

BRB Nos. 97-1022
and 99-400

MICHAEL HART)
)
Claimant-Petitioner)
)
v.)
)
JAMES RIVER CORPORATION) DATE ISSUED:
)
and)
)
AETNA INSURANCE)
)
Employer/Carrier-)
Respondents) DECISION and ORDER

Appeals of the Decision and Order Denying Benefits and Decision and Order Denying Reconsideration of Thomas Schneider, Administrative Law Judge, United States Department of Labor, and the Decision and Order Denying Modification of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

William M. Tomlinson and Jay W. Beattie (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Decision and Order Denying Reconsideration (95-LHC-1702) of Administrative Law Judge Thomas Schneider (BRB No. 97-1022) and the Decision and Order Denying Modification of Administrative Law Judge Anne Beytin Torkington (BRB No. 99-400) 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).

On December 22, 1989, claimant slipped and fell, injuring his lower back during the course of his employment for employer. He was off work until December 27, 1989, but he experienced a recurrence of lower back pain on December 31, 1989. Employer voluntarily paid compensation under the Act from January 3, 1990, to February 21, 1990, and again from April 9, 1990, to December 6, 1990. From June 1, 1991, to January 17, 1993, employer voluntarily paid compensation for 22 days that claimant missed work. Thereafter, claimant was almost continually unable to work until January 1, 1995, when he retired. At the February 6, 1996, formal hearing, claimant sought benefits under the Act for temporary total disability for the periods he was unable to work from the date of injury until June 27, 1995, and thereafter for permanent total disability until April 26, 1996, by which time claimant hoped to obtain employment as a vocational counselor. Employer contended that any disability claimant has is solely due to a pre-existing back condition.

In his Decision and Order Denying Benefits, Administrative Law Judge Schneider determined that the December 22, 1989, injury caused only a temporary flare-up of claimant's long standing back pathology and did not result in any permanent disability. Accordingly, Judge Schneider denied the claim for benefits under the Act. In his Decision and Order Denying Reconsideration, the administrative law judge found that employer properly raised the issue of the cause of claimant's back disability and he reiterated that claimant's back disability is due to his pre-existing back symptomatology.

Claimant appealed the Decision and Order Denying Benefits and Decision and Order Denying Reconsideration. BRB No. 97-1022. In response to a Motion for Modification filed by claimant, the Board dismissed claimant's appeal without prejudice by Order dated January 28, 1998, and remanded the case to the administrative law judge for modification proceedings. As Judge Schneider was no longer available, the case was assigned without objection by the parties to Administrative Law Judge Torkington. Claimant submitted new evidence from Dr. Saunders in an attempt to establish that Dr. Saunders did not concur with Dr. Logan's assessment regarding disability resulting from the work injury. In her Decision and Order Denying Modification, Judge Torkington rejected claimant's contention that Judge Schneider made a mistake of fact by misinterpreting the opinion of Dr. Saunders regarding claimant's diagnosis and the existence of a permanent disability as a result of the December 22, 1989, work injury. She found that claimant failed to develop Dr. Saunders' opinion fully at the initial hearing and may not correct this error at this juncture. Moreover, Judge Torkington concurred with Judge Schneider that the December 22, 1989, work injury caused only a temporary aggravation of claimant's pre-existing back condition and did not result in any permanent disability. Claimant appealed this decision to the Board, and he

moved to reinstate his prior appeal of Judge Schneider's decision. By Order dated February 4, 1999, the Board acknowledged claimant's appeal of the Decision and Order Denying Modification, BRB No. 99-400, reinstated claimant's original appeal, BRB No. 97-1022, and consolidated these appeals for purposes of decision.

On appeal, claimant contends that Judge Schneider applied an incorrect legal standard in determining that his December 22, 1989, back injury resulted in only a temporary aggravation of his back condition and that this finding is not supported by substantial evidence. Claimant further challenges the authority of Judge Torkington to determine on the existing record that claimant's work injury caused only a temporary aggravation of claimant's back condition.¹ Employer responds, urging affirmance of both decisions.

We initially address claimant's appeal of Judge Schneider's Decision and Order Denying Benefits and Decision and Order Denying Reconsideration. When claimant has a pre-existing condition, employer is liable for the entire resulting disability if the work injury aggravates, accelerates, or contributes to the underlying condition. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). However, if the disability in this case is due solely to the natural progression of a prior injury or condition, employer is not liable. Due to the operation of Section 20(a), it is employer's burden to produce substantial evidence that claimant's disability is solely attributable to the prior injury or condition. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); 33 U.S.C. §920(a). If the evidence credited by the administrative law judge upon weighing the evidence is sufficient to rebut the Section 20(a) presumption, any error in the application of Section 20(a) is harmless. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998).

In his Decision and Order Denying Benefits, Judge Schneider noted Dr. Lee's testimony that a doctor who had treated claimant both before and after the December 22, 1989, work injury would be best qualified to determine the etiology of claimant's back condition. The administrative law judge found that only Dr. Saunders fit within this criterion and that Dr. Saunders concurred with the opinion of Dr. Logan that claimant sustained no permanent disability due to the December 22, 1989, work injury. The administrative law judge next found that claimant's complaints of back pain did not substantially change after the work injury. Finally, the administrative law judge noted that claimant had settled for \$40,000 a prior claim against a different employer arising out of a back injury on May 14,

¹Claimant does not challenge Judge Torkington's finding that there was no mistake of fact.

1984, inferring therefrom that the prior injury was not insignificant. Judge Schneider thus concluded that claimant sustained only a temporary flare-up from the December 22, 1989, work injury and he did not sustain any resulting permanent disability.

Claimant contends that the administrative law judge applied an incorrect legal standard in denying benefits, as he stated in his decision and again on reconsideration that claimant's back condition was not "substantially" changed or increased by the December 22, 1989, work injury. While we agree that such a standard is not in accordance with law, *see generally Bass*, 28 BRBS at 15, we reject claimant's contention that the administrative law judge relied exclusively on such a standard in the instant case. The administrative law judge did state that claimant's back condition did not substantially change after the December 22, 1989, work injury, but this statement refers to his finding that claimant's physical complaints both before and after this injury were virtually identical. Decision and Order Denying Benefits at 4; Decision and Order on Recon. at 1. In both the initial decision and on reconsideration, the administrative law judge's ultimate conclusion was that the December 22, 1989, injury caused a temporary flare-up of back pain, but no permanent impairment based on medical opinions of record. Thus, if this finding is supported by substantial evidence, any error in stating an incorrect standard would be harmless.

In finding that claimant has no permanent disability due to the work injury, the administrative law judge weighed the evidence as a whole and credited the opinion of Dr. Logan, with which Dr. Saunders concurred. Dr. Logan, an orthopedic surgeon, examined claimant along with Dr. Brown, a neurologist. They opined on February 12, 1990, that claimant was healed from the "present episode" and that no permanent disability resulted from the work injury. EX 48 at 66-67. Dr. Logan, on May 8, 1990, stated that claimant's recurrent back pain is not due to the December 1989 incident, but is due to an underlying narrowing of the lumbosacral intervertebral disc space and/or spondylolysis. EX 59 at 86-87. Dr. Saunders, who treated claimant before and after the work incident, a fact the administrative law judge rationally found significant, concurred in Dr. Logan's opinion.² EX 61 at 91. As the administrative law judge's inferences in the instant case are rational and as

²We note claimant's contention that the administrative law judge did not explain why he did not give determinative weight to Dr. Lee's opinion that the December 22, 1989, work injury is a predominant cause of claimant's current back condition. Tr. at 192. The administrative law judge noted that Dr. Lee failed to reconcile this statement with his prior testimony that a doctor who examined claimant both before and after the December 22, 1989, work injury is best able to determine the etiology of claimant's back condition. Moreover, it is within an administrative law judge's discretion as fact-finder to credit part of a doctor's testimony and discredit other parts. *Perini v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

his findings supported by substantial evidence, we affirm his conclusion that claimant did not sustain any permanent impairment from the December 22, 1989, work injury.³

Regarding claimant's appeal of Judge Torkington's Decision and Order Denying Modification, claimant challenges the judge's authority to issue a decision finding that he did not sustain any permanent impairment as a result of the December 22, 1989, work injury because she reached this conclusion based on the existing record and she did not preside at a formal hearing on modification. Judge Torkington first found that claimant's attempted to clarify Dr. Saunders' opinion only after Judge Schneider issued his decision. She found that any mistake was in counsel's failure to develop the evidence more fully at the time of the initial hearing, and not in Judge Schneider's interpretation of Dr. Saunders' opinion. She also found, upon considering the new evidence, that Dr. Saunders' new report and deposition does not establish a mistake in fact in Judge Schneider's opinion. Claimant specifically does not challenge these findings on appeal. Cl. Brief at 1. Judge Torkington finally considered all the evidence of record, and concluded that claimant's work injury did not result in permanent disability. Claimant takes issue with this latter finding, contending the administrative law judge had no authority to render a decision on the record as a whole without holding a new hearing.

We reject claimant's contention. First, we note that the administrative law judge's denial of modification rests on three grounds, two of which are not challenged on appeal. Moreover, we note that claimant did not seek a new hearing before Judge Torkington when the case was reassigned to her, and therefore waived his rights to such. *See Pigrenet v. Boland Marine & Manufacturing Co.*, 656 F.2d 1096, 13 BRBS 843 (5th Cir. 1981)(*en banc*). Finally, the administrative law judge is required to consider all evidence of record, both old and new, if the case is reopened on modification. *See generally Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). Claimant, therefore, has not demonstrated error in the administrative law judge's decision on modification.

³Thus, we need not reach claimant's contention that Judge Schneider erred in finding, in the alternative, that claimant could have performed a job employer offered to him in early 1994.

Accordingly, Administrative Law Judge Thomas Schneider's Decision and Order Denying Benefits and Decision and Order Denying Reconsideration are affirmed. BRB No. 97-1022. Administrative Law Judge Anne Beytin Torkington's Decision and Order Denying Modification is also affirmed. BRB No. 99-400.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge