BRB No. 99-1172

FERMIN TORRES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BRADFORD MARINE, INCORPORATED	)	DATE ISSUED: 08/16/2000
	)	
	)	
and	)	
	)	
ZENITH INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of James Guill, Associate Chief Administrative Law Judge, United States Department of Labor.

Laurence F. Valle (Valle & Craig, P.A.) and Patrice A. Talisman (Hersch & Talisman, P.A.), Miami, Florida, for claimant.

Robert L. Bamdas (Kelley, Kronenberg, Kelley, Gilmartin, Fichtel & Wander, P.A.), West Palm Beach, Florida, for employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (98-LHC-270) of Associate Chief Administrative Law Judge James Guill 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, a laborer for employer's lift department, injured his low back lifting a heavy

object at work on February 3, 1994. Claimant returned to light duty work on August 18, 1994, and alleged that he sustained an aggravation of his work-related back injury while operating a forklift on that day. Claimant was involved in an automobile accident on November 21, 1994, while allegedly on his way to seek medical treatment from Dr. Prieto for his work-related back injury. Claimant was terminated from employment by employer on December 7, 1994, when he failed to return to work after being released to do so by Dr. Coll. Employer voluntarily paid claimant temporary total disability benefits from March 5, 1994, through September 27, 1994, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Claimant sought permanent total disability benefits commencing October 3, 1994.

After finding that the parties agreed that the February 3, 1994 injury was work-related, the administrative law judge found that employer established rebuttal pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a), with respect to the alleged aggravation on August 18, 1994. Upon weighing the evidence, the administrative law judge found that claimant did not sustain a work-related aggravation of his back injury in August 1994. The administrative law judge further found that the automobile accident of November 21, 1994 was an intervening cause which relieved employer of further liability for benefits. The administrative law judge thus awarded claimant temporary total disability benefits from February 3, 1994, through October 3, 1994, based on the opinion of Dr. Coll.

On appeal, claimant challenges the administrative law judge's decision to credit the opinions of Drs. Coll, Kernish, and Yates, over the remaining medical opinions of record and his consequent conclusion that claimant is not entitled to benefits after October 3, 1994. Claimant also challenges the administrative law judge's finding that his November 1994 automobile accident is an intervening cause of his disability thus relieving employer of further liability. In support of the administrative law judge's decision, employer responds to both claimant's petition for review and his reply brief.[1]

Claimant initially contends that the administrative law judge erred in crediting the opinions of Drs. Coll, Kernish, and Yates, over the opinions of Drs. Burak, Belaga, Bennett, Zaslow, and Feijoo to find that claimant did not suffer an aggravation in August 1994 of his initial work injury in February 1994. Once, as here, claimant invokes the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial countervailing evidence that claimant's condition was neither caused nor aggravated by his employment.

[1]Claimant's reply brief and employer's response to it are accepted as part of the record. 20 C.F.R. §§802.213, 802.215, 802.217.

See Brown v. Jacksonville Shipyards, Inc., 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if the injury caused or aggravated claimant's back condition, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997)*; see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, the administrative law judge found that claimant did not establish that he suffered an aggravation of his back injury at work in August 1994. Contrary to claimant's contentions, the administrative law judge acted within his discretion in crediting the opinions of Drs. Coll, Kernish, and Yates over the remaining medical opinions of record in rendering this finding.[2] *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); Decision and Order at 18; Emp. Exs. 2, 6, 15 at 28, 49-50, 19 at 6-10, 21; Cl. Ex. 6. The administrative law judge credited Dr. Coll's opinion that claimant could return to work without restrictions and that his condition had reached permanency on October 3, 1994, as Dr. Coll was claimant's treating physician. Dr. Coll found no objective basis for claimant's complaints of pain.[3] Moreover, the administrative law judge found that Dr. Coll's opinion was supported by that of Dr. Kernish, who did not see lumbar disk herniations on claimant's 1994 magnetic resonance imagings (MRIs), contrary to the opinions of Drs. Burak and Belaga. Furthermore, the administrative law judge credited Dr. Yates's opinion that no aggravation occurred in August 1994 since Dr. Yates was the only physician to examine claimant after his February 1994 work injury and November 1994 automobile accident. Dr. Zaslow's opinion that in August 1994 claimant aggravated his pre-existing condition was based on claimant's statement to Dr. Zaslow that he did not injure his back in the November 1994 automobile accident. However, claimant's statements to Dr. Zaslow were contradicted by his statements to the hospital, and the administrative law judge rationally found that Dr. Feijoo vacillated between stating that the work injuries or claimant's November 1994 automobile accident caused his lumbar disk herniations. The administrative law judge also found the qualifications of Drs. Coll, Kernish, and Yates superior to those of Drs. Burak,

[2]Claimant does not challenge the administrative law judge's finding that the opinions of Drs. Coll, Kernish, and Goldberg establish rebuttal pursuant to Section 20(a) with regard to the alleged August 1994 aggravation, and thus this finding is affirmed. The administrative law judge did not address whether the alleged August 1994 work injury was a natural progression of claimant's February 1994 work injury; claimant asserted only that the alleged August 1994 injury was an aggravation of the earlier February 1994 work injury.

[3]Thus, even if claimant did sustain an aggravation in August 1994, the administrative law judge rationally found that claimant could return to work without restrictions on October 3, 1994, based on Dr. Coll's opinion. *See* discussion, *infra*.

Bennett, and Zaslow.[4] As the administrative law judge's weighing of the evidence is rational, and as his findings are supported by substantial evidence, we affirm the administrative law judge's finding that claimant did not suffer an aggravation at work in August 1994. *See generally Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999).

Claimant also contends that the administrative law judge erred in finding that his November 21, 1994, automobile accident was an intervening cause relieving employer of liability after that date. Claimant asserts that employer is responsible for all injuries arising out of the November 1994 automobile accident as he was on his way to seek medical treatment with Dr. Prieto for his work injuries after dropping off his children at school. An intervening cause is a subsequent, non work-related event which is not caused by claimant's work injury. *See Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). If employer establishes that claimant's disability is due to an intervening cause, it is relieved of that portion of the disability attributable to that event. *See Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff'g on recon. en banc*, 31 BRBS 13. Contrary to claimant's contention, the administrative law judge properly placed the burden on employer to establish that the 1994 automobile accident was in fact an intervening cause. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Plappert*, 31 BRBS at 109; *Bass*, 28 BRBS at 15; Decision and Order at 18-20; Tr. at 68-71; Cl. Exs. 3 at 36-37; 4 at 49; Emp. Ex. 13 at 49.

[4]Dr. Burak is a chiropractor and Drs. Bennett and Zaslow are osteopaths. The administrative law judge misidentified the Board-certification of Dr. Coll as a neurologist when in fact he was a Board-certified orthopedic surgeon, and the administrative law judge failed to note the Board-certification in neurology of both Drs. Belaga and Goldberg. These errors however, are harmless, as the administrative law judge rationally found the credited doctors have superior credentials.

The administrative law judge first rejected claimant's testimony that because of back pain, he intended to see Dr. Prieto that day, subsequent to dropping off his children at school.[5] Although claimant testified that he spoke to the carrier's claims representative, Ms. Bock, and employer's office manager and his former boss, Ms. Estes and Mr. Thompson, respectively, about still needing medical care, both Ms. Estes and employer's general manager, Mr. Engle, testified that they did not hear from claimant after he was released to return to work on October 3. The administrative law judge further noted that no medical records of Dr. Prieto were submitted as a part of the record despite claimant's testimony that he treated claimant for back pain, and the judge rationally drew an adverse inference from this fact. *See Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989). These findings support the administrative law judge's conclusion that the car accident did not occur as a result of treatment for the work-related injury. *See generally Mattera v. M/V Antionette, Pacific King, Inc.*, 20 BRBS 43 (1987).

Moreover, the administrative law judge's finding that claimant's present lumbar condition is the result of the intervening November 21, 1994, automobile accident is supported by the fact that claimant's two lumbar disk herniations were not diagnosed on MRIs until after the November 1994 automobile accident, as well as by the opinions of Drs.

[5]Thus, error, if any, in the administrative law judge's failure to allow claimant to explain that taking his children to school did not involve a deviation from the route to the doctor's office is harmless as the administrative law judge did not believe claimant's testimony that he was on the way to see Dr. Prieto. *See* Cl. Br. at 16-17; Tr. at 127-128. Moreover, employer correctly asserts that claimant was able to testify on cross-examination that dropping off his children at school did not involve a deviation from the route to the doctor's office. *See* Emp. Br. at 17-19; Tr. at 98-99.

Yates, Feijoo and Goldberg.[6] Decision and Order at 20; Cl. Ex. 20; Emp. Exs. 2, 15. Furthermore, Dr. Coll had released claimant to work without restrictions prior to the occurrence of the automobile accident. Thus, we affirm the administrative law judge's finding that the November 1994 automobile accident is an intervening cause relieving employer of liability after that date as it is rational, supported by substantial evidence, and in accordance with law. *See generally Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993).

Claimant further contends that the administrative law judge erred in crediting the opinion of Dr. Coll in denying disability benefits after October 3, 1994. Claimant bears the burden of establishing the nature and extent of his disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In arriving at a decision regarding the nature and extent of claimant's disability, the administrative law judge is entitled to weigh the evidence and to draw his own inferences from it. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge found that the opinion of Dr. Coll, claimant's treating physician, that claimant had reached maximum medical improvement and could return to his usual work without restrictions on October 3, 1994, outweighed the remaining evidence of record as it was the best reasoned medical opinion. Decision and Order at 20-21; Emp. Ex. 6; Cl. Ex. 6. As the administrative law judge acted within his discretion in evaluating and weighing the evidence and provided rational explanations for his conclusions, we affirm his denial of temporary total disability benefits after October 3, 1994. *See generally Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

[6]Dr. Yates testified that claimant's operation of a forklift did not aggravate his pre-existing injury and that the automobile accident of November 1994 was more likely the cause of claimant's herniated disk than the mechanism of injury of operating the forklift. Emp. Ex. 15. Dr. Feijoo testified that the herniated disk could have resulted from the automobile accident. Cl. Ex. 20. Dr. Goldberg stated that operating a forklift would not be expected to cause a disk herniation, but that an automobile accident could cause such an injury. Emp. Ex. 14 at 21-24.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge