BRB No. 98-1226

RICHARD CARROLL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED: June 16, 1999
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Granting Employers (sic) Motion to Dismiss Claim for Additional Compensation Benefits and the Decision and Order-Denying Benefits of David W. Di Nardi, Administrative Law Judge , United States Department of Labor.

Richard Carroll, Waterford, Connecticut, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Granting Employers (sic) Motion to Dismiss Claim for Additional Compensation Benefits and the Decision and Order-Denying Benefits (97-LHC-1836, 97-LHC-1837, 98-LHC-676) of Administrative Law Judge David W. Di Nardi 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 *pro se* claimant, 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); 20 C.F.R. §§802.211(e); 802.220.

Claimant was previously awarded permanent total disability benefits from September 13, 1994, and continuing, for a work-related injury to his right leg on February 24, 1993. He subsequently filed additional claims for benefits for injuries allegedly sustained on February 18, 1982,[1] November 22, 1991 and December 3, 1992. By Order dated January 16, 1998, the administrative law judge granted employer's motion to dismiss these claims for compensation benefits, as claimant was already receiving permanent total disability benefits or had already been paid compensation for periods of related disability. The administrative law judge found that the only dispute remaining concerned continuing medical care for claimant's November 22, 1991 back injury.[2] It is not disputed that claimant suffered a work-related injury to his back on November 22, 1991, while pulling closed a gate at employer's facility. Employer paid claimant temporary total disability benefits from November 23, 1991

[1]Claimant's original claim for compensation for an injury to his left knee dated February 18, 1983, listing a date of injury of February 18, 1983, was amended to show a date of injury of February 9, 1982. *See* Cl. Ex. 62. The record indicates that there was no time lost for this injury, and there is no medical evidence of record regarding this injury. *See* Emp. Ex. 3. Therefore, this decision is limited to a review of the administrative law judge's disposition of the claims on the 1991 and 1992 injuries, case numbers 98-LHC-676 and 97-LHC-1837.

[2]While the administrative law judge found that the only issue remaining for resolution pertained to claimant's back condition, he also considered claimant's request to seek treatment from Dr. Salkin for his hand/wrist condition.

to December 14, 1991. Claimant was released by his treating physician to return to full duty on December 15, 1991, which he did with no time lost due to his back condition thereafter. Subsequently, claimant sought treatment in 1996 with Dr. Maletz for pain in his back.[3] Dr. Maletz ordered an MRI, which showed a left lateral disc herniation at L4-5. Claimant sought medical benefits for this back condition, contending that it was related to the work injury in December 1991.

In his Decision and Order, the administrative law judge found that claimant no longer requires any medical treatment for the 1991 back injury, and that any medical treatment he may now require is due solely to the effects of his non-work-related disc herniation. The administrative law judge also found that employer has authorized treatment for claimant's work-related hand injury with Dr. Zeppieri, and that claimant has not been to see Dr. Zeppieri since July 11, 1996. The administrative law judge instructed claimant to see Dr. Zeppieri regarding problems with his hand as he is the authorized physician.

Claimant, without legal representation, appeals this decision, contending that the administrative law judge erred in finding that his current back condition is not work-related, that employer misrepresented what authorization for medical treatment was given, that the authorized physician was not a specialist and is unavailable, and that he is not restricted from receiving additional compensation. Employer has not responded to this appeal.

Initially, clamant contends that the administrative law judge erred in finding that his current back condition is not causally related to his employment injury on November 22, 1991. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his injury is causally related to his employment, if claimant establishes the elements of his *prima facie* case. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). Once the presumption is invoked, the burden shifts to employer to rebut it with substantial countervailing evidence

[3]The record includes a letter dated February 23, 1996, from claimant's former counsel, Nathan Julian Shafner, to Dr. Halperin indicating that claimant had been authorized to receive a one-time evaluation of his back. However, claimant testified that he was unsuccessful at arranging an appointment with Dr. Halperin's office and after several months of failed attempts to make an appointment, sought treatment with Dr. Maletz. *See* Cl. Ex. 136; Tr. at 51.

that claimant's disabling condition was not caused or aggravated by his employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). When employer produces such substantial evidence, the presumption drops out of the case, and the administrative law judge must weigh all of the evidence relevant to the causation issue, and render a decision supported by the record. *Universal Maritime Corp. v. Moore*., 126 F.3d 256, 31 BRBS 119 (4th Cir. 1997); *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transport Corp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987).

