

BRB No. 99-0955

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

Appeal of the Decision and Order Denying Benefits of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Christopher A. Taggi (Mason, Cowardin & Mason), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-LHC-2327) of Administrative Law Judge Richard E. Huddleston 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman, & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained an injury to his back on February 9, 1995, while carrying material up and down ladders. On March 1, 1995, claimant underwent back surgery, in which the surgeon attempted to relieve claimant's advanced right foot drop, a weakness caused by the compressed nerve in the injured back.¹ Employer voluntarily paid claimant various disability benefits for the injury, and

¹Dr. Allen explained in his testimony that "foot drop" is a descriptive lay term which is actually a symptom of the nerve injury, and that claimant's foot drop is 100 percent attributable to the compressed nerve. Deposition at 10.

claimant returned to light duty with employer on February 19, 1996. JX 1. The issue to be resolved at hearing was whether, as a result of surgery for his back injury, claimant suffered a disability to his leg which would be compensable under the schedule at Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2). After Dr. Allen's deposition was taken, claimant supplemented his argument, alternatively contending that, even if claimant's back surgery did not cause claimant's foot drop, the initial work injury directly caused injury to claimant's right leg and foot, entitling him to scheduled disability benefits.

In his Decision and Order, the administrative law judge found that claimant is entitled to invocation of the presumption of Section 20(a) of the Act, 33 U.S.C. §920(a), that claimant's foot drop was caused by the back surgery necessitated by the work injury. He further found that employer produced sufficient evidence to establish rebuttal of this presumption. Thus, the administrative law judge weighed the evidence as a whole and concluded that the right leg and foot problems were not caused by the surgery, and, in any event, are not separately compensable under the schedule because claimant's foot drop is the result of a natural progression of claimant's back injury.²

Claimant appeals the administrative law judge's findings that the surgery did not cause claimant's foot drop and that his leg impairment is not separately compensable. Employer responds, urging affirmance.

We reject claimant's contention that the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption. Specifically, claimant contends that the administrative law judge was precluded from finding that employer established rebuttal of the presumption because Dr. White opined that claimant's foot drop is "secondary to proximal nerve damage associated with [claimant's] lumbar laminectomy." CX 3- A . The administrative law judge found the Section 20(a) presumption rebutted based on the reports and deposition testimony of Dr. Allen that claimant's foot drop occurred prior to surgery and was "100 percent attributed to the compressed nerve." Allen Dep. at 10, 15-16; CX-1A; CX 2-B. The administrative law judge's finding that this opinion constitutes substantial evidence severing the connection between claimant's surgery and his foot drop is affirmed. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS

²Claimant did not claim a loss of wage-earning capacity under Section 8(c)(21) of the Act, as he works for employer in light duty work earning the same pay as in his pre-injury position.

71(CRT) (7th Cir. 1999).

In weighing the evidence as a whole, the administrative law judge rationally credited Dr. Allen's opinion over claimant's testimony that he did not have the foot drop prior to surgery because Dr. Allen's contemporaneous office notes diagnose foot drop before the surgery was performed. Moreover, he found that Dr. White's opinion did not establish a definite causal relationship between the foot drop and the surgery; the administrative law judge stated that his opinion could be read to imply merely a temporal relationship. Inasmuch as the administrative law judge's weighing of the evidence and the inferences he drew therefrom are rational and within his discretion as the fact finder, we affirm the finding that claimant's foot drop was not caused by the back surgery.³ See generally *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); see also *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

Claimant next contends that even if the foot drop occurred prior to the surgery, he nevertheless is entitled to benefits under the schedule. In this regard, claimant argues that, based on Dr. Allen's testimony, the injury is not just to the nerve at the site of the compression in claimant's back, but also is to the nerve throughout the leg, resulting in a permanent injury, *i.e.*, foot drop, which substantially diminishes claimant's ability to use his right foot. Thus, claimant contends that the site of the injury is not limited to the back. Claimant further contends that he is entitled to an award under the schedule for a loss of use of his leg as a sequela of his work injury, citing *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

³Thus, we express no opinion regarding whether claimant's leg impairment would be compensable under the schedule if it had been caused by the surgery.

It is well-established that the schedule of Section 8(c)(1)-(19) is not applicable where the actual situs of the injury is to a part of the body not specifically listed in the schedule, even if the injury results in disability to a part of the body which is listed. *See, e.g., Pool Co. v. Director, OWCP*, 206 F.3d 543 (5th Cir. 2000); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT)(9th Cir.1995); *Ward v. Cascade General, Inc.*, 31 BRBS 65 (1996); *Andrews v. Jeffboat, Inc.*, 23 BRBS 169, 173 n.4. (1990). Consistent with the Supreme Court's holding in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1990), the situs of the injury controls the right to compensation under the schedule, rather than the nature of the disability. *Pool Co.*, 206 F.3d at 547; *Long*, 767 F.2d at 1581, 17 BRBS at 152(CRT). The Ninth Circuit in *Long* held that it is not necessary to compensate the claimant by way of a liquidated damages award under the schedule in a case where a back injury results in a leg impairment because the issue of the claimant's loss in wage-earning capacity is addressed pursuant to Section 8(c)(21).⁴ *Id.*

In the instant case, as the site of injury is claimant's back, we reject claimant's contention that he is entitled to a scheduled award. That the ruptured disc in claimant's back produced nerve damage in his leg does not establish that the site of the injury was claimant's leg. The administrative law judge's finding that claimant's foot drop is the result of the natural progression of the back injury is supported by substantial evidence. The administrative law judge credited Dr. Allen's testimony that the ruptured disc caused the foot drop by affecting nerves connected to the site of the rupture. As the site of the injury was claimant's back, the schedule does not apply. Claimant's argument based on *Bass* must therefore be rejected, as *Bass* is distinguishable from the present case. In *Bass*, the claimant initially sustained an injury to scheduled members, his knees, thus entitling him to an award under the schedule. As a result of these injuries, claimant subsequently developed back problems. The Board held that the claimant was not limited to the scheduled award, but could also receive a separate award under Section 8(c)(21) for the back condition if he established a loss in wage-earning capacity due to his back. *Bass*, 28 BRBS at 17-18. The Board reasoned that the liquidated damages of the schedule do not adequately compensate for the loss in wage-earning capacity due to an impairment to a body part not listed in the schedule.

The facts presented here are the converse of those in *Bass*. Claimant sustained an injury to his back with a consequential impairment to the leg. In this situation, the schedule cannot apply as the situs of the injury controls, and claimant's recovery must be under

⁴That the claimant in this case did not claim a loss in wage-earning capacity does not provide a basis for departing from this law.

Section 8(c)(21). *Id.* Inasmuch as the administrative law judge correctly applied this law to the facts of this case, the denial of benefit is affirmed.

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge