BRB No. 08-0264

S. M. Claimant-Petitioner v. SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Employer/Carrier-Respondents	)	DATE ISSUED: 08/12/2008 DECISION and ORDER

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

Lewis S. Fleishman (Cassidy, Raub & Fleishman, PLLC), Houston, Texas, for claimant.

Monica F. Markovich (Brown Sims, P.C.), Houston, Texas, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2007-LDA-00057, 00059) of Administrative Law Judge C. Richard Avery 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.*, 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).

Claimant began working for employer in Iraq as a bus driver on January 29, 2005. Claimant alleged that she injured her neck and left shoulder on April 4, 2005, when a bus lunged forward as she was reaching through a window from outside the bus to turn on the ignition. Claimant continued working until May 13, 2006, when she asked to return to the United States. Claimant sought treatment for neck and shoulder pain on September 26, 2006, from Dr. DeBender, who opined in November 2006 that she is unable to work due to her pain. Claimant sought benefits under the Act for temporary total disability from May 14, 2006, and medical treatment for her orthopedic injuries and a psychological condition she alleged was related to these injuries.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking her orthopedic injuries to her employment based on an MRI of claimant's neck and left shoulder that showed subacromial impingement syndrome, and claimant's testimony of a work accident that could have caused the condition.[1] The administrative law judge found that employer established rebuttal of the presumption, and, based on the record evidence as whole, that claimant's injuries are not related to her employment. The administrative law judge also found claimant entitled to the Section 20(a) presumption that her psychological condition is related to her employment. The administrative law judge found that claimant had a pre-existing psychological condition that was not aggravated by her employment. The administrative law judge concluded that claimant, therefore, failed to carry her burden of proof on this issue.

On appeal, claimant challenges the denial of benefits for her injuries, contending that the administrative law judge's findings that her neck, shoulder and psychological conditions are not related to her employment are not in accordance with law. Employer responds, urging affirmance.

Claimant contends that the administrative law judge failed to state the legal standard for establishing rebuttal of the Section 20(a) presumption and to state how the evidence relates to that standard. Contrary to claimant's contention, the administrative law judge accurately stated that "once claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing

[1] Claimant also alleged that she sustained a work-related knee injury. The administrative law judge found that claimant is not entitled to any recovery for this alleged injury since she lost no time from work and she has no permanent impairment. Decision and Order at 2. Claimant does not challenge this finding.

evidence."[2] Decision and Order at 23, *citing Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *see also Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). In finding the presumption rebutted concerning claimant's orthopedic injuries, the administrative law judge credited the Incident Report for claimant's April 4, 2005, bus incident, which states there were no injuries. The administrative law judge relied on evidence in the record showing that claimant's medical records both in Iraq and the United States do not include any complaints of neck or shoulder pain until May 13, 2006, and that claimant did not seek medical care for these conditions until she was examined by Dr. DeBender on September 26, 2006. JXs 11, 14; CX 19. The administrative law judge also credited a normal MRI of claimant's cervical spine taken in November 2006, and Dr. Vandeweide's statement that he was unable to diagnose any neck or shoulder injury and his opinion that any injury claimant has is not related to the April 4, 2005, work incident. EXs 9 at 4, 7; 11 at 14, 17-19. We affirm the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption regarding claimant's orthopedic injuries as the administrative law judge stated the proper rebuttal standard and his finding is supported by substantial evidence. *See Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT); *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995) (decision on reconsideration); *see also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

The administrative law judge next addressed claimant's psychological condition, finding her entitled to the Section 20(a) presumption based on a diagnosis by four physicians of a psychological disorder, and on emails claimant submitted to her supervisors that she had been subjected to harassment by co-workers and supervisors. The administrative law judge summarized the evidence that employer submitted to rebut

[2] In this regard, we reject claimant's contention that the administrative law judge erred in failing to apply "the zone of special danger" principle to this case. Under the Act, an injury generally occurs in the course of employment if it occurs within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. *Palumbo v. Port Houston Terminal, Inc.*, 18 BRBS 33 (1986); *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593 (1981). However, in cases arising under the Defense Base Act, the United States Supreme Court has held the injury may be within the course of employment even if the injury did not occur within the space and time boundaries of work, so long as the employment creates a "zone of special danger" out of which the injury arises. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951). In this case, there is no allegation that claimant's injuries did not occur within the space and time boundaries of work, and application of the "zone of special danger" rule would not aid claimant in any way in proving her case.

the presumption. Specifically, claimant's medical records in Iraq and while on leave in the United Sates document only a single complaint of mental trauma, and she failed to mention the April 4, 2005, incident when she was examined by Dr. Hernandez, a psychiatrist, on May 19, 2006, which was five days after she returned to the United States. JXs 14, 16, 24; CX 17. The administrative law judge also addressed employer's evidence that claimant had a pre-existing psychological condition. *See* JXs 15 at 59-60; 16, 24, 25 at 412-417; CX 22; EX 16. The administrative law judge found that only Dr. Claghorn addressed whether there was a causal relationship between claimant's employment in Iraq and her psychological impairments. Dr. Claghorn opined that claimant's personality disorder pre-existed her employment with employer and was not aggravated by this employment. JX 15 at 27, 69, 73, 77. The administrative law judge concluded, based on the evidence as whole, that the pattern of behavior at claimant's previous jobs, along with the medical diagnoses of a pre-existing psychological impairment and the opinion of Dr. Claghorn, establish that claimant's pre-existing psychological condition was not aggravated by her employment with employer. Decision and Order at 28-29.

Although claimant correctly asserts that the administrative law judge did not specifically address rebuttal of the Section 20(a) presumption with regard to claimant's psychological condition, any error is harmless in this case. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). Dr. Claghorn stated that claimant's psychological condition was neither caused nor aggravated by her employment. There are no other opinions addressing a relationship between claimant's psychological condition and her employment. Dr. Claghorn's opinion is sufficient to rebut the Section 20(a) and to support the finding on the record as a whole that claimant's psychological condition is not work-related.[3] *Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988). Therefore, as it is supported by substantial evidence, we affirm the denial of benefits for claimant's psychological condition.

[3] Claimant contends that the administrative law judge erred by not mentioning the aggravation rule. Under the "aggravation rule," where an employment-related injury aggravates, accelerates or combines with an underlying condition, employer is liable for the entire resultant condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). Although the administrative law judge did not state this principle, he appropriately discussed the evidence of record and his finding that claimant's psychological condition was not aggravated by her employment in Iraq is supported by substantial evidence.

Regarding claimant's orthopedic injuries, the administrative law judge weighed the evidence as a whole after finding that employer established rebuttal of the Section 20(a) presumption.[4] The administrative law judge discredited claimant's allegation that her neck and shoulder injury was caused by the bus incident based upon the absence of any evidence documenting any neck and shoulder symptoms from April 4, 2005, until September 26, 2006, when claimant was examined by Dr. DeBender. JXs 11, 14, 24. The administrative law judge found that, while the report from claimant's May 13, 2006, visit to a medic in Iraq noted a history of shoulder pain, she received no treatment for this condition, but was instead treated for headaches. CX 17.

The administrative law judge also found that none of claimant's treating doctors connected her neck and shoulder complaints to the April 4, 2005, incident. The administrative law judge found that while Dr. Hoover testified that the kind of activity claimant performed in Iraq could cause shoulder impingement, he was unable to conclude that claimant's employment actually caused her impingement. CX 28 at 74. The administrative law judge found that Dr. Vanderweide examined claimant twice and "adamantly" opined that claimant's symptoms were not related to the April 4, 2005, incident. EX 9; Decision and Order at 25-26. Specifically, Dr. Vanderweide stated that he expected the extent of claimant's injury to be severe given claimant's subjective complaints, and that while claimant does have shoulder impingement, claimant would have more significant objective findings and atrophy if, in fact, more than two years had passed since the injury. EXs 9 at 7; 11 at 17, 19. Dr. Hoover stated that he could not locate a problem area for claimant's neck symptoms, nor could he tell how long claimant had suffered from her shoulder impingement. CX 28 at 20, 37-38, 44, 46. The administrative law judge noted Dr. Hoover's statements that while a shoulder

[4] Claimant asserts that the administrative law judge misapplied the "true doubt" rule, and that, as a result, he imposed a higher burden of proof on claimant to establish that her injuries are related to her employment. Specifically, in weighing the evidence as a whole, the administrative law judge stated that he had "true doubt" whether claimant's injuries are related to her employment. Decision and Order at 25, 28. However, the administrative law judge further stated in his decision, "[I] have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), that the burden of persuasion is with the proponent of the rule." Decision and Order at 23. This statement accurately reflects the Supreme Court's holding in *Greenwich Collieries*, and the administrative law judge therefore appropriately imposed on claimant the burden of proving that her injuries are related to her employment. In context, it appears that the administrative law judge was expressing his doubt that claimant's conditions are work-related, rather than that he found the evidence to be in equipoise. Decision and Order at 25-29.

impingement is usually brought on by an injury or repetitive activity, it also could evolve over time, and that he found strange claimant's increased symptoms upon returning home since she reportedly has refrained from working, and her condition could heal on its own in about three months with rest. *Id*. at 22, 42, 46, 72-73.

Based on the absence of any medical opinion that claimant's orthopedic injuries were caused by her employment, the administrative law judge's conclusion that claimant failed to carry her burden of establishing the work-relatedness of her neck and shoulder complaints is supported by substantial evidence.[5] *See Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *see also Hice v. Director, OWCP*, 48 F.Supp. 2d 501 (D. Md. 1999). Therefore, we affirm the denial of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[5] In her Post-Hearing Brief, claimant asserted that testimony by Dr. Hoover linked claimant's orthopedic symptoms to her employment. Brief at 8-9. Dr. Hoover's testimony, however, is that claimant presented with muscle spasm in her neck on May 13, 2006, and that this spasm could have been connected to her complaint of headaches. CX 28 at 9.