

LARRY D. SMITH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SERVICE EMPLOYEES)	DATE ISSUED: 04/11/2013
INTERNATIONAL, INCORPORATED)	
)	
and)	
)	
INSURANCE COMPANY OF THE)	
STATE OF PENNSYLVANIA)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, for claimant.

Patricia A. Krebs and Megan C. Misko (King, Krebs and Jurgens, P.L.L.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2009-LDA-00260) of Administrative Law Judge Larry W. Price 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time that this case is before the Board. To recapitulate the facts, claimant, while working for employer as a security officer in Bagram, Afghanistan, sustained work-related injuries to his back and left knee on March 11, 2008, when he fell through a wooden pallet over which he was walking. Claimant returned to the United States, where he received medical treatment for left and right knee pain, back pain, and depression. Claimant sought benefits under the Act for injuries to his left and right knees and back, as well as for a psychological condition that he asserted resulted from the March 11, 2008, work incident.

In his initial Decision and Order, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption with regard to claimant's left knee and back conditions, found that employer did not establish rebuttal of the presumption, and determined, assuming, *arguendo*, that employer had established rebuttal, that the record as a whole establishes that claimant suffered injuries to his left knee and back as a result of his March 11, 2008, work incident. The administrative law judge then addressed claimant's alleged right knee and psychological injuries without reference to the Section 20(a) presumption, stating that since these alleged injuries constituted "subsequent conditions" which allegedly arose from claimant's initial work injury, those conditions would be compensable only if they "naturally or unavoidably" resulted from claimant's initial work injuries. The administrative law judge found that claimant did not establish that either of these conditions was the natural or unavoidable result of his work-related back and left knee injuries and, therefore, they are not compensable under the Act. The administrative law judge found that claimant is unable to resume his usual employment duties with employer as a result of his left knee and back injuries, and that employer did not establish the availability of suitable alternate employment; accordingly, the administrative law judge awarded claimant ongoing temporary total disability compensation, commencing March 11, 2008, as well as medical benefits for his left knee and back injuries. 33 U.S.C. §§908(b), 907.

On appeal, the Board vacated the administrative law judge's finding that claimant's psychological condition is not work-related, and remanded the case for the administrative law judge to apply the Section 20(a) presumption to claimant's claim for a psychological condition.¹ If the presumption is invoked, the Board stated that the administrative law judge must address whether employer introduced substantial evidence to establish rebuttal of the Section 20(a) presumption, taking into consideration the aggravation rule. If employer rebutted the presumption, the administrative law judge was to resolve the issue of causation on the record as a whole, with claimant bearing the

¹Claimant did not appeal the finding that his right knee condition is not work-related.

ultimate burden of persuasion. *Smith v. Service Employees Int'l, Inc.*, BRB No 11-0110 (Aug. 17, 2011)(unpub.).

In his Decision and Order on Remand, the administrative law judge found that claimant failed to establish the elements of his prima facie case with regard to his psychological condition. Assuming, *arguendo*, that claimant was entitled to the benefit of the Section 20(a) presumption, the administrative law judge found that employer rebutted the presumption and that, based on the record as a whole, claimant did not establish that his psychological condition is related to his work injury.

On appeal, claimant challenges the administrative law judge's finding that his psychological condition is unrelated to his work injury. Employer responds, urging affirmance of the administrative law judge's decision in its entirety. Claimant filed a reply brief, to which employer filed a surreply brief.²

Claimant challenges the administrative law judge's failure to afford him the Section 20(a) presumption with respect to his psychological condition, alleging that the Board held the presumption applicable to claimant's claim. We need not address this contention since the administrative law judge proceeded to address whether employer rebutted the Section 20(a) presumption with substantial evidence and, thereafter, whether claimant established a causal relationship between his work injury and his psychological condition based upon the record as a whole. Decision and Order on Remand at 2-4. Thus, any error committed by the administrative law judge in addressing the application of Section 20(a) is harmless.³ See *Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988).

Claimant next avers that the administrative law judge erred in finding the opinion of Dr. Griffith sufficient to rebut the Section 20(a) presumption. We disagree. It is employer's burden to rebut the presumption with substantial evidence that claimant's psychological condition was not caused or aggravated by his work injury. See *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d

²We reject claimant's contention that employer's brief was untimely filed. 20 C.F.R. §802.212.

³We note, moreover, that the Board stated that "the Section 20(a) presumption applies to [claimant's] claim as a matter of law, if the administrative law judge finds that the psychological injury could have resulted from claimant's employment." *Smith*, slip op. at 5.

285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). In order to rebut the Section 20(a) presumption, employer need not “prove the deficiency” in claimant’s prima facie case; rather, “all it must do is advance evidence to throw factual doubt on the prima facie case.” *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 231, 46 BRBS 25, 29(CRT) (5th Cir. 2012). In his decision on remand, the administrative law judge found that Dr. Griffith, who evaluated claimant on October 23, 2009, opined that claimant’s psychological condition is not related to his employment and that claimant’s psychiatric complaints appear to be grossly exaggerated. The administrative law judge found this opinion sufficient to rebut the Section 20(a) presumption. Decision and Order on Remand at 3; EX 14 at 39. As this opinion throws factual doubt on claimant’s prima facie case, it constitutes substantial evidence that claimant’s psychological condition is unrelated to his employment. Therefore, we affirm the administrative law judge’s finding that the Section 20(a) presumption is rebutted. *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT).

Once employer rebuts the Section 20(a) presumption, the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1984). In this case, the administrative law judge proceeded to weigh the relevant evidence and he concluded that claimant did not establish that his psychological condition is related to his work injury. We reject claimant’s assertion that the administrative law judge erred in his evaluation of the record. It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, weigh the medical evidence, and draw his own inferences therefrom.⁴ *See 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). In his decision, the administrative law judge initially found claimant to be a less than credible witness; specifically, the administrative law judge found that claimant inflated the mileage for which he sought reimbursement and that the results of claimant’s psychological testing suggested a tendency to exaggerate symptoms. Decision and Order on Remand at 4. The administrative law judge also discussed the medical evidence and determined that there was nothing to distinguish the relative expertise of Dr. Griffith and Dr. Covert. *Id.* Although Dr. Covert opined that the after-effects of claimant’s work accident resulted in his present psychological condition, the administrative law judge gave this opinion less weight than Dr. Griffith’s opinion that claimant’s psychological condition is not work-related because Dr. Covert did not address the effects of claimant’s pre-existing

⁴Claimant’s contention that the administrative law judge erred in failing to take into account the credibility determinations of an administrative law judge in a different case involving the same physician as in this case thus is without merit.

psychological conditions. The administrative law judge thus concluded that claimant did not meet his burden of establishing that his current psychological condition is related to his employment with employer. This finding is rational and supported by substantial evidence. *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). We therefore affirm the administrative law judge's determination that claimant's psychological condition is not work-related, and the consequent denial of benefits for that condition.⁵

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁵Claimant's counsel has filed a petition requesting an attorney's fee for services performed in the prior appeal, BRB No. 11-0110. As claimant was ultimately unsuccessful in establishing the work-relatedness of his psychological condition, counsel is not entitled to an attorney's fee for work on this appeal. *See* 33 U.S.C. §928; 20 C.F.R. §802.203. Therefore, the fee petition is denied.