

TERRY REESE	)	
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Claimant-Petitioner	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL	)	DATE ISSUED: 03/23/2006
TERMINALS	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Charlene Parker Brown (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

R. John Barrett and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-1953) of Administrative Law Judge Richard E. Huddleston 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).

In this claim for medical benefits, employer disputed that claimant's current right shoulder condition, consisting of rotator cuff and labral tears, is causally related to his November 6, 2002, work accident. The parties agreed that claimant injured his lower back and the right side of his neck in this accident, and that employer provided claimant

with medical benefits pursuant to Section 7 of the Act for those injuries. 33 U.S.C. §907. Thus, the only issue before the administrative law judge is whether employer is liable for surgery to repair the damage to claimant's right shoulder. Tr. at 5-6.

In his Decision and Order, the administrative law judge found that claimant invoked the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), linking his right shoulder rotator cuff and labral tears to his accident, but that employer presented sufficient evidence to establish rebuttal of the presumption. Weighing the evidence as a whole, the administrative law judge found that claimant did not establish, by a preponderance of the evidence, that his right shoulder tears are work-related, and he therefore denied the claim for medical benefits.

On appeal, claimant challenges the administrative law judge's finding that his current right shoulder condition is not work-related and that employer therefore is not liable for medical benefits for this condition. Employer responds, urging affirmance of the administrative law judge's decision.

An employer is liable for medical benefits for its employees' work-related injuries, subject to the provisions of Section 7 of the Act, 33 U.S.C. §907. *See generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1<sup>st</sup> Cir. 2004). In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which is invoked if claimant establishes that he suffered a harm and that an accident occurred or working conditions existed which could have caused the harm. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Employer may establish rebuttal of the Section 20(a) presumption by producing substantial evidence that claimant's harm is not work-related. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5<sup>th</sup> Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). If employer establishes rebuttal of the Section 20(a) presumption, it no longer controls. The administrative law judge must weigh all the evidence as a whole, and claimant bears the burden of proving that his condition is related to the work injury by a preponderance of the evidence. *See Universal Maritime Corp.*, 126 F.3d 256, 31 BRBS 119(CRT); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge invoked the Section 20(a) presumption and found it rebutted.<sup>1</sup> In weighing the evidence as a whole, the administrative law judge found that

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<sup>1</sup> Claimant does not challenge the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997).

claimant did not establish that his right rotator cuff and labral tears are work-related. He found that claimant did not complain to a physician of shoulder pain until six months after the accident, and he thus discounted the complaints of shoulder pain claimant made to his physical therapists after the work accident. The administrative law judge relied on medical evidence stating that if claimant's shoulder tears occurred in the work accident, then claimant would have had immediate symptoms which were neither reported nor diagnosed. The administrative law judge also rejected Dr. O'Connell's October 11, 2004 opinion that claimant's shoulder conditions are related to the work accident in view of his prior opinion discounting a relationship between the accident and the shoulder injuries. Claimant asserts that the administrative law judge improperly weighed the evidence and erred in failing to accord determinative weight to the physical therapists' reports of shoulder pain and to the October 11, 2004 opinion of Dr. O'Connell relating the tears to the work accident.

We reject claimant's contentions of error and affirm the administrative law judge's finding that claimant did not establish the work-relatedness of his shoulder condition. Dr. O'Connell stated in an October 29, 2004, letter that claimant would have felt immediate pain had he sustained acute rotator cuff and labral tears as alleged. EX 7 at 2. He reviewed claimant's medical records and stated that claimant did not complain of any symptoms consistent with such injuries.<sup>2</sup> *Id.* at 1-2. Dr. Morales, who examined claimant six days after the accident, testified on deposition that a patient suffering from a rotator cuff tear would complain of "[p]ain, weakness in the shoulder and the arm," and that claimant did not mention right shoulder problems nor did Dr. Morales find any "strength deficits." EX 4 at 12; CX 7. The administrative law judge noted that claimant complained of shoulder pain to his physical therapists in the period between December 2002 and February 2003, but observed that Dr. Gershon, who treated claimant regularly in the period following the injury, released claimant to full-duty work on April 1, 2003, and did not record complaints of shoulder pain until May 19, 2003, approximately six months following claimant's work-related incident. EX 3 at 12, 14. Although claimant testified at the hearing that he experienced continuous shoulder pain, the administrative law judge did not rely on this testimony in view of the fact that claimant's complaints of pain in his cervical and right upper trapezius regions were adequately recorded in claimant's medical records immediately following his work-related accident, but that shoulder symptoms were not.<sup>3</sup> Decision and Order at 13.

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<sup>2</sup> Dr. O'Connell stated claimant would have symptoms of lateral shoulder pain and upper arm pain. EX 7 at 2.

<sup>3</sup> Dr. O'Connell additionally stated in the October 29, 2004, letter that claimant's complaints of pain in his cervical and right upper trapezius regions are not consistent with a rotator cuff tear. Decision and Order at 13; EX 7 at 2.

The administrative law judge acknowledged that claimant submitted Dr. O'Connell's October 11, 2004 opinion as evidence of a causal connection between his November 6, 2002, work-related accident with employer and his current right shoulder conditions. In his 2003 opinion, Dr. O'Connell had discounted a relationship between the shoulder tears and the accident because he was of the opinion that claimant had not fallen off a vehicle in the accident. EX 7 at 1. Upon becoming aware that claimant had indeed fallen in this manner, Dr. O'Connell stated that if claimant had no intervening injury, then the rotator cuff tear and labral tear are due to his work related injury. CX 2 at 1. The administrative law judge declined to credit this opinion as it was not given until almost two years following claimant's work-related incident and was given at the request of claimant's counsel for an opinion as to causation.<sup>4</sup> Additionally the administrative law judge stated that Dr. O'Connell did not detail why his opinion of the catalyst of claimant's shoulder injury had changed.

It is well established that the administrative law judge is entitled to determine the weight to be accorded to the evidence and that he is not bound to accept the opinion or theory of any particular medical examiner. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5<sup>th</sup> Cir. 1959); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 74 (5<sup>th</sup> Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2<sup>d</sup> Cir. 1961). Moreover, it is impermissible for the Board to substitute its views for those of the administrative law judge; thus, the administrative law judge findings may not be disregarded merely on the basis that other inferences might appear to be more reasonable. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4<sup>th</sup> Cir. 2003). The administrative law judge rationally relied on the doctors' description of the symptoms claimant would have suffered immediately had he torn his rotator cuff and labrum in the work accident. As these symptoms were not recorded in any of the contemporaneous medical reports, the administrative law judge rationally found that claimant's shoulder condition is not related to the work accident. Claimant has not raised any reversible error in the administrative law judge's decision,<sup>5</sup> and we

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<sup>4</sup> In November 2003, Dr. O'Connell had stated the lack of evidence of a fall "would make it less likely that his rotator cuff tear which is seen on the MRI came from this work-related injury." EX 7 at 1.

<sup>5</sup> Claimant correctly states that the administrative law judge found that the accident occurred as claimant alleged. *See* Decision and Order at 12-13. Claimant therefore avers that the administrative law judge was required to credit Dr. O'Connell's October 11, 2004 report stating that, if claimant fell as alleged, then the shoulder injuries are related to that fall. In view of Dr. O'Connell's opinion two weeks later regarding the symptoms claimant would have suffered had he injured himself in the fall, and the administrative law judge's finding that such symptoms were absent for six months, we

therefore affirm the finding that claimant's shoulder injury is not work-related, and the consequent denial of medical benefits, as it is supported by substantial evidence. *See generally Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999).

Accordingly, we affirm the administrative law judge's Decision and Order denying benefits.

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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JUDITH S. BOGGS  
Administrative Appeals Judge

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reject claimant's contention. *See generally Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969) (fact finder may accept or reject all or any part of opinion or testimony).