BRB No. 04-0810

DENNIS DUGAS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FORCENERGY GAS EXPLORATION, INCORPORATED	)	DATE ISSUED: 07/13/2005
	)	
	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

James J. Hautot (Judice & Adley, P.L.C.), Lafayette, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (1999-LHC-3115) of Administrative Law Judge C. Richard Avery 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).

This is the fourth time this case has been appealed to the Board. In his testimony at the April 17, 1998, formal hearing, claimant alleged that, while working for employer

offshore on a fixed platform as a roustabout on August 15, 1995, he struck his elbows numerous times on swinging doors while carrying supplies of water. Tr. at 22-29. Claimant was subsequently diagnosed with bilateral ulnar neuropathy, which he alleged was caused or aggravated by the swinging door incidents. In its current appeal, employer challenges the administrative law judge's finding, based on a weighing the evidence as a whole, that claimant's condition is casually related to his work for employer. Therefore, employer argues that the administrative law judge erred in finding claimant entitled to temporary total disability benefits from October 5, 1995 until December 4, 1998. Claimant has not responded to this appeal.

To recapitulate, in his initial Decision and Order, the administrative law judge found that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption linking his injury to his employment and that employer failed to rebut the presumption. As claimant's condition had not reached maximum medical improvement, the administrative law judge awarded claimant temporary total disability benefits beginning October 5, 1995.

Employer appealed this decision, challenging the administrative law judge's determination as to the cause of claimant's condition. The Board vacated the administrative law judge's award because he had not addressed fully the contentions regarding the occurrence of a work accident. Therefore, the Board remanded the case for the administrative law judge to determine initially whether an accident occurred at work, thus entitling claimant to invocation of the Section 20(a) presumption. If the administrative law judge found that the presumption was invoked, the Board directed him to then consider whether employer presented substantial evidence to rebut the presumption. *Dugas v. Forcenergy Gas Exploration, Inc.*, BRB No. 99-0163 (Oct. 21, 1999)(unpub.).

On remand, the administrative law judge credited claimant's testimony to find that an accident occurred at work, and he therefore invoked the Section 20(a) presumption linking claimant's injury to his employment. The administrative law judge found employer's evidence insufficient to establish rebuttal. Alternatively, the administrative law judge found that the record as a whole supports the conclusion that claimant's injury is work-related. Employer's appeal of this decision to the Board, BRB No. 00-0604, was dismissed without prejudice, as the case was remanded to the administrative law judge upon employer's filing a motion requesting modification under Section 22 of the Act, 33 U.S.C. §922.

Pursuant to employer's motion for modification, the administrative law judge held a new hearing on September 19, 2000. With regard to the cause of claimant's injury, the administrative law judge denied modification, finding that employer did not present evidence that either the Section 20(a) presumption was not properly invoked or it was

rebutted; thus, employer failed to show a mistake in fact. Nonetheless, the administrative law judge terminated claimant's benefits as of December 4, l998, finding that employer had established a change in claimant's physical and economic condition such that claimant could perform his usual or suitable alternate employment, earning in excess of his pre-injury earnings.

Claimant appealed, and employer cross-appealed, the administrative law judge's Decision and Order on Remand and Decision and Order on Employer's Motion for Modification to the Board. In its appeal, employer again challenged the administrative law judge's finding that claimant's condition was work-related. The Board held that substantial evidence supported the finding that an accident occurred at work which could have caused claimant's neurological condition. Thus, the administrative law judge properly invoked the Section 20(a) presumption. *Dugas v. Forcenergy Gas Exploration, Inc.*, BRB Nos. 00-0604, 01-0337/A (Dec.12, 2001)(unpub.)(*Dugas II*).[1] The Board also affirmed the administrative law judge's finding that employer did not rebut the Section 20(a) presumption. The Board then addressed claimant's contention that the administrative law judge erred in terminating claimant's temporary total disability benefits as of December 4, 1998, pursuant to Section 22. The Board held that the administrative law judge rationally found that claimant was no longer incapable of performing his usual or suitable alternate employment. *Id.* at 4. The Board agreed, however, that the administrative law judge erred in failing to ascertain claimant's post-injury wage-earning capacity, and therefore remanded the case for findings in this regard.

Upon his second remand from the Board, the administrative law judge found that employer established the availability of suitable alternate employment paying $24,000 per year and that, consequently, claimant sustained no loss of wage-earning capacity as of December 4, 1998. Both parties appealed. The Board affirmed the administrative law judge's finding that claimant was not entitled to further benefits as of December 4, 1998. Based on intervening case law, the Board re-addressed employer's contention that the administrative law judge erred in finding it had not produced substantial evidence to rebut the Section 20(a) presumption. The Board held that employer established rebuttal of the Section 20(a) presumption based on Dr. Hurst's opinion, and remanded the case to the administrative law judge to weigh the evidence of record as a whole regarding the cause of claimant's arm condition. *See Dugas v. Forcenergy Gas Exploration, Inc.*, BRB Nos.03-0103/A (Sep. 25, 2003)(unpub.)(*Dugas III).*

[1] Employer appealed the Board's decisions in *Dugas II* and *Dugas III* to the United States Court of Appeals for the Fifth Circuit. By orders dated April 10, 2002, and February 10, 2004, the court stayed the appeals.

On remand, the administrative law judge found that the evidence of record as a whole supports the conclusion that claimant's injury is work-related. Employer appeals. Once, as here, employer rebuts the Section 20(a) presumption, it no longer controls and the issue of causation must be resolved on the evidence as a whole, with claimant bearing the burden of persuasion. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994).

The administrative law judge credited Dr. Domingue's opinion that "if the symptoms started that day, then I'd be hard pressed to say they are not related to something that happened that day." CX 7 at 15-16. The administrative law judge also credited claimant's testimony regarding the incidents at work and his symptoms. Tr. at 22-27. The administrative law judge further credited Dr. Kline's opinion that the scenario of the work injury was "hard to argue against." Kline deposition at 38-41. The administrative law judge explained that Dr. Fruge, who initially checked a "no" causation box on a form, later denied checking this box. RX 12 at 12-14. Finally, although Dr. Hurst opined that claimant's condition is not work-related, he acknowledged that it was possible that the work events could have accelerated claimant's underlying condition. RX 7 at 8-9, 17-19. The administrative law judge therefore found his opinion insufficient to overcome the evidence establishing a causal relationship between claimant's employment and his ulnar condition.

We reject employer's contention that the administrative law judge's finding that claimant's condition is work-related is in error. In adjudicating a claim, it is well established that an administrative law judge is entitled to weigh the evidence and to evaluate the credibility of all witnesses and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence and may credit any part of an opinion. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962); *see also Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Employer has not demonstrated that the administrative law judge's decision to credit claimant's testimony is "inherently incredible or patently unreasonable" in light of the other evidence of record. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see also Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994), *aff'g Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1990); *see also Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In addition, the administrative law judge rationally found that the opinions of Drs. Domingue and Kline support a finding that claimant's work accident caused his ulnar condition. To the extent that employer seeks a re-weighing of the evidence, such is beyond the Board's scope of

review, as the selection from among reasonable inferences is left to the administrative law judge's discretion. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). As the administrative law judge's weighing of the evidence is rational, his finding that claimant's impairment is work-related is supported by substantial evidence, and employer has not raised any reversible error in the administrative law judge's findings, we affirm the administrative law judge's award of temporary total disability benefits from October 5, 1995 to December 4, 1998. *See generally Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

Accordingly, we affirm the administrative law judge's Decision and Order on Remand.

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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BETTY JEAN HALL
Administrative Appeals Judge