BRB No. 04-0262

MICHAEL L. SINGLETON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGRAM MATERIALS, INCORPORATED	)	DATE ISSUED: 11/16/2004
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Thomas F. Phalen, Administrative Law Judge, United States Department of Labor.

Dennis F. Nalick, St. Louis, Missouri, for claimant.

Christopher P. Boyd and Tara N. Baker (Taylor, Day & Currie), Jacksonville, Florida, for carrier/employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2002-LHC-0758) of Administrative Law Judge Thomas F. Phalen 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 welder, alleged that he injured his back on May 17, 2002, when he fell off a walkway onto a steel flat seven or eight feet below. Claimant alleged that the fall at work aggravated his pre-existing degenerative lumbar condition, rendering him unable to perform his usual job duties. In his decision, the administrative law judge found claimant entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption linking his back condition to the work injury. The administrative law judge found, however, that employer established rebuttal of the presumption and, upon weighing all of the evidence, that claimant's work incident did not cause or aggravate claimant's current condition. Accordingly, the administrative law judge denied benefits.

Claimant appeals, arguing that the administrative law judge erred in finding that employer established rebuttal of the Section 20(a) presumption and in his weighing of the evidence as a whole. Employer responds, urging affirmance.

Upon invocation of the Section 20(a) 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); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2002). Where aggravation of a pre-existing condition is at issue, employer must establish that the work injury neither directly caused the injury nor aggravated the pre-existing condition. *See, e.g., Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

In the instant case, the administrative law judge found that employer established rebuttal of the Section 20(a) presumption based upon the opinions of Drs. Estes and O'Brien. Dr. Estes, a chiropractor, stated that he was unaware of claimant's back condition's being work-related. He stated claimant's symptoms are consistent with a long-term degenerative disc condition and not an acute, fresh injury.[1] EX 6 at 19. Dr. O'Brien, a board-certified orthopedic surgeon, stated that claimant's condition was age-related three-level lumbar degenerative disease and that the work incident did not cause any structural or anatomic change in claimant's condition. EX 5 at 4. He testified on deposition that the work accident neither caused nor aggravated claimant's pre-existing condition. EX 2 at 21.

We need not address claimant's contentions regarding the sufficiency of Dr. Estes's opinion for rebuttal purposes, as the administrative law judge properly found that the opinion of Dr. O'Brien rebuts the Section 20(a) presumption. Claimant's contentions

[1] Dr. Estes, a chiropractor, treated claimant approximately 21 times between 1998 and the date of the incident. EX 6.

regarding Dr. O'Brien's opinion go to the weight his opinion should receive and not to its sufficiency as rebuttal evidence. Therefore, as Dr. O'Brien's opinion constitutes substantial evidence that claimant's current back condition was not caused or aggravated by the work accident, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption. *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also Rochester v. George Washington University*, 30 BRBS 233 (1997).

When employer establishes rebuttal of Section 20(a) presumption, the presumption 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. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). The administrative law judge weighed the medical opinions and accorded greater weight to that of Dr. O'Brien, as corroborated by that of Dr. Estes. Thus, the administrative law judge concluded that claimant failed to establish the work-relatedness of his current back condition.

Claimant argues that the administrative law judge erred in not giving dispositive weight to the opinion of Dr. Bernstein, a board-certified orthopedic surgeon who opined that claimant's back condition was related to the 2002 injury.[2] Claimant further contends that the administrative law judge erred in crediting the opinions of Drs. O'Brien and Estes.

Even if it is assumed that Dr. Bernstein, who saw claimant twice after the work incident, is, as claimant argues, his treating physician, Dr. Bernstein's opinion is not automatically entitled to dispositive weight. Although the administrative law judge may give special weight to the treating physician's opinion concerning a course of treatment, *see Amos v. Director, OWCP*, 153 F.3d 1051, *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied* 528 U.S. 809 (1999), an administrative law judge is not required to find determinative the opinion of claimant's treating physician. *See generally Wolf Creek Collieries v. Director, OWCP*, 298 F.3d 511 (6th Cir. 2002); *Morehead Marine Serv., Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998). Rather, the administrative law judge is entitled to determine the weight to be accorded to each medical opinion in light of the other evidence of record. *See, e.g., Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS

[2] Dr. Bernstein opined that the work accident aggravated claimant's pre-existing degenerative spinal condition and that claimant would be fully functional had he not suffered the work accident on May 17, 2002. CX 1.

48(CRT) (4th Cir. 1998). In the instant case, the administrative law judge gave rational and specific reasons for according less weight to Dr. Bernstein's opinion.

In giving less weight to the opinion of Dr. Bernstein, the administrative law judge found that Dr. Bernstein's opinion was undermined by an inaccurate patient history. The administrative law judge found that Dr. Bernstein was unaware of the extent of claimant's back pain preceding the work injury, as evidenced by claimant's visits to Dr. Estes. *See* n.1, *supra*. Significantly, the administrative law judge noted that Dr. Bernstein stated his opinion on causation might change if the injury did not cause claimant to miss work. The administrative law judge found that claimant continued to work for approximately six weeks after the incident.[3]

Consequently, the administrative law judge relied upon the opinion of Dr. O'Brien that claimant's back condition was not aggravated by the work incident because it was well-reasoned and documented, based on a more accurate patient history and supported by the medical records of claimant's prior back injuries as well as by claimant's continuing to work after his fall. Moreover, the administrative law judge found that Dr. O'Brien's opinion is supported by that of Dr. Estes, who opined that claimant's condition was the result of long term degenerative disc disease and not an acute fresh injury. EX 6. Finally, the administrative law judge found claimant to be a less than credible witness, which could reflect upon the opinion of Dr. Bernstein. Decision and Order at 15.

We reject claimant's contention that the administrative law judge erred in relying on Dr. O'Brien's opinion because his opinion is divergent from Dr. Bernstein's opinion on the issue of symptom magnification. The administrative law judge found Dr. O'Brien's opinion to be well-documented and supported by objective test results. Decision and Order at 15. Moreover, the fact that Dr. Estes gave his opinion without a full review of his file on claimant does not detract from the administrative law judge's finding that Dr. Estes's opinion supports that of Dr. O'Brien.

Claimant's disagreement with the administrative law judge's weighing of the evidence is not a sufficient reason for the Board to overturn it, as it is axiomatic that the

[3] Claimant contends that the administrative law judge erred in finding he continued to work until June 23, 2002. The administrative law judge fully explained why he found employer's evidence that claimant continued to work persuasive based on payroll records which included varying hours per week and overtime, and on doctor's notes. Decision and Order at 5 n.5; EXs 4, 9, 11; HT at 131-32. The administrative law judge rationally found that claimant's testimony that he used vacation and sick leave during this period to be unsupported by any documentation.

Board is not permitted to reweigh the evidence but may only ascertain whether substantial evidence supports the administrative law judge's decision. *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999); *see also Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994). It is well established that the administrative law judge has the authority to weigh the evidence. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As the opinions of Drs. O'Brien and Estes constitute substantial evidence supporting the finding that claimant's back condition was unrelated to the 1999 work injury, we affirm the administrative law judge's denial of compensation for this condition. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge