



BRB No. 21-0470

REGINALD SWARN)	
)	
Claimant-Petitioner)	DATE ISSUED: 5/31/2022
)	
v.)	
)	
HUNTINGTON INGALLS,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Monica Markley, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for Claimant.

Jonathan H. Walker and Stephanie C. Sweeney (Mason, Mason, Walker, & Hedrick, P.C.), Newport News, Virginia, for Self-Insured Employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Monica Markley’s Decision and Order Denying Benefits (2019-LHC-00726) rendered on a claim filed pursuant to the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must affirm the ALJ’s findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O’Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for Employer as a shipfitter. His duties included welding, climbing ladders, and lifting heavy steel material. TR at 33. On September 11, 2010, Claimant injured his left knee and was out of work from September 13, 2010, until July 10, 2011, and subsequently from October 12 until October 18, 2011.¹ Claimant returned to work with no restrictions and continued to work for Employer. TR at 34. On October 28, 2016, approximately five years after the left knee injury, Claimant filed a claim under the Act for a right knee injury. EX 5 at 2.

Claimant first complained of right knee pain to Dr. Arthur Wardell on November 7, 2014, but also reported being able to work without restriction. Dr. Wardell found Claimant had “right knee range of motion from 0 to 100 degrees.” CX 2 at 11. Claimant’s next mention of right knee pain was on October 28, 2016, after which he claimed to have “wear and tear of his right knee in the performance of his normal activities while employed at the Shipyard.” EX 5 at 2; CX 10 at 1.²

On January 17, 2020, a formal hearing was held in Newport News, Virginia. The ALJ found Claimant established a prima facie case linking his right knee injury to his work, thus invoking the Section 20(a) presumption. She also found Employer rebutted the Section 20 (a) presumption, and, on weighing the evidence as a whole, gave greater weight to Employer’s evidence and denied the claim for benefits. The ALJ held Dr. Cavazos’s opinion was “well-reasoned and much more reliable,” “discussed the temporal relationship between the onset of Claimant’s osteoarthritis and work conditions” as well as the March 2018 MRI which revealed end stage osteoarthritis,³ and acknowledged how Claimant’s symptoms did not improve despite his long absence from work. She noted Dr. Payne’s opinion, albeit dated earlier and without the benefit of the treatment notes, which “came to the same causation conclusions” and supported Dr. Cavazos’s opinion. *Id.* at 23.

¹ The compensability of the left knee injury is not at issue. We note, however, Claimant had arthroscopic surgery on his left knee but was still complaining of pain thereafter. He continued to treat for his left knee during the same period he was complaining about his right knee. He ultimately underwent left knee replacement surgery on September 19, 2018.

² He had “25 evaluations from 03/30/2015 to 09/26/2016” with Dr. Wardell but only complained of pain in his left knee. EX 6 at 1.

³ The MRI found “advanced medial femorotibial compartment osteoarthritis.” CX 7. Dr. Cavazos stated these findings indicated osteoarthritis progressed over a long period of time and became symptomatic in December 2016. EX 5 at 6.

Conversely, she found Dr. Wardell's opinion was "conclusory," "not well reasoned," not explained or supported by objective findings, and relied primarily on Claimant's testimony. D&O at 18-22. Claimant appeals the denial, and Employer responds, urging affirmance.

Claimant contends the ALJ incorrectly determined the medical opinions of Drs. Payne and Cavazos were more credible and worthy of more weight than the opinion of Dr. Wardell. Employer responds, arguing the ALJ's credibility determinations are reasonable, and she gave appropriate weight to the opinions of Drs. Payne and Cavazos because their opinions were consistent with each other and with the record as a whole. Employer further asserts Dr. Wardell's medical records are themselves internally inconsistent, and the ALJ rationally found Claimant was not credible during his testimony at the hearing.

To invoke the Section 20(a) presumption, 33 U.S.C. §920(a), a claimant must establish a prima facie case and need only show the existence of working conditions that could have caused the injury alleged. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). The burden then shifts to the employer to rebut the presumption by presenting substantial evidence that the alleged injury had another cause. *White v. Pearson Boatbuilding Co.*, 29 BRBS 1, 9 (1995). When the Section 20(a) presumption is invoked and rebutted, as here,⁴ the presumption drops from the case, and the ALJ must weigh all the relevant evidence to determine whether the claimant has borne his burden of persuasion by a preponderance of the evidence. *Coffey v. Marine Terminals Corp.*, 34 BRBS 85, 86 (2000) (citing *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994)); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

An ALJ is the factfinder and the evaluator of all testimony. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The ALJ must draw her own conclusions and reach a decision based on the record as a whole. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The ALJ is not bound to accept the opinion or theory of any medical examiner and may draw her own inferences from the medical record. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). On appeal, the Benefits Review Board may not reweigh the evidence because it does not engage in *de novo* review. *Sea-Land Services, Inc., v. Director, OWCP [Ceasar]*, 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981); 20 CFR §802.301.

⁴ The ALJ invoked the presumption based on Claimant's testimony and Dr. Wardell's opinion. D&O at 20. She found Employer rebutted the presumption based on the opinions of Drs. Cavazos and Payne. *Id.* at 22.

Three doctors offered opinions on the cause of Claimant's right knee condition. Claimant informed Dr. Wardell of right knee pain on October 28, 2016, along with continuing left knee problems. Though there was some tenderness, Dr. Wardell said the right knee had "full motion and full stability. He diagnosed "[r]ight knee strain consequential to left knee injury" and sought authorization to treat the right knee. CX 10 at 1. Dr. Wardell did not mention Claimant's right knee again until April 26, 2018, when he stated: "Mr. Swarn continues to have pain in the right knee as well as difficulty with ambulation." *Id.* at 44.⁵

On May 31, 2017, Claimant had an examination with Dr. Loel Payne. He noted mild lateral tenderness but no effusion, no significant crepitance, good stability, and normal gait. *Id.* He also conducted x-rays, which showed "moderate to severe medial compartment arthritis." *Id.* Dr. Payne diagnosed Claimant with osteoarthritis stating, "[b]oth knees appear to be similar, and I suspect the arthritis is due more to the wear and tear of natural aging with most likely some underlying hereditary component [;] [h]owever, I do not believe that this is a direct result of his left knee problem, nor a specific injury to the right knee." CX 2 at 2-3; EX 8 at 2-3.

On January 3, 2019, Dr. Wardell reported Claimant had been out of work since January 31, 2018, his right knee was sore, but physical therapy may be helping. He diagnosed "primary osteoarthritis of right knee" as well as a medial meniscus tear in his right knee "due to his work injury of 10-28-16." CX 10 at 71, 73. In July 2019, Dr. Wardell stated Claimant needed a total right knee replacement. *Id.* at 91-92.

On January 4, 2019, Claimant met with Dr. Daniel Cavazos and told him his right knee pain and discomfort was due to his work activities. In his report, dated January 16, 2019, Dr. Cavazos considered Dr. Wardell's and Dr. Payne's reports, noting, specifically, there were no treatment reports for the right knee from Dr. Wardell prior to January 2018, as well as objective evidence and surgical reports. *Id.*; CX 5 at 3; EX 6. Dr. Cavazos x-rayed both knees which he stated showed the right knee had "isolated right medial tibiofemoral compartment osteoarthritis" and the left knee was in "good position" after a total knee arthroplasty. X-rays also showed "[p]re-existing degenerative tear of the right medial meniscus" which Dr. Cavazos stated "was due to the high-grade osteoarthritis of the right knee. This lesion was not symptomatic and to a reasonable degree of medi[c]al

⁵ Claimant testified Employer accepted the right knee condition and, on January 10, 2018, authorized treatment, including arthroscopic surgery and physical therapy, and began paying benefits. Claimant had arthroscopy on his right knee in June 2018. In January 2019, Employer controverted the claim and ceased paying benefits. Dr. Wardell now recommends total right knee replacement. TR at 37-39; *see* CX 3.

probability not exacerbated nor aggravated by work protocol, nor a proposed overuse syndrome secondary to a left knee work injury.” CX 5 at 5. Rather, the “[c]ause and effect relationship of [Claimant’s] knee osteoarthritis was to a reasonable degree of medical probability, a biological event related to his physiology and the natural development of osteoarthritis.” *Id.* at 6. Dr. Cavazos found further support for his conclusion in the fact that, during the six-month period between January and June 2018 when Claimant was kept out of work and had “no exposure to the stress of active work,” “there was no discernable improvement in [his] symptoms” or clinical findings. *Id.*⁶ Overall, he concluded the right knee condition was not work-related. *Id.* at 7. Upon receiving and reviewing additional reports from Dr. Wardell, Dr. Cavazos confirmed his initial opinion. EX 6.

On November 12, 2019, after having reviewed the opinions of Drs. Cavazos and Payne as well as Claimant’s 2017 Questionnaire, Dr. Wardell opined in a three-sentence letter to Claimant’s counsel: “it is my opinion to a reasonable degree of medical certainty, that the work that Mr. Swarn was doing, going up and down ladders and steps and pivoting on an unstable left knee, aggravated the arthritis in his right knee leading to his current disability and the need for a total knee replacement on the right.” CX 13.⁷

In weighing the evidence as a whole, the ALJ focused on the above doctors’ opinions. She rationally concluded Dr. Wardell’s November 2019 letter is “conclusory,” “not well-reasoned,” not explained or supported by objective findings, and seems to rely primarily on Claimant’s statements. The ALJ also specified Dr. Wardell, following “myriad examinations,” reported Claimant’s right knee had a “range of motion that was generally preserved to 100 degrees or higher and consistently exhibited normal stability and no effusion” which is contradictory to his summary conclusion. D&O at 22-23; *see, e.g.*, CX 10 at 16, 72.⁸

⁶ Dr. Cavazos also stated the “complex tearing of the right medial meniscus” was “degenerative in nature” and “minimal” to Claimant’s symptoms, as his “arthroscopic medial meniscectomy did not affect the course of [his] symptoms or function.” CX 5 at 6.

⁷ Thereafter, despite the recommendation, Dr. Wardell released Claimant to return to light-duty work on December 2, 2019, until his follow-up appointment, with right knee restrictions. CX 13 at 98.

⁸ Only in “further criticism” of Dr. Wardell’s opinion did the ALJ mention the possibility that Dr. Wardell’s records confuse which restrictions were for which knee in that Dr. Wardell signed off on permanent restrictions because of Claimant’s right knee on December 2, 2019, and wrote it was “per FCE.” D&O at 23. The ALJ posited Dr. Wardell could have confused which knee was the subject of the October 7, 2019 FCE he relied on to make the December 2, 2019 restriction or perhaps Dr. Wardell “was crediting Claimant’s

Instead, she gave greater weight to Dr. Cavazos's opinion, which she found was "well-reasoned and much more reliable." *Id.* The ALJ rationally held Dr. Cavazos' conclusions regarding causation were persuasive because he "discussed the temporal relationship between the onset of Claimant's osteoarthritis and work conditions" as well as the March 2018 MRI which revealed end stage osteoarthritis.⁹ Furthermore, the ALJ rationally found Dr. Cavazos' osteoarthritis diagnosis supported by his assessment that Claimant's symptoms did not improve despite his long absence from work. The ALJ also reasonably gave some weight to Dr. Payne's opinion, albeit dated earlier and without the benefit of the treatment notes, because he "came to the same causation conclusions" and supported Dr. Cavazos's opinion. *Id.* at 23. As the ALJ gave rational reasons for her weighing of the record evidence, and as the opinions she credited support her finding that

subjective allegations and using the left knee functional capacity results to assess his right knee abilities." *Id.* The October 7, 2019 FCE was for Claimant's left knee. Because the ALJ gave other permissible reasons for rejecting Dr. Wardell's opinion, and because this argument goes toward restrictions and SAE which we do not reach, we reject Claimant's assertion that the ALJ erred by stating Dr. Wardell may have been confused about which knee he was discussing. Any such error is harmless. In any event, at least one visit note seems to contain some confusion. CX 10 at 44-45 (On April 26, 2018, Dr. Wardell noted a history of left knee problems, examined the right knee and found limited motion, crepitus, pain, and tenderness, and then assessed/diagnosed a left medial meniscal tear and Baker's cyst.).

⁹ The MRI found "advanced medial femorotibial compartment osteoarthritis." CX 7. Dr. Cavazos stated these findings indicated osteoarthritis progressed over a long period of time and became symptomatic in December 2016. EX 5 at 6.

Claimant's right knee condition is not work-related, we reject Claimant's arguments. *Hice v. Director, OWCP*, 48 F. Supp. 2d 501 (D. Md. 1999); *see generally Hough v. Vimas Painting Co., Inc.*, 45 BRBS 9 (2011).

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge