BRB No. 13-0403

PATRICK ZINE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS INCORPORATED- PASCAGOULA OPERATIONS	)	DATE ISSUED: Apr. 9, 2014
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Renee E. Thiry, Mobile, Alabama, for claimant.

Susan F.E. Bruhnke (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2012-LHC-00571) of Administrative Law Judge Lee J. Romero, Jr., 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 injured his left knee on June 28, 2010, during the course of his employment for employer as a welder's helper. Employer voluntarily paid claimant temporary total disability compensation, 33 U.S.C. §908(b), for various periods from June 29 to December 21, 2010, and for a 10 percent permanent impairment of the left lower extremity, 33 U.S.C. §908(c)(2), (19). Claimant sought additional compensation

and medical benefits for a back injury, which he alleged occurred in the June 28, 2010, work accident. Claimant's November 2012 MRI showed disc protrusions and Dr. Shaikh diagnosed lumbar radiculitis and lumbosacral spondylosis in December 2012. CX 34.

In his decision, the administrative law judge found that claimant did not establish a prima facie case that his back condition is related to the June 28, 2010, work accident. Assuming, arguendo, invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), the administrative law judge found that employer established rebuttal thereof. The administrative law judge then concluded, based on the record as a whole, that claimant did not establish that he injured his back in the June 28, 2010, work accident.

On appeal, claimant challenges the denial of the claim for a work-related back injury. Employer responds, urging affirmance.

We need not address claimant's contention that the administrative law judge erred in failing to apply the Section 20(a) presumption to his back injury claim as substantial evidence supports the finding that employer rebutted the Section 20(a) presumption. *See generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). It is employer's burden to rebut the Section 20(a) presumption by presenting substantial evidence that claimant's condition was not caused by his work accident.[1] *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The credibility of the witnesses and contrary evidence are not weighed at this stage; all employer need produce is evidence to throw factual doubt on claimant's prima facie case. *Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012).

The administrative law judge found the Section 20(a) presumption rebutted by the opinions of Drs. Granberry and Petersen, and by claimant's first complaints of back pain many months after the accident. Contrary to claimant's contentions, the opinion of Dr. Granberry that claimant's lower back complaints are not related to the work accident, as supported by the opinion of Dr. Petersen that claimant's lower back discomfort post-dates the workplace accident by a year and is not related to the accident, constitute substantial evidence to rebut the Section 20(a) presumption. *See Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Rochester v. George Washington University*, 30 BRBS 233 (1997). Moreover, the administrative law judge did not err by also relying on the September 23, 2011

[1] Although the administrative law judge found the record contains evidence that claimant had complained of back pain shortly before the work accident, claimant did not assert that the work accident aggravated a pre-existing back condition. *See* Decision and Order at 22; Cl. Brief at 22.

negative lumbar x-ray, notwithstanding the later MRI demonstrating disc protrusions. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). Therefore, we reject claimant's contentions of error, and we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption as it is rational, supported by substantial evidence and in accordance with law. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT).

If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case and the administrative law judge then must weigh all the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *see also 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).[2]

Claimant contends that the administrative law judge failed to mention relevant evidence in his weighing of the evidence. Specifically, claimant asserts that the administrative law judge did not mention that claimant reported a back injury on June 29 and July 1, 2010, and that employer initially authorized treatment for back pain. *See* CXs 2; 21 at 8-10; 32 at 4. Claimant also challenges the administrative law judge's not giving weight to his and his wife's testimony that he initially reported back pain to Dr. Granberry in July 2010 and that, in February 2011, claimant's attorney requested treatment for claimant's back and filed a claim alleging both back and knee injuries occurred as a result of the work accident.

It is well-established that an administrative law judge is entitled to weigh the evidence and to draw his own inferences therefrom; he has the prerogative to credit one witness or medical opinion over that of another and is not bound to accept the opinion or theory of any particular medical examiner. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *see also Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). The administrative law judge properly found there is no medical opinion linking claimant's back pain to the work injury, whereas Drs. Granberry and Petersen opined there is no relationship between claimant's back pain and the work accident. Decision and Order at 25. Contrary to

[2] Contrary to claimant's contention that, pursuant to *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986), the administrative law judge was required to resolve all doubtful question in his favor, the "true doubt rule" was held by the Supreme Court in *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT), to violate the Administrative Procedure Act. In any event, the administrative law judge did not find any "doubtful questions" in this case.

claimant's contention, the administrative law judge noted in his summary of the evidence that claimant initially reported back pain immediately after the work accident. Decision and Order at 4, 20. However, the administrative law judge rationally rejected claimant's testimony that he had experienced back pain since the work injury. The administrative law judge rationally credited the medical records that do not note any complaints between June 28 and December 15, 2010, and Dr. Granberry's records first noting such complaints in February 2011.[3] *Id*. at 25; *see Mendoza*, 46 F.3d at 500-501, 29 BRBS at 80-81(CRT). The administrative law judge also rationally found that the November 2012 MRI, which showed disc protrusions, and Dr. Shaikh's diagnosis in December 2012 of lumbar radiculitis and lumbosacral spondylosis, are entitled to less weight as it pertains to the cause of claimant's back pain, since this evidence was generated over two years after the work accident.[4] *Id*. Therefore, the administrative law judge concluded that claimant failed to establish, based on the record as a whole, that his work accident caused a back injury. As this finding is rational and supported by substantial evidence, it is affirmed. *Ortco Contractors, Inc.*, 332 F.3d 283, 37 BRBS 35(CRT). We, therefore, affirm the denial of the claim for a work-related back injury.

[3] The administrative law judge had already found claimant's credibility "wanting" due to inconsistencies among claimant's trial testimony, deposition testimony and the medical records. Decision and Order at 16-18. The administrative law judge noted testimony of claimant and his wife that claimant initially complained of back pain to Dr. Granberry on July 20, 2010, whereas Dr. Granberry's records do not mention back pain until February 2011. *Id*. at 17. The administrative law judge also discussed claimant's accounts of a motor vehicle accident on May 10, 2010, which are contradicted by the records of the Mobile Infirmary Medical Center (CX 33), and his denials of prior back or knee injuries, which are contradicted by Dr. Rubenstein's medical records. *Id*. at 18. The decision to give less weight to the lay testimony is well within the administrative law judge's discretion. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

[4] Dr. Shaikh did not give an opinion as to the cause of claimant's back condition. CX 34.

According, the administrative law judge's Decision and Order is affirmed.

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