BRB No. 12-0605

LEONARD L. SIMONSON, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAHER TERMINALS, LLC	)	DATE ISSUED: 07/19/2013
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Decision and Order Denying Claimant's Request for Reconsideration of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Jameelah Salahuddin, Brick, New Jersey, lay representative, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Decision and Order Denying Claimant's Request for Reconsideration (2011-LHC-00876) of Administrative Law Judge Adele H. Odegard 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1]Claimant has a lay representative. In such cases, the lay representative should request, in writing, permission to appear before the Board. 20 C.F.R. §802.202(d)(2). Although Ms. Salahuddin did not do so, employer does not object to her representation of claimant. We authorize Ms. Salahuddin to appear before the Board in this case.

Claimant injured his left knee and quadriceps tendon on February 7, 2008, during the course of his employment as a straddle operator. Claimant underwent surgery on August 7, 2008, to repair the quadriceps tendon and knee menisci. Claimant's treating physician, Dr. Spagnuola, opined that claimant's quadriceps and knee injuries reached maximum medical improvement on January 9, 2009, and that claimant could return to his usual employment with a limitation against climbing ladders. Claimant underwent a second surgery to repair the left quadriceps muscle in November 2010. Claimant then underwent left knee replacement surgery in August 2011. Employer voluntarily paid claimant compensation for temporary total disability from February 8, 2008 to January 8, 2009, 33 U.S.C. §908(b), and for a 30 percent permanent partial disability of the left leg. 33 U.S.C. §908(c)(2). Claimant sought additional disability and medical benefits for his left leg injury, as well as for neck and back injuries he allegedly suffered as a result of his injured leg's giving out in November 2008.

In her decision, the administrative law judge rejected claimant's contention that he re-injured his left quadriceps tendon, and hurt his neck and back in a November 2008 fall that occurred as consequence of the original work injury. Decision and Order at 22-23, 33-35. However, the administrative law judge found that claimant's second quadriceps surgery in November 2010 was related to the initial August 2008 work injury; she awarded claimant medical benefits for this second surgery and subsequent treatment, as well as compensation for temporary total disability from November 19, 2010 to May 19, 2011. *Id*. at 33-35. The administrative law judge found that claimant's knee replacement surgery is not compensable. The administrative law judge found that claimant's left leg injury originally reached maximum medical improvement on January 9, 2009, and that claimant was able to return to his usual employment.[2] The administrative law judge found that, except for the second work-related surgery and related medical expenses incurred during the six-month recovery period, claimant is not entitled to medical benefits after January 9, 2009, as there is no evidence that claimant sought authorization from employer for medical treatment. Decision and Order at 34-35. On reconsideration, the administrative law judge: rejected claimant's submission of documents after the record had closed; reiterated her finding credible the opinion of Dr. Greifinger; declined to reverse her findings that claimant did not reinjure his left quadriceps tendon in November 2008 and that claimant's back, neck and degenerative left knee conditions are not related to the work injury; and affirmed her finding that claimant did not request authorization from employer for medical treatment after January 9, 2009.

On appeal, claimant contends the administrative law judge erred by not admitting physical therapy reports into the record, in finding credible the opinion of Dr. Greifinger,

[2]The administrative law judge also found that, as employer had compensated claimant for a 30 percent left leg impairment and there is no evidence of a higher degree of impairment, she need not further address this issue. Decision and Order at 32-33.

and in finding claimant did not sustain additional injuries in November 2008 due to the work injury. Claimant also challenges the administrative law judge's findings as to the date of maximum medical improvement and that claimant is not entitled to medical treatment payable by employer after January 2009. Employer responds, urging affirmance of the administrative law judge's decision

We first address several motions claimant filed after he filed his petition for review and brief.[3] In these documents, we discern only one allegation of error on the part of the administrative law judge. Claimant contends the administrative law judge did not comply with Judge Bullard's October 12, 2010 Order that he receive an "independent medical examination." Although there is no October 12, 2010 Order of record, an October 18, 2010 "Order Summarizing Evidence Schedule" issued by Judge Bullard provides, "[C]laimant shall have the opportunity to ask a physician of his choice to review Dr. Greifinger's evidence and render an opinion on Employer's evidence." Claimant contends Judge Bullard required either the Office of Administrative Law Judges or employer to pay for the medical records review, which he characterizes as an "independent medical examination." We reject claimant's contention that the administrative law judge erred in not ordering employer to pay for the cost of obtaining a review of his medical records. Claimant must bear the cost of developing his evidence.[4]

Claimant challenges the administrative law judge's exclusion from evidence of physical therapy reports that were submitted with his post-hearing brief. In her November 3, 2011 Order, the administrative law judge closed the record and set the date for submitting post-hearing briefs. In her January 6, 2012 Order, the administrative law judge accepted the parties' briefs, but she declined to accept into the record the physical therapy reports claimant submitted with his brief. *See* Decision and Order at 2 n.2. Claimant argued on reconsideration that the administrative law judge erred by not admitting the physical therapy reports. In her order on reconsideration, the administrative law judge declined to admit the documents into evidence as they were offered after the

[3]Claimant moved for oral argument on October 25, 2012. By Order issued on November 21, 2012, the Board denied claimant's motion. On December 7, 2012, claimant filed a second request for oral argument. By Order issued on January 10, 2013, the Board denied claimant's second request. On January 24, 2013, claimant filed a request for an explanation of the denial of his request for oral argument. The Board's January 10 Order fully explained the basis for the denial of claimant's request for oral argument, and we will not further address this motion.

[4]Claimant also states that he was not provided Dr. Greifinger's November 17, 2010 report until June 7, 2011. However, since the administrative law judge did not close the record until November 3, 2011, claimant had ample time to arrange for another physician to review Dr. Greifinger's medical records per Judge Bullard's order.

record had closed. The administrative law judge also noted that the rejected reports are less probative than the reports dated December 12, 17, 18, 30, 2008, and January 6, 2009, she had admitted into evidence. Order on Recon. at 3-5; *see* CXs K, M, N.

The administrative law judge has great discretion concerning the admission of evidence, and any decisions regarding the admission or exclusion of evidence are reversible only if they are arbitrary, capricious, or constitute an abuse of discretion.[5] *Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). In this case, the administrative law judge rationally disallowed the untimely submitted physical therapy reports on the ground that they are less probative than the reports already of record. Claimant has not established that the administrative law judge abused her discretion by declining to admit the reports. *See Milam v. Mason Technologies*, 34 BRBS 168 (2000). Therefore, we reject claimant's contention of error.

Claimant next contends the administrative law judge erred by finding credible the opinion of Dr. Greifinger. The administrative law judge addressed at length claimant's contentions regarding Dr. Greifinger's opinion, and we will not repeat her analysis here. Decision and Order at 20-21; Order on Recon. at 5-6. The administrative law judge is afforded the discretion to weigh the evidence and to determine the weight to be accorded to the various medical opinions. The Board may not reweigh the evidence, but must affirm rational findings that are supported by substantial evidence. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001). Thus, as it is rational and within her discretion, we affirm the administrative law judge's general crediting of the opinion of Dr. Greifinger.

Claimant contends the administrative law judge erred by finding he reached maximum medical improvement with regard to the quadriceps injury on January 9, 2009. The administrative law judge credited the opinions of claimant's treating physician, Dr. Spagnuola, and of Dr. Greifinger, that claimant's condition reached maximum medical improvement on January 9, 2009, following his August 2008 surgery, and that claimant's quadriceps allograft remained intact after the surgery. The administrative law judge

[5]In his brief, claimant cites the Federal Rules of Civil Procedure and the Federal Rules of Evidence as support for his contentions. Section 23(a) of the Act specifically states that the rules of evidence and procedure are not applicable except as provided under the Act. 33 U.S.C. §923(a). The standards governing the admissibility of evidence in administrative hearings are thus less stringent than those which govern under the Federal Rules of Civil Procedure. *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997); *Brown v. Washington Metro. Area Transit Auth.*, 16 BRBS 80 (1984), *aff'd*, No. 84-1046 (D.C. Cir. 1984).

found the opinions of Drs. Spagnuola and Greifinger are based on claimant's "demonstrated recovery from surgery, as illustrated by the Claimant's physical capabilities," and supported by their statements that "no additional medical or surgical treatment was necessary." Decision and Order at 27; *see* CX O; EXs 5 at 35; 6 at 41; 9; 13 at 42-46.

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement, *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004), or where it has continued for a lengthy period and appears to be of lasting or infinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). In this case, the administrative law judge rationally credited the opinions of Drs. Spagnuola and Greifinger, which are supported by the December 24, 2008 functional capacity examination, to find that claimant's left leg injury reached maximum medical improvement on January 9, 2009. We affirm this finding as it is supported by substantial evidence. *See Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005).

Claimant challenges the administrative law judge's findings that he did not sustain any additional work-related injuries due to the consequences of the initial work injury. Specifically, claimant contends the administrative law judge erred in finding he did not sustain additional injuries to his left leg and knee, neck, and back in an incident occurring at home in November 2008.

The administrative law judge found that any additional injuries claimant sustained in November 2008 were caused by claimant's own action (either a fall or twisting event) and were not occupationally-related. Decision and Order at 23. On reconsideration, the administrative law judge addressed claimant's contention of error regarding her characterization of the alleged November 2008 re-injury. Claimant argued that he did not misplant his foot; rather, his leg buckled and he fell down stairs. Order on Recon. at 6. The administrative law judge found it irrelevant how claimant's alleged injury arose because any incident was not related to claimant's work injury.

The administrative law judge erred to the extent she found claimant cannot recover because these injuries did not occur at work or occurred because of claimant's "carelessness." Decision and Order at 22-24; Order on Recon. at 6. Employer is liable for the natural or unavoidable results of the work injury pursuant to Section 2(2) of the Act, 33 U.S.C. §902(2). *See, e.g., James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989) (employer liable when claimant aggravated his work-related back injury by stepping into a hole in his yard); *Grumbley v. Eastern Associated Terminals Co.*, 9 BRBS 650 (1979) (employer not liable when claimant, who had reason to know that his work-injured right knee might give way, fell off his roof, injuring his left leg). If claimant's subsequent injuries are the result of an intervening cause, employer is not liable for any increased

disability or for medical benefits for the conditions caused by the intervening accident. *See Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983); *Cyr v. Crescent Wharf & Warehouse*, 211 F.2d 454 (9th Cir. 1954). For the reasons expressed below, the administrative law judge's error is harmless with respect to the claimed additional injuries to claimant's quadriceps tendon, left knee and neck. However, we vacate the finding that claimant's back complaints are not work-related and we remand the case for further consideration.

We affirm the administrative law judge's finding that claimant did not re-tear his quadriceps tendon in November 2008. The administrative law judge based her finding on the December 2008 and January 2009 opinions of Dr. Spagnuola, and the February 2009 opinion of Dr. Greifinger, that the initial quadriceps tendon allograft was intact. Decision and Order at 23; EXs 5 at 26; 13 at 21, 24-25, 28. The administrative law judge also relied on Dr. Spagnuola's January 9, 2009 report, wherein he concurred with the December 24, 2008 functional capacities evaluation that claimant could perform medium to heavy work, with the limitation against climbing more than 10 steps on a ladder. EX 5 at 35; *see* EX 9. The administrative law judge credited Dr. Greifinger's deposition testimony that claimant could not have performed physically as stated in Dr. Spagnuola's report if he had re-torn the quadriceps allograft in November 2008. EX 13 at 23-24. As the administrative law judge's finding is supported by substantial evidence, it is affirmed. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

We also affirm the administrative law judge's finding that claimant did not injure his neck as a consequence of his fall in November 2008. Although claimant reported neck complaints to Dr. Greifinger in February 2009, the administrative law judge found that Dr. Cohen, in February 2009, did not make any findings regarding a neck complaint and that claimant did not report any neck complaints to Drs. Coblentz and Nehmer in late 2009.[6] EXs 7, 8. The administrative law judge found, therefore, that claimant did not establish he sustained any harm to his neck. This finding is supported by substantial evidence and is affirmed. *See Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988). Therefore, the Section 20(a) presumption is not applicable to the neck injury claim and employer is not liable for medical benefits for this alleged condition. *Id.*

Claimant injured his left knee in the work accident; he had surgery in August 2008 to repair the menisci and patello-femoral ligament. CX 6. Claimant had knee replacement surgery in August 2011 for a degenerative condition. The administrative law judge found that the knee replacement surgery is not compensable. In this regard, the

[6]Additionally, the December 24, 2008 functional capacity examination recorded a normal range of motion for claimant's neck. EX 9 at 72-73.

administrative law judge's failure to give claimant the benefit of the Section 20(a) presumption that his degenerative knee condition is related to the work injury is harmless error. *See generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). The administrative law judge credited the opinion of Dr. Greifinger that claimant's knee replacement surgery is not related to the work injury. This opinion constitutes substantial evidence that claimant's condition is not work-related and thus it rebuts the Section 20(a) presumption. *C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008). In the absence of any affirmative evidence linking claimant's degenerative knee condition to the work injury, claimant cannot establish such a relationship, based on the record a whole. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). Accordingly, we affirm the administrative law judge's finding that claimant's degenerative knee condition and resultant surgery are not related to his work injury.[7]

With respect to claimant's back pain, the administrative law judge found that claimant established he has a lower back condition, based on Dr. Ahmed's interpretation of an October 2010 MRI showing lower back disc bulge, impingement and spondylolisthesis. CX JJ. The administrative law judge found, however, that claimant did not establish working conditions that could have caused his back condition because any fall in November 2008 is unrelated to claimant's employment. Decision and Order at 24; Order on Recon. at 6. Therefore, the administrative law judge did not apply Section 20(a) to presume that claimant's back condition is work-related.

We remand the case for the administrative law judge to address claimant's contention that he injured his back due to a fall he suffered when his injured leg gave out, pursuant to Section 2(2) of the Act. A claimant must show a degree of due care in regard to his injury and take reasonable precautions to guard against re-injury. *See generally Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998). Thus, a claimant may not recover if the remote consequences of his work injury result from his intentional post-injury misconduct, and are only the indirect, unforeseeable result of the work-related injury. *See Lira*, 700 F.2d 1046, 15 BRBS 120(CRT); *Cyr*, 211 F.2d 454; *Grumbley*, 9 BRBS 650. On remand, the administrative law judge should address the circumstances of claimant's alleged fall in November 2008. If claimant merely misplanted his injured foot or fell when his injured leg gave out, then claimant's alleged back injury did not occur because of claimant's "misconduct" such that it would constitute an intervening cause.

[7]Claimant also contends he has a work-related heart condition. Cl. Brief at 35, 39. We will not address this issue as it is raised for the first time on appeal. *See generally Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

In addition, as the harm to claimant's back could have resulted from the work-related injury to claimant's leg, the administrative law judge should apply the Section 20(a) presumption to the issue of the work-relatedness of claimant's back condition if the fall was not the result of an intervening cause. *See James*, 22 BRBS 271. In this regard, the administrative law judge erred by implicitly requiring that claimant submit medical evidence affirmatively linking his back condition to his February 2008 work injury in order to invoke the Section 20(a) presumption.[8] *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Moreover, claimant provided medical evidence to support his claim. Claimant saw Dr. Spagnuola on November 26, 2008, and reported that he had "misplanted" his injured leg and felt a "tear" in his knee. Dr. Spagnuola noted "a palpable defect" above the kneecap, and stated claimant may have re-torn his quadriceps muscle; accordingly, he ordered an MRI.[9] On December 10, 2008, Dr. Spagnuola assessed that claimant was limping ("walking with antalgic gait") and favoring his left leg. CX J. Claimant alleged that his back pain was due to his limp. Cl. Post-Hearing Br. at 30. From February through April 2009, claimant saw Dr. Cohen. Claimant reported that he "fell down" in November 2008. Dr. Cohen assessed a low back strain causally related to the "injury of February 6, 2009" (sic); he observed that claimant had decreased range of motion in his lower back, paravertebral spasm, and increased back pain. He opined that claimant should not work "at this time." CX P. As noted above, Dr. Ahmed diagnosed various back problems in October 2010. CX JJ. Thus, on remand, the administrative law judge must assess consistent with law the work-relatedness of claimant's back condition.[10]

Claimant lastly challenges the administrative law judge's finding that, except for his second quadriceps surgery in November 2010, he is not entitled to medical treatment payable by employer after January 2009. Claimant alleges employer refused to authorize treatment for the re-injury of his left leg in November 2008 and for his degenerative knee condition. Cl. Brief at 30-31. In her decision, the administrative law judge found claimant did not request that employer authorize additional medical care after January 9, 2009. Decision and Order at 34-35. On reconsideration, the administrative law judge

[8]"[T]here is no evidence, other than the Claimant's assertion, to link his back condition to conditions he encountered in his employment." Decision and Order at 24.

[9]As discussed, Dr. Spagnuola stated the MRI did not show the graft had torn.

[10]The administrative law judge should re-evaluate claimant's entitlement to disability and medical benefits for his back injury if it is found to be work-related. Claimant alleges on appeal that he sought and was refused authorization for treatment for his back condition. Cl. Brief at 31-32.

also stated that employer is not responsible for medical benefits for conditions that are unrelated to the work injury. Order on Recon. at 8.

Employer is not liable for claimant's knee replacement surgery necessitated by his non-work-related degenerative left knee condition. *See generally Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). Contrary to claimant's contention, claimant's long-standing treatment with Dr. Spagnuola signifies he consented to that doctor being claimant's treating physician. *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995). Moreover, claimant has not established error in the administrative law judge's finding that he did not seek authorization for any additional treatment for his work-related left leg injury.[11] *See generally Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57(CRT) (D.C. Cir. 1989). The administrative law judge also noted that there did not appear to be any claims for reimbursement for expenses incurred prior to January 2009. Decision and Order at 3 n.3. Therefore, we reject claimant's contention that the administrative law judge erred in denying additional medical benefits.

[11]Claimant contends that employer did not authorize further treatment after Dr. Nehmer recommended it in December 2009. Cl. Brief at 31-32. The administrative law judge accurately noted that Dr. Nehmer gave claimant a prescription for physical therapy "at his request." Decision and Order at 27 n. 48; EX 8 at 70. Dr. Nehmer's prescription is not a request that employer furnish medical care. Accordingly, we reject claimant's contention.

Accordingly, we vacate the finding that claimant's back condition is not compensable, and we remand the case for the administrative law judge to address this issue consistent with this decision. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and the Decision and Order Denying Claimant's Request for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge