BRB No. 98-0678

EARL LAWRENCE	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
STEVENS SHIPPING COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum), Savannah, Georgia, for claimant.

Stephen E. Darling (Sinkler & Boyd, P.A.), Charleston, South Carolina, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (93-LHC-0213) of Administrative Law Judge John C. Holmes 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 is the second time this case is before the Board. On January 16, 1991, claimant suffered an injury during the course of his employment with employer when the loading truck he was driving was struck by another vehicle, causing his knees to bang and twist against the dashboard. Claimant was initially diagnosed with a neck

and back strain and contusions of the right shoulder and knee. Employer voluntarily paid claimant temporary total disability compensation from January 29, 1991 through April 4, 1991, 33 U.S.C. §908(b), and temporary partial disability compensation from April 4, 1991 through April 16, 1991. 33 U.S.C. §908(e). Claimant returned to work in May 1991 and worked until March 1992, when he stopped due to complaints of pain.

Dr. Friedman, an orthopedic surgeon, diagnosed a torn meniscus and on June 8, 1992, claimant underwent a left knee arthroscopy and partial medial meniscectomy. In September 1992, Dr. DuBois opined that claimant suffered from myositis, an inflammation of the paraspinal muscles, possibly due to an aggravation of claimant's previous back problems. In January 1993, Dr. DuBois diagnosed myofascial pain syndrome, and opined that claimant is permanently and totally disabled. Claimant, who suffered previous injuries to his back and left wrist, sought permanent total disability benefits under the Act due to continued pain in his back and knee.

In his initial Decision and Order, issued on March 21, 1994, the administrative law judge found that claimant suffered a work-related knee injury, and awarded permanent partial disability compensation under Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2). Finding that no medical rating had been given for claimant's left knee impairment, the administrative law judge rated it as 10 percent, 5 percent based on pain and 5 percent due to surgery, and awarded benefits accordingly. However, the administrative law judge discredited claimant's complaints of back pain and found that claimant did not sustain a work-related back injury. Thereafter, claimant and employer filed petitions for modification. Claimant based his petition on the June 8, 1994 report of Dr. Friedman, wherein that physician opined that claimant had a 17 percent impairment rating to the left lower extremity. Additionally, claimant urged the administrative law judge to award permanent total disability benefits, based on the 1996 opinion of Dr. DuBois that claimant suffered from myofascial pain syndrome and fibromyalgia, and the finding of total disability of a Social Security Administration (SSA) administrative law judge. Citing *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994), employer sought reversal of the administrative law judge's permanent partial disability award, arguing that the administrative law judge improperly based his causation finding on the true doubt rule.

In his Decision and Order on modification, the administrative law judge reaffirmed his Section 8(c)(2) award for a 10 percent permanent partial disability to claimant's left leg. In so doing, the administrative law judge rejected Dr. Friedman's report, finding that it was "suspiciously taken" two months after the initial decision and added no new information relative to claimant's left knee injury. With regard to

claimant's back injury contention, the administrative law judge rejected the findings of the SSA administrative law judge as not binding. The administrative law judge further rejected Dr. DuBois's opinion that claimant was totally disabled as a result of his back condition, as Dr. DuBois could not directly relate this condition to claimant's work injury. Lastly, the administrative law judge declined to reverse his permanent partial disability award, stating that it was not based on the "true doubt" rule. Thus, the administrative law judge denied both claimant's and employer's petitions for modification.

On appeal, the Board held that it was patently unreasonable for the administrative law judge to have cast suspicion on the June 8, 1994, report of Dr. Friedman solely because it was authored two months after the administrative law judge's initial decision; thus, the Board vacated the administrative law judge's decision regarding the extent of claimant's impairment to his left lower extremity, and remanded the case for the administrative law judge to fully consider whether claimant has suffered a change in condition with regard to his left knee in light of all the evidence of record, including the reports of Dr. Friedman. In addition, the Board vacated the administrative law judge's conclusion that claimant's back condition is not causally related to his employment and instructed the administrative law judge to consider, on remand, whether claimant is entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption of causation with regard to claimant's back injury. *See Lawrence v. Stevens Shipping Co.,* BRB No. 96-1574 (July 17, 1997)(unpublished).

On remand, the administrative law judge rejected Dr. Friedman's 17 percent impairment rating to claimant's left lower extremity, as claimant had normal range of motion in his left knee, claimant's symptoms were exacerbated by his non-compliance with physical therapy, and an earlier examination by Dr. Friedman revealed no meniscal pathology in the left knee. The administrative law judge next rejected two May 1996 reports by Dr. Friedman, stating that these reports failed to discuss whether claimant's pain and swelling in his left knee resulted from the work-related accident. With regard to claimant's lower back condition, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption, but that employer established rebuttal of the presumption based on the opinions of Drs. Tatum, Thompson and Gilmore. After weighing the evidence as a whole, the administrative law judge reaffirmed his previous finding that claimant does not suffer from a permanent disabling back condition.

On appeal, claimant contends that the administrative law judge again erred in failing to increase his permanent impairment rating under Section 8(c)(2) from 10 to 17 percent. In addition, claimant contends that the administrative law judge erred in

finding rebuttal of the Section 20(a) presumption established, and in ultimately finding that claimant does not suffer from a work-related, permanently disabling back condition. Employer responds, urging affirmance of the administrative law judge's Decision and Order on remand.

Claimant's initially challenges the administrative law judge's finding regarding the extent of his left knee impairment. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards, Inc.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56 (1985). In his June 8, 1994, report, Dr. Friedman stated that claimant suffered from a 17 percent impairment to the left lower extremity and that no further treatment was planned for claimant's knee at that time. *See* Cl. Ex. 5. In his Decision and Order on remand, the administrative law judge rejected Dr. Friedman's 17 percent impairment rating, noting that claimant's 120 degree range of motion in his left knee, as revealed by Dr. Friedman's examination, was a normal finding according to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993)(AMA *Guides*). In addition, the administrative law judge rejected Dr. Friedman's impairment rating because the physician stated that claimant's symptoms were exacerbated by his non-compliance with physical therapy, and because claimant's May 2, 1994, examination by Dr. Friedman revealed no meniscal pathology in the left knee. Although Dr. Friedman, in his May 1996 reports, noted pain and swelling in claimant's left knee, diagnosed a medial meniscus tear, and recommended that claimant undergo a second arthroscopy and partial meniscectomy, *see* Cl. Exs. 6-7, the administrative law judge rejected these reports since they failed to discuss whether claimant's pain and swelling in his left knee resulted from the work-related accident.

In arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.,* 21 BRBS 33 (1988). After thoroughly reviewing the record in the instant case, we hold that it was patently unreasonable for the administrative law judge to reject Dr. Friedman's 17 percent impairment rating to claimant's left lower extremity, as his reasoning is based on his substituting his own medical conclusions for those of the only medical examiner to provide an opinion regarding the degree of impairment to claimant's left knee. While Dr. Friedman did not specifically relate claimant's additional knee problems to claimant's 1991 work injury in his 1996 reports, that question relates to the issue of causation, not the extent of claimant's disability, and therefore, it was improper for the administrative

law judge to reject the reports on that basis.[1] As Dr. Friedman's June 8, 1994 report is the sole medical report of record which establishes a disability rating to claimant's left lower extremity, we vacate the administrative law judge's 10 percent impairment rating with regard to claimant's left lower extremity, and we hold that claimant is entitled to an award under Section 8(c)(2) of the Act based on a permanent partial disability of 17 percent to claimant's left lower extremity.

Claimant next contends that the administrative law judge erred in considering the compensability of his back condition and finding rebuttal of the Section 20(a) presumption. Section 20(a) of the Act provides claimant with a presumption that an injury is causally related to his employment. 33 U.S.C. §920(a). In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was 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). 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; the unequivocal testimony of a physician that no relationship exists between the injury and a claimant's employment is sufficient to rebut the presumption. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). If employer establishes rebuttal of the presumption, the administrative law judge must weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lanes, G.I.E.*, 23 BRBS 279 (1990); *see also Director, OWCP v. Greenwich*

[1]Indeed, claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption with regard to the cause of his current knee condition. Where a subsequent intervening event is alleged, an employer may meet its rebuttal burden by producing substantial evidence that claimant's disabling condition was caused by a subsequent non-work-related event. *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon.*, 31 BRBS 109 (1997); *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). However, where the subsequent disability is the natural and unavoidable result of the work injury, the employer is liable for the entire resultant disability. *Plappert*, 31 BRBS at 110. In the instant case, employer does not allege, and there is no evidence of, a subsequent intervening event which resulted in claimant's current knee condition.

Collieries, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

Initially, we note that the administrative law judge invoked the Section 20(a) presumption linking claimant's present back problems to his employment. *See, e.g., Phillips,* 22 BRBS at 94. As no party challenges the administrative law judge's finding that claimant is entitled to invocation of the presumption, it is affirmed.

In the instant case, the administrative law judge based his finding of rebuttal on the opinions of Drs. Tatum, Thompson and Gilmore. Our review of the record reveals, however, that these physicians did not rule out claimant's 1991 work accident as a cause or contributor to claimant's back condition. Specifically, while Dr. Tatum questioned whether claimant was malingering, she ultimately diagnosed musculoskeletal pain syndrome secondary to an on-the-job accident. *See* Emp. Ex. 5. Dr. Tatum's opinion thus supports a causal nexus and cannot rebut Section 20(a). Dr. Thompson, who diagnosed mild degenerative arthritis, stated in his May 21, 1991, report that claimant's back had improved considerably and that he will have no permanent impairment, *see* Emp. Ex. 7; these statements, however, relate to the issue of the extent of claimant's disability, not to the issue of causation. Lastly, Dr. Gilmore, in his report of February 20, 1992, diagnosed probable lumbar sprain or strain. Thereafter, in his September 18, 1992, report, Dr. Gilmore stated that claimant's 1991 work accident combined with his prior back and neck difficulties to cause a prolonged absence from work, but did not result in a permanent impairment. *See* Emp. Ex. 9. Accordingly, as the opinions of Drs. Tatum, Thompson and Gilmore do not state that claimant's 1991 work accident did not cause or aggravate claimant's back condition, these opinions are insufficient as a matter of law to establish rebuttal of the Section 20(a) presumption. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). Thus, a causal relationship between claimant's employment and his back condition has been established. *See Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *see generally ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989). The denial of benefits to claimant under Section 8(c)(21) for his present back condition is therefore vacated, and the case is remanded to the administrative law judge for consideration of the remaining issues.

Accordingly, the administrative law judge's Decision and Order on remand is modified to reflect claimant's entitlement to a permanent partial disability award under Section 8(c)(2) of the Act for a 17 percent impairment to claimant's left lower extremity. With regard to claimant's back injury, the administrative law judge's Decision and Order on remand is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge