BRB No. 92-571

DAVID HOLMES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
UNIVERSAL MARITIME SERVICE CORPORATION	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Celestino Tesoriero, (Grainger & Tesoriero), New York, New York, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (89-LHC-2546) of Administrative Law Judge Robert D. Kaplan 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. *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

*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 April 8, 1979, claimant slipped and fell, sustaining a lumbosacral sprain during the course of his employment. During a recuperative absence of two months, from April 8, 1979 to June 13, 1979, employer paid temporary total disability benefits and medical expenses, 33 U.S.C. §§908(b), 907; thereafter, claimant returned to his pre-injury work. Tr. at 3-4, 29; Emp. Ex. 6-10. On July 7, 1985, claimant retired, citing his inability to continue work because of back pain caused by two herniated discs. Claimant filed for compensation under the Act, claiming permanent total disability from July 7, 1985 and contending that his disability was caused by the 1979 work-injury. Tr. at 17, 33, 44-45; Cl. Ex. 5.

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 found, after evaluating the record as a whole, that claimant's current back condition was not caused by his prior 1979 work-injury; the instant claim for benefits was therefore denied. On appeal, claimant challenges the administrative law judge's finding that employer rebutted the Section 20(a) presumption, specifically contending that employer failed to completely sever the "potential connection" between the 1985 condition and the 1979 incident. Employer responds, urging affirmance.

Initially, we note that neither party challenges the administrative law judge's determination that claimant is entitled to the presumption at 33 U.S.C. §920(a) that his injury is related to his employment with employer. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). 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, contributed to, or aggravated by his employment. *See Peterson v. General Dynamics Corp.*, 25 BRBS 71 (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*, U.S. , 113 S.Ct. 1264 (1993); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990); *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). 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 this case, claimant alleges that the administrative law judge erred in finding the Section 20(a) presumption rebutted. We disagree. The administrative law judge found the testimony of Dr. Burton, who reviewed claimant's medical records and determined that claimant sustained a soft tissue sprain of his back in 1979, with no indications of herniated discs and no evidence of on-going back pain until late 1984, sufficient to rebut the presumption. Dr. Burton stated there is "no continuity and no similarity between [claimant's] current complaints of disc herniation and those which he had in 1979[,]" and he concluded that claimant's herniated discs are the cause of his present complaints and are "unrelated to the effects of the alleged episode of April 8, 1979." Emp. Exs. 16, 21 at 29-30. Contrary to claimant's contention, Dr. Burton's opinion constitutes sufficient evidence

to rebut the Section 20(a) presumption; we thus affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See, e.g., Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Because employer rebutted the presumption, the issue of causation must be determined on the whole body of proof. Claimant submitted the opinions of Drs. Pizzano and Post to support his claim of causation. Dr. Pizzano, claimant's treating physician for anemia and high blood pressure, indicated in a January 1986 letter that claimant has "experienced intermittent episodes of low back pain with symptoms of radiculitis" and that the initial injury of April 1979 "significantly contributed to [claimant's] low back symptoms, *i.e.* Disc Syndrome." Cl. Ex. 1. Dr. Post stated, in a May 1990 report, that claimant has "residua of chronic disc herniation L3-4 and L4-5 as a result of the accident of April 8, 1979." Cl. Ex. 7; *see also* Cl. Ex. 24. In contrast, in addition to Dr. Burton's opinion, employer presented the opinions of Drs. Koval and Schultze who evaluated claimant in 1979, 1980 and 1981. These physicians found no residuals from claimant's 1979 lumbosacral strain and determined that claimant suffered no disability from that injury. Emp. Exs. 6, 8, 10. The record also establishes that claimant performed full-time manual labor after 1979 for six years without losing time from work due to his back condition, that there is no medical evidence of back pain until late 1984, and that there is no evidence of herniated discs until 1985.[1] Decision and Order at 12-14; Tr. at 6; Emp. Exs. 1, 19. In addressing the issue of causation, the administrative law judge discredited claimant's testimony of continuing back pain and credited the testimony of Dr. Burton, which he found to be supported by the record as a whole, over the opinions of Drs. Pizzano and Post, to conclude that claimant's 1979 injury did not cause his 1985 condition. Decision and Order at 12-14.

Questions of witness credibility are for the administrative law judge as the trier-of-fact. *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). Further, it is solely within the administrative law judge's discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Thus, it was within the administrative law judge's discretion to credit the opinion of Dr. Burton, that claimant's physical condition is not related to his 1979 work-injury, over those of Drs. Pizzano and Post. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Therefore, as the administrative law judge's credibility determinations are neither inherently incredible nor

[1]The 1984 medical records indicate that claimant's back pain was only three or four days old, and the 1985 reports indicate his pain was only three or four months old. Emp. Exs. 1, 19.

patently unreasonable, and as the record contains substantial evidence to support the administrative law judge's decision, we reject claimant's contentions and affirm the administrative law judge's finding that claimant's 1979 employment injury did not cause his 1985 disability.[2] *Phillips*, 22 BRBS at 96.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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ROBERT J. SHEA
Administrative Law Judge

[2]We note that the administrative law judge did not discuss whether claimant's continued work aggravated claimant's 1979 back strain or contributed to his 1985 back condition. *See* Decision and Order at 10, 14-15. As claimant failed to raise this argument before the administrative law judge, and in fact testified there were no work-related incidents between 1979 and 1985 which could have caused herniation, we shall not address it on appeal. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988); Cl. Pre-Hearing Statement; Tr. at 38.