



BRB No. 15-0153

CHRISTOPHER T. JOHNSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: <u>Jan. 14, 2016</u>
CERES MARINE TERMINALS,)	
INCORPORATED)	
)	
Self-Insured)	DECISION and ORDER
Employer-Respondent)	EN BANC

Appeal of the Decision and Order – Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Charles H. Raley, Jr., and Erin Brownfield Raley (Raley & Raley, P.C.), Savannah, Georgia, for claimant.

Mason White (Brennan, Harris & Rominger, LLP), Savannah, Georgia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS, BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2013-LHC-00033) of Administrative Law Judge Alan L. Bergstrom 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 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). The en banc Board heard oral argument in this case on November 5, 2015, in Savannah, Georgia.

The initial facts in this case are stipulated. JX 1; Tr. at 8-10. The parties agree claimant suffered a head injury on February 20, 2010, while working for employer at its

facility in Garden City, Georgia.¹ Employer voluntarily paid claimant temporary total disability and medical benefits.² Although claimant returned to work in July 2010, he continued to receive medical treatment and evaluations for his headaches. Claimant left his employment because of continuing headaches, contending he was unable to work after November 3, 2011. He asserted entitlement to temporary total, temporary partial, and permanent partial disability benefits, as well as medical benefits. Employer controverted the claim.

The administrative law judge found that claimant sustained a minor closed-head injury, a left shoulder injury, and a left knee injury on February 20, 2010, in the workplace accident. The administrative law judge found claimant entitled to temporary total disability benefits between February 21 and July 7, 2010, at which time claimant returned to his usual work. Giving significant weight to the opinion of Dr. Mazzeo, employer's expert in neurology, the administrative law judge found claimant failed to establish that debilitating headaches related to the 2010 work injury continued up to and after November 3, 2011, and he denied the claim for disability and medical benefits after that date. Decision and Order at 37.

Claimant appeals the administrative law judge's denial of benefits, contending that the administrative law judge's decision is not supported by substantial evidence because he improperly weighed the evidence and speculatively surmised that claimant sustained a later injury that accounts for his continuing headaches. Claimant also contends the administrative law judge erred in finding his retirement from longshore work was "voluntary," i.e., not related to the work injury. Claimant seeks reversal of the denial of disability benefits. Employer responds, urging affirmance.

¹ Claimant and his partner had just finished lashing boxes when his partner slipped and caused the "3-high lashing rod," which weighed approximately 70 to 80 pounds, to fall, striking claimant on the left side of his head. This knocked off claimant's hard hat, caused him to fall backwards and twist his left knee, and resulted in other rods tumbling down upon him. Decision and Order at 6; Tr. at 22-26. Claimant also injured his shoulder.

² Employer paid claimant temporary total disability benefits from February 21 to July 7, 2010, and from November 4, 2011, to June 26, 2012, at the rate of \$1,224.66 per week. Employer paid claimant's medical benefits through May 2012. Between July 8, 2010, and November 3, 2011, claimant performed his usual work and sustained no economic loss. Decision and Order at 2-3; JX 1; Tr. at 8-10. Although claimant's actual last day of work was November 1, 2011, CX 35 at 58, the parties stipulated that claimant had no economic loss through November 3, 2011. Tr. at 10.

In his petition for review and brief, claimant contended the administrative law judge erred in not invoking the Section 20(a), 33 U.S.C. §920(a), presumption and in finding it rebutted. At oral argument, claimant conceded that the administrative law judge's arguable failure to apply Section 20(a) in this case is harmless error at worst, and he acknowledged that the case was to be decided based on the record as a whole. OA Tr. at 29-30, 39, 43. Claimant's concession enables us to proceed directly to claimant's contention that the administrative law judge erroneously weighed the evidence as a whole.³ On the record as a whole, the claimant bears the burden of establishing, by a preponderance of the evidence, a causal relationship between the work accident and his injury. *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 is entitled to determine the weight to be accorded to the evidence of record, to address the credibility and sufficiency of any testimony, and to choose from among reasonable inferences. *See, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 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).

Claimant sets forth Dr. Carter's opinion as support for an award of benefits. Contrary to claimant's assertion, the administrative law judge rationally relied on Dr. Carter's opinion in addressing the evidence as a whole to find that claimant's work-related injury had resolved and that his current headaches are not related to the 2010 injury. Dr. Carter, claimant's treating neurologist, originally diagnosed claimant with post-concussive syndrome and advised him he would likely return to normal status within one year. EX 7 at 1-3. In June 2011, she stated: "At this point, I do not think we can call his syndrome postconcussive syndrome anymore, as we are a year and a half out from the accident that happened in February 2010." *Id.* at 40-41. In July 2011, after reviewing normal brain MRI and MRA studies, Dr. Carter stated that the "MRI showed T2

³ In any event, a review of the record reveals there is sufficient evidence to invoke, and substantial evidence to rebut, the Section 20(a) presumption. There is no dispute that claimant suffered a head injury and continues to have headaches and that an accident occurred at work on February 20, 2010, which could have caused claimant's harm. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). However, Dr. Mazzeo's opinion that claimant's current headaches are unrelated to the February 2010 injury constitutes substantial evidence rebutting the Section 20(a) presumption. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995) (Decision on Recon.); EXs 10, 20.

hyperintensities that could be consistent with either migraine headaches or with hypertension,” and she noted claimant had a long history of hypertension for which he was taking medication. *Id.* at 47-48. In April 2012, when filling out an examining physician’s report, Dr. Carter stated that claimant has disabling headaches triggered by loud noise and gas fumes. She stated that these “seemingly stem” from the February 2010 accident. *Id.* at 72-73. In her 2013 deposition, Dr. Carter stated that claimant’s headaches in June 2011, as well as those in June 2012, were not related to the 2010 injury, within a reasonable degree of medical certainty, because it had been too long since claimant’s accident. EX 8 at 29, 35-36, 40, 43. Dr. Carter explained that she used the term “seemingly” to “hedge” her opinion because patients can have disabling migraines, and she was giving claimant the benefit of the doubt. *Id.* at 29, 35-36, 40, 43, 46-48. She last reported that she “cannot say with medical certainty that [claimant’s] headaches are in any way currently related to the trauma that occurred in February 2010.” EX 7 at 94-96. Although Dr. Carter at one time opined that claimant’s current headaches were “seemingly” related to the 2010 injury, it is clear that her ultimate opinion was that they are not. Thus, it was reasonable for the administrative law judge to conclude that Dr. Carter’s opinion is not supportive of claimant’s contention that his continuing headaches are related to the work accident. Decision and Order at 33-35.

With respect to the remaining evidence, the administrative law judge gave great weight to the opinion of Dr. Mazzeo who stated that claimant’s condition had improved and resolved following the 2010 injury, as evidenced by claimant’s having performed his usual work for over one year after his return to work. Dr. Mazzeo concluded that the headaches claimant experienced in 2011 and 2012 were not related to the 2010 injury. EX 10 at 31, 34; EX 20.⁴ The administrative law judge also acknowledged that the records of Dr. Patel, claimant’s treating physician, indicate that claimant complained of a work-related headache only on December 2, 2011. EX 4 at 57; EX 5 at 18-23.⁵ The

⁴ Dr. Mazzeo specifically wrote:

[I]t is implausible that Mr. Johnson’s post-concussive headaches would have resolved to the point where he had no functional disability between July of 2010 and November of 2011 (over one year), yet would experience subsequent recurrent headaches attributable to the February 20, 2010 injury. In addition to not being medically likely based upon the natural progression of post-concussive symptoms, it defies common sense.

EX 20.

⁵ During the period between May 2010 and October 2012, claimant complained to Dr. Patel of a sinus headache on March 3, 2011, and of a headache on December 2, 2011. Claimant related the December 2011 headache to his 2010 injury. EX 4 at 49-52, 57.

administrative law judge further found that claimant's assertion that noise and fumes triggered his headaches is not consistent with his employment from July 5, 2010, through November 3, 2011, when he earned full wages and performed overtime work while exposed to those conditions, the commencement of his own lawn care business on November 1, 2011, or the work he performed on his father's farm tractor on November 6, 2011. Decision and Order at 30-35.

In reviewing findings of fact, the Board may not reweigh the evidence, but may only inquire into the existence of evidence to support the findings. *South Chicago Coal & Dock Co. v. Bassett*, 104 F.2d 522 (7th Cir. 1939), *aff'd*, 309 U.S. 251 (1940); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981) (table). The administrative law judge's findings may not be disregarded merely because other inferences could have been drawn from the evidence.⁶ See *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 438, 37 BRBS 17, 19(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). As substantial evidence supports the administrative law judge's findings that headaches related to claimant's February 2010 accident had resolved and that claimant failed to establish that his recurring headaches are due to the 2010 injury,⁷ we affirm the administrative law judge's denial of disability benefits after November 4, 2011.⁸ *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Santoro*

The reports for the remaining six appointments with Dr. Patel during that period reveal no complaints from claimant of headaches. Moreover, on July 20, 2011, when claimant had appointments with both Drs. Patel and Carter, the record indicates that claimant did not report a headache to Dr. Patel, EX 4 at 53-56, but claimant told Dr. Carter his headaches had not improved, EX 7 at 47-48.

⁶ The administrative law judge surmised that the cause of claimant's current headaches was a post-July-2011 non-work-related head injury. Decision and Order at 35. As claimant notes, this inference is improper, as there is no evidence to support it. Nonetheless, the inference was not the basis for the administrative law judge's conclusion, and the error, therefore, is harmless.

⁷ Claimant filed a claim based only on the February 2010 injury. CX 12 at 1; CX 14 at 1-2. He did not file a claim asserting that working conditions aggravated or triggered headaches caused by the work accident, and he conceded that the claim was based solely on the February 2010 trauma. OA Tr. at 23.

⁸ In a traumatic injury case, the sole relevant inquiry with respect to a claimant's retirement is whether the work injury precludes a return to the claimant's usual work, and thus, whether the claimant satisfied his burden of establishing a prima facie case of total disability. *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997); *MacDonald v.*

v. Maher Terminals, Inc., 30 BRBS 171 (1996). As we affirm the finding that claimant’s disability after November 3, 2011 was not work-related, we also affirm the denial of medical benefits after that date. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff’d mem.*, 32 F. App’x 126 (5th Cir. 2002) (table).

Accordingly, the administrative law judge’s Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

Bethlehem Steel Corp., 18 BRBS 181 (1986). The administrative law judge found that headaches related to the February 2010 work injury were not the reason for claimant’s departure from work; therefore, we also reject claimant’s argument that he was an “involuntary retiree.”

JONATHAN ROLFE
Administrative Appeals Judge