BRB No. 98-1222

ARMANDO MARTINEZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED: June 16, 1999
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Preston Easley (Law Offices of Preston Easley), San Pedro, California, for claimant.

Maryann C. Shirvell (Laughlin, Falbo, Levy & Moresi, LLP), San Diego, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (97-LHC-654) of Administrative Law Judge Ellin M. O'Shea 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).

Claimant, on April 30, 1996, received by mail employer's written complaint firing him for being told repeatedly to put on his hard hat, refusing to hook up to a fall arrest system while aloft, throwing a locking cone from a container, and refusing to go on board the vessel to unload extra cones at the end of the second shift on April 17, 1996. Claimant alleged he sustained a work-related psychological injury, *i.e.,* an adjustment disorder with anxiety and depression, due to the false allegations and to the allegedly irregular notification of his firing. Claimant sought temporary total disability benefits from May 17, 1996, through August 1, 1996, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Claimant has no documented pre-existing psychological conditions.

The administrative law judge initially found that employer's firing claimant was a "legitimate personnel action" within the meaning of *Marino v. Navy Exchange*, 20 BRBS 166 (1988). The administrative law judge, therefore, concluded that claimant's alleged psychological injury is not compensable under the Act. Assuming, *arguendo*, that employer's actions did not constitute a "legitimate personnel action," the administrative law judge found that claimant did not suffer from a work-related psychological injury.[1] Consequently, the administrative law judge denied claimant's claim for temporary total disability and medical benefits.

On appeal, claimant challenges the administrative law judge's finding that his psychological condition is not compensable under the Act. Employer responds in support of the administrative law judge's denial.[2]

We first address claimant's challenge to the administrative law judge's finding that claimant's firing was a "legitimate personnel action" that precludes recovery. In *Marino*, 20 BRBS at 166, the Board held that to the extent claimant's psychological injury was due solely to his termination resulting from a reduction in force, it was not compensable under the Act. The Board stated that, "A legitimate personnel action or termination is not the type of activity intended to give rise to a worker's compensation claim." *Id.* at 168.

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[1]The administrative law judge also found that she did not have jurisdiction under Section 31 of the Act, 33 U.S.C. §931, to determine whether claimant committed fraudulent misrepresentations and perjury in support of his claim.

[2]Employer also requests that the Board refuse to consider claimant's appeal as it does not adequately identify errors in the administrative law judge's findings. Emp. Br. at 5. We deny employer's motion as claimant's brief does adequately assign error to the administrative law judge's decision. 20 C.F.R. §802.211(b).

In determining that claimant's firing comes within the holding of *Marino*, the administrative law judge credited employer's witnesses and the PMA records to find that the allegations against claimant were true and that the proper procedure was used to fire him. Decision and Order at 12-16. The administrative law judge acted within her discretion in crediting the testimony of the longshore supervisors, Messrs. Vaden, McJunkin, and Warren, as their testimony was substantially consistent that claimant was warned by Mr. Vaden to put on his hard hat and to hook up to the fall arrest system, that claimant was responsible for throwing a cone, as witnessed by Mr. Vaden and heard by Mr. McJunkin, and that claimant walked off the job at 3 a.m. without being dismissed by a supervisor. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); Decision and Order at 15; Tr. at 327-332, 353-355, 364-365, 377. Claimant has raised no error committed by the administrative law judge in weighing the conflicting evidence; specifically, the administrative law judge found that claimant's testimony was not credible and that his co-workers' testimony was not as reliable as that of the supervisors.[3] Decision and Order at 13-15.

[3]Although claimant denied all of the allegations against him in his answer to employer's complaint, stating that he wore his hard hat at all times except while in the truck, and that he was hooked up to the fall arrest system the entire time he was aloft, claimant testified at the hearing that he did not wear his hard hat while aloft or while on the gangway and that he may not have been hooked up to the fall arrest at certain times. EX I; Tr. at 219-222, 273. Claimant changed his testimony regarding which bosses were working and who dismissed him. Tr. at 267-269, 273-274. Claimant also testified by deposition that he could not find his log book because he had thrown it away, but then "found" the book the night between the two days of the hearing. Tr. at 259. *See* Decision and Order at 14.

With regard to the procedure used in notifying claimant of the complaint against him, the administrative law judge found that it was proper as it was filed within 30 days of the work incident and appropriately sent to him by mail after claimant could not be served with the complaint in person since he walked off the job. Decision and Order at 15; Tr. at 336, 358-359. Moreover, the administrative law judge noted that claimant had been served with complaints by mail in the past and the administrative law judge found that the process was not unduly protracted compared to claimant's previous cases. Decision and Order at 15; Tr. at 284, 293.

As the administrative law judge acted within her discretion in weighing the evidence in favor of employer, the administrative law judge's conclusion that claimant's termination was a "legitimate personnel action," and thus that claimant's psychological injury allegedly resulting therefrom is not compensable, is affirmed.[4] *See Marino*, 20 BRBS at 166; Decision and Order at 12-16.

We next address claimant's challenge to the administrative law judge's alternative finding that assuming, *arguendo,* that claimant's firing was not a "legitimate personnel action," claimant would not be entitled to benefits based on her weighing of the evidence. The Section 20(a) presumption is applicable in psychological injury cases. *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 384 n. 2 (1990); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989)(decision on remand); 33 U.S.C. §920(a). In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case that he has a

[4]The fact that claimant was eventually allowed to resume work for employer after being taken off employer's non-dispatch list, as the administrative law judge correctly noted, does not establish that the termination was improper. Decision and Order at 15 n. 7. Moreover, although claimant attempts to draw a parallel between this case and *Whittingon v. National Bank of Washington*, 12 BRBS 439 (1980), *Whittington* is inapposite in that therein, unlike here, the record established that the claimant had pre-existing psychological problems which she alleged were aggravated by stress in the work environment. Thus, the Board in *Whittington* held that the claimant's psychological injury, after becoming upset upon receiving employer's memorandum stating that she would be asked to resign if she did not improve her attendance, punctuality, and attention to her job, would be compensable if the work-related discipline aggravated, exacerbated, or accelerated any of her pre-existing psychological problems. Furthermore, the psychological injury in *Whittington* was not alleged to be due to a firing or reduction in force, as in *Marino* and the instant case. *See also Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127 (1997)(McGranery, J., dissenting), *aff'd on recon. en banc*, 32 BRBS 134 (1998)(Brown and McGranery, JJ., dissenting).

psychological condition and that an accident occurred or that working conditions existed which could have caused or aggravated the condition. *Whittington v. National Bank of Washington,* 12 BRBS 439 (1980). Once the Section 20(a) presumption is invoked, the burden shifts to the employer to rebut the presumption with specific and comprehensive evidence that claimant's condition is not caused or aggravated by his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Sam v. Loffland Bros.*, 19 BRBS 288 (1987). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

The administrative law judge found the Section 20(a) presumption invoked based on Dr. Goldstein's opinion that claimant suffered from an adjustment disorder with anxiety and depression from a work incident. She found the Section 20(a) presumption rebutted based on Dr. Prover's opinion that claimant does not suffer from an industrially-related psychological injury.[5] Upon a weighing of the evidence, the administrative law judge credited Dr. Prover's opinion over that of Dr. Goldstein, based on his superior credentials and his better reasoned opinion.[6] *See Calbeck*, 306 F.2d at 693; *Donovan*, 300 F.2d at 741; *Hughes*, 289 F.2d at 403; Decision and Order at 16-19; CX 16; EX A:1-9, S at 192-195; Tr. at 113, 119-122, 148-149, 152, 382. As the administrative law judge acted within her discretion in crediting Dr. Prover's opinion and as Dr. Prover's opinion establishes that claimant did not suffer from an industrially-related psychological injury, the administrative law judge's denial of benefits is affirmed as supported by substantial evidence.

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[5]Claimant does not challenge the administrative law judge's finding that Dr. Prover's opinion establishes rebuttal, but only that the administrative law judge erred in crediting the opinion of Dr. Prover over that of Dr. Goldstein.

[6]Dr. Prover is a medical doctor, Board-certified in psychiatry. EX S at 192-195. Dr. Goldstein is a licensed psychologist. CX 16. Dr. Prover explained his alternative diagnoses of malingering and "factitious anxiety disorder." EX A:7-8; Tr. at 127-128, 389. Dr. Goldstein diagnosed anxiety and depression due to the incident at work, yet stated that claimant did not look or act anxious or depressed. She also testified that claimant's overall mental status examination was normal, and the administrative law judge found dubious her assertion that none of claimant's alleged stress was due to non-industrial sources, when the record revealed several sources for such stress. Tr. at 113, 148-149, 152.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge