BRB No. 01-0668

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| MICHAEL L. TUTTLE | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| MARINE POWER & EQUIPMENT | ) | DATE ISSUED: May 14, 2002 ) |
| and | ) | |
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| FREMONT COMPENSATION INSURANCE GROUP | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

William D. Hochberg, Edmonds, Washington, for claimant.

Marshall Fergusen (Metz & Associates), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (00-LHC-2507) of Administrative Law Judge Edward C. Burch 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On April 10, 1980, claimant was struck on the head at work, and sustained an injury to his neck. Claimant obtained medical treatment, finished his shift, and performed light duty

work the following day. Claimant reported that his neck condition did not improve and he stopped working. Employer voluntarily paid claimant compensation for temporary total disability from April 14, 1980, to September 25, 1981. 33 U.S.C. §908(b). Claimant subsequently obtained non-longshore employment and he sought additional compensation under the Act. In the initial decision issued in July 1984, Administrative Law Judge Heyer found that claimant was unable to return to his usual employment as a shipfitter due to his neck condition, and he awarded claimant compensation for permanent partial disability commencing on October 26, 1981, based on a loss of wage-earning capacity of $236.80 per week. 33 U.S.C. §908(c)(21). The administrative law judge denied employer's request for Section 8(f) relief. 33 U.SC. §908(f).

Employer appealed the compensation award and the denial of Section 8(f) relief to the Board. In its decision, the Board vacated the permanent partial disability award and remanded the case for the administrative law judge to address claimant's credibility and evidence indicating that claimant did not provide his physicians with an accurate history of his physical condition. The Board affirmed the administrative law judge's denial of Section 8(f) relief. *Tuttle v. Marine Power & Equipment*, BRB No. 84-1929 (Dec. 18, 1987). In the decision on remand issued on December 2, 1988, Judge Heyer determined that claimant was unable to return to his usual longshore employment and has permanent work restrictions due to his neck condition of no repetitive heavy activity, particularly in awkward positions, and he again awarded claimant compensation for his loss of wage-earning capacity. This decision was not appealed.

On May 25, 1999, claimant reported neck spasms to his internist, Dr. Stoop, who referred claimant for an orthopedic evaluation. In November 1999, claimant was examined by Dr. Phillips, who recommended surgery. In September 2000, claimant was examined by Dr. Hahn, a neurologist, and she operated on claimant's neck on October 25, 2000. Claimant asserted that his neck condition is related to the April 10, 1980, work injury, and he sought continuing compensation under the Act for temporary total disability commencing November 10, 1999.

In his decision, Administrative Law Judge Burch (the administrative law judge) found that claimant established a *prima facie* case and is entitled to the Section 20(a) presumption linking his current neck condition to the April 1980 work injury. 33 U.S.C. §920(a). The administrative law judge found that employer rebutted the Section 20(a) presumption, and he concluded that claimant failed to establish, based on the record as a whole, that his neck condition is related to the work injury. Accordingly, the administrative law judge denied the claim.

On appeal, claimant argues that the administrative law judge's decision does not comply with the principles of collateral estoppel and "law of the case" because the administrative law judge rendered findings inconsistent with the Board's prior decision and

Judge Heyer's decision on remand. Claimant also asserts that the administrative law judge erred by finding that his current neck condition is not related to his April 1980 work injury. Employer responds, urging affirmance.

Claimant first contends that the administrative law judge's reliance on medical records introduced into evidence in the proceedings before Judge Heyer violates the doctrines of collateral estoppel and "law of the case." Claimant contends that Judge Heyer found that claimant's work accident caused his neck injury, and that the administrative law judge cannot rely on the same medical evidence and reach the opposite conclusion.[1] We reject claimant's contention. The doctrine of collateral estoppel precludes litigation by the parties in a second action of issues necessarily and actually litigated in the first action. *Kollias v. D & G Marine Maintenance*, 22 BRBS 367 (1989), *rev'd on other grounds*, 29 F.3d 67, 28 BRBS 70(CRT) (2d Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995). Collateral estoppel bars a party from relitigating an issue if: (1) the issue at stake is identical to the one alleged in the prior litigation; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *Figueroa v. Campbell Industries*, 45 F.3d 311, 315 (9th Cir. 1995). Judge Heyer, however, did not address the cause of claimant's neck disability in terms of any injuries claimant may have sustained after his April 1980 work injury, *see, e.g.*, *Tuttle v. Marine Power & Equipment*, 82-LHC-1595, slip op. at 5-6 (Dec. 2, 1988) (decision on remand), and the parties certainly did not actually and necessarily litigate the cause of claimant's neck condition in 1999-2000 in the earlier proceeding. Accordingly, as the issues in the two proceedings are not identical, Judge Burch was not precluded by the doctrine of collateral estoppel from relying on evidence of injuries claimant may have sustained after the work injury in determining the cause of claimant's present neck complaints.[2] *Id.* Similarly, as neither Judge Heyer nor the Board addressed the cause of claimant's current neck condition, the law of the case doctrine is wholly inapplicable. *See generally Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

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[1]This includes medical reports discussing incidents occurring in 1982, 1983, and 1986, as well as claimant's demolition work in the 1980s, and Dr. Brooks's report and deposition, from 2000, relying on these earlier reports.

[2]It is not clear if claimant sought additional disability benefits commencing in 1999 by way of a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922. If he did, the collateral estoppel doctrine would be inapplicable, as Section 22 displaces doctrines such as *res judicata* and collateral estoppel, *see Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968), and permits an administrative law judge great latitude in weighing evidence submitted in prior proceedings, *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 1053 (1971).

We next address claimant's challenge to the administrative law judge's finding that claimant's current neck condition is not related to his April 1980 work injury. In order to be entitled to the Section 20(a) presumption linking claimant's condition to his employment, claimant must establish a *prima facie* case by establishing the existence of a harm and that an accident occurred or working conditions existed that could have caused the harm. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1990). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or contributed to by his employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied*, 528 U.S. 1187 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). 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.[3] *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).

[3]We reject claimant's contention the administrative law judge misconstrued Section 20(a) by stating that the issue to be resolved is whether April 1980 work injury "necessitated" his October 2000 neck surgery. Decision and Order Denying Benefits at 8. In the following sentence the administrative law judge accurately summarized claimant's contention that the work injury "contributed" to his present neck condition, and the administrative law judge properly stated that employer must rebut the Section 20(a) presumption with substantial evidence that claimant's neck condition was not caused or contributed to by the work injury. *Id.* at 8, 9.

In this case, it is uncontested that claimant is entitled to the Section 20(a) presumption. Thus, the relevant inquiry is whether employer met its burden of rebutting the presumption with substantial evidence. The administrative law judge found rebuttal established based on the opinion of Dr. Brooks, as corroborated by claimant's medical records. Dr. Brooks opined that claimant's current neck condition is not directly due to the work injury, nor did the work injury contribute to the current condition. He stated that his opinion is based on the length of time since the initial injury, the absence of evidence of neck trauma on the initial x-rays and myelogram, and the mechanics of the injury.[4] CX 16 at 10-11, 15, 51; EX 9. The administrative law judge found that claimant's medical records support the conclusion that claimant's present condition is not related to his work injury. Specifically, the administrative law judge credited evidence that the first positive test result, which showed a

[4]We reject claimant's contention that Dr. Brooks's opinion does not meet employer's burden of production on rebuttal. The administrative law judge noted Dr. Brooks's acknowledgment that claimant's neck condition is possibly due to his April 1980 injury, *see* EX 16 at 15, 41; however, the administrative law judge properly found Dr. Brooks's ultimate conclusion was rendered with reasonable medical certainty, *see* EX 16 at 15, 51, and is therefore substantial evidence to rebut the presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *see also Conoco*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998).

slight disc herniation at C5/C6, was not recorded until approximately seven years after the April 1980 date of injury, and, in the interim, claimant reported a neck injury in 1982 while shoveling snow, and another neck injury in 1986 after chopping wood. EX 9 at 36-37; CXS 5 at 35-36; 10 at 86-87. The administrative law judge also credited the absence of radicular symptoms during the 1980s, and the opinions of Drs. Stoop and Hahn attributing some of claimant's neck symptomatology to automobile accidents in February and April 2000.[5] *See* CXS 7 at 52; 9 at 84-85; 11 at 88; 12 at 133-136. As the administrative law judge's finding that employer rebutted the Section 20(a) is supported by substantial evidence, it is affirmed. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT).

[5]The administrative law judge did not analyze whether any of the accidents in which claimant allegedly was involved constituted an intervening cause of claimant's neck condition. *See, e.g., Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992); *Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 19 (1997); *James v. Pate Stevedoring Co.,* 22 BRBS 271 (1989). As Dr. Brooks's opinion alone is sufficient to rebut the Section 20(a) presumption, the administrative law judge's reliance on car accidents and reports of pain following incidents at home in 1982 and 1986 as additional support does not constitute error.

Having found rebuttal established, the administrative law judge addressed the causation issue based on the evidence as a whole. Initially, the administrative law judge reiterated his finding on rebuttal that the objective evidence of record supports the opinion of Dr. Brooks. The administrative law judge found that the opinion of Dr. Phillips that claimant's April 1980 work injury contributed to his current neck condition is based on subjective symptoms reported by claimant, who the administrative law judge found is an unreliable historian.[6] The administrative law judge further found that claimant exaggerated his symptoms. The administrative law judge credited the opinions of Drs. Lauren, Grisham, Phillips and Brooks in this regard. CXS 6 at 44; 11 at 105; EXS 4 at 6; 9 at 55. The administrative law judge rejected claimant's contentions that Dr. Phillips is his treating physician and that his opinion is therefore entitled to more weight than the opinion of Dr. Brooks. The administrative law judge thus concluded that the weight of the evidence favors employer, and he therefore denied benefits.

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[6]In support of this credibility determination, the administrative law judge noted Judge Heyer's finding that claimant's testimony before him regarding his symptoms and limitations was exaggerated, inaccurate, and unconvincing. *Tuttle*, 82-LHC-1595, slip op. at 4-6 (Dec. 2, 1988). The administrative law judge cited evidence in the record of claimant's unreliability, including claimant's failure to report his car accident on February 7, 2000, to Dr. Phillips, whom he saw that afternoon, and claimant's testimony that he resigned from his last job due to the worsening of his neck condition, which the administrative law judge found was contradicted by his statement to Dr. Brooks that he had been laid off due to a lack of work. CX 14 at 17-19; *compare* Tr. at 26-27, 31 *with* EX 9 at 49. The administrative law judge also cites claimant's inaccurate representation to Dr. Hahn that spinal compression fractures were diagnosed in 1984, when claimant's objective tests results of record nearest in time to 1984 were interpreted as revealing no abnormalities. *Compare* CX 7 at 51 *with* CX 11 at 89, 93. Decision and Order at 12.

Contrary to claimant's assertions, the administrative law judge did not err in failing to accord determinative weight to the medical opinion of Dr. Phillips. It is well-established that an administrative law judge is not bound to accept the opinion or theory of any particular medical examiner but may instead draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 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). Moreover, the administrative law judge rationally determined, based on Dr. Phillips's examining claimant a total of three times as opposed to Dr. Brooks's single examination of claimant that, in the context of claimant's 20-year history of neck complaints, it is doubtful that Dr. Phillips gained much additional perspective regarding the cause of claimant's condition, and the administrative law judge rationally concluded that he need not credit Dr. Phillips's opinion as the treating physician.[7] *See generally Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Moreover, the administrative law judge rationally gave less weight to the opinion of Dr. Phillips due to his reliance on claimant's subjective complaints, which were called into doubt. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As claimant has failed to demonstrate any reversible error made by the administrative law judge in his evaluation of the conflicting medical evidence, the administrative law judge's denial of benefits premised on claimant's failure to establish a causal link between his current neck condition and his 1980 work injury is affirmed. *See Rochester v. George Washington University*, 30 BRBS 233 (1997); *see also Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

[7]There is no issue in this case concerning claimant's need for the neck surgery performed by Dr. Hahn, as Dr. Brooks stated the surgery was needed. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge