BRB No. 86-943

CHARLES RALPH OLIVER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	
	)	DATE ISSUED:_____
and	)	
	)	
AETNA CASUALTY AND SURETY COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Clarence E. Blair, Compton, California, for claimant.

N.R. Samuelsen (Samuelsen, Coalwell & Gonzalez), San Pedro, California, for employer/carrier.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (84-LHC-2465) of Administrative Law Judge Alexander Karst 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).[1] 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

[1]We note that the district director's inability to locate the record delayed the review of this appeal. *See* Board Orders dated April 7, 1989 and June 18, 1992.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

On September 19, 1978, while working in his capacity as a shipfitter, claimant slipped and fell, injuring his back, neck and shoulder. He reported his injury immediately and visited the shipyard doctor that day. Dr. Cabrera, claimant's treating physician, excused claimant from work until February 12, 1979, at which time he released him to light duty work. Despite Dr. Cabrera's opinion, and that of Dr. London, an orthopedic surgeon, who opined that claimant's condition reached maximum medical improvement and released claimant to return to work on July 16, 1979, claimant did not return to work until August 21, 1979, at which time he undertook a light duty position using a bandsaw to cut aluminum parts. Claimant subsequently resigned after five months, citing pressure, fatigue, pain and an inability to do the work. Tr.1 at 6, 62-66, 85-87, 119-120; Emp. Ex. 3. Thereafter, claimant filed a claim under the Act for permanent total disability benefits.[2]

A hearing was held wherein the parties disputed the cause, nature and extent of claimant's disability. The administrative law judge found that employer provided claimant with work within his post-injury limitations and demonstrated there is no loss in his wage-earning capacity. Decision and Order at 3. Next, the administrative law judge credited the opinions of Drs. Booth, London, Bonecutter and Keesey and determined that, as of July 16, 1979, claimant was "physically quite capable of performing [the work] . . . without intolerable physical discomfort." *Id.* The administrative law judge also found that, although claimant is an "emotionally and psychologically troubled" man, his claim of a permanent psychiatric impairment as a result of his fall failed for lack of proof, as he has not shown that those problems were caused or permanently aggravated by his 1978 back, neck or shoulder injury.[3] *Id.* at 4. Additionally, he determined that claimant's emotional difficulties are not so severe as to disable him from performing the work employer provided. Accordingly, because employer paid claimant compensation beyond the July 16, 1979 date of maximum medical improvement, the administrative law judge denied benefits. *Id.* at 5.

On appeal, claimant challenges the administrative law judge's denial of benefits for his physical and psychological conditions. Employer responds, urging affirmance.

[2]Employer paid temporary total disability benefits through December 1, 1980. Tr.1 at 231.

[3]The administrative law judge found the reports of claimant's treatment by Drs. Koch, Wilson, San Luis, and Dickstein to be unpersuasive as to a connection between claimant's work accident and his various disorders. Decision and Order at 3. We note that, with the exception of Dr. Dickstein, the above-mentioned doctors' opinions are referenced only in the medical reports of Drs. Benjamin, Booth, Feldman and Spamer. *See* Cl. Exs. 2-3; Emp. Exs. 1-2, 5, 7. The record transmitted to the Board contains no reference to the report of Dr. Dickstein.

Claimant initially contends he was denied procedural due process when employer retained, for approximately three months, a medical report authored by Dr. Keesey and the administrative law judge subsequently refused to allow him to depose that physician, and that the administrative law judge thereafter erred in denying compensation for his physical condition. We disagree. An administrative law judge has broad discretionary power to direct and authorize discovery in support of the adjudication process; thus, a refusal to issue an order is reversible only if so prejudicial as to result in a denial of due process. *Bonner v. Ryan-Walsh Stevedoring Co., Inc.*, 15 BRBS 321, 325 (1983); *Lopes v. George Hyman Construction Co.*, 13 BRBS 314 (1981); 33 U.S.C. §927(a); 5 U.S.C. §556(c). If a case involves the introduction of an *ex parte* medical report, the adverse party must be given the opportunity to cross-examine the author of the report. *Richardson v. Perales*, 402 U.S. 389 (1971); *see also Darnell v. Bell Helicopter International, Inc.*, 16 BRBS 98 (1984), *aff'd sub nom. Bell Helicopter International, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13 (CRT) (8th Cir. 1984). Reliance upon an *ex parte* report will be affirmed where the author is not biased and has no interest in the case, where the opposing party has the opportunity to cross-examine or subpoena the author, and where the report is not internally inconsistent. *Darnell*, 16 BRBS at 100.

In the instant case, claimant's injury occurred on September 19, 1978, the hearing before the administrative law judge took place on February 12-13, 1985, and Dr. Keesey examined claimant on October 17, 1985.[4] *See* Tr.1; Tr.2; Emp. Ex. 9. Employer received a copy of Dr. Keesey's October 28, 1985 report on November 4, 1985. Claimant avers employer unfairly delayed service of the report until January 26, 1986. On February 12, 1986, claimant sought leave to depose Dr. Keesey, noting that a deposition of that physician was scheduled for March 14, 1986. The administrative law judge denied the request, stating: "You have had over a year since the trial of this case to submit additional evidence. Claimant's request for another deposition is denied. The matter stands submitted." Cl. Brief at Exs. C-D. On the facts of this case, we conclude that any error by the administrative law judge foreclosing cross-examination in this manner is harmless, as Dr. Keesey's report was not determinative of the decision.

It is well-established that claimant bears the burden of proving the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). In the instant case, the administrative law judge, in concluding that claimant's physical condition did not preclude his return to work on July 16, 1979, found the opinions of Drs. London, Booth, Bonecutter and Keesey to be convincing. Dr. London, who examined claimant on July 16, 1979, opined that claimant was recovered from his back, neck, and shoulder injuries, that claimant's condition was

[4]Prior to trial, claimant underwent two EMGs, with contradictory results. At the conclusion of the first day of the hearing, claimant obtained leave to undergo a third EMG and an MRI. Tr.1 at 275-278. According to employer, the EMG results were negative. The MRI revealed minimal disc bulges at L4-5 and L5-S1, with no significant abnormalities. Cl. Brief at Ex. E. Claimant requested and was granted leave to undergo a fourth EMG on September 4, 1985. Cl. Brief at 2; Emp. Brief at 2. Dr. Keesey conducted the fourth EMG, which indicated normal findings in the cervical and lumbosacral regions. Emp. Ex. 9.

permanent and stationary, and that claimant was fit to return to work without restrictions.[5] Emp. Ex. 3 at 42. Dr. Booth, who examined claimant on July 24, 1980, diagnosed a contusion and sprain of the right shoulder, a sprain of the cervical spine with no residuals, and a sprain and contusion of the lumbosacral spine, superimposed on spondylolysis at L4. Emp. Ex. 2 at 37. Dr. Booth found claimant's condition to be permanent and stationary and predicted that claimant would receive no benefit from further treatment. Dr. Booth re-examined claimant on January 23, 1985, and reported no change from his 1980 diagnosis and conclusions. *Id.* at 31, 38. In March 1985, Dr. Bonecutter, who conducted an EMG of claimant's lumbosacral spine, stated he could find no fault with Dr. Booth's examinations and conclusions. Emp. Exs. 7-8. In September 1985, claimant underwent an EMG conducted by Dr. Keesey, who thereafter found normal findings in claimant's cervical and lumbosacral regions. Emp. Ex. 9. In contrast, Dr. Spamer, in reports dated February 6 and 7, 1985, diagnosed lumbar discogenic disease with radiculopathy, cervical sprain and strain, and possible discogenic disease with active radiculopathy, and advised claimant to limit himself to sedentary work. Cl. Ex. 2.

As the administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner, he may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In this case, the administrative law judge's decision to credit the opinions of Drs. London, Booth, and Bonecutter over that of claimant's expert, Dr. Spamer, is rational and within his authority as factfinder. *See generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Furthermore, as these credited opinions constitute substantial evidence to support the administrative law judge's finding that claimant had no physical impairment subsequent to July 16, 1979, and could return to work,[6] we hold that claimant was not prejudiced by the administrative law judge's refusal to allow him time to depose Dr. Keesey and that the administrative law judge's reliance on Dr. Keesey's *ex parte* report is harmless. Accordingly, we reject claimant's due process argument, and we affirm the administrative law judge's determination that claimant was not disabled as a result of his physical condition subsequent to July 16, 1979, as that finding is supported by substantial evidence. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

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[5]Dr. London found evidence of spondylolysis at L5; however, he considered this to be a pre-existing chronic condition which was not responsible for claimant's complaints. Emp. Ex. 3 at 42.

[6]The credited opinions establish claimant could return to work without restrictions. We note that, contrary to the administrative law judge's statement, the standard is not whether claimant can perform work "without intolerable physical discomfort." Decision and Order at 3. Credible complaints of pain alone may establish disability. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). However, any error is harmless in this case, as the medical evidence supports a finding that claimant's physical condition was not impaired.

Claimant next contends the administrative law judge erred in determining that his psychological problems were neither caused nor aggravated by his work-related injury. Claimant relies on Dr. Feldman's opinion to support his contention.[7] Dr. Feldman diagnosed claimant as having adjustment disorder with mixed emotions, anxiety and depression. Cl. Ex. 3 at 14. He noted that claimant has psychophysiological musculoskeletal reaction, and that claimant's physical impairment is a psychosocial stressor affecting his overall condition. *Id*, at 15. Dr. Feldman concluded that the combination of physical and psychiatric impairments rendered claimant temporarily totally disabled from gainful employment, and he recommended further treatment and evaluation. *Id*. at 16-17. The administrative law judge considered Dr. Feldman's report to be inconclusive, as he felt it did not explicitly connect claimant's emotional condition with his work-related injury, and he denied the claim for "failure of proof," stating that claimant's psychological problems pre-dated the employment injury and were not caused or aggravated by it. Decision and Order at 4-5.

Section 20(a) of the Act, 33 U.S.C. §920(a), however, provides claimant with a presumption that his injury is causally related to his employment if he establishes that he sustained a harm or pain and that working conditions existed or an accident occurred which could have caused that harm or pain. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). An employment injury need not be the sole cause of a disability; rather, if the work-related injury aggravates, accelerates, or combines with an underlying condition, the resultant disability is compensable. *See, e.g., Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). Once the Section 20(a) presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

In the instant case, the administrative law judge found that claimant sustained a work-related injury during the course of his employment with employer on September 19, 1978; furthermore, the record contains evidence diagnosing multiple psychiatric conditions which could have been caused by his work injury. Thus, claimant has established the two elements of his *prima facie* case, and the administrative law judge should have invoked the Section 20(a) presumption. *See Adams v. General Dynamics Corp.*, 17 BRBS 258 (1985). In his decision, however, the administrative law judge did not apply the Section 20(a) presumption to link claimant's psychological problems to his work injury. Rather, he erroneously placed the burden of establishing a causal relationship on claimant, denying the claim based on psychiatric impairment due to "failure of proof." *See Sinclair v. United*

[7]Claimant also relies on a February 11, 1985, report of Dr. Dickstein. This report, however, is not in the record transmitted to the Board, and the transcript and other materials do not reflect its admission into the record.

Food & Commercial Workers, 23 BRBS 148 (1989).

Failure to invoke Section 20(a) may be harmless error where the administrative law judge credits evidence which is sufficient to rebut the presumption and provides substantial evidence in support of the decision. In this case, employer produced potential rebuttal evidence, offering the opinion of Dr. Benjamin. In January 1985, Dr. Benjamin, a psychiatrist, diagnosed claimant as having a mixed personality disorder with histrionic, dependent, passive-aggressive, paranoid and anti-social features. Emp. Ex. 1 at 12. He classified this, however, as a chronic, pre-existing, non-industrial condition, and he noted that it was not precipitated, aggravated or accelerated by claimant's industrial injury in 1978. He found no temporary or permanent industrial psychiatric disability, and no reason for claimant to continue psychiatric or psychological treatment. *Id.* at 18-19. The administrative law judge neither credited nor discredited Dr. Benjamin's opinion, but described it as a "very lengthy and rambling report which is more of a legal brief than a medical evaluation...." Decision and Order at 4. This case must therefore be remanded for the administrative law judge to apply the Section 20(a) presumption and determine whether employer offered sufficient evidence to rebut. *See Sinclair*, 23 BRBS at 154-155. We, therefore, vacate the administrative law judge's finding that there is no causal relationship between claimant's psychological condition and his work injury, and we remand this case for the administrative law judge to reconsider the issue of causation in light of the Section 20(a) presumption and the aggravation rule.[8]

Lastly, claimant contends that he is entitled to reimbursement for the medical and litigation expenses paid during the course of this claim. Specifically, claimant contends the administrative law judge should have assessed against employer over $1,600 for various litigation expenses, and over $4,000 for medical expenses incurred by claimant. Section 7(d) of the Act, 33 U.S.C. §907(d), permits an employee to recover necessary medical expenses for a work-related injury if he has first requested authorization, prior to obtaining treatment, except in cases of refusal or neglect. *McQuillen v. Horne Brothers, Inc.*, 16 BRBS 10 (1983); 20 C.F.R. §702.421. The administrative law judge made no findings regarding the liability for and the amount of medical expenses for services and treatment provided to claimant, nor did he indicate whether claimant satisfied the requirements of Section 7(d). Because the administrative law judge did not address this issue, he must, on remand, consider whether claimant is entitled to recover these expenditures. *See McQuillen*, 16 BRBS at 16.

Section 28(d) of the Act, 33 U.S.C. §928(d), provides that reasonable and necessary costs and fees for witnesses may be assessed against an employer in those cases where an attorney's fee has been awarded. *Love v. Potomac Iron Works*, 16 BRBS 249 (1984); *Byrum v. Newport News*

[8]The administrative law judge's summary conclusion that claimant's emotional difficulties would not prevent his return to his pre-injury work does not provide an alternate basis for affirmance. The administrative law judge does not explain his reasoning or discuss the evidence relied upon. Contrary to the administrative law judge's statement that Dr. Feldman did not assess claimant's disability, that physician opined that claimant was totally disabled from employment by the combination of physical and psychological problems. Cl. Ex. 3 at 16. On remand, the administrative law judge should reconsider this issue and explain his rationale for the decision reached, specifying the evidence relied upon. The administrative law judge should also clarify which medical reports were admitted into the record.

Shipbuilding & Dry Dock Co., 14 BRBS 833 (1982). Section 28 of the Act, 33 U.S.C. §928, generally provides that an attorney's fee may only be awarded after the successful prosecution of a claim. *See* 20 C.F.R. §702.134. Because it has yet to be determined whether claimant has successfully prosecuted his claim, this issue must also be considered by the administrative law judge on remand. Consequently, if he awards either benefits or medical expenses on remand, claimant has successfully prosecuted his claim and would be entitled to an attorney's fee and costs. *Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd*, 920 F.2d 558, 24 BRBS 49 (CRT) (9th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order denying benefits for a psychological condition is vacated, and the case remanded for further consideration consistent with this decision. On remand, the administrative law judge must also determine whether claimant is entitled to medical and legal expenses. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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ROBERT J. SHEA
Administrative Law Judge