BRB Nos. 11-0426
and 12-0258

LARRY GABRIEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIPBUILDING, INCORPORATED	)	DATE ISSUED: 01/28/2013
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Claimant's Petition for Modification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Larry Gabriel, Harvey, Louisiana, *pro se*.

Richard S. Vale, Frank J. Towers and Pamela Noya Molnar (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant, appearing without representation, appeals the Decision and Order and Order Denying Claimant's Petition for Modification (2010-LHC-00183) 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.* (the Act). In reviewing an appeal where claimant is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine if they are supported by substantial evidence, are rational, and are in accordance with law; if they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant alleged injuries to his knees and back as a result of an accident sustained while he was working as a carpenter for employer on April 12, 2006. Claimant received treatment at employer's clinic for bilateral knee contusions and was referred to Dr. Katz for an orthopedic evaluation. Dr. Katz, who had previously treated claimant in April/May of 2005 for back and knee pain related to a non-work-related accident,[1] diagnosed bilateral knee pain and performed a right knee arthroscopy on June 20, 2006. He continued to treat claimant until January 29, 2007, at which time he recommended that claimant undergo a total right knee arthoplasty, which was performed by Dr. Sanchez on May 15, 2007. Claimant continued to treat with Dr. Sanchez and, at his September 24, 2007 visit with the physician, complained, for the first time following the April 12, 2006 work accident, of constant back pain and left knee pain. At that time, Dr. Sanchez found no objective basis for claimant's complaints of back pain or any evidence to indicate that claimant's left knee pain was related to the April 12, 2006 work accident. Dr. Sanchez also opined that claimant reached maximum medical improvement with a 15 percent permanent impairment of the right lower extremity and that claimant was capable of sedentary work, within certain prescribed physical restrictions.[2] He thereafter referred claimant to Dr. Knight for pain management.

Claimant, instead, obtained pain management treatment from Drs. Schlosser and Ortenberg. Dr. Schlosser, who treated claimant between November 26, 2007, and May 12, 2008, attributed claimant's leg pain to the degenerative changes in his lower back that pre-existed his April 12, 2006 injury and noted, based on claimant's statements regarding his accident history, that claimant's right knee condition possibly and/or probably exacerbated his low back pain due to gait alteration. At his deposition, Dr. Schlosser testified that he would place claimant in a sedentary to light-duty work capacity. Dr. Ortenberg, however, concurred with Dr. Sanchez's opinion that claimant's left knee and

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[1]Claimant sustained a left knee meniscal tear and was diagnosed with protruding degenerative discs at L5-S1 as a result of a grocery store incident. Dr. Juneau performed arthroscopic surgery in March 2005 to repair the meniscal tear and recommended epidural injections to address claimant's back pain. Claimant refused the epidural injections, and instead sought treatment for continued knee and back pain from Dr. Katz. On April 25, 2005, Dr. Katz opined that claimant's back pain was due to his pre-existing degenerative spondylosis at L5-S1 and his knee pain was due to post-operative discomfort associated with degenerative knee conditions. Over the next three weeks, Dr. Katz prescribed injections, physical therapy and anti-inflammatories. Dr. Katz last treated claimant for these injuries on May 19, 2005.

[2]Dr. Sanchez placed the following work restrictions on claimant: frequent standing, stretching and change of positions; occasional walking; no kneeling, crouching, crawling, repetitive bending at waist, stooping, or climbing; and limited lifting and carrying to 10 pounds. EX 4.

low back pain were not related to the April 12, 2006 work accident and opined that claimant was at maximum medical improvement for his injuries as of the date of claimant's first visit with the physician on December 20, 2007. Dr. Ortenberg also agreed with Dr. Sanchez's assessment that claimant was capable of performing sedentary work.

Claimant continued to seek treatment for his back and right knee pain with Drs. Rozas and Gallagher. Based solely on claimant's subjective complaints, both physicians initially diagnosed a failed total right knee replacement. However, upon further examination, Drs. Rozas and Gallagher each opined that there were not any objective abnormalities to explain claimant's pain. Subsequently, Dr. Gallagher, along with Dr. Habig, who likewise found claimant's subjective complaints of right knee pain to be out of proportion with the objective findings, concluded that there was no need for a revision of claimant's right total knee replacement.

Claimant testified that he has not been able to work since the date of his accident. Employer voluntarily paid temporary total disability benefits from April 12, 2006 through January 19, 2009, as well as medical benefits for the treatment of claimant's conditions. Claimant, thereafter, with the assistance of counsel, sought benefits under the Act for his right knee and low back complaints.

In his decision dated February 9, 2011, the administrative law judge found that claimant sustained a right knee injury, but not a back injury, as a result of the April 12, 2006 work accident. Addressing the nature and extent of claimant's work-related right knee injury, the administrative law judge found that employer established that, as of September 24, 2007, claimant's right knee condition had reached maximum medical improvement with a 15 percent permanent impairment and that suitable alternate employment was available. The administrative law judge thus found claimant entitled to temporary total disability benefits from the date of his injury, April 12, 2006, through September 24, 2007, and to an award of permanent partial disability benefits pursuant to the schedule, 33 U.S.C. §908(c)(2), (19). The administrative law judge calculated claimant's entitlement to temporary total and permanent partial disability benefits, compared that sum, $48,783.40, with the amount of disability benefits voluntarily paid by employer, $59,298.98, and concluded that claimant is not entitled to any additional disability benefits. Moreover, the administrative law judge denied claimant's request for additional medical benefits for a revised total right knee replacement operation.

Claimant, no longer represented by counsel, appealed the administrative law judge's decision to the Board but also filed a petition for modification. 33 U.S.C. §922. The Board dismissed claimant's appeal, BRB No. 11-0426, and remanded the case to the administrative law judge for consideration of the petition for modification. 20 C.F.R. §802.301(c). In his Order dated January 24, 2012, the administrative law judge found that claimant did not establish a change in his condition or a mistake in a determination of

fact in the prior decision, and he thus denied modification.

Claimant, appealing pro se, challenges the administrative law judge's denial of modification and denial of additional disability and medical benefits for his April 12, 2006 work injury.[3] Employer responds, urging affirmance.

Once claimant has established his prima facie case, he is entitled to the Section 20(a), 33 U.S.C. §902(a), presumption linking his harm to his employment, *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000), and the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director*, *OWCP,* 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *Id.; see also Director, OWCP v. Greenwich Collieries,* 512 U.S. 257, 28 BRBS 43(CRT) (1994).

The administrative law judge found that "the Section 20(a) presumption clearly links the right knee but not the back injury and pain to the April 12, 2006 work-related injury." Decision and Order at 16. The administrative law judge, nonetheless, determined that not only did employer "fully" rebut any claim that claimant may have made concerning a causal relationship between his back and the April 12, 2006 incident, but that it also showed that "the true origin of claimant's back pain" was the non-work-related grocery store accident in 2005. *Id.* at 16-17. In reaching this conclusion, the administrative law judge rationally relied on the opinions of Drs. Rozas, Juneau, Sanchez, Ortenberg and Schlosser, each of whom could not relate claimant's low back pain to the April 12, 2006 work accident. EX 25, Dep. at 49-50; EX 30, Dep. at 19, 33; EX 12, Dep. at 23-24, 27, 33; EX 14, Dep. at 31-33, 62, 104-105; EX 31, Dep. at 38, 39. As these opinions constitute substantial evidence that claimant's back condition was not caused or aggravated by the April 12, 2006 work accident, the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption with regard to this condition is affirmed.[4] *See Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012).

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[3]The Board assigned claimant's appeal of the administrative law judge's denial of modification BRB No. 12-0258, reinstated claimant's prior appeal, BRB No. 11-0426, and consolidated the appeals for purposes of rendering a decision.

[4]Thus, any error in the administrative law judge's finding that the Section 20(a) presumption did not apply to the back pain is harmless. *Bingham v. General Dynamics Corp.,* 20 BRBS 198 (1988).

In weighing the evidence as a whole, the administrative law judge rationally credited the objective medical evidence, notably the reports of Dr. Sanchez, in conjunction with those of Drs. Ortenberg and Schlosser, over claimant's subjective complaints of back pain, and/or his suggestion that the failed right knee replacement resulted in an altered gait and back pain. *See 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). Specifically, the administrative law judge found that the objective evidence establishes, in contrast to claimant's position, that the total knee replacement was successful and that claimant did not complain of any back pain, or exhibit any altered gait, until 17 months after the date of the accident, *i.e.*, only after his treating physician indicated that claimant was at maximum medical improvement and was capable of returning to light-duty work. As the administrative law judge's decision to accord no weight to claimant's testimony that he incurred increased symptoms of low back pain as a result of the April 12, 2006 work incident is rational and supported by substantial evidence, it is affirmed. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911(1979). Consequently, as the administrative law judge drew rational inferences from the objective evidence, *see Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), his conclusion that claimant did not establish by a preponderance of the evidence that his work accident on April 12, 2006, caused or aggravated his back condition is affirmed. *See Sistrunk v. Ingalls Shipbuilding, Inc.,* 35 BRBS 171 (2001).

The administrative law judge next found, based on the opinion proffered by Dr. Sanchez, as corroborated by that of Dr. Ortenberg, that claimant reached maximum medical improvement with regard to his work-related right knee injury as of September 24, 2007. Dr. Sanchez, who performed claimant's right total knee replacement surgery on May 15, 2007, stated that, by September 24, 2007, "everything [was] looking good" as x-rays from that date "showed that the knee was well aligned and that the components were not loose," such that "I didn't see anything wrong with his knee." EX 12, Dep. at 18, 23-24, 31-32. Dr. Sanchez thus concluded that claimant reached maximum medical improvement with regard to his work-related right knee condition on September 24, 2007. EX 12, Dep. at 41. Dr. Ortenberg indicated that she felt claimant was at maximum medical improvement with regard to his work-related right knee injury as of the date of claimant's first visit, December 20, 2007. EX 14, Dep. at 52, 62. Moreover, all of the physicians who subsequently examined claimant's right knee to determine the viability for a revision surgery, most notably Drs. Gallagher and Habig, found that any such procedure was unnecessary.

In light of the opinions of Drs. Sanchez, Gallagher and Habig, the administrative law judge rationally concluded that additional surgery on claimant's right knee is not anticipated. *See McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000). Moreover, in light of Dr. Sanchez's opinion that claimant reached maximum medical improvement with regard to his work-related right knee injury as of September 24, 2007,

the administrative law judge rationally concluded that claimant's condition was permanent as of that date. We thus affirm the administrative law judge's finding that claimant sustained a permanent impairment as of September 24, 2007, as it is rational, supported by substantial evidence, and in accordance with law. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980).

The administrative law judge, having found claimant incapable of returning to his usual employment as a carpenter, rationally found that employer established the availability of suitable alternate employment by identifying for claimant three entry-level sedentary jobs, which were within claimant's physical limitations according to his treating physician, EXs 17, 24A, 29, 37, 43, 46-48, and which were appropriate for claimant's educational level. *See Ledet v. Phillips Petroleum Co.,* 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). The administrative law judge's finding that employer established the availability of suitable alternate employment is rational, supported by substantial evidence and in accordance with law. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *see New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1991). Additionally, the administrative law judge's finding that claimant did not establish that he was diligent in seeking alternate employment is supported by substantial evidence, particularly given claimant's admission that he had not worked or looked for employment since the April 12, 2006 work incident. *See 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); *see also Turner,* 661 F.2d 1031, 14 BRBS 156. Claimant, therefore, is limited to a permanent partial disability award under the schedule. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). The record also supports the administrative law judge's scheduled award of permanent partial disability for 43.2 weeks based on the 15 percent permanent impairment rating of Dr. Sanchez, as agreed upon by Drs. Gallagher and Ortenberg. 33 U.S.C. §908(c)(2), (19); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). The record contains no evidence of a higher permanent impairment rating for claimant's right knee condition. Accordingly, we affirm the administrative law judge's findings that claimant is entitled to periods of temporary total and permanent partial disability benefits. 33 U.S.C. §§908(b), (c)(2), (19).

The administrative law judge, however, found employer entitled to a credit, pursuant to Section 14(j) of the Act, 33 U.S.C. §914(j),[5] for its prior payments of

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[5]Section 14(j) provides:

compensation against the compensation to which he found claimant entitled. *See Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002). The administrative law judge found that employer had voluntarily paid a total of $59,298.98 in benefits.[6] Decision and Order at 20. Comparing this figure to the amount of benefits to which the administrative law judge found claimant entitled, $48,783.40, representing $31,061.03 in temporary total disability benefits from April 12, 2006 through September 24, 2007, and a scheduled award of $17,722.37, the administrative law judge concluded that claimant received, in voluntary disability payments, $10,515.58, more than he was due. *Id.* Accordingly, he denied claimant's request for additional disability benefits. As the administrative law judge's calculations are in order, his finding that employer is entitled to a credit for its overpayment of disability benefits owed claimant and resulting conclusion that claimant is not entitled to any additional disability benefits is affirmed. *LaRosa v. King & Co.,* 40 BRBS 29, 30-31 (2006).

Moreover, the administrative law judge's finding that claimant did not need revision surgery is supported by substantial evidence. The record establishes, as the administrative law judge found, that all of the orthopedic surgeons who examined claimant's right knee subsequent to the total knee replacement surgery performed by Dr. Sanchez on May 15, 2007, *i.e.*, Drs. Rozas, Gallagher, Habig, and Sanchez, ultimately found that there is nothing to suggest that something had gone wrong with the knee replacement and thus, concluded that additional surgery is unnecessary.[7] *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir.

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

[6]The administrative law judge found that employer voluntarily paid temporary total disability benefits totaling $42,889.38, EX 16, and permanent partial disability benefits totaling $16,409.60, representing the 40-week period between April 18, 2008 and January 19, 2009, at the stipulated compensation rate of $410.24. Decision and Order at 20 n. 5.

[7]The administrative law judge found that while Drs. Rozas and Gallagher each initially diagnosed a "failed total knee replacement," both physicians acknowledged that that diagnosis was based on claimant's subjective complaints and not because of any abnormality they saw on x-ray or by examination. EX 25, Dep. at 13; EX 26, Dep. at 63. The administrative law judge also found that, upon further testing, Dr. Rozas and Dr. Gallagher both concluded that the right knee replacement appeared to be a success, with Dr. Gallagher further adding that revision surgery would not be necessary. Decision and Order at 9-10, 21; Order on Modification at 4-5.

1993). Claimant thus did not meet his burden to show that the surgery is necessary for the treatment of the work injury. *Id.* Therefore, we affirm the administrative law judge's denial of authorization for a second knee replacement surgery. Accordingly, we affirm the administrative law judge's first decision in its entirety as the findings are supported by substantial evidence in the record and in accordance with law. *O'Keeffe,* 380 U.S. 359.

Lastly, we address the administrative law judge's decision on claimant's motion for modification. Pursuant to Section 22 of the Act, a prior decision can be set aside if the moving party, here claimant, establishes there has been a change in his physical or economic condition since the entry of the prior decision or a mistake in a determination of fact in the prior decision. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995)*; Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). In this case, the administrative law judge rationally found that claimant did not establish a basis for modification. The administrative law judge addressed all of the evidence, new and cumulative that claimant submitted in support of his petition for modification, and rationally concluded that the evidence failed to persuade him that additional knee surgery is warranted or that claimant sustained additional disability.[8] As they are supported by substantial evidence, we affirm the administrative law judge's findings that claimant did not establish a change in his physical or economic condition since the date of the administrative law judge's February 9, 2011 decision, or that there was a mistake in the determination of fact in the administrative law judge's first decision. 33 U.S.C. §922; *O'Keeffe*, 380 U.S. 359; *Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004). As claimant failed to sustain his burden under Section 22 of the Act, we affirm the denial of his motion for modification. *Winston v. Ingalls Shipbuilding, Inc.,* 16 BRBS 168 (1984).

[8]Claimant submitted, in conjunction with his petition for modification, 18 exhibits, *see* CX-A through CX R, which the administrative law judge acknowledged prior to addressing the merits of claimant's petition for modification. The administrative law judge found that this evidence, allegedly showing a failed right knee replacement, "amounts to a mere snapshot of the voluminous medical records that were previously submitted considered." Order on Modification at 4-5. The administrative law judge nonetheless reconsidered this evidence and reiterated that none of the physicians in this case ultimately testified that claimant's knee replacement had failed. *See* n. 7, *supra.*

Accordingly, the administrative law judge's Decision and Order and Order Denying Claimant's Petition for Modification are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge