

BRB No. 99-0991

ALBERT BAUMAN)
)
 Claimant-Respondent)
)
 v.)
)
 DOMINO SUGAR CORPORATION) DATE ISSUED:
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 and)
)
 CIGNA INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

James E. Vinturella (Lewis & Caplan), New Orleans, Louisiana, for claimant.

James A. Babst (Lamothe & Hamilton, PLC), New Orleans, Louisiana, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (1998-LHC-1038) of Administrative Law Judge James W. Kerr, Jr., 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 if they 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 alleged that he suffered an injury to his back on July 8, 1997, while moving sugar in the hold of a vessel with a shovel. Claimant immediately reported the alleged incident to employer's foreman, Mr. Robinson, who allowed claimant to return home. The following day, claimant requested and was granted authorization from employer to visit

employer's physician, who diagnosed claimant as having sustained a lumbosacral strain. Claimant has not returned to work since the date of this incident.

In his Decision and Order, the administrative law judge concluded, based upon the testimony of claimant, that claimant established the existence of working conditions which could have caused his present back condition, that claimant was therefore entitled to the Section 20(a), 33 U.S.C. §920(a), presumption, and that employer failed to rebut the same; accordingly, the administrative law judge found causation established. Next, the administrative law judge determined that claimant was incapable of resuming his usual employment duties, but that employer established the availability of suitable alternate employment as of October 13, 1998. Accordingly, the administrative law judge awarded claimant temporary total disability benefits during the period of July 8, 1997 through October 12, 1998, and temporary partial disability benefits thereafter, as well as medical benefits, interest and an attorney's fee. *See* 33 U.S.C. §§907, 908(b), (e).

On appeal, employer contends that the administrative law judge erred in finding that an accident or injury occurred during the course of claimant's employment; alternatively, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the Section 20(a) presumption. Employer additionally challenges the administrative law judge's determination regarding the extent of any disability sustained by claimant. Claimant responds, urging affirmance.¹

Working Conditions

Employer initially challenges the administrative law judge's determination that claimant established the existence of a work-related accident or injury which could have caused his present back condition. It is well-established that claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm in order to establish his *prima facie* case. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). It is claimant's burden to

¹In his response brief, claimant additionally challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. We decline to address this issue, which should have been raised in a cross-appeal. *See Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988).

establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, employer does not dispute that claimant has suffered a harm, *i.e.*, a shoulder strain, but argues that claimant failed to establish the existence of a work incident which could have caused that condition. In raising this contention, employer challenges claimant's motives in accepting employment with it on July 8, 1997, noting that higher-paying, more comfortable work was available to claimant on that date. Additionally, employer states that the incident at issue was unwitnessed, that the level of sugar in the vessel's hold was less than the foot opined by claimant and that, thus, claimant should have been using a scraper or broom rather than a shovel to perform his duties. In addressing this issue, the administrative law judge acknowledged claimant's testimony that he accepted work with employer to ensure employment on July 8, 1997. Next, the administrative law judge found the depth of the sugar in the vessel's hold to be irrelevant, since claimant asserted that he sustained an injury moving that sugar; moreover, the administrative law judge noted Mr. Robinson's concession that it was possible that claimant was using a shovel on July 8, 1997. Moreover, the administrative law judge found that claimant was working for employer at the time of the onset of his back pain, that the following day claimant was sent to employer's doctor, and that claimant was thereafter diagnosed by that physician as having sustained a lumbosacral strain. Thus, in concluding that claimant affirmatively established the existence of working conditions which could have caused his harm, the administrative law judge specifically addressed and rejected each of employer's contentions, and relied upon claimant's testimony that claimant heard a pop in his back, and experienced an immediate onset of pain in his back, while working for employer in the hold of a ship.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 371 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the instant case, the administrative law judge specifically set forth and considered each of employer's concerns and concluded that claimant did, in fact, sustain a work-related accident as described on July 8, 1997. On the basis of the record, the administrative law judge's decision to credit the testimony of claimant is neither inherently incredible nor patently unreasonable; accordingly, we affirm the administrative law judge's finding that claimant established his *prima facie* case, and his consequent invocation of the Section 20(a) presumption. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Causation

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's condition is not caused or aggravated by his employment. *See Conoco v. Director, OWCP*, 194 F.2d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). If employer establishes rebuttal of the presumption, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); *see also Greenwich Collieries*, 512 U.S. at 267, 28 BRBS at 43 (CRT).

We affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption in the instant case. The administrative law judge's finding is supported by the record, as he rationally found the opinion of Dr. Steiner, upon whom employer relies in support of its contention of error, insufficient to rebut the presumption since that physician's opinion focuses on whether claimant was disabled as of the date of his examination, February 5, 1998, and he did not render an opinion as to whether claimant sustained an injury following the July 8, 1997, work-incident. *See RX-1*. Accordingly, as Dr. Steiner's testimony does not address whether claimant's employment caused, aggravated, accelerated, or contributed to claimant's back problems following the July 8, 1997, incident, the administrative law judge properly found it insufficient to rebut the Section 20(a) presumption. As employer did not produce evidence severing the causal relationship between claimant's employment and his back condition, we affirm the administrative law judge's finding that claimant's back condition is related to his employment. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Prima Facie Case of Total Disability

Lastly, employer contends that the administrative law judge erred in determining that claimant is incapable of performing his usual employment duties with employer. Specifically, employer asserts that the administrative law judge erred in failing to credit the opinion of Dr. Steiner over the opinion of Dr. Phillips since, employer states, Dr. Steiner tested claimant for malingering while Dr. Phillips did not. It is well-established that claimant bears the burden of establishing 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 & Constr. Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10

(CRT)(4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In finding that claimant established a *prima facie* case of total disability, the administrative law judge credited the opinions of claimant and Dr. Phillips. In this regard, Dr. Phillips opined that claimant's bulging disc at L4-5, as evidenced by an MRI, weakened claimant's disc ligament and, as a result of claimant's work activities on July 8, 1997, that weakened ligament was torn. As a result of his condition, Dr. Phillips opined that claimant would be restricted to light-duty work and would thus be unable to resume employment as a longshoreman. *See CX-1*. Claimant testified that following the July 8, 1997, work-incident, he unsuccessfully attempted to return to work, but that his back restricted his ability to lift. *See TR* at 26-28. In contrast, Dr. Steiner, while acknowledging that claimant's MRI revealed a disc bulge, determined that claimant's responses upon examination were inconsistent and that claimant was capable of resuming his usual employment duties as a longshoreman. *See RX-1*.

We reject employer's contention that the administrative law judge erred in failing to credit and rely upon the opinion of Dr. Steiner. An administrative law judge is not bound to accept the opinion of any particular medical examiner, but rather, is entitled to weigh the credibility of all witnesses and draw his own inferences from the evidence. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Anderson*, 22 BRBS at 22. In the instant case, the administrative law judge rationally found that Dr. Phillips accepted the credibility of claimant, took into account the abnormal results evidenced on claimant's MRI, and determined that claimant is precluded from employment as a longshoreman.² As this opinion provides substantial evidence to support the administrative law judge's

²Contrary to employer's assertion, the administrative law judge committed no error in crediting Dr. Phillips' opinion even though Dr. Phillips expressed his disdain for tests used by other physicians to determine whether a claimant is credible. The administrative law judge considered Dr. Phillips testimony on this issue and, as is within his discretion, thereafter weighed the credibility of the medical witnesses in addressing the issue of claimant's ability to resume work as a longshoreman. *See generally Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997).

determination that claimant is incapable of resuming his usual employment duties, *see Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991), we affirm the administrative law judge's finding that claimant has established a *prima facie* case of total disability, and his consequent award of ongoing disability benefits to claimant. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge