

BRB No. 04-0545

DANILO A. PERALTA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS	)	DATE ISSUED: <u>Mar 16, 2005</u>
	)	
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.

James E. Shields (Shields & Shields, APLC), Gretna, Louisiana, for claimant.

Aldric C. Poirier, Jr. (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2003-LHC-0421) of Administrative Law Judge Clement J. Kennington 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, an outside machinist, suffered an injury at work on July 30, 2001, when his supervisor threw a metal chair at him, hitting him in his left knee. Although he returned to his usual job following treatment at employer's first aid clinic, claimant sought additional medical treatment on August 8, 2001, and underwent arthroscopic surgery on April 26, 2002. Claimant attempted to return to work in August and October of 2002, but employer refused him work based on the drugs he was prescribed. EXs 6, 12. Subsequently, employer terminated claimant.<sup>1</sup> At present, claimant suffers from pain in the left knee for which he sought disability benefits.

In his Decision and Order, the administrative law judge found that claimant's current knee condition is the result of the work incident and that employer established the availability of suitable alternate employment. Accordingly, he awarded claimant temporary total disability compensation from August 9, 2001, to July 3, 2003, 33 U.S.C. §908(b), and continuing temporary partial disability from July 4, 2003, 33 U.S.C. §908(e), as well as related medical expenses incurred after May 13, 2002. 33 U.S.C. §907(a).

Employer appeals, contending that the administrative law judge erred in concluding that claimant's knee condition is related to the incident on July 30, 2001, and in awarding claimant disability compensation and medical expenses. Claimant responds, urging affirmance of the administrative law judge's award.<sup>2</sup>

On appeal, employer argues that the administrative law judge erred in finding that claimant suffers from any knee condition arising out of his employment. In establishing that an injury is causally related to his employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which provides a presumed causal nexus between the injury and the employment. Claimant bears the initial burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish his *prima facie* case. See *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); see also *U.S.*

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<sup>1</sup> Employer paid claimant temporary total disability benefits from July 30, 2001, to May 13, 2002. Stip. 8.

<sup>2</sup> Although claimant argues in his response brief that employer failed to establish suitable alternate employment, this issue is not raised in a cross-appeal and will not be addressed as it does not support the administrative law judge's decision. *Burgo v. General Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT) (2<sup>d</sup> 1997), cert. denied, 523 U.S. 1136 (1998); *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998). We also decline to address the issues raised in claimant's letter dated December 7, 2004; if claimant's condition has deteriorated, his recourse is to seek modification under Section 22 of the Act, 33 U.S.C. §922.

*Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once claimant has established his *prima facie* case, he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment. *Port Cooper/T.Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96 (CRT) (5<sup>th</sup> Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5<sup>th</sup> Cir. 1998).

In the instant case, the parties stipulated that a workplace incident occurred on July 30, 2001, during which claimant was struck on the left knee with a metal chair. Stip. 1. In addition, every doctor of record diagnosed patello femoral chondromalacia and synovial plica syndrome of the left knee,<sup>3</sup> and Drs. Manale, Watermeier, Murphy, Bourgeois and Sanchez opined that the incident on July 30, 2001, could have caused, aggravated or rendered symptomatic claimant's knee condition. See, e.g., EXs 7, 12, 13, 14. Thus, the administrative law judge's determination that claimant is entitled to invocation of the Section 20(a) presumption based upon the work incident and the harm to his knee is supported by the parties' stipulation and the medical evidence of record and therefore is affirmed. See *Port Cooper/T. Smith Stevedoring Co.*, 227 F.3d 285, 34 BRBS 96(CRT).

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. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5<sup>th</sup> Cir.), cert. denied, 540 U.S. 1056 (2003); *Louisiana Ins. Guar Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5<sup>th</sup> Cir. 2000); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT). In the instant case, the administrative law judge found that employer established rebuttal based upon the opinion of Dr. Montz, a board-certified orthopedic surgeon, who stated that claimant's knee condition and pain are not related to the accident at work. EXs 8 at 56; 14.

Having found the presumption rebutted, the administrative law judge weighed all of the evidence and resolved the causation issue based on the record as a whole. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Specifically, the administrative law judge discussed the objective evidence which supports the existence of the underlying condition, the medical opinions of record, and claimant's ongoing complaints of pain, and concluded that claimant's current knee condition and chronic pain are caused or aggravated by the work incident of July 30, 2001. The administrative law judge noted the lack of objective medical data supporting

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<sup>3</sup> Dr. Watermeier opined that claimant suffered from pre-existing plica and chondromalacia and that his condition was aggravated and rendered symptomatic by the work trauma. HT at 232-235. Drs. Sanchez and Montz also found plica syndrome.

claimant's contentions of knee pain.<sup>4</sup> Nonetheless, the administrative law judge credited the opinions of four of the five examining physicians and of both claimant's treating physicians who opined that claimant's work injury aggravated his pre-existing knee condition.<sup>5</sup> Moreover, the administrative law judge fully addressed employer's contention that claimant's knee condition would have healed and his complaints of pain dissipated if his condition had been caused by the work incident; the administrative law judge reasoned that claimant's depression, which Dr. Aristimuno had diagnosed as secondary to the work accident, could have contributed to his ongoing pain.<sup>6</sup> Decision and Order at 29.

We affirm the administrative law judge's decision finding that claimant's knee condition is work-related. The administrative law judge discussed all relevant evidence and provided rational reasons for choosing from among competing inferences. Decision and Order at 29. The administrative law judge based his conclusion on the facts of the accident, the medical opinions which link claimant's pain to the work accident, and claimant's testimony. It is the administrative law judge's prerogative to draw inferences and make credibility assessments, and we decline to disturb his judgment as the findings are adequately anchored in the record.<sup>7</sup> See *Pittman Mech. Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4<sup>th</sup> Cir. 1994).

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<sup>4</sup> A claimant's pain is a valid consideration in assessing the compensability of claimant's claim. See generally *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5<sup>th</sup> Cir. 1991). In the instant case, the administrative law judge acknowledged that claimant's testimony was unreliable upon occasion but stated he was reluctant to discredit it in its entirety; such a finding is within his discretion. Decision and Order at 24; *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, although claimant's complaints of pain are subjective in nature, none of the physicians or physical therapists discredited them. Decision and Order at 29.

<sup>5</sup> The administrative law judge gave little weight to the contrary opinion of Dr. Montz because he had examined claimant only once. Decision and Order at 29.

<sup>6</sup> The administrative law judge noted that although claimant had not developed the argument that there was a psychological overlay arising out of his work injury, Drs. Aristimuno, Bourgeois, Montz, Murphy, Sanchez and Watermeier all recorded claimant's depression in their medical records. Decision and Order at 29.

<sup>7</sup> Employer also appeals the administrative law judge's determination that it is liable for claimant's medical bills relating to his knee condition after November 30, 2001. Because we affirm the administrative law judge's finding that claimant's current knee

Employer next appeals the administrative law judge's finding that claimant is unable to perform his usual job due to his work injury. Claimant has the burden of establishing his inability to perform his usual work due to the injury. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). In raising this argument, employer emphasizes that there is no objective evidence supporting the administrative law judge's finding that claimant is unable to return to his usual employment and that Dr. Sanchez released claimant to return to full duty as of October 31, 2001. EX 13 at 4.

The administrative law judge noted claimant's testimony that his usual job was heavy labor, requiring him to climb stairs, stoop, and lift heavy objects. HT at 41-43. The administrative law judge found that it is "undisputed Claimant cannot return to his prior job as an outside machinist," Decision and Order at 31, and proceeded to address the medical opinions of record. The majority of the physicians who examined claimant placed physical restrictions upon his work activities based upon claimant's complaints of pain and work history, and findings of minimal degeneration. Dr. Murphy released claimant to light duty work in September 2002, EX 16; Dr. Bourgeois, to sedentary work in May 2003, CX 13; Dr. Manale found claimant disabled from his usual job as an outside machinist, EX 7; and Drs. Watermeirer and Montz both placed physical restrictions on claimant's climbing, squatting, kneeling and lifting heavy objects. EXs 12, 14. Only Dr. Sanchez, EX 13, released claimant to return to his usual job. The administrative law judge gave little weight to this opinion because Dr. Sanchez examined claimant only once, in 2001. Decision and Order at 31. The administrative law judge also opined that Dr. Sanchez's opinion, rendered before claimant's knee surgery, was too dated to be given much weight.

The administrative law judge's conclusion that claimant is unable to return to his usual job is supported by substantial evidence. It is within the administrative law judge's discretionary purview to determine the weight to be accorded to the medical evidence of record. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). The administrative law judge provided a rational reason for giving less weight to Dr. Sanchez's opinion as it was given prior to claimant's surgery. Employer's disagreement with the administrative law judge's weighing of the evidence is not a sufficient reason for the Board to overturn it, as it is axiomatic that the Board is not permitted to reweigh the evidence but may only ascertain whether substantial evidence supports the administrative law judge's decision. *See, e.g., Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994). As the opinions of Drs. Murphy, Bourgeois, Manale, Watermeier, and Montz constitute substantial evidence supporting the finding

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condition and chronic pain arose out of claimant's work injury, we affirm his finding that employer is liable for medical expenses arising out of these conditions.

that claimant's knee condition restricts his ability to perform his usual job, we affirm the administrative law judge's finding that claimant established his *prima facie* case of total disability. *Diosdado v. Newport Shipbuilding & Repair Co.*, 31 BRBS 70 (1997).

Employer raises no issues on appeal concerning the administrative law judge's findings regarding suitable alternate employment and claimant's residual wage-earning capacity. Thus, those findings are affirmed, as are the administrative law judge's awards of temporary total disability and temporary partial disability benefits.

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

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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REGINA C. McGRANERY  
Administrative Appeals Judge