BRB No. 03-0766

TERRANCE V. OLSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED:Aug. 4, 2004
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston, Bunnell & Stone, LLP), Portland, Oregon, for claimant.

Jay W. Beattie (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2002-LHC-2007) of Administrative Law Judge Paul A. Mapes 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).

Claimant, a class A longshoreman, suffered a work-related left knee injury on February 19, 1999, when he slipped and fell on the wet surface of a deck. Claimant alleged that he aggravated a pre-existing back condition in this incident, and he sought compensation for permanent total disability for his combined injuries.[1] Claimant's physicians opined that claimant has nerve root compression at L5. Dr. Seres, who examined claimant on behalf of employer, stated that there is no evidence of nerve root compression or a herniated disk and that claimant has mechanical low back pain.

The administrative law judge found that claimant is entitled to compensation for his knee injury, but that his back condition is not related to the work accident on February 19, 1999. Based on his finding that employer established the availability of suitable alternate employment, the administrative law judge awarded claimant permanent partial disability benefits under the schedule for a 19 percent loss of use of his left leg.[2] 33 U.S.C. §908(c)(2), (19).

Claimant appeals, contending that the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption with regard to claimant's back condition and in finding that his disabling back condition is not related to the compensable knee injury based on the record as a whole. Employer responds, urging affirmance.

The administrative law judge found claimant entitled to invocation of the Section 20(a) presumption that his back condition is related to the February 19, 1999 work injury. Decision and Order at 21. As claimant has a pre-existing back condition, employer's burden on rebuttal is to produce substantial evidence that claimant's condition was neither caused nor aggravated by his employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). 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 with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256,

[1] The record reflects that claimant previously suffered work-related injuries to his back on April 3, 1980, EX 2, April 21, 1991, EX 6, and October 17, 1995, EX 24; to his right ankle on June 5, 1992, EX 26; to his ribs and face on September 24, 1993, EX 20; and to his right shoulder on August 2, 1994, EX 25. Claimant also has been compensated for a work-related 45 percent binaural hearing loss. EX 46.

[2] The administrative law judge additionally awarded claimant compensation for temporary total disability from February 20, 1999, to April 10, 2000, the date of maximum medical improvement.

31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In the instant case, the administrative law judge found that employer established rebuttal based on: (1) medical records showing that claimant had a series of back injuries prior to February 1999 with radicular left leg symptoms similar to those of which he currently complained; (2) the absence of any references in claimant's medical records of back pain or radicular leg symptoms during the 20-month period between February 1999 and October 2000; and (3) Dr. Seres's opinion that claimant's condition is due solely to the natural progression of claimant's pre-existing degenerative condition. Decision and Order at 21. Claimant contends that each of these findings is insufficient to rebut the Section 20(a) presumption. Although claimant is correct that the administrative law judge's first reason for finding rebuttal is insufficient, we nonetheless affirm the administrative law judge's finding that employer produced substantial evidence that claimant's current back condition is not related to the February 1999 accident.

Initially, the fact that claimant had a pre-existing back condition is not alone sufficient to rebut the Section 20(a) presumption due to the aggravation rule. When claimant alleges that a pre-existing condition is aggravated by an employment injury, employer must establish that the work injury did not aggravate the condition in order to rebut the Section 20(a) presumption. *See generally Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). Thus, the mere fact that the claimant has a pre-existing condition does not establish the absence of a causal link between the current condition and the work injury. Similarly, whether the administrative law judge's second basis for rebuttal, *i.e.*, the lack of documentation of any back problems in the 20 months following the February 1999 injury is sufficient in and of itself to rebut the Section 20(a) presumption, *see Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989), is also not dispositive, as we affirm the administrative law judge's finding that Dr. Seres's opinion constitutes substantial evidence rebutting the presumed connection between claimant's back condition and the injury of February 1999.

Dr. Seres stated that the 1999 work accident neither caused nor worsened claimant's back condition and that claimant's current symptomatology is due "solely to the natural progression" of his pre-existing degenerative condition. HT at 375. Claimant contends that Dr. Seres's opinion is insufficient to establish rebuttal because it is based on an inaccurate history regarding claimant's symptomatology, including his failure to consider claimant's back complaints in the 20 months following the accident. It is claimant's contention that Dr. Seres based his conclusion on his determination from the medical records that claimant's symptoms were basically unchanged. EX 67.

Although an administrative law judge may reject an opinion offered in rebuttal if it reflects an inaccurate supposition about the claimant's medical or employment history, *see 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), Dr. Seres testified that he based his opinion both upon his observations of claimant as well as on his review of claimant's medical records dating back to 1980. HT at 333. Moreover, the administrative law judge was not convinced that claimant had back pain in the first 20 months after the February 1999 incident due to the absence of medical records documenting such pain.[3] Employer's burden on rebuttal is one of production, not persuasion. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). In the instant case, the administrative law judge rationally found that Dr. Seres's opinion that claimant's back condition was not caused or worsened by the 1999 accident constitutes substantial evidence to rebut the presumed causal connection between claimant's back condition and his 1999 work accident. *See Duhagon*, 169 F.3d at 618, 33 BRBS at 2(CRT); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998). Accordingly we affirm the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption.

In considering the evidence as a whole, the administrative law judge weighed the medical opinions, objective evidence, and the testimony of the witnesses and concluded that claimant failed to carry his burden of persuasion. Decision and Order at 22-23. Thus, he found that claimant's back condition is not work-related. Claimant argues that the administrative law judge erred in not giving dispositive weight to the opinion of his treating physician, Dr. Hill, who opined that claimant's back condition is related to the 1999 injury. We disagree.

Although the administrative law judge may give special weight to a treating physician's opinion, *see Amos v. Director, OWCP*, 153 F.3d 1051, *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied* 528 U.S. 809 (1999), an administrative law judge is not required to credit such an opinion where there is contrary, probative evidence in the record.[4] *See generally Pietrunti v. Director, OWCP*, 119 F.3d

[3] Claimant did not suggest any reasons why such complaints were never recorded by any of the physicians or nurses from whom he sought medical attention during that period of time.

[4] In its decision in *Amos*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999), the Ninth Circuit, within whose jurisdiction this case arises, addressed a case in which the issue concerned the reasonableness of a course of treatment recommended by claimant's treating physician. The court held that where no other physician opined that the treating physician's recommended course was unreasonable, claimant was entitled to pursue the

1035, 31 BRBS 84(CRT) (2d Cir. 1997). Rather, the administrative law judge, as the factfinder, is entitled to determine the weight to be accorded to the medical evidence of record. *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *see also Black & Decker Disability Plan v. Nord*, 123 S.Ct. 1965 (2003). In the instant case, the administrative law judge gave a rational reason for according less weight to Dr. Hill's opinion.

The administrative law judge specifically found that Dr. Hill's opinion was "severely undermined" by his admission that he was unaware that claimant had suffered from radicular left leg symptoms for many years prior to the 1999 accident. Decision and Order at 22; HT at 211. Consequently, the administrative law judge relied upon the opinion of Dr. Seres that there was no relationship between claimant's current back condition and that incident because it was supported by the medical records concerning claimant's prior back injuries as well as by the lack of documented medical attention for back complaints until 20 months after the 1999 incident. Moreover, the administrative law judge found that Dr. Seres's opinion is supported by that of Dr. Laycoe, CX 18, and Dr. Wyman, who opined that there is no causal connection between the claimant's back problems and the work injury.[5] CX 27.

Claimant's disagreement with the administrative law judge's weighing of the evidence does not state a sufficient basis for the Board to overturn it, as it is axiomatic that the Board is not permitted to reweigh the evidence but may ascertain only whether substantial evidence supports the administrative law judge's decision. *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994). As the administrative law judge's weighing of the evidence is rational and as the opinions of Drs. Seres, Laycoe and Wyman constitute substantial evidence supporting the finding that claimant's back condition is unrelated to the 1999 work injury, we affirm the administrative law judge's denial of compensation for this condition. *See Duhagon*, 169 F.3d at 618, 33 BRBS at 2-3(CRT).

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treatment prescribed by his treating physician. This case, in contrast, presents a causation issue and the record contains conflicting medical opinions, hence the administrative law judge is required to determine which evidence is entitled to greater weight.

[5] Dr. Laycoe opined that claimant's current back symptoms were solely due to the ongoing progressive nature of his degenerative disc disease, EX 85; Dr. Wyman stated that he found no causal connection between the claimant's back problem and the 1999 work injury. CX 27.

Accordingly, the administrative law judge's Decision and Order 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