BRB No. 98-1091

EDWARD M. ARMSTRONG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVENS SHIPPING AND TERMINAL COMPANY	)	DATE ISSUED: April 28, 1999
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denial of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

L. Jack Gibney, Jacksonville, Florida, for claimant.

Mark K. Eckels (Boyd & Jenerette, P.A.), Jacksonville, Florida, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Claim (94-LHC-1689) of Administrative Law Judge Edward Terhune Miller 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).

On November 6, 1985, claimant sustained a work-related injury to his right knee which resulted in arthroscopic surgery in January 1986. Claimant subsequently returned to work and, on March 10, 1992, while working as an automobile driver, sustained an injury to his right shoulder. Claimant underwent shoulder surgery in December 1992. Thereafter, claimant complained of knee problems and, in June 1993, he underwent a second surgical procedure on his right knee. Employer voluntarily paid claimant temporary total disability

compensation for various periods until June 28, 1993, the date on which Dr. Dolan released claimant to return to work. 33 U.S.C. §908(b). Claimant then filed a claim under the Act seeking permanent total disability compensation or, alternatively, permanent partial disability compensation, subsequent to June 28, 1993.

In his Decision and Order, the administrative law judge initially determined that claimant's March 1992 work incident neither injured nor aggravated his right knee, and that claimant's present knee condition is related to his prior November 1985 work-injury. Next, the administrative law judge found that claimant was capable of returning to his usual employment duties as of June 28, 1993, and that claimant had failed to demonstrate a post-injury loss in wage-earning capacity. Accordingly, the administrative law judge denied claimant's request for ongoing disability benefits.

On appeal, claimant challenges the administrative law judge's denial of his claim for compensation. Employer responds, urging affirmance.

We will first address claimant's contention that the administrative law judge erred in failing to link claimant's present knee condition to his March 10, 1992, work incident. Specifically, claimant asserts that employer failed to establish rebuttal of the Section 20(a) presumption linking claimant's present knee condition to the injury at issue in the instant case. Initially, we note that the administrative law judge did not consider whether claimant was entitled to invocation of the presumption when addressing this issue. In order to be entitled to the Section 20(a), 33 U.S.C. §920(a), presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition is not caused or aggravated by his 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). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment; the unequivocal testimony of a physician that no relationship exists between the injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If employer establishes rebuttal of the presumption, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, the parties stipulated that an accident occurred on March 10, 1992, and medical evidence of record establishes the existence of a harm, *i.e.*, knee complaints which resulted in surgery. Claimant, thus, has established his *prima facie* case and is entitled to invocation of the Section 20(a) presumption. Although the administrative law judge did not apply the presumption in addressing this issue, he considered all of the evidence in addressing the question of whether claimant's present knee problems are related to his March 10, 1992, work-incident. If the evidence the administrative law judge relied upon to find that causation was not established is sufficient to rebut the presumption, his failure to apply the presumption is harmless. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). If, however, that evidence is insufficient to rebut the presumption, and there is no other evidence in the record sufficient to establish rebuttal, then causation is established as a matter of law. *Id.; Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981).

The administrative law judge based his finding that claimant's March 10, 1992, work-incident did not injure or aggravate his right knee upon the credited testimony of Drs. Muenz, Chapa, Dolan, and Ripley. Neither the reports of Drs. Muenz and Chapa, who examined claimant immediately following his March 1992 work-injury, nor the reports of Dr. Dolan, who first treated claimant in October 1992, reveal a history of recent knee trauma. *See* RXS 4, 5. Thereafter, in April 1993, claimant sought treatment with Dr. Ripley, the physician who performed his prior knee surgery. Dr. Ripley, who ultimately diagnosed claimant's condition as chondromalacia and a meniscal tear, stated that while trauma could have caused these conditions, it was her opinion that claimant's present knee problems were the natural degenerative findings resulting from claimant's prior 1985 knee injury and related surgery. *See* RX 8 at 10, 16, 22, 25-26, 29. In support of this opinion, Dr. Ripley noted that x-rays taken in April 1993 revealed bone spurs and a loss of cartilage, both of which would be the natural progression of claimant's condition resulting from his 1985 injury and surgery. *See id.* at 9. Thereafter, in addressing the meniscal tear in claimant's knee, Dr. Ripley opined that this condition was a degenerative type tear and was not the result of trauma since, had trauma occurred to claimant's knee, she would have expected symptoms to arise within months of the trauma. *See id*. at 10, 17-18. As the credited testimony of Dr. Ripley is sufficient to sever the causal link between claimant's March 10, 1992, work accident and his present knee condition, *see generally Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988), we hold that the administrative law judge's failure to invoke the Section 20(a) presumption is harmless. *See Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988). Moreover, as the evidence credited by the administrative law judge affirmatively establishes the absence of a causal connection between claimant's present knee condition and his March 10, 1992, work accident, and as claimant has cited to no evidence supportive of his position that such a relationship exists, we affirm the administrative law judge's determination, based upon the record as a whole, that claimant's present knee condition is not causally related to his March 10, 1992, work accident. *See generally Rochester v. George Washington University*, 30 BRBS 233 (1997); *see also Greenwich Collieries*, 512 U.S. at

267, 28 BRBS at 43 (CRT).

Claimant next challenges the administrative law judge's denial of his claim for continuing total disability benefits; specifically, claimant asserts that, contrary to the administrative law judge's determination, he was incapable of returning to work until March 22, 1994, at the earliest. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

In finding that claimant was capable of returning to his usual employment duties as an automobile driver as of June 28, 1993, the administrative law judge relied upon the medical opinion of Dr. Dolan, claimant's treating orthopedic surgeon. In his opinion following claimant's shoulder surgery, Dr. Dolan placed various restrictions on claimant and opined that claimant was capable of returning to work as of June 28, 1993.[1] *See* RX 5. Subsequently, on March 22, 1994, Dr. Dolan reviewed several specific job descriptions and opined that claimant was capable of performing the duties of a van or automobile driver. Based upon this testimony, which he found to be supported by the opinion of Dr. Sury, the administrative law judge found that claimant's shoulder injury did not prevent him from returning to his usual employment as a driver as of June 28, 1993.

We reject claimant's contention that the administrative law judge erred in his evaluation of the evidence on this issue. It is well-established that an administrative law judge is entitled to evaluate the testimony of all witnesses and draw his own inferences from the evidence. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge's decision to rely upon the testimony of Dr. Dolan is rational and within his authority as factfinder; accordingly, as this credited opinion constitutes substantial evidence in support of the administrative law judge's ultimate finding that claimant was capable of returning to his usual employment duties as of June 28, 1993, we affirm the administrative law judge's determination that claimant was not totally disabled subsequent to that date.[2]

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[1]Dr. Dolan specifically restricted claimant from work above chest level, from work involving outstretched arms, from working behind his back, and from lifting or pushing greater than 50 pounds.

[2]Contrary to claimant's contention, the burden of proof does not shift to employer to establish the availability of suitable alternate employment until claimant establishes an inability to return to his usual employment duties due to a work-related injury. *See New*

Orleans (Gulfwide) Stevedores, Inc. v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986).

Lastly, claimant contends that the administrative law judge erred in failing to enter an award for continuing permanent partial disability benefits pursuant to his alleged post-injury loss in wage-earning capacity; specifically, claimant asserts that, as employer has not established that he could earn his pre-injury wages, claimant is entitled to continuing disability benefits. We disagree. Initially, we note that, contrary to claimant's assertion, it is claimant's burden to establish the nature and extent of his disability. *See Anderson,* 22 BRBS at 20. In addressing the issue of claimant's post-injury wage-earning capacity, the administrative law judge implicitly acknowledged claimant's failure to meet his burden on this issue when he found that claimant submitted no evidence into the record regarding his assertion that his post-injury hours would be different than his pre-injury hours, that he worked in any position other than that of a driver, or that the number of hours worked by drivers had been reduced subsequent to claimant's injury.[3] The administrative law judge therefore concluded that claimant did not sustain a loss in wage-earning capacity since he could return to his usual employment duties as a driver.[4] We conclude, based upon our review of the record, that the administrative law judge's finding that claimant sustained no loss of wage-earning capacity as a result of his March 10, 1992, work accident is rational and supported by the record, and that claimant has failed to establish any reversible error by the administrative law judge in reaching this determination. We therefore affirm that finding by the administrative law judge, *see Sears v. Newport News Shipbuilding & Dry Dock Co.,* 19 BRBS 235 (1987), and his consequent denial of additional disability benefits beyond June 28, 1993.

[3]We note that claimant in fact submitted no documentary evidence into the record in support of his claim for compensation under the Act. *See* Tr. at 18.

[4]In this regard, the administrative law judge noted that claimant could either return to work as an automobile driver, the specific position in which he was employed pre-injury, or as a van driver, a comparable position which paid equivalent wages.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge