BRB No. 92-571

DAVID HOLMES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
UNIVERSAL MARITIME SERVICE CORPORATION	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER on RECONSIDERATION

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Celestino Tesoriero (Grainger & Tesoriero), New York, New York, for self-insured employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant has filed a timely motion for reconsideration of the Board's decision in this case, *Holmes v. Universal Maritime Service Corp.*, BRB No. 92-571 (April 28, 1994) (unpublished). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer has responded, urging denial of the motion and affirmance of the decision. We hereby grant claimant's motion for reconsideration; however, we deny the relief requested.

We shall briefly reiterate the facts of this case. On April 8, 1979, claimant slipped and fell, sustaining a lumbosacral sprain during the course of his employment. During a recuperative absence of two months, from April 8 to June 13, 1979, employer paid temporary total disability benefits and medical expenses, 33 U.S.C. §§908(b), 907; thereafter,

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

claimant returned to his pre-injury work. Tr. at 3-4, 29; Emp. Exs. 6-10. On July 7, 1985, claimant

retired, citing his inability to continue working because of back pain caused by two herniated discs. Claimant filed for compensation under the Act, claiming permanent total disability from July 7, 1985, and contending that his disability was caused by the 1979 work injury. Tr. at 17, 33, 44-45; Cl. Ex. 5.

Dr. Pizzano, claimant's treating physician for anemia and high blood pressure, indicated in a January 1986 letter that claimant "experienced intermittent episodes of low back pain with symptoms of radiculitis" and that the initial injury of April 1979 "significantly contributed to [claimant's] low back symptoms, *i.e.* Disc Syndrome." Cl. Ex. 1. Dr. Post stated, in a May 1990 report, that claimant has "residua of chronic disc herniation L3-4 and L4-5 as a result of the accident of April 8, 1979." Cl. Ex. 7; *see also* Cl. Ex. 24. Dr. Burton, who reviewed claimant's medical records, determined that claimant sustained a soft tissue sprain of his back in 1979 with no indications of herniated discs and no evidence of on-going back pain until late 1984. He concluded that claimant's herniated discs are the cause of his present complaints and are "unrelated to the effects of the alleged episode of April 8, 1979." Emp. Exs. 16, 21 at 29-30. Additionally, Drs. Koval and Schultze who evaluated claimant in 1979, 1980 and 1981, found no residuals from claimant's 1979 lumbosacral strain and determined that claimant suffered no disability from that injury. Emp. Exs. 6, 8, 10.

The administrative law judge determined that employer rebutted the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's current back condition was caused by his work injury, and then found, after evaluating the record as a whole, that claimant's condition was not caused by his 1979 work injury.[1] Therefore, he denied benefits. Decision and Order at 12-15. On appeal, claimant challenged the administrative law judge's finding that employer rebutted the Section 20(a) presumption, specifically contending that employer failed to completely sever the presumed connection between the 1985 condition and the 1979 incident. The Board rejected claimant's arguments and affirmed the administrative law judge's decision. Initially, it noted that neither party challenged the invocation of the Section 20(a) presumption, and then it affirmed the finding of rebuttal, as Dr. Burton's report unequivocally severed any relationship between claimant's present condition and his 1979 symptoms. Such evidence, coupled with the administrative law judge's credibility determination, also supported a finding of no causation on the record as a whole. *Holmes*, slip op. at 2-4. Claimant moves for reconsideration of the Board's decision, and employer responds, urging affirmance of the Board's decision and denial of claimant's motion.

[1]The administrative law judge discredited claimant's testimony of continuing back pain, and he credited the testimony of Dr. Burton over the opinions of Drs. Pizzano and Post. Decision and Order at 12-14.

