BRB No. 98-0742

MOHAMMED S. KHALIL	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
BETHLEHEM STEEL CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Award of Benefits and Partial Rejection of Claim of Edward Terhune Miller, United States Department of Labor.

Neil J. Fagan, Columbia, Maryland, for claimant.

Richard W. Scheiner (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Award of Benefits and Partial Rejection of Claim (94-LHC-3207) of Administrative Law Judge Edward Terhune Miller 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).

Claimant sustained a work-related injury to his right little toe on August 31, 1992, which resulted in his assignment to light office work for approximately two months, until October 26, 1992. The parties stipulated that claimant lost no time

from work. The administrative law judge accepted the parties' stipulation that claimant's work injury resulted in a two percent loss of the right foot under the schedule set forth in Section 8(c)(4) of the Act, 33 U.S.C. §908(c)(4).[1]

Thereafter, claimant returned to his usual employment, with no work restrictions, and was so performing at the time of the hearing. Claimant nevertheless alleged entitlement to additional benefits under the schedule for injuries to his right ankle and knee which he averred occurred in the work accident. After consideration of the evidence, the administrative law judge found claimant entitled to invocation of the presumption of Section 20(a) of the Act, 33 U.S.C. §920(a), but the administrative law judge found further that employer produced sufficient evidence to establish rebuttal concerning claimant's alleged knee injury. Thus the administrative law judge weighed the evidence as a whole and concluded that the right knee injury alleged by claimant is not work-related. Moreover, the administrative law judge found that based on the evidence as a whole, claimant failed to establish any impairment to his ankle and denied claimant permanent partial disability benefits for his right knee and ankle.[2]

On appeal, claimant contends that the administrative law judge erred in failing to award him permanent partial disability for his alleged work-related injuries to his ankle and knee. Employer responds, urging affirmance.

If claimant establishes his *prima facie* case, by establishing the existence of a bodily harm and an accident or working conditions that could have caused the harm,

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[1] On February 13, 1998, at employer's request, the administrative law judge issued an order correcting the number of weeks for which benefits were awarded from 24.6 weeks, as stated in the original order, to 4.1 weeks.

[2]The administrative law judge found that claimant is entitled to medical benefits under Section 7 of the Act, 33 U.S.C. §907, for his toe injury, including safety shoes for work in an appropriately larger size to accommodate the malformation of claimant's toe.

Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused, contributed to or aggravated by his employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *Bridier v. Alabama Dry Dock & Shipbuilding Co.*, 29 BRBS 84 (1995). It is employer's burden on rebuttal to present specific and comprehensive evidence to sever the causal connection between the injury and employment. *Swinton v. J. Frank Kelly, Inc.,* 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see generally Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all the evidence and resolve the causation issue based on the record as a whole. *Universal Maritime*, 126 F.3d at 262-263, 31 BRBS at 123 (CRT); *see also Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

Claimant contends the administrative law judge erred in finding the Section 20(a) presumption rebutted and in crediting the opinion of Dr. Kan over that of Dr. Lippman. Dr. Kan was retained by the Department of Labor to reconcile the conflicting opinions of employer's expert, Dr. Wenzlaff, and claimant's doctor, Dr. Lippman. *See* 33 U.S.C. §907(e); EX 42. Dr. Wenzlaff opined that claimant had no disability to the little toe or right foot as a result of the August 31, 1992 accident, and that he had not examined claimant's right knee because he had not complained about it. Dr. Lippman, claimant's consulting physician, stated that based on assigned AMA guidelines, in addition to claimant's two percent impairment of the foot, claimant sustained a 22 percent impairment of the ankle, a 24 percent impairment of the knee, and an additional ten percent impairment of the lower extremity because of pain, loss of endurance, and loss of function.

The administrative law judge invoked the Section 20(a) presumption based on claimant's complaints of pain to the knee and ankle, and the occurrence of the accident at work on August 31, 1992. The administrative law judge found, however, that employer established rebuttal of the presumption based on Dr. Kan's opinion. The administrative law judge then found Dr. Kan's opinion entitled to the greatest weight because of his exceptional professional credentials, appropriate examination, and review of claimant's medical records. EX 48.

We affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. In a report dated November 19, 1994, Dr. Kan stated that after review of claimant's entire medical file of his treatment for the August 31, 1992,

accident, it is obvious from the record that claimant had no discernible problem with the medial meniscus of his right knee, and therefore, Dr. Kan concluded that although claimant demonstrated an internal derangement of the right knee on the doctor's examination of June 24, 1994, this condition is obviously not related to the injury that claimant sustained on August 31, 1992.[3] EX 43 at 4. This opinion is sufficient to sever the presumed causal connection between claimant's knee condition and the work accident. *Universal Maritime*, 126 F.3d at 262-263, 31 BRBS at 123 (CRT).

[3]The administrative law judge found also that Dr. Kan's opinion established the most persuasive evidence of maximum medical improvement of the toe fracture and its sequelae as having occurred on June 24, 1994.

Moreover, we affirm the administrative law judge's crediting of Dr. Kan's opinion over that of Dr. Lippman. Dr. Lippman's diagnosis was of traumatic injury, right lower extremity, with fracture of the little toe, strain of the right ankle with chronic symptoms, and contusion of the right knee both secondary to the traumatic injury. The administrative law judge rejected the assigned percentage losses by Dr. Lippman because he did not provide any reasoning for his disability assessment in view of essentially normal objective findings.[4] Such a determination is within the administrative law judge's discretion as the trier-of-fact. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath v. Hughes*, 289 F.2d 403 (2nd Cir. 1961). Consequently, we affirm, as supported by substantial evidence, the administrative law judge's weighing of the evidence as a whole to find that claimant failed to establish that his August 31, 1992, accident resulted in a compensable knee injury.

Next, contrary to claimant's contention, the administrative law judge rationally found that claimant has no work-related impairment to his ankle. The administrative law judge found that the opinion of Dr. Folgeras that recorded positive findings with respect to claimant's little toe, but no positive findings with regard to the knee or ankle, supported an inference that claimant did not have any ankle pain. The administrative law judge found further that the opinion of Dr. Folgeras is corroborated by Dr. Kan's negative findings regarding the ankle and the reports of the doctors from the Eastern Medical Center finding full mobility and no swelling of the ankle. As stated above, the administrative law judge did not find credible Dr. Lippman's assessment of impairment with respect to claimant's ankle, and he declined to credit claimant's complaints of pain with regard to his ankle given the absence of objective medical evidence of impairment. It is within the authority of the administrative law judge to weigh, evaluate and draw inferences from the medical evidence of record. *See generally Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962). As the Board may not reweigh the evidence, and as his finding is

[4]The administrative law judge found that Dr. Wenzlaff's testimony and report are almost entirely lacking in credibility and exhibit a significant bias against claimant, as the administrative law judge found he seemed to have disregarded the x-ray evidence and the obvious malformation of claimant's toe described by most other doctors.

supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish a basis for an award of permanent partial disability benefits for his alleged ankle injury as the result of his August 31, 1992 accident.

Accordingly, the administrative law judge's Decision and Order-Award of Benefits and Partial Rejection of Claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON
Acting Administrative Appeals Judge