BRB No. 04-0780

CLARA TUCKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	DATE ISSUED: 10/27/2005
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Salvatore J. Sambri (Regan, Halperin & Long, P.L.L.C.), Washington, D.C., for claimant.

Sarah O. Rollman (Office of General Counsel), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-DCW-00007) of Administrative Law Judge Stuart A. Levin awarding benefits 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (1981) (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).

Claimant, a custodian,[1] suffered back injuries when she was pushed to the ground by a passenger rushing to catch a train on May 12, 1981. Claimant returned to her job in June 1981. In June 1992, claimant was fired for failure to return to work after her release to work following an unrelated knee injury; an ensuing union grievance resulted in claimant's choosing to retire in June 1993 rather than being terminated. Claimant sought permanent total disability compensation commencing June 10, 1992; employer had paid benefits through June 9, 1992. HT at 49.

In his Decision and Order, the administrative law judge found that claimant's disabling back condition as of June 1992 is the result of the injuries she sustained on May 12, 1981. Accordingly, he found her entitled to compensation for permanent total disability commencing June 10, 1992.

Employer appeals, contending that the administrative law judge erred in concluding that claimant's permanent total disability is the result of her 1981 work injury and not the result of her subsequent, intervening injuries. Claimant responds, urging affirmance.

After claimant's return to work in June 1981, claimant suffered a series of accidents, aggravations and exacerbations. On August 5, 1983, claimant suffered debilitating back pain and was off work for six weeks after bending over to pick up a floor mat at work. On November 10, 1983, claimant reported severe back pain while dusting overhead at work. Throughout 1984, she suffered intermittent back pain which required medical treatment. On January 5, 1985, claimant was injured in non work-related automobile accident, suffering shoulder and neck pain. While at work on March 27, 1985, claimant suffered a recurrence of severe back pain when she bent over to pick up a trash can and was unable to straighten up. Finally, claimant was injured on May 15, 1986, when she fell off an escalator at work, injuring her right foot and left knee. Employer contends that it is a subsequent accident which ultimately disabled claimant, rather than the 1981 injury.

Once, as here, claimant establishes her *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred which could have caused the harm or aggravated or accelerated a previous condition, she is entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption linking her harm to her employment. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990). Upon invocation, the burden shifts to employer to rebut the

[1] Claimant's job duties involved cleaning and scrubbing walls, tiles and escalators, emptying trash cans, cleaning fare card machines, mopping floors, and hauling large containers of cleaning materials. HT at 35-26.

presumption with substantial evidence that claimant's condition was not caused by her employment. *Whitmore v. AFIA Worldwide Ins.*, 837 F.2d 513, 20 BRBS 84(CRT) (D.C. Cir. 1988). If the administrative law judge finds the presumption 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. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

In a case involving a subsequent injury, an employer can rebut the Section 20(a) presumption by showing that claimant's disabling condition was caused by a subsequent event, provided the employer also proves that the subsequent event was not caused by claimant's work-related injury or that the disabling condition is not the natural or unavoidable result of the initial work injury. *See Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Employer remains liable for the entire disability if it is the result of the natural progression of the first injury. However, where claimant's disability is the result of an intervening cause, the employer is relieved of liability for that portion of the disability attributable to the second injury, but remains liable for any disability due to the first injury. *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997); *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991).

The administrative law judge found that employer established rebuttal of the Section 20(a) presumption based on the opinion of Dr. Gordon, an orthopedic consultant, CX 5, who stated that claimant evinces no objective indications of any residual impairments arising out of the 1981 back injury and is physically capable of performing her usual job duties as a custodian. The administrative law judge then weighed all the evidence of record and concluded that claimant's current disabling back condition arose out of her 1981 work accident. In this regard, he discussed each of the subsequent incidents in detail, but found that while each resulted in a temporary aggravation of claimant's condition none constituted an intervening cause so as to relieve employer of liability. The administrative law judge credited the opinion of Dr. Moskovitz, claimant's treating physician, as supported by those of Drs. Fine, Goldman and Levitt.

Dr. Moskovitz initially diagnosed claimant as suffering from lumbar strain syndrome secondary to a concussive injury to her lower spine. CX 1. During the ensuing fifteen years, Dr. Moskovitz treated claimant for intermittent exacerbations and remissions of her lumbar disc symptoms. A CT scan conducted on September 14, 1984, revealed a disc protrusion at L4/L5. CX 4. Although claimant suffered two significant injuries subsequent to the original work injury, *i.e.*, a shoulder and neck injury in an automobile accident on January 5, 1985, and a knee injury at work on May 15, 1986, Dr. Moskovitz maintained that claimant's lower back condition arising out of the work injury rendered her totally disabled despite the temporary increase in symptomatology arising

out of these incidents. Accordingly, Dr. Moskovitz opined that the automobile accident increased claimant's pain and was the primary source of her impairment immediately following its occurrence, but that as a result of claimant's receiving epidural injections, she was back to her pre-automobile accident status by August 26, 1985. EX 4 at 12-13; CX 1 at 185. Similarly, although claimant's knee injury, a partial tear of her anterior cruciate ligament, created additional pain and impairment, Dr. Moskovitz stated that by October 1, 1986, her knee condition had improved but her back symptoms remained. CX 1 at 173. Dr. Moskovitz attributed claimant's leg pain primarily to her radicular back symptomatology. *Id.* at 25. Dr. Moskovitz concluded that claimant remained totally disabled by her original back injury irrespective of her knee condition, which was no longer disabling in 2000. *Id.* at 1-2, 13. The administrative law judge found that Dr. Moskovitz has treated claimant since 1982, is very familiar with her case, and that objective tests and evaluations support his opinion.[2] The administrative law judge found the opinion of Dr. Gordon, who also diagnosed lumbar disc disease due to degeneration rather than an acute incident but found claimant capable of performing her pre-1981 job duties and likely to be malingering, EX 2, less persuasive than that of Dr. Moskovitz because Dr. Gordon had not personally viewed the objective test results, such as the CT scan and myelogram, prior to rendering his opinion. Decision and Order at 11-12.

We reject employer's contentions of error. It is well established that the administrative law judge is entitled to weigh and draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co*., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Employer's disagreement with the administrative law judge's weighing of the evidence is not 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. *See generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *see generally 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). The administrative law judge's weighing of the evidence is rational, and the

[2] The administrative law judge found the opinions of Drs. Levitt, Goldman and Fine supportive of Dr. Moskovitz's opinion. Decision and Order at 12. The administrative law judge found Dr. Levitt, CX 8, rated claimant with a ten percent impairment to the whole person based on her back condition with no impairment rating for her knee injury; he opined that her current complaints and active disc process are linked to her original injury in 1981. Dr. Goldman, CX 7, found claimant totally disabled by her lumbar disc disease. Dr. Fine, CX 6, opined claimant had reached maximum medical improvement for her back impairment as of March 22, 1996, and is totally disabled.

opinions of Drs. Moskovitz, Fine, Goldman and Levitt constitute substantial evidence supporting the finding that claimant's disabling back condition is related to the 1981 work injury. The fact that Dr. Moskovitz attributed claimant's disabling back condition not only to the 1981 injury, but to the other incidents at work involving her back in 1983 and 1985, does not detract from his opinion as employer did not establish that claimant's current disability is due entirely to supervening incidents and not to the natural progression of the initial injury. *See Wright v. Connolly-Pacific Co.*, 25 BRBS 161(1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993). Thus, we affirm the administrative law judge's award of permanent total disability compensation.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge