability and medical benefits on modification, as claimant has not been seen by Dr. Vachout since 1983.

In appealing the administrative law judge's findings on remand in this regard, employer contends that the Board erred in its prior opinion in holding Dr. Loughran's opinion insufficient to rebut Section 20(a). Employer asserts that the Board engaged in impermissible fact finding. Initially, we note, as we did in our prior opinion that the administrative law judge did not apply the Section 20(a) presumption. The issue in the modification proceeding did involve a causation issue, contrary to the statement of the administrative law judge in his decision on remand that causation was not contested and that the issue was nature and extent of disability. It is uncontroverted that claimant had surgery on each knee and that claimant has an impairment to each leg. The issue, then, is the cause of the knee condition necessitating surgery and of the resulting impairments, and claimant is entitled to application of Section 20(a) on this causation issue. Dr. Loughran's testimony specifically addresses causation. Contrary to employer's contention concerning Dr. Loughran's opinion, however, the Board properly held that Dr. Loughran's opinion is insufficient to establish rebuttal of the Section 20(a) presumption, as it is equivocal as to the cause of the knee condition which led to surgery and the disability resulting thereafter.

Dr. Loughran testified that he had no way of ascertaining whether claimant's fall contributed to claimant's ongoing degenerative arthritic knee condition, that it would be extremely speculative to assign any part of any operative findings to a particular injury, and that it would be very difficult to

state how much of the surgery was related to the fall. Dr. Loughran's deposition at 33-35, 38-39. He also stated that claimant's pre-existing degenerative arthritis was aggravated by the fall at work, although it is "less likely" that it would be a permanent aggravation. Importantly, he stated that surgery is undertaken because of symptoms, not because of x-ray findings, and that the pain claimant experienced following the injury led him to seek treatment. *Id.* at 25-26, 29.

As the Board noted in its prior decision, the administrative law judge recognized that there was some degree of aggravation of claimant's arthritis by the work-related fall in 1982, and he erroneously placed the burden on claimant to establish that claimant's surgeries and disabilities were due to claimant's work-related fall. *Menchaca*, slip op. at 5. As Dr. Loughran's opinion does not unequivocally state that the work injury did not aggravate claimant's pre-existing degenerative condition, his opinion is insufficient to rebut the presumption that claimant's surgeries and resulting disabilities are work-related. *Phillips*, 22 BRBS at 94. Consequently, we reaffirm our prior decision on this issue.

We also affirm the administrative law judge's award of temporary total disability benefits, scheduled permanent partial disability benefits and reimbursement of medical expenses, as we reject the remaining challenges of employer and claimant with regard to the administrative law judge's award of benefits. Employer contends that the administrative law judge erred in awarding permanent disability benefits while finding that claimant's condition is not permanent and ordering further care to be provided. Employer's contention lacks merit. The administrative law judge did not state that claimant's condition is still temporary.[2] He awarded temporary total disability benefits for claimant's periods of recuperation, and a 40 percent scheduled loss to the right leg and a 35 percent scheduled loss to the left leg after crediting Dr. Fischer's report, which provided these disability ratings. Decision and Order on Remand at 2; Cl. Ex. 7. We affirm the administrative law judge's scheduled award based on the disability ratings given on the date of Dr. Fischer's examination, July 25, 1986. *Jones v. Genco, Inc.*, 21 BRBS 12 (1988) (the date a physician assesses claimant with a disability rating is sufficient to determine the date of permanency).

[2]Based on Dr. Krieger's opinion, the administrative law judge stated that claimant needs a total knee replacement operation for which employer is responsible. This does not negate a finding that claimant's condition is permanent. *Morales v. General Dynamics Corp.*, 16 BRBS 293 (1984), *aff'd in pert. part sub nom. Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66, 17 BRBS 130 (CRT)(2d Cir. 1985).

Claimant contends he is entitled to an award of permanent total disability benefits beginning September 7, 1988, the date claimant stopped working from an unrelated work injury.[3] We reject claimant's contention. As claimant only sought temporary total disability benefits after surgery and scheduled permanent partial disability benefits, claimant did not raise a claim below for total disability benefits. *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984). Claimant, therefore, cannot now attempt to claim permanent total disability benefits. Consequently, we affirm the administrative law judge's scheduled awards of benefits. Lastly, claimant asserts that penalties under Section 14, 33 U.S.C. §914, should be allowed. Claimant does not explain, however, why he is entitled to penalties under Section 14 and thus does not adequately raise any issues for the Board to address.[4] *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); *Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986); 20 C.F.R. §802.211; Cl. Br. at 8.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[3]Although Dr. Krieger stated that claimant was disabled for heavy type of work on January 18, 1988, claimant testified that he was able to continue working until he had an unrelated work injury on September 7, 1988. Cl. Ex. 3; Tr. of September 9, 1991 at 24-25, 30.

[4]Claimant requests that the Board enforce the administrative law judge's orders on remand that employer pay interest, medical expenses for knee replacement surgery and an attorney's fee. The Board does not have the power to enforce the administrative law judge's orders. Claimant may seek enforcement of the orders upon application to the district director for a supplemental default order pursuant to Section 18(a) of the Act, 33 U.S.C. §918(a). The district director's supplemental order regarding an employer's default can then be enforced in federal district court. 33 U.S.C. §918(a).