BRB No. 01-0481

ROBERT E. MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: Feb. 20, 2002
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

J. Paul Demarest and Seth H. Schaumburg (Favret, Demarest, Russo & Lutkewitte), New Orleans, Louisiana, for claimant.

Joseph J. Lowenthal, Jr., and Michelle A. Bourque (Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P.), New Orleans, Louisiana, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (97-LHC-2898) of Administrative Law Judge C. Richard Avery 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).

This case is before the Board for a second time. To briefly recapitulate the facts, claimant worked as a welder at employer's shipyard. On January 26, 1996, claimant fell through a hole on the deck of a vessel and landed on his tail bone. He suffered a comminuted fracture of his T12 vertebrae with compromise of the spinal canal and fractures of the eight

and ninth ribs. Claimant underwent surgery to repair the fractured vertebrae, and rods were surgically placed on both sides of claimant's spine. Claimant continued to complain of pain, but, following a year of treatment, claimant's orthopedic surgeon, Dr. Butler, stated that there was nothing further he could offer claimant to relieve the pain. Claimant then sought treatment from a neurosurgeon, Dr. Provenza, who in turn referred claimant to a pain management specialist, Dr. Gupta. In addition, claimant sought psychiatric care for treatment of depression due to the ongoing chronic pain. Claimant has not returned to work and sought total disability benefits under the Act.

In his original Decision and Order, the administrative law judge found that claimant had not reached maximum medical improvement and that he was temporary totally disabled. In addition, the administrative law judge found employer liable for claimant's medical expenses, including those of Drs. Provenza and Gupta. Employer appealed this decision to the Board. On appeal, the Board affirmed the administrative law judge's finding that claimant is temporarily totally disabled. *Miller v. Avondale Industries, Inc.*, BRB No. 98-1444 (Aug. 5, 1999). The Board, however, held that the administrative law judge did not determine whether claimant's cervical complaints, for which he was receiving treatment from Drs. Provenza and Gupta, are work-related and, thus, whether the past or future treatment offered by these physicians was and is necessary and reasonable for claimant's work-related injuries.[1] *Id.*

On remand, the administrative law judge found that, after weighing the evidence as a whole, the evidence is sufficient to establish that claimant's cervical symptoms are related to the accident at work on January 25, 1996, and that the past and future treatment of Drs. Provenza and Gupta was and is reasonable and necessary for claimant's work-related condition. Therefore, the administrative law judge found that employer is liable for medical treatment provided for claimant's cervical symptoms.

On appeal, employer contends that the administrative law judge erred in finding

[1]The Board also held that as employer refused to pay for the treatment rendered by Drs. Provenza and Gupta, claimant was released from the obligation of continuing to seek approval for his subsequent treatment and thereafter was entitled to all reasonable and necessary medical benefits provided by these physicians associated with his work-related injuries. *Miller*, slip op. at 6.

claimant's cervical complaints to be work-related, noting that claimant did not begin to complain of problems with his cervical spine until a year and a half after the accident, following three incidents for which he sought emergency room treatment. Employer also contends that the administrative law judge erred in failing to give determinative weight to the opinions of Drs. Butler and Russo. Employer lastly contends that the treatment provided by Drs. Provenza and Gupta was unauthorized and was not necessary or reasonable for claimant's injury. Claimant responds, urging affirmance of the administrative law judge's decision.

Once, as here, the Section 20(a) presumption is invoked, employer may rebut it by producing substantial evidence that claimant's employment did not cause, accelerate, aggravate or contribute to his injury. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied,* 120 S.Ct. 1239 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). In its original decision, the Board held that the opinion of Dr. Butler is sufficient to establish rebuttal of the Section 20(a) presumption, as he stated that claimant's cervical complaints are not related to the January 1996 work injury. *Miller*, slip op. at 4. Therefore, the presumption no longer applies, and the administrative law judge was instructed on remand to weigh the competing evidence as a whole, with 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).

On remand, the administrative law judge found that the evidence supports the conclusion that "a causal relationship exists between [c]laimant's cervical symptoms and his accident of January 25, 1996...." Decision and Order on Remand at 5. He found that the evidence is not inconsistent with a finding that claimant could have sustained a cervical injury in the work accident that was not immediately recognized. The administrative law judge based this finding on the fact that claimant presented to Dr. Butler with a severe back injury and was treated for a fractured vertebrae in the thoracic spine. He observed that while Dr. Butler surgically repaired claimant's fracture, he did not explore other potential problems in claimant's spine in spite of claimant's continued complaints of back pain. However, when claimant was seen by Dr. Provenza, he was diagnosed with possible cervical stenosis and suspected thoracic lumbar neurology. Dr. Provenza recommended further testing, *i.e.*, a myelogram, in light of the "perceived severity of [claimant's] trauma," in order to evaluate the cervical region in reference to the work injuries to the thoracic and lumbar region. In addition, Dr. Provenza referred claimant to Dr. Gupta, a pain management specialist, who applied trigger point injections in the affected region, which provided claimant with some relief. The administrative law judge did not find it persuasive that claimant did not complain of neck symptoms immediately following the work accident, as claimant continuously

complained of back pain and the approach taken by Drs. Provenza and Gupta appeared to address that pain.

Employer contends that the administrative law judge erred in relying on the opinions of Drs. Provenza and Gupta as they did not have claimant's full medical history following the work accident. In this regard, employer contends that claimant's cervical complaints are due to an intervening event. Specifically, employer contends that claimant visited the emergency room three separate times prior to his first complaints referable to his cervical area, and that Drs. Provenza and Gupta were unaware of these emergency room visits.[2] However, claimant explained that after the rods were inserted to stabilize his spine, he went to the hospital to be examined if he felt that there could be a problem with the rods, and the administrative law judge found that the records from those hospital visits do not indicate that claimant had suffered an injury to his cervical area or had any complaints consistent with a cervical injury. H. Tr. at 47. Employer is relieved of liability for disability attributable to an intervening cause. *See generally Bludworth Shipyard, Inc. v. Lira,* 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983). Employer, however, bears the burden of establishing an intervening cause, *see, e.g., Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc,* 31 BRBS 109 (1997), and the administrative law judge here properly found that the emergency room reports do not establish that claimant aggravated or reinjured his condition on these occasions. We affirm this finding as it is rational and supported by the evidence of record, and thus we reject employer's contention that claimant's cervical symptoms are due to an intervening cause. *See generally Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992); *see generally Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001). Moreover, Dr. Provenza's ignorance of the specific visits to the emergency room

[2]In July 1996, claimant was attacked at an ATM machine in an apparent robbery. He sought treatment at the emergency room, and was released with the diagnosis of chronic back pain. H. Tr. at 81-82. In addition, claimant went to the emergency room on October 11, 1996, after falling out of a car and was discharged against medical advice with a diagnosis of chronic back pain. *See* Emp. Ex. 7; H. Tr. 47. The records also indicate that claimant sought treatment at the emergency room on February 16, 1997, when he began having low back pain after playing ball with his son. Emp. Ex. 7; H. Tr. at 50. Claimant was released in good condition with a diagnosis of chronic low back pain.

does not undermine his opinion as there is no evidence that claimant suffered any residual effects from the incidents, and, after Dr. Provenza had the opportunity to look at the emergency room records, he stated that no cervical condition was noted therein.

Contrary to employer's next contention, the administrative law judge is not required to give greater weight to the opinions of Drs. Russo and Butler based on their superior credentials, or because they examined claimant closest in time to his January 25, 1996 accident. *See generally Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993). The administrative law judge found that the fact that claimant did not complain of cervical pain to Dr. Russo or Dr. Butler was not dispositive. Indeed, claimant did not complain of pain in the cervical region to Dr. Provenza; rather, Dr. Provenza noted that claimant had symptoms, including arm weakness and pain, that were consistent with a cervical problem. C. Ex. 2 at 10. Dr. Provenza suspected that claimant had thoracic lumbar neurology with possible cervical stenosis, and he recommended further tests to determine if the condition existed. He stated that he wanted to examine claimant's cervical complaints in light of the severity of claimant's injury to the lumbar and thoracic regions. Thus, the administrative law judge concluded that it was in pursuit of treatment for claimant's continuing, generalized, work-related back pain that Dr. Provenza wanted to explore the relationship between claimant's cervical spine and his thoracic and lumbar pain. *Id.* at 5.

The administrative law judge is entitled to draw his own inferences and conclusions from the evidence, *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),and rational inferences supported by the record may not be set aside. *See Cardillo v. Liberty Mutual Ins. Co.,* 330 U.S. 469 (1997); *Hullinghoist Industries, Inc. v. Carroll,* 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). Thus, as it is rational and supported by the opinion of Dr. Provenza and the severe nature of claimant's work injury, we affirm the administrative law judge's conclusion that the testing and treatment of claimant's cervical complaints are related to the work injury on January 25, 1996.

Employer also contends that claimant was not entitled to seek treatment from Dr. Provenza and Dr. Gupta without employer's authorization. The Board's prior determination that claimant was released from the obligation of continuing to seek approval for his subsequent treatment with Drs. Provenza and Gupta, as claimant's request for authorization was denied, constitutes the law of the case. *See Miller*, slip op. at 6; s*ee generally Ion v. Duluth, Missabe & Iron Range Ry. Co.,* 32 BRBS 268 (1998). Employer also contends that the treatment and tests recommended by Drs. Provenza and Gupta are not reasonable or necessary. Contrary to employer's contention, however, Dr. Provenza did not state that the October 1996 myelogram negated his recommendation for another thoracic and lumbar myelogram. Rather, Dr. Provenza stated that the myelogram was nearly a year old by the

time claimant began treatment with him, and that as the prior myelogram showed some abnormalities, it would not be unreasonable to get an updated radiographic study. The administrative law judge further found that the course of treatment provided by Drs. Provenza and Gupta provided some relief, albeit temporary, for claimant's symptoms. Therefore, as employer has failed to raise any reversible error on appeal, we affirm the administrative law judge's finding that the recommended treatment and tests are reasonable and necessary, and thus, that employer is liable for this medical care.[3] *See generally Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112, 113 (1996).

Accordingly, the Decision and Order on Remand of the administrative law judge awarding medical benefits for claimant's cervical condition is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[3]We also reject employer's contention that the administrative law judge's decision evidenced bias in claimant's favor. The administrative law judge found only that Dr. Butler stated he had nothing to offer claimant which would relieve claimant's continuing complaints of pain, and that Dr. Butler stated that seeking treatment elsewhere was an option, although unlikely to be beneficial to claimant. These statements fail to show that the administrative law judge was biased. *See Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).