BRB No. 03-0499

GEORGE T. BOOKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BOH BROTHERS CONSTRUCTION COMPANY	)	DATE ISSUED:MAR 29, 2004
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster, Metairie, Louisiana, for claimant.

Ward Lafleur and Marc Moroux (Mahtook & Lafleur, L.L.C.), Lafayette Louisiana, for employer.

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

PER CURIAM

Employer appeals the Decision and Order (2002-LHC-1734) of Administrative Law Judge Clement J. Kennington awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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).

Claimant, while working as a heavy construction worker for employer on July 7, 2000, sustained a slip and fall accident whereby he hit his right knee against a three by eight board. Initially, Dr. Cohen diagnosed claimant with a knee contusion and concluded that claimant was able to return to light duty, Claimant's Exhibit 2, but

subsequently an MRI and EMG showed that surgery was needed. On October 31, 2000, Dr. Hinton performed arthroscopic surgery to repair a complex tear to claimant's medical meniscus. Following the surgery, on January 8, 2001, Dr. Hinton opined that claimant had reached maximum medical improvement with regard to his right knee injury, and assessed him with a 20 percent permanent partial impairment, but did not place any mechanical restrictions on claimant. Claimant's Exhibit 2.

Claimant, however, continued to show symptoms of numbness and nerve injury and was referred to Drs. Sconzert and Odenheimer. In February 2001, Dr. Sconzert opined that claimant could return to work at full duty, Claimant's Exhibit 2, but claimant continued to complain of pain and in July 2001, Dr. Odenheimer diagnosed a foot drop, noted the presence of complex regional pain syndrome, and issued a "no work" slip. Claimant's Exhibits 3, 4. Subsequently, claimant began to experience back pain that Drs. Hinton and Odenheimer attributed to an altered gait resulting from claimant's post-work accident leg and foot problems. Claimant's Exhibits 1, 3. Drs. Hinton and Odenheimer recommended a lumbar MRI, and Dr. Odenheimer also recommended an EMG and prescribed driving hand controls for claimant. Employer, however, denied all of these requests.

Following the injury, claimant performed light duty work for employer, but was subsequently dismissed after testing positive for cocaine. Employer voluntarily paid claimant temporary total disability benefits from July 13, 2000, until July 21, 2001, and permanent partial disability benefits from July 13, 2000 to November 27, 2002.

In his decision, the administrative law judge determined that claimant is entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to his foot drop and back pain, and that employer established rebuttal thereof. Decision and Order at 13-15. Considering the evidence as a whole, the administrative law judge concluded that claimant's foot drop and back problems were work-related. Further, the administrative law judge concluded that claimant cannot, as a result of his work-related injuries, return to his usual employment and that employer has not established the availability of suitable alternative employment. Accordingly, he awarded claimant temporary total disability benefits from July 8, 2000.[1] The administrative law judge further found that the recommended lumbar MRI, the EMG, and the automobile hand controls are all reasonable and necessary medical expenses, and thus awarded benefits for these items, as well as for continuing medical treatment, under Section 7 of the Act, 33 U.S.C. §907. In

[1] The administrative law judge found that, although claimant likely reached maximum medical improvement, such a determination was not possible until claimant was given a lumbar MRI and an updated EMG.

a subsequent Decision and Order Awarding Attorney Fees issued on June 10, 2003, the administrative law judge awarded claimant's counsel a total of $16,379.49 in fees and expenses.

On appeal, employer challenges the administrative law judge's findings regarding causation and maximum medical improvement, his award of temporary total disability and medical benefits, and his subsequent award of an attorney's fee. Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

Employer asserts that the administrative law judge erred in finding that claimant's foot drop and back problems are work-related and that claimant is entitled to further disability benefits and diagnostic testing and medical treatment for these conditions. Employer argues that there is no objective evidence that claimant's foot drop was causally related to his work accident and that testimony by both Dr. Odenheimer and Dr. Sconzert specifically demonstrates that claimant's symptoms of foot drop would have manifested sooner than they did if the condition was related to claimant's work accident. Moreover, employer asserts that because claimant's foot drop is not related to his work accident, neither could his back problems be related to the accident. Employer further argues that claimant's hearing testimony regarding his back pain is inconsistent and thus insufficient to establish causation.

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case, and the administrative law judge then must weigh all the evidence and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In concluding that claimant's foot drop was causally related to his workplace injury, the administrative law judge found, based on the evidence as a whole, that while there was no evidence of foot drop immediately following the workplace accident, Dr. Odenheimer opined that surgical intervention for the knee injury could cause a foot drop,

Claimant's Exhibit 4, and Dr. Sconzert opined that a foot drop could be caused by the scar tissue resulting from claimant's surgery, Employer's Exhibit 1. Further, the administrative law judge recognized that while Dr. Hinton never diagnosed the presence of a foot drop, he did note claimant's on-going complaints of numbness in his foot. Claimant's Exhibit 2. The administrative law judge thus concluded that, in the absence of any non work-related intervening cause between claimant's knee surgery and assessment of foot drop, and given the slow pace of healing indicated by the physicians, the evidence that a foot drop could be caused by claimant's surgery and resulting scar tissue, and the fact that claimant reported symptoms as early as January 8, 2001, the preponderance of the evidence establishes that claimant's foot drop is causally connected to his work accident.

The administrative law judge further found that both Drs. Odenheimer and Hinton opined that claimant's back problems could be the result of an abnormal gait, and that Dr. Sconzert opined that claimant had a physiological reason to limp. Accordingly, the administrative law judge concluded that claimant's back problems likewise arose from his work injury. As the opinions of the three physicians of record, *i.e.*, Drs. Sconzert, Odenheimer and Hinton, support the administrative law judge's conclusions that claimant's foot drop and subsequent back ailment are causally related to claimant's work injury, we affirm the administrative law judge's determination in this regard. *See generally Carpenter v. California United Terminals*, 37 BRBS 149 (2003); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Further, we reject employer's assertion that it is not responsible for further medical treatment and testing pursuant to Section 7(a), 33 U.S.C. §907(a). In order for a medical expense to be assessed against employer, claimant must establish that the expense is work-related and reasonable and necessary for the treatment of his work injury. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). Claimant can establish a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Romeike*, 22 BRBS 57; *see also Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). In the instant case, the administrative law judge found that the lumbar MRI was recommended by Drs. Hinton and Odenheimer, and that the updated EMG was recommended by Dr. Odenheimer, and that, based on those physicians' opinions, both are reasonable and necessary to further evaluate and treat claimant's work-related foot drop pain and back pain. Decision and Order at 17. The administrative law judge further concluded that claimant is entitled to hand control devices for his car as an earlier automobile accident was due to claimant's inadequate control over his foot, and the record contains an "uncontradicted" recommendation from Dr. Odenheimer for such hand controls. *Dupre v. Cape Romaine Contractors*, 23 BRBS 86 (1989). We thus affirm the administrative law judge's findings

under Section 7(a) as employer has presented no contrary evidence and the record supports the administrative law judge's findings. *See Romeike*, 22 BRBS 57.

Employer further argues that the evidence of record demonstrates that claimant has reached maximum medical improvement and that his current condition is unrelated to his workplace accident. Accordingly, employer argues that claimant is not entitled to receive continuing temporary total disability benefits.

Contrary to the assertion of employer, the administrative law judge properly found that the record fails to support a conclusion that claimant is at maximum medical improvement with regard to his work-related condition. The administrative law judge found that while claimant reached maximum medical improvement with regard to the surgical repair of his meniscus, Claimant's Exhibit 1, Drs. Hinton and Odenheimer both opined that further treatment and evaluation was necessary for claimant's foot drop and back condition. Specifically, the administrative law judge observed with regard to the foot drop that Dr. Hinton did not assess a date of maximum medical improvement and stated that a neurological evaluation was necessary in order to determine if claimant's lower extremity had reached maximum medical improvement. Claimant's Exhibit 1. The administrative law judge further found that while Dr. Odenheimer, claimant's neurologist, opined that claimant had reached a plateau with respect to improvement of his condition, he nevertheless opined that assessing a date of maximum medical improvement was impossible until he could determine, via a lumbar MRI, the extent of claimant's ongoing back problems. Claimant's Exhibits 3, 4. Moreover, the administrative law judge found that Dr. Sconzert was uncertain as to when claimant would reach maximum medical improvement with regard to his work-related injuries. Accordingly, the administrative law judge determined that a finding of maximum medical improvement for claimant's foot drop and back condition must await further treatment. Inasmuch as the determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence, *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988), and the administrative law judge's finding regarding maximum medical improvement is supported by substantial evidence, it is affirmed. Moreover, as employer has not challenged the administrative law judge's findings that claimant cannot, as a result of his work-related injuries, return to his usual employment, and that employer did not show the availability of any suitable alternative employment, those findings, as well as his consequent award of temporary total disability benefits, are affirmed.

Lastly, employer argues that because the administrative law judge erred in ruling in claimant's favor, the award of an attorney's fees is erroneous. In the Decision and Order Awarding Attorney Fees issued on June 10, 2003, the administrative law judge pursuant to claimant's unopposed attorney fee petition, awarded $16,379.49 total in fees

and expenses. Employer raises no specific challenges to this fee, and as we have affirmed the award of benefits, we also affirm the fee award. *See Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge