BRB No. 98-0979

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| JOE B. CHERRY | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| I.T.O. CORPORATION | ) | DATE ISSUED: April 7, 1999 |
| | ) | |
| Self-Insured | ) | |
| Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order of Fletcher E. Cambell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Bradford C. Jacob (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2253) of Administrative Law Judge Fletcher E. Campbell, 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 findings of fact and conclusions of law of the administrative law judge if they 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 sustained injuries to his left hip and thigh, right shoulder, neck and back during the course of his employment with employer on February 12, 1979. Pursuant to an agreement between the parties, an order was entered whereby claimant was awarded permanent partial disability compensation from May 25, 1981, to May 31, 1990, and

permanent total disability thereafter. *See* 33 U.S.C. §908(c)(21), (a). Additionally, employer was awarded relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Claimant's treating physician subsequently diagnosed claimant as having a chronic degenerative back condition, specifically described as lumbar spinal canal stenosis, and recommended that claimant undergo surgery for that condition. Employer denied liability for claimant's surgery, contending that claimant's condition was not causally related to his February 12, 1979, work injury.

In his Decision and Order, the administrative law judge, after initially finding that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption of causation, found that employer produced substantial evidence to rebut the presumption. Next, after considering the totality of the evidence, the administrative law judge concluded that claimant's present back condition, which requires surgery, was not causally related to his February 12, 1979, work injury. Accordingly, the administrative law judge denied claimant benefits under the Act.

On appeal, claimant challenges the denial of benefits. Employer responds, urging affirmance.

In the instant case, the administrative law judge properly invoked the Section 20(a) presumption as he found that claimant suffered a harm and that an accident occurred which could have caused that harm. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Upon invocation of the presumption, the burden shifts to employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment, and therefore, to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). The opinion of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985)*; Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994).

In finding that employer rebutted the presumption, the administrative law judge relied upon the opinion of Dr. Magness, who wrote three letters regarding the cause of claimant's back condition. In the first two, dated January 13, and February 15, 1995, Dr. Magness stated that claimant's degenerative spinal canal stenosis, for which he recommended that claimant undergo a laminectomy, was not related to his February 12, 1979, work injury. *See*

EXS 21, 23. Following the second letter, which used the phrase "not specifically related," claimant's counsel wrote to Dr. Magness discussing contribution, and Dr. Magness responded that the February 1979 injury "might be considered a small contributing factor to his overall problems with back and leg pain." EX 28. The administrative law judge found rebuttal based on the first two statements of Dr. Magness. As this evidence is sufficient to sever the causal link between claimant's February 12, 1979, work accident and his present back condition, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See generally Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Claimant also challenges the administrative law judge's finding that causation was not established based on the record as a whole; specifically, claimant assigns error to the administrative law judge's decision not to rely upon the last testimony letter written by Dr. Magness as well as the testimony of Drs. Mason and Rish. After considering all of the medical evidence of record, the administrative law judge found that Dr. Magness's initial statements that claimant's progressive degenerative spinal canal stenosis is unrelated to his work accident were entitled to greater weight than his last letter. He also found the opinions of Drs. Mason and Rish were insufficient to meet claimant's burden because they examined him in 1979-1980. Accordingly, the administrative law judge found claimant did not meet his burden of showing his current condition is related to his work injury.

In this case, the administrative law judge fully evaluated the relevant evidence, and his findings regarding the medical opinions are supported by the record. Dr. Magness's first two letters do not support a causal relationship, and the third letter, stating the injury might be "a small contributing factor," was properly found insufficient to establish a causal nexus. As the administrative law judge also properly discounted the opinions based on examinations in 1979-1980, his determination that claimant failed to meet his burden in this case is affirmed. *Greenwich Collieries*, 512 U.S. at 267, 28 BRBS at 43 (CRT). We therefore affirm the administrative law judge's determination, based on the record as a whole, that claimant's present back condition, for which surgery is recommended, is not causally related to his February 12, 1979, work accident. *See, e.g., Rochester v. George Washington University*, 30 BRBS 233 (1997). As, claimant's entitlement to medical treatment is contingent upon a finding of a causal relationship between the condition necesitating treatment and his employment, employer is not liable for the surgical procedure at issue here.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge