BRB Nos. 04-0427
and 04-0427A

BERNARD J. SANTERRE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT COMPANY	)	DATE ISSUED: 01/14/2005
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Denying Claim for Medical Bills of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Aram P. Jarret III and Robert V. Chisholm (Chisholm Chisholm & Kilpatrick), Providence, Rhode Island, for claimant.

Kevin C. Glavin (Cutcliffe Glavin & Archetto), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denying Claim for Medical Bills (2002-LHC-0841) of Administrative Law Judge Daniel F. Sutton 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, an outside machinist, injured his back and right shoulder while trying to move a boring bar weighing 300 to 400 pounds on June 26, 1995. Claimant was

diagnosed with multiple disc herniations and underwent a laminectomy and fusion procedure on January 3, 1996. Claimant was laid off on June 28, 1996, due to a reduction in personnel; claimant has not worked since that time. In a Decision and Order issued on December 10, 1998, Administrative Law Judge DiNardi awarded claimant permanent total disability benefits and found employer entitled to Section 8(f), 33 U.S.C. §908(f), relief. CX 2.

Claimant developed knee pain, and, on February 12, 2001, he fell while walking at his home. CX 3. Ultimately, claimant was treated by Dr. Warner, a pain management specialist, with "Synvisc" injections to alleviate the pain in claimant's left knee. Claimant alleged that his current knee condition is related to his work-related back injury, and he sought to have employer pay for the Synvisc injections. Employer controverted this claim on the ground that claimant's knee condition is unrelated to his work injury, and, therefore, it is not liable for the requested medical treatment.

In his Decision and Order, Administrative Law Judge Sutton (the administrative law judge) found that claimant's knee condition is related to the work injury to his back, but that claimant failed to establish that the injections were necessary for treatment of the knee condition. Accordingly, the administrative law judge found that employer is not responsible for medical bills arising out of the Synvisc injections.

Claimant and employer appeal this decision. Employer argues that the administrative law judge erred in finding that claimant's knee condition is related to the work-related back injury. Claimant argues that the administrative law judge erred in finding that the medical treatment was unnecessary for treatment of his knee pain.

We address first employer's appeal of the administrative law judge's finding that claimant's knee condition is related to his work-related back injury. Specifically, employer contends that the administrative law judge erred in finding that employer did not rebut the Section 20(a) presumption. Once, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that claimant's condition was not caused, aggravated, or rendered symptomatic by his work accident.[1] *See, e.g., American Stevedoring, Ltd. v. Marinelli,* 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *American Grain Trimmers v. Director, OWCP,* 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied,* 528 U.S. 1187 (2001).

[1] The administrative law judge found that the Section 20(a) presumption was invoked based on Dr. Warner's opinion that claimant's chronic knee pain is due to the work-related back injury. CX 4 at 5; Decision and Order at 5.

The administrative law judge found that employer failed to establish rebuttal based upon the opinion of Dr. Barnett, a board-certified orthopedic surgeon specializing in knees, EX 1, because his opinion was confusing and contradictory. Decision and Order at 4, 6. Although, as employer argues, Dr. Barnett stated that claimant's knee condition is not work-related, EX 1 at 3, 10, he also stated that claimant's episodic back pain may have resulted in the fall and damage to claimant's knee. EX 1 at 21, 27, 33. Moreover, Dr. Barnett stated that claimant's knee condition was the result of the injury which occurred on June 26, 1995, EX 1 at 8, and that claimant's back pain may have altered his mechanical gait, theoretically aggravating the knees. *Id.*

We affirm the administrative law judge's finding that Dr. Barnett's opinion does not rebut the Section 20(a) presumption. The administrative law judge discussed the opinion in depth and rationally found that it does not constitute substantial evidence severing the presumed causal connection between claimant's back injury and knee injury because it is contradictory. Dr. Barnett stated both that claimant's knee condition was work-related and not work-related. EX 1 at 8, 10. Thus, as it is rational, supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the Section 20(a) presumption, and that claimant's knee condition therefore is related to his work-related back injury. *See American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997).

Next, we address claimant's argument that the administrative law judge erred in finding that employer is not liable for the cost of the Synvisc injections administered by Dr. Warner on July 2 and 16, 2001. CX 4. On October 5, 2001, employer denied payment for this treatment. EX 5.

Pursuant to Section 7(a) of the Act, 33 U.S.C. §907(a), employer is liable for medical treatment necessary for claimant's work-related injury. The administrative law judge found that claimant made a *prima facie* case that the injections were necessary for the treatment of claimant's work-related knee condition based on the opinion of claimant's treating physician, Dr. Warner.[2] CX 4 at 5. The administrative law judge found, however, that the Synvisc treatments were unnecessary, based upon the opinion of Dr. Barnett. The administrative law judge found that Dr. Barnett explained under what circumstances such injections are indicated, and gave greater weight to the doctor's opinion as he is an orthopedic surgeon specializing in the treatment of knees, whereas Dr. Warner is a pain management specialist. The administrative law judge concluded that claimant's subjective assessment that the injections afforded some limited relief is not sufficient to overcome Dr. Barnett's opinion. Thus, the administrative law judge

[2] Dr. Warner has treated claimant since September 1997. CX 8.

concluded that the injections were not necessary and that therefore employer is not liable for their cost. Decision and Order at 6.

We agree with claimant that this finding is not supported by substantial evidence and must be reversed. Dr. Warner, claimant's treating physician, diagnosed bilateral osteoarthropathy in May 2001, CX 8, and he stated that the Synvisc injections he administered on July 2 and 16, 2001, were necessary for this work-related condition.[3] CX 4 at 5. Dr. Barnett examined claimant only on September 18, 2001, and obtained new x-rays. EX 1 at ex. 1. He diagnosed bilateral patellofemoral chondromalacia and probable early degenerative arthritis of both knees, and recommended, *inter alia*, treatment with anti-inflammatory medication. Dr. Barnett stated that the "use of Synvisc injections in light of the relatively normal appearing x-rays would be of questionable benefit."[4] *Id.* In his deposition, Dr. Barnett explained his opinion in more detail. He stated that "At the time I saw him, injections would not have been indicated," because claimant did not have inflammatory changes or effusion in his knee. EX 1 at 10.

On the facts of this case, we hold that Dr. Barnett's opinion, based on his examination of claimant two months after the last injection, cannot establish that the injections were unnecessary. His opinion establishes that at the time he saw claimant, injections would not have been indicated based on the absence of certain symptoms; thus, his opinion supports the conclusion that, as of September 2001, injections were not necessary. However, the injections were administered in July, and at that time Dr. Warner opined that the injections were necessary for claimant's work-related knee condition, and he reported that claimant obtained some relief from them. CX 4. As Dr. Barnett did not address whether the injections were necessary at the time they were administered, his opinion cannot support a finding that this treatment was unnecessary. *Cf. Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988) (affirming finding that surgery unnecessary where, *inter alia*, such an opinion was given both before and after the surgery and credited physicians opined that surgeon misinterpreted objective test results). Since the administrative law judge found Dr. Warner's opinion sufficient to establish a *prima facie* case of compensability, and there is no other contemporaneous

[3] According to the Federal Drug Administration, Synvisc is indicated for the treatment of pain from osteoarthritis of the knee in patients who have failed to respond adequately to conservative nonpharmacologic therapy and to simple analgesics such as acetaminophen. http://www.fda.gov/cdrh/consumer/synhal.html. *See In Re Wellbutrin SR/Zyban Antitrust Litigation*, 281 F.Supp.2d 751 (E.D.Pa. 2003) (taking official notice of public records published on the world-wide web).

[4] Dr. Barnett continued, "Certainly, there would be less costly alternatives available for treating the patient's bilateral knee condition." EX 1 at ex. 1.

opinion, the record supports the conclusion that the injections were necessary at the time they were administered. *See 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) (deference due treating physician on proper course of treatment). We, therefore, reverse the administrative law judge's finding that employer is not liable for the cost of the two Synvisc injections administered by Dr. Warner.[5]

[5] Employer contends that because the administrative law judge denied claimant reimbursement of the medical expenses at issue, he erred in awarding claimant's counsel an attorney's fee. There is no indication in the file before the Board that the administrative law judge has awarded an attorney's fee. Nonetheless, in view of our affirmance of the administrative law judge's finding that claimant's knee condition is work-related and the reversal of the denial of the medical costs at issue, employer is properly held liable for claimant's attorney's fee if the provisions of Section 28(a) or (b) are otherwise satisfied. *See generally Overseas African Constr. Corp. v. McMullen*, 500 F.2d 1291 (2d Cir. 1974).

Accordingly, the administrative law judge's finding that employer is not liable for the cost of the two Synvisc injections is reversed. The administrative law judge Decision and Order is otherwise 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