BRB No. 97-1259

NATHAN E. HUFFMAN, JR.	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

J. Bradford Doyle, Corte Madera, California, for claimant.

Richard M. Slagle and Joan L.G. Morgan (Slagle Morgan & Ellsworth, LLP), Seattle, Washington, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand Denying Benefits (91-LHC-1502) of Administrative Law Judge Henry B. Lasky 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).

This case is before the Board for the second time. On April 26, 1990, claimant, a casual longshoreman, injured his right shoulder and cervical spine while working for employer. Claimant was initially treated on April 30, 1990, by Dr. Strange, a board-certified family practitioner. Dr. Strange diagnosed a right shoulder strain, and referred claimant on May 3, 1990 to Dr. Mysliwiec, an orthopedic specialist, who opined that claimant could not return to longshoring work, but released claimant to light duty work on January 31, 1991. Paul Tomita, a vocational rehabilitation counselor, identified job opportunities within claimant's physical restrictions as a motel desk clerk, customer service representative, and bank teller, which were available as of January 31, 1991, and Dr. Mysliwiec approved these positions. On November 18, 1991, claimant returned to Dr. Strange for treatment of depression. Dr. Strange attributed this condition to multiple stresses, including claimant's cervical injury, and prescribed Prozac. In addition, in March 1992, claimant was evaluated for emotional difficulties by Don Filmore, MA, a psychological counselor of the Quinault Indian Nation Clinic, who noted that a major source of claimant's stress was his dealings with the insurance company and his inability to move the proceedings along. On April 2, 1992, claimant was also evaluated by Carol Baros, MA, a psychological counselor who diagnosed him as suffering from major depression with paranoia and feelings of victimization related to his dealings with the insurance company handling his claim. Employer voluntarily paid claimant temporary total disability compensation from May 4, 1990 through March 2, 1992. Claimant sought additional disability compensation and medical benefits under the Act for his cervical injury and depression.

In his initial Decision and Order, dated August 5, 1992, the administrative law judge, rejecting claimant's testimony that his depression is related to his cervical injury, found that claimant's depression was due to his legal tax problems with the Internal Revenue Service and the State of Washington, a pending paternity suit, and his multiple unrelated medical problems. The administrative law judge also determined that any disability claimant had resulting from claimant's cervical injury ceased as of January 31, 1991, when employer established the availability of suitable alternate employment which paid more than claimant was earning at the time of his injury. Accordingly, he awarded claimant temporary total disability benefits from May 4, 1990, until he was released to return to work on January 31, 1991, but denied claimant any disability compensation benefits thereafter. The administrative law judge further concluded that there was no credible evidence that either claimant's cervical injury or his depression would preclude him from performing the suitable alternate work established by employer, citing Dr. Mysliwiec's deposition testimony which reflects that claimant is capable of performing reasonably continuous gainful employment in light, sedentary occupations. CX 29 at 59-60.

Claimant appealed, arguing that he was entitled to ongoing temporary total disability

compensation from November 18, 1991, for depression caused in part by his work-related cervical injury. Claimant also challenged the administrative law judge's calculation of his average weekly wage, asserting that although he had a post-injury wage-earning capacity of $240 per week based on Mr. Tomita's testimony, if the correct average weekly wage was applied, he had nonetheless sustained a permanent loss in his wage-earning capacity and was therefore entitled to permanent partial disability compensation for his cervical injury. Employer responded, urging affirmance.

In its Decision and Order dated April 29, 1996, the Board vacated the administrative law judge's determination that claimant's depression was not related to his work injury as he did not analyze the relevant evidence in light of the Section 20(a) presumption. As it was undisputed that claimant suffers from depression and that a work accident occurred, the Board concluded that claimant was entitled to the Section 20(a), 33 U.S.C. §920(a), presumption and remanded for the administrative law judge to reconsider claimant's entitlement to disability compensation in light of all relevant evidence consistent with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). In remanding the case, the Board noted that in attributing claimant's depression to other causes, the administrative law judge failed to consider relevant evidence, including the medical opinion of Dr. Strange that from at least November 18, 1991, claimant has been unable to pursue gainful employment because of depression related, at least in part, to the effects of his cervical injury, and the opinion of the psychological counselor, Ms. Baros.

With respect to the administrative law judge's determination that there was no credible evidence that claimant's depression would preclude his performing the suitable alternate work established by employer, the Board noted that the administrative law judge's reliance on Dr. Mysliwiec's deposition testimony was misplaced as his opinion that claimant was capable of performing gainful employment in light, sedentary occupations was premised only on claimant's physical capacity. CX 29 at 59-60. In addition, the administrative law judge did not address Mr. Tomita's testimony that, while he was unaware of whether claimant's depression was chronic or acute or whether he had been prescribed medication for it, the condition would affect his employability. Tr. at 244. The Board, however, affirmed the administrative law judge's determination that claimant failed to establish a loss in his wage-earning capacity based on his physical injuries, concluding that the administrative law judge rationally determined that claimant's average weekly wage was $166.89 ,which was less than his unchallenged post-injury wage-earning capacity of $240. *Huffman v. Stevedoring Services of America,* BRB No. 92-2397 (April 29, 1996)(unpublished). Thereafter, employer sought review of the Board's Decision and Order before the United States Court of Appeals for the Ninth Circuit, which dismissed employer's appeal as interlocutory. *Stevedoring Services of America v. Director, OWCP*, No. 96-70520 (9th Cir. Sept. 16, 1996).

In a Decision and Order on Remand Denying Benefits issued May 21, 1997, the

administrative law judge did not follow the Board's Decision and Order holding claimant entitled to the benefit of the Section 20(a) presumption. Instead, citing *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), he reaffirmed his prior Decision and Order, stating that the Board misstated the law and facts with respect to Section 20(a) presumption, as employer did not concede that claimant has depression and claimant did not present any credible lay or medical testimony sufficient to establish that he suffered from depression as a result of his April 1990 cervical injury.[1] In finding that claimant was not entitled to the Section 20(a) presumption, the administrative law judge also noted that claimant did not mention depression until he saw Dr. Strange in November 1991, 19 months after his cervical injury, and that there was no medical diagnosis of clinical depression by a qualified board-certified psychiatrist. The administrative law

[1]The administrative law judge specifically found that the testimony of claimant's live-in girlfriend, Rose Courcy, stating that claimant was depressed and that she believed that it was related to his inability to do what he had done previously, was insufficient to establish any relationship between claimant's alleged depression and his work injury, characterizing it as unconvincing, unreliable, and biased. In addition, he also found the testimony of claimant's classmate, Penny Burnett, that claimant was depressed because of his insurance problems, insufficient to invoke Section 20(a) as it was tainted by information provided by claimant and was contradicted by testimony provided by Drs. Strange, Mysliwiec and Mr. Filmore. Moreover, he determined that there was no medical evidence of clinical depression by a qualified board-certified psychiatrist but merely record notations by an orthopedist and family practitioner, Drs. Mysliwiec and Strange, who have no qualifications in this regard and merely accepted claimant's assertion that he felt depressed.

judge determined, however, that even if the Section 20(a) presumption was invoked, it was rebutted and that the record as a whole is replete with evidence that any alleged stress, depression, anxiety, or similar condition is not causally related to claimant's 1990 cervical injury. Finally, the administrative law judge took issue with the Board's determination that in concluding that claimant's depression was not disabling, he erred in failing to consider Mr Tomita's testimony regarding claimant's employability; he found that as claimant did not have any depression arising out of and incurred in the course of his employment and claimant had conceded that he had a $249 per week residual wage-earning capacity based on the alternate jobs identified by Mr. Tomita, consideration of this testimony was unnecessary. Accordingly, he again denied the claim.

On appeal, claimant challenges the administrative law judge's finding that he is not entitled to compensation for depression resulting from his work-related cervical injury on various grounds, arguing that employer did not rebut the Section 20(a) presumption and that the administrative law judge exhibited animus toward him by relying on extrinsic evidence of claimant's falsifying IRS returns and a paternity suit against claimant to discredit all of the testimony he presented relating his depression to the 1990 cervical injury. Employer responds, urging affirmance.

The administrative law judge's denial of benefits cannot be affirmed. Initially, we note that in the prior Decision remanding the case, the Board specifically held that claimant is entitled to the Section 20(a) presumption. Thus, on remand, the issues before the administrative law judge were the cause of claimant's depression in light of the presumption and the extent of his disability, if any, resulting therefrom in light of all of the relevant evidence. Section 804.405(a) of the regulations, 20 C.F.R. §802.405(a), governing the operations of the Benefits Review Board, provides that "[w]here a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board." Thus, in reconsidering claimant's entitlement to invocation of the Section 20(a) presumption on remand, the administrative law judge erred by failing to follow the Board's directive. *See Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). Moreover, as it was based on claimant's diagnosed depression[2] and the undisputed work

[2]On remand, the administrative law judge for the first time purports to find claimant does not suffer from depression, a conclusion requiring that he discredit virtually all of the medical and lay evidence regarding claimant's mental condition as employer introduced no affirmative evidence that either claimant was not depressed or that his depression was not work-related. His conclusion can be essentially summed up as resting on the premise that since he found claimant's complaints to lack credibility, the opinions of health providers and others regarding those complaints should also be rejected. In relying upon his own conclusion regarding claimant's complaints to override the medical evidence, the administrative law judge

injury, the Board's holding that claimant invoked Section 20(a) is in accordance with *U.S. Industries*, 455 U.S. at 608, 14 BRBS at 631. The issue before the administrative law judge on remand thus involved employer's burden to rebut the statutory presumption.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition is not caused or aggravated by his employment. *See 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 Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

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used identical reasoning to that rejected by the United States Court of Appeals for the Second Circuit in *Pietrunti v. Director, OWCP,* 119 F.2d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). *See* discussion, *infra*. In any event, the administrative law judge erred in raising this issue for the first time on remand. Employer did not dispute that claimant had depression in the initial proceedings before the administrative law judge or the Board; it only argued that because claimant's depression did not develop until 19 months after his work accident and he had numerous other problems, it was not related to his cervical injury. *See* Employer's July 17, 1992 Proposed Findings of Fact and Conclusions of Law at 22-23. Moreover, in his initial Decision and Order, the administrative law judge found that claimant suffered from depression, but that it was not work-related or disabling. Aug. 4, 1992, Decision and Order at 5-6. Thus, the record not only lacks any evidence that claimant was not depressed, but it also reflects that this issue was not timely raised. Aug. 4, 1992, Decision and Order at 5-6.

Notwithstanding his finding that claimant was not entitled to the Section 20(a) presumption, the administrative law judge also found that rebuttal had been established and that the record as a whole established that any alleged stress, depression, or anxiety is not causally related to claimant's work-related 1990 cervical injury. On appeal, claimant asserts that the administrative law judge denied his claim on the basis of tenuous inferences and circumstantial evidence while at the same time mischaracterizing, ignoring, and failing to rationally and objectively consider relevant evidence. Claimant further avers that as there is no record evidence sufficient to establish the absence of a causal connection between claimant's depression and his work-related cervical injury, the administrative law judge erred in finding employer rebutted the Section 20(a) presumption and in denying the claim accordingly.

We agree with claimant that the administrative law judge's finding of rebuttal does not comport with applicable law. The administrative law judge initially found that employer had completely ruled out the causal connection between claimant's April 26, 1990, physical injury and his claim of depression 19 months later because the purported diagnoses of depression by Drs. Strange and Mysliwiec were not credible inasmuch as they were premised on claimant's mendacious complaints. This finding does not provide an adequate ground for rebuttal. Initially, the administrative law judge abused his discretion by substituting his own medical judgment for the uncontradicted opinion of claimant's treating physicians that claimant was experiencing depression as a result of his work injury based upon his finding that claimant's symptoms were not credible. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84 (CRT) (2d Cir. 1997). The evidence relevant to claimant's mental state includes the reports and depositions of these doctors, as well as reports of two psychological counselors, Carol Baros and Don Filmore, who evaluated claimant and recommended counseling. Although, as the administrative law judge noted, none of these professions was a clinical psychiatrist, Dr. Strange in fact treated claimant for depression and deposed that treatment of patients for depression was a regular part of his family practice.[3] CX 30 at 16-17. Dr. Strange described claimant's feelings of depression, his resulting physical symptoms and stressors causing the condition in discussing the basis for his diagnosis. *Id.* at 15-16, 17-18. At the time of the hearing, claimant had been taking Prozac, an antidepressant prescribed by Dr. Strange for approximately 6 months. Given this evidence and the lack of countervailing evidence from employer, the record does not contain substantial evidence supporting the administrative law judge's conclusions. Inasmuch as "depression is not the blues. It is a mental health illness; and health professionals, in particular psychiatrists, not lawyers or judges, are the experts on it," *Pietrunti,* 119 F.3d at

[3]There is no evidence in this case that Dr. Strange, or any other board-certified family practitioner, is not qualified to diagnose or treat depression.

1044, 31 BRBS at 91 (CRT), *quoting Wilder v. Chater*, 64 F.3d 335, 337 (7th Cir. 1995), the administrative law judge's decision cannot be affirmed as it is not supported by the opinions of the health professionals in this case.

More importantly, since employer bears the burden of severing the presumed causal nexus, even if the decision to discredit all of the relevant evidence was affirmable, such a finding cannot rebut Section 20(a). The administrative law judge found that rebuttal was established because neither Drs. Strange and Mysliwiec, nor the psychological counselors, Mr. Filmore and Ms. Baros, provided credible testimony which linked claimant's depression to his 1990 cervical injury. This conclusion improperly placed the burden on claimant to establish that his depression is work-related, rather than on employer to establish that it is not work-related. *See generally Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of N. 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. 1253 (1993). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the 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); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

In addition, the administrative law judge erred in finding that employer succeeded in completely ruling out the connection between claimant's 1990 injury and his alleged depression because the records of both Dr. Strange and Dr. Mysliwiec attributed claimant's depression to causes in addition to the injury. Inasmuch as Dr. Strange opined that claimant's depression was due at least in part to his cervical injury, his opinion cannot rebut the Section 20(a) presumption. *Konno v. Young Bros., Ltd*, 28 BRBS 57, 62 (1994). Moreover, that the doctors and counselors may have attributed claimant's symptoms to additional causes other than the work injury is also not determinative; the Section 20(a) presumption is not rebutted merely by suggesting alternate ways that claimant's injury might have occurred. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Moreover, under the aggravation rule, claimant's entire condition is compensable if due in part to the work-related injury. *See Konno*, 28 BRBS at 61. Finally, the administrative law judge's reliance on the 19 month gap between claimant's last day of work and the first documentation of his depression is also insufficient, by itself, to establish rebuttal. *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

Inasmuch as the administrative law judge improperly allocated the burden of proof in determining that employer established rebuttal of the Section 20(a) presumption,[4] this

[4]Although much of claimant's brief is dedicated to challenging the administrative law judge's discrediting of record evidence linking claimant's

finding must be vacated. As employer introduced no evidence that claimant did not suffer from depression due at least in part to his work injury, moreover, the record contains no evidence to rebut the Section 20(a) presumption. Accordingly, causation is established as a matter of law, and the administrative law judge's finding that claimant does not suffer from depression due to his work injury must be reversed.

Employer suggests in its response brief, however, that the denial of benefits may be affirmed, in any event, because the administrative law judge's alternate finding that claimant failed to establish any loss in his wage-earning capacity based on stress, depression, anxiety or similar conditions is rational and supported by substantial evidence. We are unable, however, to affirm the denial of benefits on this alternate basis because in so concluding, the administrative law judge disregarded the Board's prior remand instructions and misinterpreted the import of claimant's concession that Mr. Tomita's testimony established that he retained the capacity to earn $6.00 per hour or $240 per week. In its prior decision, the Board noted that although the administrative law judge found based on Dr. Mysliwiec's testimony that claimant is capable of performing reasonably continuous or gainful employment in light, sedentary occupations, Dr. Mysliwiec's testimony did not provide substantial evidence to support this determination because in context it was clear he had been referring only to claimant's physical capacity. In addition, the Board noted that at the hearing Mr. Tomita testified that while he was unaware of whether claimant's depression was chronic or acute and whether he had been prescribed medication for it, this condition would affect his employability. Tr. at 244. Thus, the Board directed the administrative law judge on remand to reconsider claimant's entitlement to disability compensation for depression in light of all of the relevant testimony.

In his Decision and Order On Remand, the administrative law judge found that the Board's determination that he erred in failing to consider Mr. Tomita's testimony was unfounded. Specifically, he determined that inasmuch as he found that claimant did not suffer from any depression arising out of and incurred in the course of his employment as a result of his 1990 injury and that claimant conceded in his post-hearing filing that the suitable

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depression to the 1990 cervical injury, in light of our decision herein, we need not address claimant's specific credibility arguments. Claimant's contention that the administrative law judge exhibited bias against him, however, is rejected. Adverse rulings, alone, are insufficient to show bias. *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

alternate employment identified by Mr. Tomita established that he had a post-injury wage-earning capacity of $240, which was greater than his average weekly wage, Mr. Tomita's testimony was immaterial. As discussed previously, however, the administrative law judge's causation analysis does not comport with applicable law. Moreover, although claimant did concede that "relying upon Mr. Tomita's analysis claimant has retained earning capacity of $6.00 per hour... or $240 per week," Mr. Tomita testified that he did not take into account claimant's mental state in considering his employability, and employer argued in the prior proceedings that the jobs identified in Mr. Tomita's labor market survey were consistent with the physical limitations imposed by Dr. Mysliwiec, who also did not account for claimant's mental state. Thus, it is evident that claimant's concession referred only to his physical injury. Accordingly, we must again vacate the administrative law judge's finding that claimant's depression was not disabling. On remand, the administrative law judge must reconsider claimant's entitlement to disability compensation for his depression in light of all of the relevant evidence of record consistent with the requirements of the APA.

Accordingly, the Decision and Order on Remand Denying Benefits of the administrative law judge is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, dissenting:

I disagree with my colleagues' decision to reverse the administrative law judge's finding that claimant does not suffer from depression related to his work injury. I would affirm the administrative law judge's decision based on the reasoning therein, as it is supported by substantial evidence and in accordance with law. Therefore, I dissent.

JAMES F. BROWN
Administrative Appeals Judge