BRB Nos. 07-1008
and 09-0702

PAMELA SORRELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COMBAT ASSOCIATES, LIMITED	)	DATE ISSUED: 05/25/2010
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order (on modification) of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

Jerry R. McKenney (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and Decision and Order (on modification) (2007-LDA-00083, 2008-LDA-00138) of Administrative Law Judge Kenneth A. Krantz 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

Employer hired claimant in April 2006 to work in Kuwait as a Lead Recreational Specialist. On May 5, 2006, claimant was injured when high winds dislodged a metal tent support beam, which struck and fractured claimant's nose. Claimant underwent surgery to repair the fracture. Claimant subsequently complained of headaches and neck pain, which radiated into her left arm and hand. Claimant received a medical convenience termination from employer, and she returned to the United States for treatment, which employer eventually refused to authorize. An MRI showed a herniated disc at C5-6 and a small post-traumatic syrinx.[1] Employer paid temporary total disability benefits from May 6, 2006 to March 27, 2007. Claimant sought additional medical treatment and continuing compensation for temporary total disability, 33 U.S.C. §908(b), at a higher average weekly wage than employer had utilized. Claimant also alleged that she developed depression related to employer's denial of necessary medical treatment for her work injury.

In his initial decision, the administrative law judge found that claimant is not entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), because she did not establish that the accident in Kuwait could have caused the harms she alleges, except for the nasal fracture. The administrative law judge found that, after a motor vehicle accident on December 17, 2005, but before claimant went to work for employer in Kuwait, she was treated at both an emergency room and a chiropractor's office for symptoms similar to those she complained of after the May 2006 work accident. The administrative law judge found that, even if claimant invoked the Section 20(a) presumption, employer established rebuttal thereof and that claimant did not show by a preponderance of the evidence that her current medical problems arose from the work injury. Accordingly, the administrative law judge found that claimant is not entitled to further compensation under the Act.

Claimant sought modification of this decision pursuant to Section 22 of the Act, 33 U.S.C. §922, based on a mistake of fact regarding the work-relatedness of her neck, left arm and psychological conditions. In his decision on modification, the administrative law judge found that he had not erred in his initial decision in not addressing whether the work injury aggravated a prior neck condition, as claimant first raised this contention in her post-hearing brief, and the brief did not make any argument or cite authority in support of the contention. On modification, the administrative law judge again found that claimant did not submit sufficient evidence to invoke the Section 20(a) presumption. The

[1] A syrinx is a fluid-filled area located in the spinal canal.

administrative law judge found that, if claimant is entitled to the presumption, employer rebutted it by providing substantial evidence of pre-existing neck, back, and left arm injuries from the December 2005 car accident. The administrative law judge concluded that, based on the record as a whole, claimant's complaints are not related to the work accident. The administrative law judge found that claimant's post-car accident symptoms were present on January 16, 2006, when claimant requested that Dr. Scott release her from further care. EX 42 at 12. The administrative law judge found that neither Dr. Budorick nor Dr. Partington could link claimant's herniated disc and syrinx to her work accident in Kuwait. Finally, the administrative law judge found that there is no evidence to support claimant's contention that she developed a psychological condition due to the work accident. Accordingly, the administrative law judge denied claimant's request for Section 22 modification.

On appeal, claimant challenges the administrative law judge's findings in his initial decision and on modification that her neck, left arm and neurological/ psychological conditions were not caused or aggravated by the May 2006 work injury. Employer responds, urging affirmance of the administrative law judge's decisions.

Claimant contends that the opinions of Drs. Partington and Sautter are sufficient to invoke the Section 20(a) presumption that her neck and psychological conditions are related to the work injury. In his decision, the administrative law judge found the claimant did not invoke the presumption because she reported similar neck and left arm symptoms after her car accident in December 2005. The administrative law judge found that, as claimant did not disclose this prior car accident to her treating physician, Dr. Partington, his opinion that her neck complaints are consistent with her injury in Kuwait is not credible. The administrative law judge also found that a surveillance video of claimant further detracts from claimant's credibility regarding her alleged neck and left arm symptoms. On modification, the administrative law judge again relied on these findings, and, moreover, cited inconsistencies in claimant's testimony that detracted from her credibility regarding the cause and onset of her neck and left arm symptoms.

We cannot affirm the administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption linking her May 5, 2006, work injury to her neck and left arm condition. Moreover, the administrative law judge erred on modification by not addressing whether claimant is entitled to the Section 20(a) presumption linking her psychological/neurological conditions to the work injury.[2] The

[2] It is well-settled that a psychological impairment related to employment is compensable under the Act, *Sanders v. Alabama Dry Dock & Shipbuilding Co.,* 22 BRBS 340 (1989), and that the Section 20(a) presumption is applicable in psychological injury

aggravation rule provides that employer is liable for the totality of the claimant's disability if the work injury aggravates a pre-existing condition. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *see also Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982). In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that she suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Claimant is not required to affirmatively prove that her work injury in fact caused or aggravated the harm; rather, claimant need establish only that the work injury could have caused or aggravated the harm alleged. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The standards for determining the work-relatedness of an injury are the same on modification as in an initial adjudication.[3] *See Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004).

It is undisputed that at work on May 5, 2006, claimant was struck in the face by a metal tent pole and sustained a fractured nose. Thus, claimant established the "accident" element of a *prima facie* case. Claimant was diagnosed with spasms in her neck shortly after the incident, and with acute neck pain with limited range of motion by early June 2006. EX 19. An MRI taken on August 7, 2006, established that claimant has a herniated cervical disc and a cervical syrinx. EX 26 at 4-5. Thus, claimant has a demonstrated "harm." The opinions of Drs. Partington and Budorick support claimant's contention that the work injury could have aggravated any pre-existing neck condition.

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cases. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 384 n.2 (1990).

[3]Section 22 of the Act displaces any notions of finality and evinces the Act's preference for accuracy unless modifying the earlier decision would not render "justice under the Act." *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007); *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993); *see also Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003). Accordingly, we reject employer's contention that claimant could not contend on modification that the work injury aggravated a pre-existing neck condition because she did not raise this argument when the case was initially before the administrative law judge. *See generally S.K. [Khan] v. Service Employers Int'l, Inc.*, 41 BRBS 123 (2007). Moreover, contrary to employer's contention, claimant alleged the aggravation theory in her brief filed after the initial hearing on the claim. *See* Claimant's Post-Hearing Brief at 14 (July 16, 2007).

Dr. Partington opined that "the likelihood is that she had a disk herniation" at the time of the December 2005 car accident, and that "I think all you can say is that the second incident in Kuwait exacerbated what she already had . . . it's difficult to apportion how much of her state when I saw her the first time was due to the first injury as opposed to the second." CX 15 at 20, 22. Dr. Budorick opined that claimant's disc herniation is not related to the work accident. EX 39 at 30-31. However, he also stated that his treatment recommendations are related to the work accident, which he opined aggravated her underlying neck condition. EX 39 at 35-37, 48. Regarding her alleged psychological and neurological condition, claimant sustained a blow to the head sufficient to fracture her nose, and she testified and submitted exhibits to show that employer repeatedly denied her allegedly necessary treatment for her work accident. Tr. at 45-62; CXs 8-12. Additionally, claimant submitted the report of Dr. Sautter. He noted that claimant's work-related closed head injury, employer's denial of medical services, and claimant's significant pain complaints are factors supporting his diagnosis of ruminative anxious depression with cognitive dysfunction. CX 16 at 15.

The above evidence is sufficient to establish that claimant's work accident could have aggravated her neck condition and caused a psychological/neurological condition.[4] *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Burley v. Tidewater Temps Inc.*, 35 BRBS 185 (2002); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Stevens v. Tacoma Boatbuilding Co*, 23 BRBS 191 (1990); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Thus, claimant has established her *prima facie* case entitling her to invocation of the Section 20(a) presumption as she established that her injuries could have been caused or aggravated by the work injury. *See generally Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982).

We also cannot affirm the administrative law judge's finding that, assuming, *arguendo*, the Section 20(a) presumption was invoked, employer produced substantial evidence to rebut the presumption with regard to claimant's neck/arm condition. Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by her employment. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT (4th Cir. 2009). Where aggravation of a pre-existing condition is at issue, employer must produce substantial evidence that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in the injury. *Id.* In his initial decision, the administrative law judge found that employer established rebuttal of the Section 20(a) presumption based on claimant's failure to

[4] Claimant's failure to disclose prior to the initial hearing that she sought treatment after the December 2005 car accident for neck pain radiating into left arm is not relevant at this point in the analysis.

disclose that she had similar neck and left arm complaints after the December 2005 car accident and surveillance video of claimant which the administrative law judge found showed activity that is not consistent with her complaints. Decision and Order at 19-20. On modification, the administrative law judge found that employer established rebuttal based on claimant's failure to disclose the car accident and the similarity of the reported symptoms to those she reported in Kuwait in May 2006. Decision and Order (on modification) at 15.

The administrative law judge's reliance on the surveillance video taken on March 2007 is misplaced. EXs 40-41. This evidence may be material to the extent of claimant's disability at that time due to her neck and left arm condition, but her post-injury mobility approximately 10 months after the work incident is not probative of whether employer produced substantial evidence that the work incident did not aggravate claimant's neck condition in May 2006. Moreover, the similarity between claimant's neck and left arm complaints after the car accident and after the work accident, by itself, cannot rebut the presumed aggravation of a prior injury. *Holiday*, 590 F.3d at 226, 43 BRBS at 69-70(CRT); *Burley*, 35 BRBS at 189; *see also Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). In *Holiday*, the United States Court of Appeals for the Fourth Circuit held that employer cannot rebut the Section 20(a) presumption with evidence addressing only a pre-existing condition as such evidence does not address the aggravation rule. In this case, there are no medical opinions of record stating that claimant's neck and left arm conditions were not aggravated by the May 5, 2006, work accident. *See id.; Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). As there is no other evidence of record that can rebut the Section 20(a) presumption, as a matter of law, we reverse the administrative law judge's finding that claimant's neck and left arm condition was not aggravated by the May 2006 work injury. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597 38 BRBS 60(CRT) (1st Cir. 2004).

Regarding claimant's psychological/neurological condition, the administrative law judge rejected Dr. Sautter's attribution in part of claimant's depression and loss of cognitive functioning to her pain and closed head injury, since he found that her pain was related only to the car accident. Decision and Order (on modification) at 20. As we hold that employer did not rebut the presumption that claimant's neck/arm condition is due to the aggravation of a prior condition by the work accident, we vacate the administrative law judge's finding that claimant failed to show that any psychological condition is related to the work accident. On remand, the administrative law judge must apply the Section 20(a) presumption that claimant's psychological/cognitive condition is related to the work injury and determine whether employer produced substantial evidence to rebut the presumption in this regard. *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd mem. sub nom., Newport News Shipbuilding & Dry Dock Co.*, 245 F. App'x 249 (4th Cir. 2007). If employer rebuts the Section 20(a) presumption,

the administrative law judge should address whether claimant established the work-relatedness of her psychological/cognitive condition based on the record as a whole. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The administrative law judge also must address any other contested issues concerning claimant's entitlement to benefits consistent with applicable law.

Accordingly, the administrative law judge's finding that claimant's neck and left arm condition is not related to the May 2006 work accident is reversed. The administrative law judge's finding that claimant's psychological/cognitive condition is not related to the work accident is vacated. The case is remanded for further findings consistent with this decision.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge