

LARRY E. SHAVER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CASCADE GENERAL,)	DATE ISSUED: <u>May 16, 2003</u>
INCORPORATED)	
)	
and)	
)	
LIBERTY NORTHWEST)	
INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Douglas A. Swanson (Swanson, Thomas & Coon), Portland, Oregon, for claimant.

Ronald W. Atwood (Ronald W. Atwood, P.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (98-LHC-1695) of Administrative Law Judge Alexander Karst 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).

Claimant, a marine painter, sustained an injury to his left shoulder on

September 12, 1997, while scraping the hull of a ship. Administrative Law Judge Henry B. Lasky issued a Decision and Order on April 12, 1999, awarding claimant medical benefits, temporary partial disability benefits, and continuing temporary total disability benefits from August 31, 1998, for this injury. Thereafter, employer filed a petition for modification seeking to modify the temporary total disability award and claimant sought an order requiring employer to accept liability for an injury to his right shoulder, which claimant alleged occurred as a consequence of his left shoulder injury. On January 23, 2002, Administrative Law Judge Karst (the administrative law judge), to whom the case was subsequently assigned, issued an order granting employer=s motion to bifurcate the modification issue from the right shoulder issue.¹

In his decision regarding claimant=s right shoulder condition, the administrative law judge found that claimant submitted sufficient evidence to establish his *prima facie* case and to invoke the Section 20(a), 33 U.S.C. '920(a), presumption of causation. The administrative law judge further found that employer submitted sufficient evidence to establish rebuttal of the Section 20(a) presumption.

¹Following the entry of Judge Lasky=s award, claimant was placed in a vocational training program for computer programming under the auspices of the Office of Workers= Compensation Programs. As claimant=s training was scheduled to be completed near the end of 2002, which would affect claimant=s wage-earning capacity, employer sought to continue the case or in the alternative to bifurcate the wage-earning capacity issue from the right shoulder issue. Claimant joined in employer=s motion to bifurcate. The administrative law judge denied employer=s request for a continuance and granted the request for bifurcation.

On weighing the evidence as a whole, the administrative law judge credited the opinion of claimant=s treating physician, Dr. Puziss, over that of Dr. Farris, employer=s expert, and found that claimant=s right shoulder condition is a consequence of claimant=s work-related left shoulder injury, and therefore is compensable.²

On appeal, employer challenges the administrative law judge=s crediting of Dr. Puziss=s opinion, contending that it is not as well-reasoned as that of Dr. Farris. Claimant responds, urging affirmance.

²Claimant stated at the hearing that he was not seeking disability compensation for the right shoulder, because he is currently being paid temporary total disability compensation for the left shoulder, based on Judge Lasky=s compensation order. He sought only a determination as to the compensability of the right shoulder condition in order to obtain medical benefits for this condition. Tr. at 78-79.

We affirm the administrative law judge's weighing of the evidence and therefore the finding that claimant's right shoulder condition is compensable. Both Dr. Puziss and Dr. Farris diagnosed mild tendinitis and mild adhesive capsulitis in claimant's right shoulder. CX 3 at 5; EX 8 at 18-19. Dr. Puziss, claimant's treating, orthopedic surgeon, opined that claimant's right shoulder pain resulted from his 1997 work-related injury to his left shoulder, which caused claimant to overuse his right shoulder. CX 6 at 11-12.³ Dr. Farris, an orthopedic surgeon who examined claimant on employer's behalf, stated that claimant's right shoulder condition was not related to his employment or to alleged overuse of the right shoulder as a result of the left shoulder injury, but is due to claimant's diabetes mellitus combined with the natural degenerative process. EX 8 at 21. In crediting Dr. Puziss's opinion, the administrative law judge initially stated that, while both physicians are well qualified, the Ninth Circuit, within whose jurisdiction this case arises, has held that the opinion of claimant's treating physician is entitled to special weight. Decision and Order at 6, *citing 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). The administrative law judge also stated that he found the opinion of Dr. Puziss cannot be dismissed because the exact relationship between diabetes and shoulder degeneration is not known. Thus, while Dr. Puziss also opined that diabetes may have predisposed claimant to shoulder difficulties, the administrative law judge found that his opinion regarding overuse of the right arm is consistent with claimant's credible testimony and more persuasive than Dr. Farris's opinion.⁴ The administrative law judge concluded that claimant's left shoulder improved, but never returned to its pre-injury condition, and that claimant has continued to use his right arm to compensate for his impaired left shoulder. Contrary to employer's contention on appeal, the administrative law judge

³In a report dated April 16, 2001, Dr. Puziss stated that the extended period of disuse of claimant's left shoulder contributed to his excessive use of the right shoulder and that this played a role in the development of tendinitis. CX 6 at 11-12.

⁴The administrative law judge found that claimant persuasively testified that he suffered from residual pain and loss of motion in the left shoulder, requiring him to rely exclusively on this right arm, and Dr. Puziss noted that claimant continued to suffer from weakness and loss of motion in his left arm. Tr. at 30, 34, 41-42, 49; EX 1. In addition, claimant returned to work for employer from September to December 8, 1999. He was assigned to the tool room, where he was required to lift heavy items and to reach overhead. The administrative law judge found that claimant testified credibly that work in the tool room brought on right shoulder pain and aggravated his condition.

addressed and rationally rejected its contention that claimant=s everyday activities do not constitute Aoveruse.@ Decision and Order at 5; see generally *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994), *aff'g Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993).

In adjudicating a claim, it is well established that the administrative law judge is entitled to weigh the evidence and draw his own inferences therefrom. 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). Moreover, the Board is not empowered to reweigh the evidence, but must affirm a decision supported by substantial evidence. See generally *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); see also *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 and as Dr. Puziss=s opinion constitutes substantial evidence to support the finding that claimant=s right shoulder condition is a consequence of his work-related left shoulder condition, we affirm the award of medical benefits for this condition. See generally *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Accordingly, we affirm the administrative law judge=s Decision and Order Awarding Benefits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge