BRB No. 91-536

ANTHONY W. WHITTAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: _____
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Lee E. Wilder (Rutter & Montagna), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason), Newport News, Virginia, for self-insured employer.

Before: STAGE, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (89-LHC-1334) of Administrative Law Judge Michael P. Lesniak rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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 that 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 injured his back during the course of his employment on November 15, 1986. Claimant was placed on light duty work and later returned to his regular employment duties with employer. Thereafter, on July 24, 1988, claimant was bending over to move a lawn sprinkler while at home when he could not straighten up. Claimant subsequently filed a claim under the Act seeking compensation as a result of his prior November 15, 1986 injury.

In his Decision and Order, the administrative law judge determined that employer rebutted the presumption of causation contained in Section 20(a), 33 U.S.C. §920(a). The administrative law judge then concluded, based upon the record as a whole, that claimant failed to establish that his disability is work-related; the claim for benefits was therefore denied.

On appeal, claimant contends that the administrative law judge erred in determining that employer rebutted the Section 20(a) presumption and that, alternatively, the administrative law judge erred in evaluating the evidence as a whole after finding rebuttal. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a), it is presumed that claimant's disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or an accident occurred which could have caused, aggravated or accelerated the condition. Perry v. Carolina Shipping Co., 20 BRBS 90 (1987). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. Sam v. Loffland Brothers Co., 19 BRBS 228 (1987). Employer can rebut the presumption by producing substantial evidence that claimant's condition was caused by a subsequent non-work-related event; in establishing that a subsequent event occurred which caused claimant's disabling condition, employer must also set forth substantial evidence that the first, work-related accident did not cause the second accident. See James v. Pate Stevedoring Company, 22 BRBS 271 (1989). If the administrative law judge determines that the presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue on the record as a whole. See Hite v. Dresser Guiberson Pumping, 22 BRBS 87 (1989).

In the instant case, claimant initially contends that the administrative law judge erred in finding the Section 20(a) presumption rebutted. Specifically, claimant contends that Dr. Allen's testimony, upon which the administrative law judge relied, is insufficient to rebut the presumption since that physician did not rule out the possibility that claimant's work-accident aggravated his underlying back condition. We disagree. After setting forth the medical evidence of record, the administrative law judge found that the testimony of Dr. Allen was sufficient to rebut the presumption. Our review of the record indicates that Dr. Allen initially opined that claimant "suffered from two lumbosacral strain syndromes that are unrelated in time and causative factors." See EX-8(d). Dr. Allen subsequently deposed that, although claimant's 1986 and 1988 incidents were the types of activities which contribute to lumbar spine degeneration, there

was no casual connection between the two incidents. See CX-4 at 11-12. We hold that Dr. Allen's opinion constitutes substantial evidence to support a finding that claimant's disabling back condition is not related to his injury at work, and thus we affirm the administrative law judge's finding that the Section 20(a) presumption was rebutted. See Phillips v. Newport News Shipbuilding and Dry Dock Co., 22 BRBS 94 (1988).

Claimant next alleges that the administrative law judge erred by failing to find that causation had been established on the record as a whole. Specifically, claimant challenges the administrative law judge's decision to credit the testimony of Dr. Allen over that of Dr. Blankenship, contending that Dr. Allen's opinion is flawed since that opinion is based upon the assumption that claimant was pain-free between 1986 and 1988. It was within the administrative law judge's discretion to accord greater weight to the opinion of Dr. Allen rather than that of Dr. Blankenship and find that claimant's disability was not related to his employment with employer.[1] See Cordero v. Triple A Machine Shop, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979). The administrative law judge noted that Dr. Allen, as claimant's treating physician, was not informed by claimant of any difficulties experienced between the two incidents. Furthermore, Dr. Allen opined that claimant had reinjured his back in 1988 while bending and that claimant suffered two lumbosacral strain syndromes which are unrelated in time and causative factors. See EX-8; CX-4. It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, Fyall v. Delta Marine, Inc., 18 BRBS 241 (1986), and he is not bound to accept the opinion or theory of any particular medical examiner. See Todd Shipyard Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962). Upon review of the record, we cannot say that the administrative law judge's credibility determination regarding the medical opinions of record are either inherently incredible or patently unreasonable. We therefore affirm the administrative law judge's determination that claimant's condition is not work-related.

[1]Contrary to claimant's contention, the administrative law judge did set forth Dr. Allen's "superior qualifications;" specifically, the administrative law judge noted that, while Dr. Blankenship is a chiropracter, Dr. Allen is a licensed physician, is Board-eligible in neurosurgery, and is on the staff of three hospitals.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge