BRB No. 10-0362

MARK H. McLEAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 01/21/2011
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Scott J. Bloch (Tarone & McLaughlin, L.L.P.), Washington, D.C., and William J. Skepnek, Lawrence, Kansas, for claimant.

Limor Ben-Maier and John Schouest (Wilson, Elser, Moskowitz, Edelman & Dicker, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2009-LDA-00170) of Administrative Law Judge Clement J. Kennington 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 worked for employer in Iraq as an operator and then as a foreman in its reverse osmosis water purification unit. His job was to purify the water using chemicals to Army specifications as well to perform any carpentry, plumbing, and security work associated with keeping the water purified. Claimant alleges he was injured on April 7, 2007, when he tripped on a step while running for cover from a low-flying aircraft over the base.[1] Jt. Ex. 7; Jt. Ex. 12 at 22-24; Tr. at 17-18. He contended his knee popped and "dislocated" and he fell hard on it. Claimant testified he mentioned the incident to his co-workers; however, he did not file an injury report, despite stating he visited the medic the following morning. Tr. at 18-22. Claimant continued to work – getting co-workers to assist him temporarily – until May 2008 when he was sent to the clinic in Kuwait where he was diagnosed with a torn meniscus in his left knee, a cockspur in his left foot, and herniated discs in his back.[2] Employer sent claimant home for treatment in May 2008. Jt. Ex. 13; Tr. at 22-24, 30-35. He was last paid by employer in June 2008, and he has not returned to his usual work. Tr. at 52.

The administrative law judge determined that, although claimant is not entirely credible, he did credibly establish that an incident occurred on April 7, 2007, which could have caused harm to his left knee. The administrative law judge found the knee injury compensable and awarded claimant temporary total disability benefits. With regard to the claims for back and neck injuries arising from claimant's employment, the administrative law judge found, based on the record as a whole, that claimant failed to establish he had sustained back and neck injuries as a result of the work accident. Decision and Order at 18-24. Further, despite having found the knee injury compensable, the administrative law judge suspended temporary total disability benefits from June 26, 2008, through March 23, 2009, finding that claimant unreasonably refused appropriate medical treatment during that period. 33 U.S.C. §907(d)(4); Decision and Order at 28.

[1]Employer's report of the incident, dated May 13, 2008, identified only a knee injury. Jt. Ex. 11. Claimant filed his claim for compensation on July 14, 2008, alleging injuries to his back, left knee, and left foot as a result of running from an explosion. Jt. Ex. 7. He filed a second claim on the same date alleging injury to his lungs as a result of exposure to hazardous chemicals. Jt. Ex. 8. Claimant filed two revisions, both on August 6, 2008: one claim form alleged injuries to his back, left knee, left foot, and neck due to exposure to hazardous chemicals, and one amended his lung injury claim to reflect a different start-work time. Jt. Exs. 9-10. Claimant's pre-hearing statement, dated January 8, 2009, stated that he has back and knee injuries associated with the work incident on April 7, 2007, that he is totally disabled, and that he has not received any disability or medical benefits. Jt. Ex. 6. Claimant gave no testimony regarding the alleged lung injury; it was not addressed by the administrative law judge and is not at issue here.

[2]The evidence reveals that claimant was sent to Kuwait for an MRI of his knee. Based on claimant's answers to certain questions, the doctor also decided to scan claimant's lumbosacral spine. Tr. at 34.

Claimant appeals the administrative law judge's decision, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in denying benefits for his back and neck injuries and in suspending a portion of his temporary total disability benefits. Specifically, he argues that the administrative law judge failed to address whether the back and neck injuries were aggravated by his overall work and whether employer submitted sufficient evidence to rebut the Section 20(a), 33 U.S.C. §920(a), presumption with regard to those injuries. Additionally, claimant argues that he did not unreasonably refuse the recommended medical treatment for his left knee but, rather, was unable to afford treatment, lost confidence in Dr. Holmes, and wanted a second opinion.

We affirm the administrative law judge's finding that claimant's back and neck injuries are not work-related as substantial evidence of record supports this finding. In determining whether an injury is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after he establishes a *prima facie* case. Once the claimant establishes a *prima facie* case, as here,[3] Section 20(a) applies to relate the injury to the employment, and the burden is on the employer to rebut this presumption by producing substantial evidence that the injury is not related to the employment.[4] *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th

[3]The administrative law judge rationally found that claimant established a *prima facie* case: there was no objective evidence that claimant had suffered a back or neck injury prior to the April 2007 incident; the MRI showed a harm; Drs. Holmes, Kujawa, and Leonard opined it was possible the harm could have resulted from the 2007 incident or from performance of his work; the alleged fall and the characteristics of claimant's employment requiring him to evade hostile attacks could have caused harm to claimant's back and neck. Decision and Order at 20; Jt. Exs. 13, 18-19; Jt. Ex. 17 at 9, 14, 35-36. Although employer suggests that the administrative law judge erred in finding that claimant established a *prima facie* case relating his back and neck injuries to his employment, it was reasonable for the administrative law judge to find that the fall and/or the employment could have caused claimant's harm. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

[4]We reject claimant's current contention that the administrative law judge did not adequately address whether the overall employment aggravated any pre-existing condition. Claimant's claim for compensation form does not identify his overall employment as a cause of his current condition, and claimant's original attorney did not make an opening statement at the hearing or file a post-hearing brief identifying work-related aggravation as an issue. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); Jt. Ex. 7; n.1, *supra*. Nevertheless, the administrative law judge acknowledged the dangers of claimant's work but rationally

Cir. 1999); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the employer rebuts the presumption, it no longer controls and the issue of whether there is a causal relationship 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).

The administrative law judge found that employer presented substantial evidence rebutting the Section 20(a) presumption with regard to claimant's back and neck injuries, relying on Dr. Richmond's opinion that the back injury was not causally linked to claimant's employment. Decision and Order at 20-21. In a peer review report dated October 11, 2009, Dr. Richmond opined that claimant's MRI revealed advanced arthritic findings that are not related to the work incident. Dr. Richmond concluded that it was impossible to link the disc injuries to either claimant's general employment or the incident because such acute protrusions would have caused symptoms warranting medical treatment, and claimant did not seek medical treatment until he learned of his condition following the MRIs in Kuwait in 2008.[5] Accordingly, Dr. Richmond concluded that claimant's symptoms are most likely due to the natural progression of an underlying degenerative disc disease as opposed to any trauma at work. Jt. Ex. 30. As Dr. Richmond's opinion constitutes substantial evidence of the absence of any relationship between claimant's back and neck injuries and his employment, the administrative law judge properly concluded that employer rebutted the Section 20(a) presumption and that it falls from the case. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003).

As the Section 20(a) presumption no longer applies, claimant bears the burden of establishing that his back and neck injuries are related to his employment. Claimant contends that three doctors stated that his back and neck injuries could have been caused by the 2007 fall. Jt. Exs. 17-19. However, the administrative law judge gave those opinions less weight because they relied solely on claimant's statements regarding a causal relationship and the administrative law judge determined claimant was not credible in this regard. Decision and Order at 21-22. Moreover, the administrative law judge specifically found that these doctors did not state that the conditions actually are

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determined that his back symptoms are not work-related.

[5]Although claimant raised the issue of a neck injury in his 2008 claim form and the administrative law judge addressed the back and the neck injuries together, there appears to be no clinical evidence of a neck injury prior to Dr. Leonard's March 2009 examination, and no objective evidence at all, as the 2008 MRIs were of the left knee and the lumbosacral spine only. Jt. Ex. 13; Jt. Ex. 17 at 16-17; Jt. Ex. 30.

work-related. *Id.* at 22. The administrative law judge rationally credited Dr. Richmond's opinion and concluded that claimant's symptoms are the result of the natural progression of an underlying degenerative condition and are not related to either the fall or to his employment in Iraq. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *see also Calbeck v. Strachan Shipping Co.*, 306 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); Jt. Ex. 25 at 26; Jt. Ex. 30. In addition, the fall occurred in April 2007 and the administrative law judge found that claimant continued to work until May 2008, without any complaints of back or neck pain, and, in fact, did not even know he had a back condition until the MRI demonstrated such in May 2008. The administrative law judge, therefore, rationally concluded that neither the 2007 fall nor claimant's overall employment caused or aggravated claimant's back condition. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988); Decision and Order at 21-22. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's back and neck conditions are not work-related.

Claimant also contends the administrative law judge erred in suspending his temporary total disability benefits from the date he last saw Dr. Holmes until the date he saw Dr. Kujawa. Claimant argues that he lost confidence in Dr. Holmes and wanted a second opinion and that, as employer was not paying benefits, he could not afford the recommended surgery anyway. Section 7(d)(4) of the Act provides that compensation may be suspended during the period when a claimant unreasonably refuses to submit to medical treatment or examination unless the circumstances justify the refusal. 33 U.S.C. §907(d)(4); 20 C.F.R. §702.410(b). The employer must first establish that the claimant's refusal to undergo treatment is unreasonable on an objective basis. If that is established, claimant must demonstrate, on a subjective basis, that the circumstances justified his refusal. The administrative law judge may suspend benefits from the date of the unjustified refusal. *B.C. [Casbon] v. Int'l Marine Terminals*, 41 BRBS 101 (2007); *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002); *Malone v. Int'l Terminal Operating Co.*, 29 BRBS 109 (1995); *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979).

Drs. Holmes and Kujawa both recommended that claimant have arthroscopic surgery to fix the torn meniscus in his left knee. The administrative law judge determined that this procedure constituted reasonable and necessary medical treatment for a torn meniscus. Decision and Order at 27. Next, the administrative law judge stated that claimant was originally scheduled for the surgery with Dr. Holmes in June 2008, "[h]owever, after a disagreement with Dr. Holmes regarding his work release, Claimant ended his treatment with Dr. Holmes." *Id.* at 28. The administrative law judge found that, after a period of time searching for another doctor, claimant found Dr. Kujawa in

March 2009, and Dr. Kujawa recommended the same treatment/surgery as did Dr. Holmes. Accordingly, the administrative law judge found that claimant's refusal to treat with Dr. Holmes constituted a refusal to submit to reasonable medical treatment.

The administrative law judge then focused on claimant and considered his particular reasons for refusing the recommended procedure. There may be "countless individual subjective reasons" justifying a claimant's refusal of reasonable treatment and the fact-finder has broad discretion in considering whether these reasons provide sufficient justification for the individual decision. *Malone*, 29 BRBS at 111-112; *Hrycyk*, 11 BRBS at 242. In this case, the administrative law judge identified the "disagreement" with Dr. Holmes over his release to return to work as claimant's only reason for refusing to treat with Dr. Holmes. Decision and Order at 28. A review of the record reveals that the administrative law judge's finding is reasonable. Claimant testified that, on the first visit, Dr. Holmes spent five minutes with him and released him to return to his usual work, despite his complaints of pain. Claimant stated that he returned to Dr. Holmes two days later to get his work release changed but he lost confidence in and felt uncomfortable with Dr. Holmes because Dr. Holmes would not listen to him. Claimant "fired" Dr. Holmes and, nine months later, found Dr. Kujawa. Tr. at 40, 47-48. Although he later testified that he had paid some bills out-of-pocket but that he had not undergone any treatments because they were too expensive, Tr. at 49-50, claimant did not cite the cost of the procedure as the reason he refused treatment with Dr. Holmes. Moreover, Dr. Holmes stated that he expected recovery from knee surgery to be complete within one month, Jt. Ex. 18 at 19, and Dr. Kujawa stated that, following the arthroscopy, claimant's recovery for his knee would have been no more than six weeks, Jt. Ex. 19 at 9-10. The administrative law judge found that, due to his decision to "fire" Dr. Holmes, claimant's knee condition was still problematic over nine months after Dr. Holmes would have performed surgery, and he found that claimant's "dispute" with Dr. Holmes did not justify refusing to undergo surgery in June 2008. Accordingly the administrative law judge suspended claimant's benefits during the period between June 26, 2008, and March 23, 2009. Decision and Order at 28. As it is within the administrative law judge's discretion to suspend benefits based on an unreasonable and unjustified refusal to undergo medical treatment, 33 U.S.C. §907(d)(4), and as claimant has not shown an abuse of that discretion, we affirm the administrative law judge's suspension of claimant's temporary total disability benefits between June 26, 2008, and March 23, 2009. *Casbon*, 41 BRBS at 104.

Accordingly, 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