BRB No. 02-0779

RAYMOND VELES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COOPER T. SMITH, INCORPORATED	)	DATE ISSUED: 08/07/2003
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION AND AMERICAN EQUITY UNDERWRITERS	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

Thomas J. Smith and Maurice E. Bostick (Galloway, Johnson, Tompkins, Burr & Smith), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2001-LHC-810) 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 was working for employer as a walking foreman when he was injured on November 26, 1999. Claimant asserted he fell on his left knee and then was hit on the

same knee by a cheater pipe when it broke loose. Dr. Moers, claimant's family physician, found bruising on the knee and recommended physical therapy and medication. Due to continued pain, however, claimant underwent an MRI in January 2000. Dr. Bryan, claimant's treating orthopedist, interpreted the results as indicative of a torn meniscus. Dr. Butler, an independent medical examiner selected by the Department of Labor, disagreed and believed the pain was due to an aggravation of pre-existing chondromalacia in the knee. Dr. Bryan performed arthroscopy in November 2000 and verified Dr. Butler's opinion. Claimant also asserted he developed back pain as a result of the knee injury; claimant had back surgery in February 2002. Employer paid claimant a period of temporary total disability benefits. Claimant filed a claim for additional benefits for both the knee and back injuries.

The administrative law judge found that claimant's testimony was straightforward and generally unequivocal and credible. Decision and Order at 26-28. He found that claimant's knee and back conditions and the resultant surgeries were related to claimant's employment, and that claimant's knee condition became permanent on November 12, 2001. The administrative law judge found that claimant is permanently totally disabled due to his knee injury, and temporarily totally disabled due to his back injury. The administrative law judge awarded claimant permanent total disability and medical benefits. *Id.* at 27-28, 31-35, 37-43. Employer appeals the administrative law judge's decision; claimant has not responded to this appeal.

Employer first contends the administrative law judge erred in finding that claimant's knee and back conditions are work-related. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which is invoked after claimant establishes that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain or aggravated a pre-existing condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *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). Employer is liable for the work-related aggravation of a pre-existing condition. *See, e.g., Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT).

In this case, the administrative law judge determined that claimant established a harm to his left knee and that there was an accident that could have caused this injury, thereby invoking the Section 20(a) presumption.[1] Decision and Order at 30. The administrative law judge also found that employer rebutted the presumption. *Id.* at 31. On the record as a whole, he found in favor of claimant. Specifically, the administrative law judge credited the opinion Dr. Butler, who stated that claimant's work injury aggravated claimant's pre-existing chondromalacia, Cl. Ex. 5, over the opinion of Dr. Pennington, who opined that the work-related injury to claimant's knee had been merely a bruise and had healed long ago. Emp. Ex. 5. In crediting Dr. Butler's opinion, the administrative law judge relied on his status as an independent physician chosen by the Department of Labor, whereas Dr. Pennington is an examining physician chosen by employer. Moreover, the administrative law judge noted that Dr. Fulford, another of employer's examining physicians, agreed with Dr. Butler that the fall at work aggravated claimant's chondromalacia. Emp. Ex. 13. The administrative law judge is entitled to determine the weight to be accorded to the physicians' opinions, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and the Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). As the administrative law judge finding that that claimant's knee condition is work-related is rational and supported by supported by substantial evidence, it is affirmed. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Meehan Seaway Service, Inc. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

Next, employer contends the administrative law judge erred in finding that claimant's back injury and resultant surgery are work-related. The administrative law judge invoked the Section 20(a) presumption, found it unrebutted, but nonetheless

[1]We decline to disturb the administrative law judge's findings that claimant fell on his knee and was hit by a cheater pipe and that claimant is a credible witness. The administrative law judge is authorized to make credibility determinations, *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), and his conclusions here are not patently unreasonable or inherently incredible. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge rationally found that claimant's inaccuracies regarding the accident were not "intentionally deceitful," and he stated he was not "persuaded by [employer's] attempt to scrutinize the record for trivial instances of Claimant's inconsistencies, none of which undermine the cogent and probative medical opinions of record…." Decision and Order at 27-28.

proceeded to weigh the evidence as a whole. Employer contends that the administrative law judge erred in crediting the opinion of Dr. Gertzbein over that of Dr. Fulford. We reject this contention. Although Dr. Fulford opined that limping does not cause back pain, he nonetheless deferred to claimant's treating physician, Dr. Gertzbein, as to the cause and severity of claimant's back injury. Emp. Ex. 13 at 25, 28, 73. Dr. Gertzbein concluded that the limp caused by claimant's knee injury aggravated claimant's pre-existing back condition, necessitating additional surgery.[2] Cl. Ex. 21. Moreover, Dr. Gertzbein stated that the lack of immediate back pain following the knee injury is consistent with his experience with these types of complaints. *Id.* at 18-20. Given Dr. Fulford's concession, the administrative law judge credited Dr. Gertzbein's opinion on the basis of his being claimant's treating physician as he examined claimant on multiple occasions and continued to treat claimant at the time of the hearing. This is a rational basis for crediting a physician's opinion. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999); *see also Black & Decker Disability Plan v. Nord*, 123 S.Ct. 1965 (2003) (under ERISA, "automatic" deference is not due opinion of treating physician). Thus, as the administrative law judge's finding that claimant's back condition is work-related is supported by substantial evidence, it is affirmed.[3]

Employer next challenges the administrative law judge's determination that claimant's knee condition reached maximum medical improvement on November 12, 2001. Contrary to employer's contention, the nature of claimant's disability has been at issue throughout the proceedings and the administrative law judge therefore did not err in determining whether claimant's knee condition is permanent.[4] *See* Cl. Ex. 1; Jt. Ex. 1; Tr. at 15. Moreover, the facts that claimant's treating physicians have not given claimant an impairment rating and that claimant continues to undergo treatment to manage his pain do not preclude a finding that claimant's condition is permanent. A condition is permanent if it has continued for a lengthy period, as opposed to one that merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Dr. Bryan performed claimant's knee surgery in November 2000, and he stated on July 11, 2001, that there was nothing further he could do for claimant's knee. Cl. Ex. 9. Claimant was referred for pain management. Cl. Ex.

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[2]Claimant had back surgery in the early 1980s.

[3]As the administrative law judge's weighing of the evidence is rational, we need not address employer's contentions of error with regard to the administrative law judge's finding that employer did not rebut the Section 20(a) presumption. *See Price v. Stevedoring Services of America*, 36 BRBS 546 (2002).

[4]Thus, employer was aware that the nature of claimant's disability was at issue, notwithstanding that claimant made inconsistent arguments in this regard. *Compare* Tr. at 27 with Claimant's post-hearing brief at 37-38.

20. Nonetheless, Dr. Cavillo noted on November 12, 2001 that claimant's left leg was "hurting severely." Cl. Ex. 23. Dr. Fulford placed claimant's knee at maximum medical improvement as of December 11, 2001. Emp. Ex. 13 at 24. That claimant continues to have pain and to need medical intervention therefor is indicative of the lasting nature of claimant's condition. *See generally Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). As substantial evidence supports the administrative law judge's finding that claimant's condition reached permanency by November 12, 2001, we affirm his finding. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

Finally, employer contends the administrative law judge erred in awarding claimant total disability benefits, as employer contends claimant has not established his inability to return to his usual work. We reject this contention. On April 25, 2001, Dr. Bryan stated that claimant cannot return to his usual work, and he had not released claimant to work at the time claimant last saw him in July 2001. Dr. Gertzbein opined that as of April 30, 2002, claimant had not yet been released for any employment with regard to his back surgery, that it is unlikely that claimant will ever be able to return to his former job, and that claimant's knee condition will contribute to this inability to work as a longshoreman. Cl. Exs. 9, 21; Tr. at 48. Thus, substantial evidence supports the administrative law judge's finding that claimant established a *prima facie* case of total disability. Decision and Order at 38, 40; *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

Once a claimant establishes his inability to return to his usual work, the burden shifts to his employer to demonstrate the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). As claimant was unable to perform any work at the time the record closed, employer presented no evidence of suitable alternate employment. Consequently, we affirm the administrative law judge's finding that claimant is totally disabled. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989). If employer obtains evidence regarding a change in claimant's physical and/or economic condition, it may move for modification of the administrative law judge's award of permanent total disability benefits. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge