BRB No. 08-0158

C.F.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: 07/24/2008
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland, Bath, Maine, for claimant.

Stephen Hessert (Norman, Hanson & Detroy, L.L.C.), Portland, Maine, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2005-LHC-0850) of Administrative Law Judge Daniel F. Sutton 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 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).

This is the second time this case has come before the Board, and the underlying facts are not in dispute. Claimant slipped on ice at work and fell on April 26, 2002. He experienced back pain, but he continued to work until June 17, 2002, when increasing pain forced him to stop. Claimant suffers from chronic degenerative disc disease and extensive osteoarthritis of the low back among other back ailments. He filed a claim for total disability benefits, alleging that his back condition was caused or aggravated by the fall in April 2002 or by his work activities between April 27 and June 17, 2002.

In his first decision, the administrative law judge found claimant entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that his back condition is work-related. He then found that employer had rebutted the presumption, and, in weighing the evidence as a whole, he found that claimant's back condition and disability were not caused or aggravated by claimant's fall or working conditions. Claimant appealed the denial of benefits. On appeal, the Board held that the opinions of Drs. Ciembroniewicz and Desai are insufficient to rebut the Section 20(a) presumption because they did not state that claimant's working conditions did not aggravate claimant's back condition or render it symptomatic. *[C.F.] v. Bath Iron Works Corp.*, BRB No. 06-0323 (Dec. 14, 2006) (McGranery, J., concurring). Consequently, the Board vacated the administrative law judge's denial of benefits and remanded the case to the administrative law judge for consideration of any remaining issues.

As the parties had stipulated at the first hearing that claimant is totally disabled, on remand, the administrative law judge addressed only whether claimant's disability was temporary or is permanent. Citing *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979), he determined that, as claimant had been out of work with persistent back symptoms for nearly three years, his condition is permanent. Decision and Order on Remand at 4. The administrative law judge awarded claimant permanent total disability benefits at a compensation rate of $443.73 per week, annual adjustments pursuant to Section 10(f), 33 U.S.C. §910(f), interest, and medical benefits. Decision and Order on Remand at 4-5. Employer appeals the decision on remand, and claimant responds, urging affirmance.

Employer contends the administrative law judge erred in awarding benefits because he was not precluded from reconsidering the issue of whether employer established rebuttal of the Section 20(a) presumption and because the Board exceeded its authority by weighing the rebuttal evidence. Employer contends substantial evidence rebuts the Section 20(a) presumption and supports the administrative law judge's original denial of benefits. Claimant responds, urging affirmance and arguing that the Board properly addressed a legal issue and rendered a decision as a matter of law, precluding the administrative law judge from reconsidering the Section 20(a) issue. Claimant also argues that there is insufficient evidence to rebut the Section 20(a) presumption.

Employer initially argues that the Board exceeded its scope of review by reweighing the evidence and arriving at its own factual conclusions. Specifically, employer asserts that the Board ignored the evidence that supported the administrative law judge's original decision and gave greater weight to that evidence which did not. We reject employer's assertion.

Where the claimant establishes a *prima facie* case and Section 20(a) applies to relate the disabling injury to the employment, as here, the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). When aggravation of a pre-existing condition is at issue, the employer must produce substantial evidence that work events neither directly caused the injury nor aggravated the pre-existing condition to result in injury. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). This rule applies not only where the underlying condition is affected but also where the work causes the claimant's underlying condition to become symptomatic. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986).

In this case, the Board did not make any factual findings. Rather, the Board addressed the two doctors' opinions submitted by employer to rebut the causal nexus between claimant's disability and his work and held that they are legally insufficient to rebut the presumption that claimant's back condition was aggravated or rendered symptomatic by his working conditions. *[C.F.]*, slip op. at 3. As the Board stated in its previous decision, Dr. Ciembroniewicz concluded that degenerative changes can become symptomatic by "overdoing it" with physical activity. Emp. Ex. 17 at 17. Moreover, he stated that claimant's fall could have produced "transient aggravation" of his pre-existing osteoarthritis. Emp. Ex. 17 at 11-12. Additionally, Dr. Desai agreed that "almost any activity could initiate symptoms if there's a disk herniation there." Cl. Ex. 14 at 7. If a physician states that a claimant's condition may be due in part to his work, then the opinion does not constitute substantial evidence sufficient to rebut the Section 20(a) presumption. *See, e.g., Preston*, 380 F.3d 597, 38 BRBS 60(CRT); *Bridier v. Alabama Dry Dock & Shipbuilding Co.*, 29 BRBS 84 (1995). As the physicians stated that claimant's work could have contributed to the manifestation of claimant's back symptoms, the Board properly held the opinions are insufficient to rebut the Section 20(a) presumption. *[C.F.]*, slip op. at 4. As employer did not produce any other evidence sufficient to rebut the presumption, the Board properly held that claimant's condition is work-related as a matter of law. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT). Accordingly, we reject employer's allegation that Board exceeded its authority.

We also reject employer's contention that the administrative law judge erred in not addressing the rebuttal issue on remand. As the Board held that claimant's back condition is work-related as a matter of law, its holding is the law of the case. *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *Schaubert v. Omega*

Services Industries, 32 BRBS 233 (1998); *Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988). Thus, the administrative law judge did not have the authority or the discretion to reconsider the issue on remand. *Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376 (1989). Employer has not challenged either the administrative law judge's finding on remand that claimant's condition is permanent or his resultant award of permanent total disability benefits. Therefore, we affirm the award of benefits.

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

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