As neither party disputes that the Section 20(a) presumption is invoked, *see Holmes*, slip op. at 2; *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition.[2] *See Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1264 (1993); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990); *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

Initially, claimant contends that the decision of the Supreme Court of the United States in *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994), affects the status of the Section 20(a) presumption under the Act. We disagree. The decision in *Greenwich Collieries* does not discuss the Section 20(a) presumption. In *Greenwich Collieries*, the Supreme Court held that Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), which places the "burden of proof" on a proponent of a rule or order, applies to cases arising under the Act. *Greenwich Collieries*, 114 S.Ct. at 2254-2255, 28 BRBS at 44-45 (CRT). Thereafter, the Court discussed the definition of the phrase "burden of proof" as that term is used in Section 7(c), and it determined that "burden of proof" means "burden of persuasion." Consequently, it held that application of the "true doubt" rule under the Act violates the APA by easing the claimant's burden of proving the validity of his claim. *Id.*, 114 S.Ct. at 2257, 2259, 28 BRBS at 46, 48 (CRT). In light of the Court's decision, claimant would have us hold employers to a greater burden of production in their attempts to rebut the Section 20(a) presumption. We decline to do so, as the Supreme Court's decision in *Greenwich Collieries* did not discuss or affect the law regarding invocation and rebuttal of the Section 20(a) presumption.[3] As an employer may rebut the Section 20(a) presumption only upon the production of specific and comprehensive evidence severing the presumed causal connection, its burden is unchanged by the decision in *Greenwich Collieries*. Consequently, Dr. Burton's opinion, on which the administrative law judge relied, that claimant's 1985 condition was not caused by his 1979 accident, is sufficient to rebut the Section

[2]In its previous decision, the Board declined to address whether claimant's continued employment aggravated or contributed to his present condition, as he failed to raise the issue before the administrative law judge. *See Holmes*, slip op. at 4 n.2. Therefore, the sole question is whether claimant's previous injury caused his present condition.

[3]The holding in *Greenwich Collieries* does affect the issue of whether causation is established on the record as a whole, after employer has rebutted the presumption. At this point, claimant bears the burden of persuasion on the record as a whole and if the evidence is in equipoise, claimant has not carried his burden.

20(a) presumption and to support a finding of no causation based on the record as a whole.[4] *See, e.g., Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Claimant also contends the Board failed to address the issues he raised on appeal. Specifically, claimant argues that the Section 20(a) presumption may be rebutted only by the production of a certain "quantum of evidence," not present in this case, as the evidence in this case is wholly negative. We reject claimant's argument. The Section 20(a) presumption may be rebutted by negative evidence if the evidence is sufficiently specific to sever the potential connection between a particular injury and a job-related accident. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). Moreover, the Board has held that negative evidence, which supplements "positive" medical evidence and a credibility determination, is sufficient to rebut the Section 20(a) presumption. *Craig v. Maher Terminal, Inc.*, 11 BRBS 400 (1979) (Miller, J., dissenting). In this case, the record contains evidence which satisfies these requirements: Dr. Burton clearly opined that claimant's present condition was not caused by his 1979 back injury; the administrative law judge rationally credited Dr. Burton's opinion over those espoused by Drs. Pizzano and Post, *see Holmes*, slip op. at 3-4; and the record establishes that claimant performed full-time manual labor after 1979 for six years without losing time from work due to his back condition, that there is no medical evidence of back pain until late 1984, and that there is no evidence of herniated discs until 1985. Tr. at 6; Emp. Exs. 1, 19. Together, this constitutes sufficient evidence on the record as a whole to support the administrative law judge's finding of no causation. *See Craig*, 11 BRBS at 403. Therefore, we re-affirm the Board's conclusion that the administrative law judge rationally determined that claimant's present condition was not caused by his 1979 work-related back injury.

[4]Additionally, claimant asserts that the Board's decision in *Kier*, 16 BRBS at 128, is incorrect because it blurs the two-tier causation analysis. We disagree. In *Kier*, the Board held that the administrative law judge's failure to find the Section 20(a) presumption rebutted was harmless, as, although there was sufficient evidence to rebut the presumption, there also was sufficient evidence on the record as a whole to support a finding of causation.

Accordingly, claimant's motion for reconsideration is granted, but the relief requested is denied. 20 C.F.R. §802.409. The Board's decision is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

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ROBERT J. SHEA
Administrative Law Judge