

LOIS D. FANT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WASHINGTON METROPOLITAN AREA)	DATE ISSUED: _____.
TRANSIT AUTHORITY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

William P. Dale (McChesney & Dale, P.C.), Bowie, Maryland, for claimant.

Michael D. Dobbs and Michael P. Sinay (Mell, Brownell & Baker), Washington, D.C., for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (87-DCW-0027, 89-DCW-0027) of Administrative Law Judge John C. Holmes 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.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (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).

This is the third time that this case has been appealed to the Board. Claimant injured her left arm on May 6, 1978, while working as a bus driver for employer; on October 26, 1981, claimant returned to work for employer as a subway station attendant. On March 16, 1982, claimant injured her lower back when she lifted a metal station gate. She thereafter worked intermittently for employer until July 27, 1984, at which time she stopped working

for employer altogether, allegedly because of lower back pain.

In October 1984, claimant was involved in two non work-related automobile accidents; the accident on October 6, 1984, was minor and the October 28, 1984, accident was more severe. On April 9, 1985, she underwent a discectomy and vertebrae fusion at L4-5 and L5-S1 performed by Dr. Jackson. Employer voluntarily paid temporary total disability benefits from July 28, 1984 until January 22, 1986. *See* 33 U.S.C. §908(b). Claimant subsequently underwent a second discectomy and fusion in January 1989; during this second surgical procedure, metal plates and a rod were inserted in claimant's lower back. Based upon the disability which she experienced as a result of the aforementioned surgeries, claimant sought continuing temporary total or permanent total disability compensation from January 23, 1986.

In the initial Decision and Order dated April 28, 1992, Administrative Law Judge Rippey determined that claimant is permanently and totally disabled as a result of her two spinal surgeries, but further found that the cause of her disability was Dr. Jackson's mistaken diagnosis of spinal instability and not anything arising out of and in the course of her employment. Claimant appealed, challenging the administrative law judge's finding that her lower back symptomatology and disability were not caused by her March 16, 1982, work injury; specifically, claimant challenged, *inter alia*, the administrative law judge's conclusions that she had no objective evidence of disc pathology, and that the surgery had been performed based on a mistaken diagnosis from Dr. Jackson. Claimant also challenged the administrative law judge's finding that any back pain she experienced on March 16, 1982, was due to multiple sclerosis. The Board reversed the administrative law judge's finding that there was no objective evidence of a trauma-induced back injury, noting that while the administrative law judge acted within his discretion in rejecting Dr. Jackson's testimony that he had observed ruptured discs at L4-5 while performing claimant's first back surgery in light of Dr. Jenkins's testimony that the discs were not observable until after their removal because the procedure had been performed from an anterior approach, he had erred in discrediting Dr. Mercer's post-surgical pathological report reflecting findings consistent with a ruptured disc based on the fact that the discs were destroyed when they were removed and, accordingly, were never visually identified as defective or herniated. Accordingly, the Board held that as claimant established a harm, *i.e.*, back pain and a herniated disc, and employer did not dispute the occurrence of the March 1982 work incident, claimant is entitled to the Section 20(a) presumption as a matter of law. The Board also reversed the administrative law judge's finding that claimant's pain following her March 16, 1982, work accident was due to her demyelinating condition, since Dr. Jenkins did not unequivocally state that the 1982 work incident did not cause or contribute to claimant's back pain, herniated discs, and the resulting surgery. Inasmuch, however, as the administrative law judge had not previously considered the impact of claimant's October 6 and October 28, 1984, non work-related car accidents in assessing the cause of claimant's disability, the

Board remanded the case for the administrative law judge to make additional findings. *Fant v. WMATA*, BRB No. 90-707 (Apr. 28, 1992)(unpublished).

On remand, Judge Rippey reopened the record for employer's submission of additional evidence. Based upon pathology reports submitted from Drs. Shmookler and Jenkins, the administrative law judge held that claimant is not entitled to the Section 20(a) presumption, contrary to the Board's prior determination, because she failed to make out a *prima facie* case of a trauma-induced herniated disc in view of the newly admitted evidence; notwithstanding this finding, the administrative law judge thereafter considered rebuttal and found that claimant's surgery and resulting disability were not the natural or unavoidable result of her March 16, 1982, work injury, but instead were caused solely by the intervening nonwork-related car accident on October 28, 1984. Claimant appealed this decision to the Board, challenging the administrative law judge's finding that she is not entitled to the Section 20(a) presumption, as well as his finding that her disability is not causally related to the March 1982 work injury on various grounds. The Board held that the administrative law judge erred in concluding that Dr. Jackson's progress notes alone provide substantial evidence sufficient to rebut the Section 20(a) presumption and establish the absence of a causal nexus with claimant's work injury; specifically, the Board determined that the administrative law judge erred by failing to consider all of Dr. Jackson's medical reports and hearing testimony, as well as the report of Dr. Jenkins. The Board thus vacated the administrative law judge's finding that claimant's October 28, 1984, car accident was the sole cause of her residual disability and remanded the case for reconsideration of the causation issue in light of all of the relevant evidence and a determination of whether any part of claimant's disability is related to her work injury. *Fant v. WMATA*, BRB No. 95-2246 (June 19, 1997)(unpublished).

On remand, the case was assigned to Judge Holmes (the administrative law judge) who, in a Decision and Order dated March 11, 1999, found that employer produced substantial evidence to rebut the presumption. Next, after considering the totality of the evidence, the administrative law judge concluded that claimant's present disability is not causally related to her work injury; rather, the administrative law judge concluded that claimant's second automobile accident was the sole factor necessitating her lumbar surgeries and her subsequent disability. Accordingly, the administrative law judge denied claimant additional benefits under the Act.

On appeal, claimant challenges the denial of benefits. Employer responds, urging affirmance.

Where, as in the instant case, claimant has invoked the Section 20(a) presumption, the burden shifts to employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment, and therefore, to rebut the presumption with substantial evidence that claimant's condition was not caused or

aggravated by her employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). The opinion 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). Moreover, where claimant is involved in a subsequent accident, employer can rebut the presumption by producing substantial evidence that claimant's disabling condition is caused by the subsequent event. *See Blutworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT)(5th Cir. 1983); *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In challenging the administrative law judge's decision on remand, claimant initially asserts that the administrative law judge erred in determining that employer had presented sufficient evidence to rebut the presumption. Contrary to claimant's contention, however, proof of another agency of causation is not necessary to establish rebuttal of the Section 20(a) presumption. *See Todd Pacific Shipyards v. Stevens*, 722 F.2d 747 (9th Cir. 1983), *cert. denied sub nom. Todd Pacific Shipyards v. Director, OWCP*, 467 U.S. 1243 (1984). In the instant case, the administrative law judge ultimately credited the opinion of Dr. Jenkins who, in a letter dated October 26, 1992, specifically stated his opinion that claimant's March 16, 1982 work-injury "neither caused nor contributed to [claimant's] back symptoms which led to her first operation in 1985," and that claimant's work-accident "was irrelevant to her chronic as opposed to transitory symptoms, was irrelevant to her lumbar surgery, and is irrelevant to her central nervous system disease." *See Emp. Ex. G*. As this medical opinion is sufficient to sever the causal link between claimant's March 16, 1982, work accident and her subsequent surgeries which resulted in her present medical condition, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See generally Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Claimant also challenges the administrative law judge's finding that causation was not established based on the record as a whole; specifically, claimant assigns error to the administrative law judge's decision not to rely upon the testimony of Dr. Jackson, her treating physician.¹ After considering at length the totality of the medical evidence of

¹Claimant's argument that all doubts must be resolved in her favor is without merit. *See*

record, the administrative law judge found Dr. Jenkins's October 26, 1992, report to be more credible on the issue of whether claimant's surgeries and resulting disability were related to her work-injury. In rendering this determination, the administrative law judge specifically found Dr. Jenkins's opinion to be well-reasoned and supported by the objective evidence of record.² In this regard, the administrative law judge found that all of the medical reports generated prior to October 1984, *i.e.*, before the occurrence of claimant's automobile accidents, indicated negative findings of herniated discs; rather, the first objective readings of such a condition occurred immediately after claimant's non worked-related automobile accidents.³ In declining to credit the contrary opinion of Dr. Jackson, the administrative law judge initially noted that this physician's testimony, while at times straightforward, was at other times inconsistent and at odds with the other evidence of record. *See* Decision and Order at 9. Next, the administrative law judge found Dr. Jackson's testimony, which attempted to describe claimant's destabilized back condition, to be near incomprehensible, and his opinion that surgery may have been required four years into the future to be nothing more than mere speculation. *Id.* at 10. Lastly, the administrative law judge found that Dr. Jackson's office notes and reports appear to demonstrate an ongoing effort to maintain

Director, OWCP v. Greenwich Collieries, 521 U.S. 267, 28 BRBS 43 (CRT)(1994).

²Dr. Jenkins evaluated claimant in 1989 and thereafter reviewed claimant's extensive charts prior to offering his opinion regarding a causal relationship between claimant's work-injury and her subsequent surgeries. *See* Emp. Ex. F.

³Contrary to claimant's contention, the procedure recommended by Dr. Lightfoot on October 22, 1984, specifically a facet analgesic arthrography, cannot be compared to claimant's post-automobile accident lumbar surgeries undertaken as a result of claimant's herniated discs.

claimant as a patient and to highlight claimant's symptoms as most favorable for continued treatment and compensation payments; accordingly, the administrative law judge concluded that Dr. Jackson's testimony and reports were so inconsistent and compensation oriented as to be not credible.⁴ Accordingly, the administrative law judge found that, after considering all of the evidence of record, claimant's intervening automobile accident and not her work-related accident caused her herniated discs, subsequent surgeries, and alleged current disability.

⁴The administrative law judge additionally noted that Dr. Jackson, in reports dated December 5, 1984 and January 7, 1985, initially related claimant's lumbar condition to her October 28, 1984, automobile accident; the administrative law judge found that Dr. Jackson's later attempts to suggest otherwise were reconstructive and not credible. *See* Decision and Order at 14.

It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom and is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, the administrative law judge fully evaluated the relevant evidence, and his findings regarding the medical opinions are supported by the record. As the administrative law judge thus rationally discounted the opinion of claimant's treating physician that claimant's present medical condition is in fact related to her work injury, claimant has not met her burden in this case. *See Greenwich Collieries*, 512 U.S. at 267, 28 BRBS at 43. We therefore affirm the administrative law judge's determination, based on the record as a whole, that claimant's present medical condition is not causally related to her March 16, 1982, work accident.⁵ *See, e.g., Rochester v. George Washington University*, 30 BRBS 233 (1997).

SO ORDERED.

BETTY JEAN HALL. Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

⁵Claimant's remaining argument concerning the admissibility on remand of Dr. Jenkins's October 26, 1992, report need not be addressed as Judge Rippey fully considered claimant's objection in his second decision and claimant thereafter failed to preserve that issue in her subsequent appeal to the Board.