It is undisputed that claimant suffered from a work-related injury to his back on November 22, 1991. However, employer contended that claimant had fully recovered from this injury by December 15, 1991, when he returned to his full duties. The next reference to claimant's back is dated February 23, 1996, when he was authorized to see Dr. Halperin for a one-time evaluation; however, it does not appear that claimant ever saw Dr. Halperin. He was seen by Dr. Maletz for back pain on August 14, 1996. Dr. Maletz noted that claimant's symptoms suggest a discogenic origin and recommended a MRI. The MRI showed a left lateral disc herniation at L4-5.

The administrative law judge found that claimant recovered from the initial injury by December 15, 1991, and concluded that the herniated disc was not shown to be causally related to any injury claimant incurred while working for employer. The administrative law judge gave determinitative weight in this regard to Dr. Willetts' opinion that "to attribute any current back condition to the events of 11/22/91, strains credulity." Cl. Ex. 105; Emp. Ex. 9. The administrative law judge did not review the evidence pursuant to Section 20(a) in determining whether claimant's disc herniation is causally related to his employment. However, this error is harmless, as Dr. Willetts' opinion that it is not reasonable to attribute any of claimant's current back condition to the November 22, 1991, incident is sufficient to establish rebuttal of the Section 20(a) presumption. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998). Moreover, the administrative law judge reviewed the evidence as a whole, including considering evidence that claimant had been treated for numerous injuries and ailments without mentioning back pain for five years following the injury, credited Dr. Willetts' opinion over Dr. Maletz's opinion, and concluded that the herniated disc was not causally related to the November 22, 1991 work incident. We affirm this finding as it is rational and supported by substantial evidence,[4] *Holmes v. Universal*

[4]We reject claimant's contention that the administrative law judge erred in not finding the decision that claimant is disabled due in part to a herniated disc of the Social Security Administration "instructive." This decision does not address the causation of claimant's back condition, and in any event the weight, if any, to be given to a Social Security Administration decision is within the discretion of the administrative law judge. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372

Maritime Service Corp., 29 BRBS 18 (1995)(Decision on Recon.), and thus affirm the denial of medical benefits for claimant's current back condition.

Claimant also contends that the administrative law judge erred in failing to authorize a change in physicians for treatment of his carpal tunnel syndrome from Dr. Zeppieri to Dr. Salkin, who also treats claimant's elbow, left knee and right ankle injuries. Employer is ordinarily not responsible for the payment of medical benefits if claimant fails to request authorization. 33 U.S.C. §907(d); 20 C.F.R. §702.406. However, failure to request authorization for a change can be excused where claimant has been effectively refused authorization or denied treatment by employer's physician. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

Contrary to claimant's contention, Dr. Zeppieri is an orthopedist, and thus an appropriate specialist for treating his wrist condition. *See* 20 C.F.R. §702.406(a). The administrative law judge rejected claimant's allegation that Dr. Zeppieri was not treating him, finding that claimant has not been denied treatment with Dr. Zeppieri, and in fact was to have been seen for a follow-up exam which claimant did not schedule. Thus, the administrative law judge found that Dr. Zeppieri was the authorized treating physician of record. There is no evidence that claimant properly sought a change in treating physicians for his hand/wrist injury from employer, and the finding that claimant has not been denied treatment is supported by substantial evidence. *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989). Claimant has therefore not established that the administrative law judge committed reversible error in finding Dr. Zeppieri remains claimant's authorized physician.

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).

Lastly, we reject claimant's contention that the administrative law judge erred in finding that he is not entitled to additional benefits above the permanent total disability benefits he is receiving as a result of his ankle injury. The administrative law judge rationally found that claimant's current back condition is not causally related to his employment. Moreover, as the administrative law judge correctly found that claimant was already permanently and totally disabled under the Act due to another injury during the relevant period, he is not entitled to additional benefits.[5] *Korineck v. General Dynamics Corp., Electric Boat Div.*, 835 F.2d 42, 20 BRBS 63 (CRT)(2d Cir. 1987); *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991).

Accordingly, the Order Granting Employers (sic) Motion to Dismiss Claim for Additional Compensation Benefits and the Decision and Order of the administrative law judge 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

[5]We also reject claimant's contention that employer actively engaged in misrepresentation, as this argument involves other injuries which are not the subject of the instant claim, as well as his contention that employer's actions violated other federal regulations, as this assertion raises issues outside the scope of the Act, and thus are not within the jurisdiction of the Board. *See* 33 U.S.C. §921(b)(3).