

BRB No. 01-0626

ART VAN VLIET)
)
 Claimant-Petitioner)
)
 v.)
)
 AMERICAN PRESIDENT LINES,)
 LIMITED)
)
 and)
)
 EAGLE MARINE SERVICES,)
 LIMITED)
)
 Employer/Carrier-)
 Respondents)

DATE ISSUED: April 25, 2002

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Second Decision and Order Upon Reconsideration of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Meade P. Brown, Jr., Kirkland, Washington, for claimant.

John P. Hayes and Brent T. Caldwell (Forsberg & Umlauf, P.S.), Seattle, Washington, for employer/carrier.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Second Decision and Order Upon Reconsideration (98-LHC-2543, 2544, and 2545) 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 findings of fact and conclusions of law of the administrative law judge which 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).

Claimant, who worked for employer as a mechanic between 1979 and 1996, injured his left foot and ankle in each of four separate accidents occurring on June 29, 1989, July 14, 1993, December 17, 1993, and June 18, 1994. Following the accident of June 29, 1989, Dr. Robertson

diagnosed a left ankle sprain, prescribed physical therapy, excused claimant from work, and referred him to a podiatrist, Dr. Warnekros. Dr. Warnekros discovered, following a CT scan, that claimant had a subtalar coalition in his left foot.¹ He performed corrective surgery on February 1, 1990, and claimant returned to work full-time on September 17, 1990. After the surgery, Dr. Robertson referred claimant to an orthopedic surgeon, Dr. Crutcher, who stated that x-rays revealed “no abnormalities in the ankle joint,” but some “moderately advanced degenerative changes in the talonavicular joint with some dorsal spurring of the talar head.” Employer’s Exhibit (EX) 7. Employer voluntarily paid temporary total disability benefits from September 16, 1989, to September 16, 1990.

On July 14, 1993, claimant sustained a second work-related injury to his left ankle. Dr. Robertson diagnosed a left ankle sprain, prescribed physical therapy, and referred claimant to a second orthopedist, Dr. Mankey. Dr. Mankey concluded that claimant suffered from degenerative arthritis in the subtalar and talonavicular regions of his left foot arising, most probably, from the subtalar coalition, and predicted that claimant would eventually need an arthrodesis, a procedure where bones are fused together to stabilize a joint. Claimant did not lose any time from work because of this injury.

Claimant sustained a third sprain to his left ankle in the course of his work on December 17, 1993. Dr. Robertson determined that claimant’s condition was stationary on December 23, 1993, and opined that claimant could then return to work. Claimant sought no compensation for this injury. On July 18, 1994, claimant again sustained a work-related sprain of his left ankle. Dr. Robertson administered treatment, including physical therapy, and released claimant to return to work on August 29, 1994. Employer paid temporary total disability benefits from June 18, 1994, until August 29, 1994. Claimant subsequently filed a claim seeking a scheduled award for permanent partial disability due to his alleged ankle and foot impairments arising from his four separate work-related left ankle sprains, including his subtalar coalition, arthritic left foot, and bunions.

¹The subtalar joint, in the middle of the foot near the ankle, enables an ordinary foot to invert. A coalition exists where bone, cartilage or fibrous matter fuses the foot bones and prevents the joint from operating. In claimant’s case, the talus and calcaneus bones appeared to be fused by a congenital bony bridge. The surgical procedure removed this bony bridge and also corrected two bunions.

In his decision, the administrative law judge determined that each of claimant's left ankle sprains was work-related but that the subtalar coalition, arthritic left foot, and bunions were not, in any way, related to claimant's employment and/or his work injuries. He therefore found claimant entitled to a scheduled award of \$15,135.15 for a ten percent permanent impairment of his left foot based on the four work-related left ankle sprains. 33 U.S.C. §908(c)(4). He however also found employer entitled to a credit in the amount of \$29,339.22, for the temporary total disability benefits it paid during claimant's convalescence following surgery for the non-work-related foot condition. As such, the administrative law judge concluded that claimant is not entitled to any additional benefits and thus denied his claim.

Claimant thereafter requested reconsideration. In his decision on reconsideration, the administrative law judge granted claimant's motion as he had received no response from employer. He therefore vacated the credit granted to employer for its voluntary payments of temporary total disability and ordered employer to pay claimant permanent partial disability benefits in the aforementioned amount commencing March 16, 1995, plus interest. In his Second Decision and Order Upon Reconsideration, the administrative law judge accepted employer's response, finding that it would be unfair to deny employer's entitlement to a credit simply because it inadvertently let claimant's reconsideration go by default. He therefore reinstated the credit for benefits paid for the non work-related condition, but determined that employer's credit should be \$18,246.58 rather than \$29,339.22.² Accordingly, he vacated his award of benefits on reconsideration, and reinstated his original decision denying benefits, modifying that decision to reflect the correction in employer's credit.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance.

Claimant asserts that the administrative law judge erred in finding that his subtalar condition was not aggravated by his work-related injuries. Claimant maintains that the administrative law judge failed to consider relevant evidence which establishes that the work-related ankle injuries aggravated claimant's pre-existing condition, *i.e.*, that claimant had to decrease his participation in jogging and soccer and his physical work duties following the work-related ankle sprain sustained in

²The administrative law judge altered the amount of the credit to reflect that claimant was no longer entitled to temporary total disability for his work-related sprain as of the date of his surgery on February 1, 1990. He thus concluded that employer was entitled to a credit for payments of temporary total disability benefits made between February 1, 1990, and September 16, 1990.

June 1989, and that claimant's 1989 and 1994 ankle sprains were accompanied by constant left heel and forefoot pain. In addition, claimant argues that the administrative law judge erred in crediting the testimony of Dr. Brooks over that of his treating physicians, Drs. Robertson and Warnekros.

Where, as in the instant case, it is undisputed that claimant is entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT)(11th Cir. 1990); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996). It is employer's burden on rebuttal to present substantial evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In his decision, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption with regard to his overall foot condition. He then determined, based on Dr. Brooks's testimony and opinion, that claimant's work-related left ankle sprains did not aggravate his foot condition due to his congenital coalition or his bunions. Accordingly, the administrative law judge concluded that employer rebutted the presumption with substantial evidence that claimant's subtalar coalition, arthritic left foot, and bunions were not work-related. In weighing the relevant evidence, the administrative law judge credited the opinion of Dr. Brooks that the work-related ankle sprains did not aggravate claimant's foot condition due to his congenital coalition, arthritis, or bunions, over the contrary opinions of Drs. Robertson and Warnekros.³ Initially, the administrative law

³In contrast to claimant's contention, the administrative law judge specifically considered, in weighing the evidence on causation, that Dr. Brooks regularly provided testimony for insurance companies but he concluded, based on the record, that the doctor's opinion in this case was not a product of pro-defense bias. The administrative law judge also considered the fact that Drs. Robertson and Warnekros were treating physicians in analyzing their opinions. He further relied on Dr. Brooks's assessment that despite claimant's testimony to the contrary, claimant had symptoms of his subtalar coalition long before the 1989 work injury.

judge determined that as the critical issues are orthopedic in nature, greatest weight must be given to opinions of orthopedists, and thus to Dr. Brooks, since he was the only orthopedist of record to offer an opinion on causation.⁴ In support of this finding, the administrative law judge observed that on at least two occasions Dr. Robertson referred claimant to orthopedists, *i.e.*, Drs. Crutcher and Mankey, and that each time he deferred to their greater expertise on orthopedic issues.⁵ Additionally, he determined that Dr. Warnekros's opinion on the critical medical questions is, on its face, entitled to diminished weight simply because he is not a medical doctor. The administrative law judge further found that Dr. Brooks demonstrated a better understanding of claimant's medical history. In this regard, he determined that both Dr. Robertson and Dr. Warnekros were apparently under the impression that claimant had no foot problems prior to the 1989 sprain, an assumption which Dr. Brooks demonstrated, by inferences from prior medical records, was incorrect.⁶

Relevant to causation, claimant challenges only the administrative law judge's determinations with regard to the weight given the opinions of the doctors, specifically asserting that the administrative law judge erred in crediting the opinion of Dr. Brooks. An administrative law judge, however, is entitled to weigh the evidence and evaluate the credibility of all witnesses, including doctors, and may draw his own conclusions from the

⁴Neither Dr. Crutcher nor Dr. Mankey, the other orthopedists of record, provided opinions regarding the work-relatedness of claimant's subtalar coalition and/or bunions.

⁵The administrative law judge also was persuaded by Dr. Brooks's testimony that Dr. Robertson made some obvious errors in reading x-rays. Specifically, Dr. Brooks testified that Dr. Robertson improperly measured the thickness of the cartilage, and therefore erroneously included arthritic degeneration in the foot rating.

⁶The administrative law judge found that the record indicates that claimant sustained other non-work-related injuries to his left ankle in 1983, and then to his left foot and knee in 1987.

evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 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). As the administrative law judge's decision to accord greatest weight to the causation opinion of Dr. Brooks is rational and based on full consideration of the evidence, his conclusion that claimant's subtalar coalition, arthritic left foot, and bunions are unrelated to any of his work injuries, and thus, are non-compensable, is affirmed. *See generally Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT). Accordingly, as the administrative law judge found, claimant is entitled only to a scheduled award of permanent partial disability benefits based on the impairment due to the four work-related left ankle injuries.

Claimant next argues that the administrative law judge's findings of maximum medical improvement, extent of permanent partial impairment, and employer's entitlement to a credit must all be reversed as they are all based on the administrative law judge's erroneous determination that claimant's subtalar coalition was not aggravated by his work-related injuries. Claimant also maintains that Dr. Robertson's nineteen percent impairment rating is most appropriate in determining the amount of the scheduled award of benefits. We reject these arguments, as we have affirmed the administrative law judge's decision to accord greatest weight to the opinion of Dr. Brooks. Thus, his findings that claimant is entitled to a scheduled award based on Dr. Brooks's ten percent permanent partial impairment rating, and that employer is entitled to a credit for amounts of temporary total disability benefits paid while claimant was recuperating from the surgery to correct his subtalar coalition, are affirmed.

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Second Decision and Order Upon Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge