BRB No. 02-0435

CARMEN KEITH HICKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HALTER MARINE GROUP, INCORPORATED	)	DATE ISSUED: Jan 23, 2003
	)	
and	)	
	)	
MISSISSIPPI INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Tommy Dulin (Dulin and Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Karl R. Steinberger and Gina Bardwell Tompkins (Colingo, Williams, Heidelberg, Steinberger & McElhaney, P.A.), Pascagoula, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2000-LHC-1110) 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).

Claimant, a safety medic, alleges that he injured his back at work on May 27, 1998. Claimant did not miss any work due to this injury, and he was terminated from

his job for insubordination on August 7, 1998. Claimant worked for a different employer from August 21, 1998, through April 1, 1999, as a safety representative, when he was terminated due to excessive absenteeism. He had back surgery in February 1999, and alleged that the operation was due to the work injury. Subsequently, claimant worked for only three weeks, as a security guard, and filed a claim seeking total disability benefits due to his back injury and other conditions he alleges are the result of his work injury. Claimant alleges that he experienced blackouts, in July and December 1999, due to the work injury and that the December 1999 blackout caused him to have an automobile accident which resulted in an injury to his neck, requiring surgery on March 8, 2000. Since July 17, 2000, claimant has undergone psychiatric treatment, which he also alleges is a result of the work accident. In addition, claimant attributes sexual dysfunction, headaches, and a leg injury to the work accident.

The administrative law judge found that claimant established that the temporary aggravation of his pre-existing back condition was work-related, but that claimant did not establish that he was disabled due to this temporary aggravation. The administrative law judge also found that claimant did not establish that the other conditions, including his February 1999 back surgery, sexual dysfunction, blackouts/seizures, neck injury, leg injury, and depression, are work-related since no physician attributed any of these alleged injuries to the work accident.

On appeal, claimant challenges the administrative law judge's denial of disability and medical benefits. Employer responds in support of the administrative law judge's decision.

Claimant initially contends that the administrative law judge erred in finding that his 1999 back surgery, sexual dysfunction, headaches, blackouts and seizures, neck injury, and leg injury are not work-related. Section 20(a), 33 U.S.C. §920(a), provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered an injury and that a work accident occurred which could have caused the injury or aggravated a pre-existing condition. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000). Once claimant has invoked the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial countervailing evidence. *See Prewitt*, 194 F.3d 684, 33 BRBS 187(CRT). If the administrative law judge finds that the Section 20(a) presumption is rebutted, all relevant evidence must

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[1]Claimant had previously had back surgery in 1992 following an automobile accident. At that time, claimant was diagnosed with severe spinal stenosis, cervical disc disease, and disc herniations at C6/7, and L4/5.

be weighed to determine if a causal relationship has been established, with claimant bearing the burden of persuasion. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000)*; see also Director, OWCP v. Greenwich Collieries [Santoro]*, 512 U.S. 267, 28 BRBS 43(CRT)(1994). In arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 360 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).

In the instant case, the administrative law judge found that claimant sustained a temporary aggravation of his pre-existing back injury but did not sustain any other injury due to his work accident on May 27, 1998. The administrative law judge found that claimant's testimony regarding his symptoms and their onset following the work injury was not credible since claimant's reports to his doctors following the work accident were inconsistent regarding his symptoms and their dates of onset; he sometimes failed to refer to the work accident and he failed to advise most of them that he was simultaneously being treated by other doctors for the same or different symptoms. As the administrative law judge's rejection of claimant's testimony is not inherently incredible or patently unreasonable, we affirm his finding. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996)*;* Decision and Order at 4 n. 11; 12-13; Emp. Exs. 4 at 9-18; 6 at 7*,* 11*.* Contrary to claimant's contention, the administrative law judge did not err in not discussing the opinions of Drs. Fondren, Black, Barrett, Drake, Hinman, and Cole, as the first three doctors treated claimant for non-work-related injuries and the latter three doctors did not provide an opinion regarding a relationship between claimant's work accident and his subsequent complaints. *See Calbeck*, 360 F.2d 693*; Hughes*, 289 F.2d 403*;* Decision and Order at 13; Cl. Exs. 11, 14, 15, 20; Emp. Exs. 4 (exhibits to Dr. McCloskey's deposition), 9.

In determining that claimant's 1999 back surgery was not work-related, the administrative law judge rationally relied on the opinions of Drs. McCloskey and Applebaum to find that employer established rebuttal of the Section 20(a)

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[2]2Dr. Fondren is an orthopedist who treated claimant for his elbow and shoulder pain. Emp. Ex. 4 (exhibits to Dr. McCloskey's deposition). Dr. Black treated claimant for his left elbow problems. Emp. Ex. 9. Dr. Barrett treated claimant for arthralgia in the hands, legs, and feet. Cl. Ex. 11. Drs. Drake and Hinman are chiropractors who treated claimant for back and neck pain, Cl. Exs. 14, 15, and Dr. Cole is a psychologist who evaluated claimant for his depression. Cl. Ex. 20.

presumption, and that upon a weighing of their opinions, claimant did not establish that his 1999 back surgery was work-related. *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd,* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Calbeck*, 360 F.2d 693; *Hughes*, 289 F.2d 403; Decision and Order at 13; Cl. Ex. 10; Emp. Ex. 4 at 22-23, 125. Dr. Applebaum stated that the sole cause of claimant's back surgery and subsequent disability was more likely than not his pre-existing condition, Emp. Ex. 4 at 125. Dr. McCloskey subsequently agreed with that statement, after reviewing the medical records of Drs. Fondren and Drake in addition to claimant's comments which were inconsistent with those records. Emp. Ex. 4 at 22-23. As these opinions constitute substantial evidence that the surgery in 1999 was due solely to the pre-existing back condition, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption, *see Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998), and that the evidence establishes the absence of a causal link between the work accident and the surgery, based on the record as a whole. *Id.* Thus, we also affirm the administrative law judge's denial of medical benefits for this condition. *See generally Davison v. Bender Shipbuilding & Repair Co.,* 30 BRBS 45 (1996).

With regard to the other conditions claimant alleges are related to the injury, *i.e.,* sexual dysfunction, headaches, blackouts/seizures, neck injury, and leg injury, we hold that any error that the administrative law judge may have committed in placing the burden on claimant to establish that the conditions are work-related is harmless. *See generally Bolden*, 30 BRBS 71; *Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988). Based on the facts of this case, we hold that the Section 20(a) presumption is not invoked with regard to these conditions, because none of the medical evidence links these alleged injuries to claimant's work accident and the administrative law judge found claimant's testimony in this regard is not credible. *See id.;* Cl. Exs. 10, 11, 13-15, 18-20; Emp. Exs. 4, 9. Thus, we affirm the administrative law judge's finding that these conditions are not work-related, as well as the denial of medical benefits for these conditions. *Davison*, 30 BRBS 45.

Claimant also contends that the administrative law judge erred in finding that claimant did not establish that his depression is work-related. The Section 20(a) presumption is applicable in psychological injury cases. *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996). In the instant case, the administrative law judge found that claimant did not establish a relationship between his depression and work accident based on the opinions of Drs. Pyles and Maggio that claimant's depression is not *directly* related to the work accident. Dr. Pyles stated that claimant's work accident had some contribution to his current psychiatric symptoms. Emp. Ex. 14 at 61-62. As there is evidence that claimant suffers from a psychiatric condition that could have been caused, at least in part, by the work accident, we hold that the administrative law judge erred in failing to invoke the Section 20(a) presumption. Since Dr. Pyles's opinion establishes that claimant's psychological

condition is in part work-related, Section 20(a) is invoked as a matter of law. *See Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon*., 32 BRBS 224 (1998); Emp. Ex. 14 at 61-62. On remand, the administrative law judge must determine whether the Section 20(a) presumption is rebutted by Dr. Maggio's opinion, and if so, to ascertain whether a causal relationship is established based on the record as a whole. If the administrative law judge finds that claimant's psychological condition is work-related, he must determine if claimant is entitled to medical benefits for this condition, *see* 33 U.S.C. §907; *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989), and if claimant is disabled thereby.

Claimant further contends that the administrative law judge erred in denying him disability benefits. It is claimant's burden to establish he is unable to perform his usual employment duties or to establish a loss in wage-earning capacity due to his injury. *See, e.g., Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998). The administrative law judge denied claimant disability benefits for the temporary aggravation of his pre-existing back condition, stating that claimant "has proven no recoverable loss of wages." Decision and Order at 15-16. The administrative law judge pointed out that claimant continued to work post-injury for employer until he was terminated for insubordination on August 7, 1998. Claimant was off work for two weeks and then worked for a different employer until April 1999, when he was terminated due to absenteeism following the surgery for the pre-existing back condition.

We affirm the denial of benefits for the period following claimant's injury. Claimant's only contention on appeal with regard to this period is that he worked in severe pain following the accident and thus is entitled to total disability benefits. A claimant who works post-injury only in spite of excruciating pain or extraordinary effort may be entitled to total disability benefits despite his continued employment.

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[3]In this regard, we note that Dr. Pyles stated, "In all likelihood [claimant] will require ongoing treatment both psychiatric as well as medical for his Chronic Pain Syndrome coupled with Severe Depression." Cl. Ex. 18 at 6. Dr. Pyles prescribed medications for claimant's depression. Cl. Ex. 18 at 5-6. Dr. Cole recommended continued treatment by Dr. Pyles for claimant's depression and psychological treatment for depression and pain including cognitive therapy, pain management, relaxation training, and if needed, biofeedback. Cl. Ex. 20 at 4. Dr. Maggio stated that claimant should not be taking the medications prescribed by Dr. Pyles. Emp. Ex. 6 at 10-11. In addition, Dr. Pyles stated that claimant is disabled from working due to his depression, Cl. Ex. 18, whereas Dr. Maggio stated claimant is not disabled by this condition, Emp. Ex. 6.

Haughton Elevator Co. v. Lewis, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978). In this case, however, there is no medical evidence to support claimant's contention, and the administrative law judge rationally discredited claimant's testimony. *See generally Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000) (pain, where credited, is a relevant factor in determining wage-earning capacity). In addition, the administrative law judge rationally found no loss in wage-earning capacity based on claimant's continued employment in his usual job, until he was terminated for reasons unrelated to his employment. Claimant also contends he is disabled due to the other conditions alleged above; however, as we have affirmed the finding that these conditions, except for claimant's depression, *supra,* are not work-related, the administrative law judge properly denied benefits for these conditions.

Claimant lastly contends that the administrative law judge erred in denying him medical benefits under Section 7 of the Act, 33 U.S.C. §907. *See* Decision and Order at 16. As we have discussed, claimant is not entitled to medical benefits for the conditions which are not work-related. *Davison*, 30 BRBS 45. With regard to the temporary aggravation of claimant's back condition, the administrative law judge noted that claimant sought treatment on one occasion with a chiropractor, Dr. Hinman, and did not seek authorization from employer for that visit. On appeal, claimant alleges that employer denied authorization for all treatment and thus claimant was not required to seek employer's authorization for treatment. *See, e.g., 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). Claimant, however, has not established that he initially sought authorization for treatment for the aggravation of the pre-existing back condition and that employer denied this treatment. *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989). Thus, we affirm the administrative law judge's denial of medical benefits for the temporary aggravation of claimant's back condition. *Id.*

Accordingly, the administrative law judge's finding that claimant's depression is not work-related is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge