

BRB No. 13-0470

TODD W. LEONARD)
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 v.)
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 HUNTINGTON INGALLS INDUSTRIES,) DATE ISSUED: Apr. 16, 2014
 INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Charlene A. Moring (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2012-LHC-00770) of Administrative Law Judge Alan L. Bergstrom 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).

On November 18, 2011, claimant, who had previously been diagnosed with degenerative disc disease, alleged that he sustained injuries to his neck, back, right arm and right shoulder while working for employer as a test electrician. Claimant alleged that he struck his head on a low-hanging light fixture. Claimant reported his injuries to employer on November 21, 2011, sought and received medical care, returned to work on February 14, 2012, and remained employed until April 23, 2012. Claimant subsequently returned to light-duty work for employer on October 29, 2012. Claimant sought total

disability benefits from November 21, 2011 to February 14, 2012, and from April 23 to October 28, 2012.

In his Decision and Order, the administrative law judge applied Section 20(a), 33 U.S.C. §920(a), to presume that claimant's post-November 18, 2011, back and cervical conditions were related to his work injury, and he found that employer did not rebut the presumption.¹ The administrative law judge found that claimant was unable to perform his usual employment duties with employer as a result of his work-related conditions from November 21, 2011 to February, 2012, and from April 23 to October 28, 2012. Thus, the administrative law judge awarded claimant temporary total disability compensation from November 21, 2011 to February, 2012, and from April 23 to October 28, 2012. 33 U.S.C. §908(b). The administrative law judge also held employer liable for the medical expenses related to claimant's cervical and back conditions. 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's finding that it did not present evidence sufficient to rebut the Section 20(a) presumption. Alternatively, employer contends the administrative law judge erred in awarding disability benefits. Claimant responds, urging the Board to reject employer's contentions of error.

Once, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, employer avers that the administrative law judge erred in concluding that the testimony of Dr. Skidmore is insufficient to rebut the Section 20(a) presumption. We agree. Employer's burden on rebuttal is to produce substantial evidence of the lack of a connection between claimant's employment and the harm.² *Holiday*, 591 F.3d at

¹ The administrative law judge additionally found that claimant did not establish his prima facie case with regard to his right arm and right shoulder conditions. These findings are not challenged on appeal.

² Thus, employer's burden on rebuttal is one of production, not persuasion. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American*

226, 43 BRBS at 69-70(CRT); *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT). In this regard, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has stated that,

[t]he substantial evidence standard of proof requires the employer to put forward as much relevant factual matter as a reasonable mind would need to accept, as one rational conclusion, that the employee's injury did not arise out of his employment. [citation omitted] The standard requires more than a scintilla of evidence, but is not a preponderance standard. *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 386 (4th Cir. 2000).

Holiday, 591 F.3d at 226, 43 BRBS at 69(CRT). In his decision, the administrative law judge found Dr. Skidmore's opinion, that the work accident described by claimant was not serious enough to bear a casual relationship to claimant's current medical condition or to aggravate claimant's prior conditions, to be probative from a neurological standpoint. Decision and Order at 20. He found, however, that this opinion had less probative value as it relates to the etiology of claimant's symptoms since Dr. Skidmore did not "persuasively explain why he felt that Claimant's work activity could not have aggravated his neck and back radiculopathies and his preexisting degenerative disc disease." *Id.* at 20-21. Additionally, the administrative law judge found that Dr. Skidmore's diagnosis of claimant's conditions, given as a neurosurgeon, was insufficient to rebut Dr. Lannik's diagnosis that claimant sustained cervical and lumbar strains. *Id.* at 21. The administrative law judge also found that Dr. Skidmore, rather than considering the totality of claimant's employment, appears to have focused narrowly on claimant's having struck his head at work. *Id.* The administrative law judge therefore concluded that employer did not produce substantial evidence to rebut the Section 20(a) presumption.

As employer correctly asserts on appeal, a review of Dr. Skidmore's testimony reveals that he stated that claimant's work injury did not cause his present conditions or aggravate his pre-existing ones. Specifically, following his May 24, 2012, evaluation of claimant, Dr. Skidmore opined that there is no relationship between any condition claimant currently had and his November 18, 2011, work incident. *See* EX 1. On deposition, Dr. Skidmore testified that:

Grain Trimmers, Inc. v. Director, OWCP, 181 F.3d 180, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1988).

Q: . . .[Following your evaluation of claimant] did you have an opinion about whether [claimant] had any type of neck injury from this incident November 18, 2011?

Dr. Skidmore: Well, I knew he didn't have a neck injury. I had the benefit at this time of an MRI that was obtained in November of 2011 that showed no acute pattern at all.

EX 2 at 14. Dr. Skidmore further deposed that:

Q: Do you believe that [claimant's work] accident aggravated [his] condition, the cervical, lumbar radiculopathy?

Dr. Skidmore: I do not, because of the medical records following that incident and not having neck pain other than the days after. . . I do not think that it aggravated anything.

EX 2 at 18; *see* Decision and Order at 14-15, 20-21.

In finding that employer did not produce substantial evidence to rebut the Section 20(a) presumption, the administrative law judge determined that Dr. Skidmore had not "persuasively" explained his opinion and that this physician appeared not to have considered whether claimant's medical conditions were related to claimant's work activity as a whole. *See* Decision and Order at 20-21. The administrative law judge's reference to the totality of claimant's work activity is misplaced, because, as the administrative law judge acknowledged, claimant alleged only that his neck and back conditions arose from a specific work incident wherein he hit his head on a light fixture. *See* Decision and Order at 3. The administrative law judge's recitation of the claim asserted is supported by evidence of the record; specifically, 1) claimant's LS-203 Claim for Compensation Form states, *inter alia*, that claimant "jammed his neck on a previously hung light . . . [which] caused his back to pop," EX 10; and 2) claimant's post-hearing brief argued that claimant, through his testimony, "proved . . . that working conditions existed (hitting his head on the light fixture) which could have caused the harm claimed." Cl. post-hearing brief at 17; *see* Tr. at 11-12 (claimant describes the November 18, 2011, work incident as hitting his head on a low overhead light). Additionally, the administrative law judge erred in placing the burden of persuasion on employer at this point in the analysis, as employer need only produce substantial evidence to the contrary in order to rebut the Section 20(a) presumption. *Holiday*, 591 F.3d at 226, 43 BRBS at 69(CRT). Thus, as the administrative law judge acknowledged Dr. Skidmore's opinion that claimant's November 18, 2011, work incident was not a causative or aggravating factor in his neck and back conditions, we hold that employer produced substantial evidence of the lack of a causal relationship between the work incident and claimant's

injuries. *Holiday*, 591 F.3d at 226, 43 BRBS at 69-70(CRT). Accordingly, we reverse the administrative law judge's finding that employer did not rebut the Section 20(a) presumption. We remand the case for the administrative law judge to weigh all of the relevant evidence and to resolve the causation issue based on the record as a whole. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

For the sake of judicial efficiency, we will address employer's contention that, assuming the compensability of claimant's neck and back conditions, the administrative law judge erred in awarding claimant temporary total disability benefits for the period of April 23 through October 28, 2012. In order to establish a prima facie case of total disability, claimant must establish that he is unable to perform his usual work due to the work injury. *Marine Repair Services, Inc. v. Fifer*, 717 F.3d 327, 47 BRBS 25(CRT) (4th Cir. 2013).

In addressing this issue, the administrative law judge found that claimant, as a result of a combination of his work-related neck and low back conditions and his pre-existing medical conditions, was totally disabled from returning to his usual employment duties with employer from April 23 to October 28, 2012.³ *See* Decision and Order at 21-22. In this regard, the administrative law judge relied on the testimony of Dr. Lannik, who removed claimant from work on April 23, 2012, due in part to his complaints of back pain.⁴ *Id.* at 22; CX 1 at 3. The administrative law judge additionally found that Dr. Lannik, in a June 14, 2012, Release to Work Certification form, stated that while claimant was excused from work through June 28, 2012, the date of claimant's ability to return to work was undetermined. Decision and Order at 22; CX 2 at 13. Based on Dr. Lannik's medical reports, employer's failure to establish the availability of suitable alternate employment, and the parties' stipulation that claimant returned to work on October 29, 2012, the administrative law judge awarded claimant temporary total disability during the period of April 23 through October 28, 2012.

³ It is undisputed that claimant returned to his usual job with employer as an electrician, in a light-duty capacity, on October 29, 2012. Moreover, employer does not challenge the administrative law judge's award of temporary total disability benefits during the period of November 21, 2011 to February 13, 2012. *See* Emp. br. at 16-17.

⁴ Dr. Lannik, a Board-certified orthopedic surgeon, first examined claimant on November 29, 2012, at which time claimant reported experiencing back and neck pain after striking his head on an overhead light. CXs 1 at 1; 2 at 1-3. Dr. Lannik subsequently treated claimant on several occasions and released claimant to return to work with restrictions on February 14, 2012. CXs 1 at 1-3; 2 at 4-5.

We affirm the administrative law judge's finding that claimant established his inability to perform his usual employment duties during the period of April 23 to October 28, 2012. In adjudicating a claim, it is well-established that the administrative law judge is entitled to weigh the evidence and may draw his own inferences therefrom. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). It is impermissible for the Board to substitute its own views for those of the administrative law judge. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003). In this case, the administrative law judge rationally found that the reports of Dr. Lannik support the conclusion that claimant was incapable of returning to his usual work until October 29, 2012. As this finding is thus supported by substantial evidence, it is affirmed. *See generally Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). Consequently, if the administrative law judge finds on remand that claimant's back and neck conditions are related to the work accident, the administrative law judge's award of temporary total disability benefits for the period of April 23 through October 28, 2012, is affirmed.

Accordingly, the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption is reversed. The case is remanded for further findings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge