BRB No. 13-0519

HENRY BIAS, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DYNAMIC INDUSTRIES, INCORPORATED	)	DATE ISSUED: Apr. 18, 2014
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Claimant's Petition for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Henry Bias, Jr., Franklin, Louisiana, *pro se*.

David K. Johnson (Johnson, Rahman & Thomas), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order and the Order Denying Claimant's Petition for Reconsideration (2012-LHC-00391) of Administrative Law Judge Clement J. Kennington 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence,

and in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On April 19, 2009, claimant, who had previously been diagnosed with osteoarthritis in his right knee, allegedly sustained an injury to that knee while working for employer as a rigger.[1] Claimant subsequently received medical care for knee symptoms. Claimant was diagnosed with a torn meniscus, and he underwent four surgeries on his knee. Claimant sought disability benefits, asserting that his post-April 19, 2009, knee complaints, surgeries, and restrictions are related to his April 19, 2009, work injury.

In his Decision and Order, the administrative law judge applied Section 20(a), 33 U.S.C. §920(a), to presume that claimant's post-April 2009 right knee condition is related to his April 19, 2009, work incident, and found that employer rebutted the Section 20(a) presumption; the administrative law judge determined on the record as a whole, that claimant's post-April 19, 2009, right knee symptoms are not related to his employment injury. Accordingly, the administrative law judge denied claimant's claim for ongoing disability and medical benefits. Claimant filed a motion for reconsideration, which the administrative law judge denied.

On appeal, claimant, representing himself, challenges the administrative law judge's denial of his claim for benefits under the Act. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.[2]

In his Decision and Order, the administrative law judge found that claimant lacked credibility because his hearing testimony was generally equivocal, ambiguous, and

[1] Claimant alleged that a 50 to 70 pound shackle struck his right knee and foot. Tr. at 9-10.

[2] In its response brief, employer challenges the timeliness of claimant's appeal; specifically, employer avers that, as claimant's appeal was filed on August 9, 2013, five days prior to the issuance of the administrative law judge's August 14, 2013 Order Denying Claimant's Petition for Reconsideration, claimant's appeal should be dismissed as premature. *See* 20 C.F.R. §§802.205, 802.206(f). The Board's September 25, 2013 acknowledgement letter erroneously states that claimant's appeal was filed on August 9, 2013. The document claimant filed on that date was a copy of his Petition for Reconsideration filed with the administrative law judge. Claimant subsequently filed a Notice of Appeal with the Board on September 10, 2013. Claimant's appeal was thus timely filed after the administrative law judge issued his order on reconsideration. *See* 20 C.F.R. §802.205.

unpersuasive, and that unexplained inconsistencies exist between claimant's testimony and documents from his medical providers. Nonetheless, the administrative law judge invoked the Section 20(a) presumption based on findings that claimant suffered a harm, specifically right knee symptoms, and that conditions existed at claimant's workplace on April 19, 2013, which could have caused that harm.[3] Decision and Order at 18. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The burden then shifted to employer to rebut the presumed causal connection with substantial evidence that claimant's injury was not caused or aggravated by his employment. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). In order to rebut the Section 20(a) presumption, employer need not "prove the deficiency" in claimant's prima facie case; rather, "all it must do is advance evidence to throw factual doubt on the prima facie case." *Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 231, 46 BRBS 25, 29(CRT) (5th Cir. 2012). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *Id.; see also Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994).

The administrative law judge found that employer rebutted the Section 20(a) presumption based on claimant's doctors' consistent diagnoses of degenerative osteoarthritis both before and after the alleged work incident; this evidence suggests that claimant did not sustain a traumatic injury. The administrative law judge also relied on the absence in the medical records of any reports of a work accident. In this regard, the administrative law judge stated that Dr. McPherson, who treated claimant before and after April 19, 2009, diagnosed claimant with chronic osteoarthritis without any indication or complaints of a traumatic injury.[4] Moreover, on May 19, 2009, Dr. Cenac diagnosed claimant with a torn meniscus, but he stated that this condition could explain

[3] The administrative law judge found that claimant's accident was not witnessed. The administrative law judge did not make a specific finding whether the accident in fact occurred, but he addressed the inconsistencies in claimant's claim in addressing whether the Section 20(a) presumption was rebutted.

[4] Specifically, the administrative law judge found that Dr. McPherson reported that claimant made no reference to a recent traumatic injury during his April 22, May 21, and June 5, 2009, office visits. *See* Decision and Order at 12-13; EX 5 at 22-24; EX 6 at 22-27.

claimant's December 2008 and January 2009 knee pain. Dr. Cenac noted that claimant did not complain of a specific traumatic injury at his initial visit. Dr. Cenac opined that claimant's knee symptoms were the result of his degenerative condition, and that claimant's torn meniscus was unrelated to his April 19, 2009, work incident. EX 3 at 28-29, 48. As the administrative law judge rationally found that this evidence throws factual doubt on the occurrence of a work accident resulting in knee pain, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT).

The administrative law judge proceeded to weigh the relevant evidence as a whole and he concluded that claimant did not establish that his right knee condition is related to his work accident. It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to weigh the medical evidence and draw his own inferences therefrom. *See 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). In his decision, the administrative law judge found claimant's "hearing testimony [to be] generally equivocal, ambiguous, incredible and unpersuasive when correlated internally with statements made to his treating physicians." Decision and Order at 16. Thus, the administrative law judge rejected claimant's testimony that he injured his knee in a work accident. The administrative law judge also found that there is no objective or medical opinion evidence stating that claimant's knee condition is the result of any work-related injury or that claimant's pre-existing right knee condition was accelerated or aggravated by any work-related injury. *Id.* at 20. Consequently, the administrative law judge concluded that the evidence does not support a finding that claimant's right knee condition is related to a work accident. *Id.* This conclusion is supported by substantial evidence of record. Therefore, we affirm the administrative law judge's finding that claimant did not establish that his post-April 19, 2009, right knee condition is related to a work accident, as well as the consequent denial of benefits. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

Accordingly, the administrative law judge's Decision and Order is affirmed.[5]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

[5] In his appeal to the Board, claimant asserts that the attorney who represented him before the administrative law judge was ineffective, in that witnesses "should have been questioned concerning [his work] accident." Cl's Sept. 5, 2013 Letter to the Board. If claimant obtains additional evidence supportive of his claim, he may file a petition for modification with the district director, pursuant to Section 22 of the Act, 33 U.S.C. §922, within one year of the rejection of his claim. 20 C.F.R. §702.373.