BRB No. 09-0686

ELLIOT ARENA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SIGNAL INTERNATIONAL, L.L.C.	)	DATE ISSUED: 03/17/2010
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin), Gulfport, Mississippi, for claimant.

Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli, Frieman & Whiteley), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2007-LHC-0734) of Administrative Law Judge Clement J. Kennington 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). This case is before the Board for a second time.

Claimant, while working as a first-class ship fitter for employer on February 28, 2005, suffered a fracture of his left clavicle for which he underwent surgery on March 11, 2005, and again on February 22, 2006, to remove hardware inserted in the first operation. Following his second surgery, claimant was released to full-duty work on May 16, 2006. On January 15, 2007, claimant requested medical leave because he was suffering from neck pain. When claimant did not return to work on April 8, 2007, following twelve weeks of leave granted under the Family and Medical Leave Act, employer treated his absence as a voluntary resignation. EX 1. Claimant sought additional compensation and medical benefits for his alleged work-related cervical injury.

In his Decision and Order, the administrative law judge found that claimant failed to establish a *prima facie* case of a compensable neck injury. Accordingly, the administrative law judge denied benefits for claimant's alleged neck injury.[1] On appeal, the Board held that, contrary to the administrative law judge's findings, claimant established his *prima facie* case and is entitled to the Section 20(a) presumption that his neck condition is related to his February 28, 2005, work accident. *E.A.* [*Arena*] *v. Signal International, LLC*, BRB No. 08-0279 (Aug. 12, 2008) (unpub.). The Board vacated the administrative law judge's alternate finding that employer established rebuttal of the Section 20(a) presumption, and remanded for further consideration of this issue, and, if necessary, consideration of the causation issue based on the record as a whole.

On remand, the administrative law judge found that employer rebutted the Section 20(a) presumption based on the absence of any serious or substantial neck complaints for about one year following the work accident and Dr. Crotwell's opinion that claimant suffered from pre-existing neck problems and that his current neck condition could not be related to the work accident. Weighing the evidence as a whole, the administrative law judge found that claimant did not establish that his neck condition is related to his work for employer. Accordingly, he denied benefits.

On appeal, claimant challenges the administrative law judge's determination that claimant's cervical injury is not causally related to the work accident he sustained on February 28, 2005. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

[1] Employer paid benefits for the clavicle injury, and the administrative law judge concluded that claimant is not entitled to additional compensation other than that already paid by employer for this injury.

Once, as here, claimant has established entitlement to invocation of the Section 20(a) presumption, *see Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989), and employer has thereafter established rebuttal,[2] *see Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000), the administrative law judge must weigh all of the evidence in the record and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See Ortco Contractors*, 332 F.3d 283, 37 BRBS 35(CRT); *Port Cooper*, 227 F.3d 285, 34 BRBS 96(CRT); *Santoro v. Maher Terminals, Inc.,* 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1984). Claimant asserts that in denying the claim for a work-related cervical injury, the administrative law judge erred in failing to credit the opinions of Drs. Black, Kesterson and White that claimant's cervical condition is related to his employment.

On remand, the administrative law judge, after review of the record as a whole, concluded that claimant did not establish by a preponderance of credible evidence that his neck condition was related to his February 25, 2005, work injury. The administrative law judge found that no physician outside of those who took claimant's version of the accident at face value linked his neck injury to the February 28, 2005, accident. In reaching this conclusion, the administrative law judge found that Drs. Cooper and Black were, by their own admission, unable to tell whether claimant's neck complaints were work-related, and that the opinions of Drs. Kesterson and White, relating claimant's cervical condition to his February 28, 2005, work injury, were flawed as they were based on claimant's incredible history of persistent neck complaints from the date of the

[2] The administrative law judge found rebuttal based on the "absence of documented complains [*sic*] over an 8 month period" and "Dr. Crotwell's unequivocal testimony that claimant suffered from pre-existing neck problems and his current neck condition could not be related to the work accident." Decision and Order on Remand at 5. In his Petition for Review, claimant raises three errors of fact and ten errors of law. Claimant's brief in support of the Petition for Review, however, addresses only the administrative law judge's weighing of the evidence on causation on the record as a whole. As claimant has failed to brief any error by the administrative law judge regarding rebuttal, we affirm, as unchallenged on appeal, the administrative law judge's rebuttal finding, and accordingly, limit our review of the administrative law judge's decision to his conclusion, based on the record as a whole, that claimant has not established that his cervical condition is related to his work for employer. *See generally Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997); *see also* 20 C.F.R. §802.211(b).

accident and inconsistent with other evidence in the record. He thus found that the only credible opinion of record, that of Dr. Crotwell, establishes that claimant's cervical condition is not related to his work. Dr. Crotwell stated that claimant's long standing cervical degenerative disc disease "is not related to his on-the-job injury." EX 14.

As the administrative law judge found, Dr. Cooper conceded that he could not state to a reasonable degree of medical probability that claimant's cervical symptoms are related to the February 28, 2005, work accident. EX 21, Dep. at 52. Similarly, Dr. Black testified, with regard to claimant's cervical condition, that he could not say "it was caused by or not caused by" the work accident, and he deferred to the opinions of the specialists. CX 27, Dep. at 49-51.[3] As for the underlying bases of the opinions of Drs. Kesterson and White, the administrative law judge found that claimant's statements that he complained of persistent and severe neck pain from the date of the February 28, 2005, injury are inconsistent with the record, since other than a brief mention of minor neck discomfort on that date, EX 16, the medical records contained no mention of severe neck pain for almost a year.[4] The administrative law judge found claimant's credibility as to his complaints was further undermined by his disciplinary record showing multiple suspensions for safety violations and by his performance of acceptable work without any complaints of pain or pain medication following his release to full duty by Dr. Black on August 1, 2005, and again on May 16, 2006.[5] We affirm the administrative law judge's decision to accord diminished weight to the opinions of Drs. Kesterson and White as the

[3] During his deposition, Dr. Black specifically stated that "I would defer [questions regarding causation of neck condition] to the neck specialist that [claimant] was seeing or another one." CX 27, Dep. at 47. He stated that he would explicitly defer to Dr. Kesterson or Dr. Crotwell with regard to claimant's neck condition. *Id.* at 49.

[4] In its prior decision, the Board noted that the administrative law judge discredited claimant's testimony on this issue and that "while there is no evidence of complaints of severe pain, the record indicates that claimant did complain of radiating arm pain and upper back pain to Dr. Black" in September 2005. *Arena*, slip op. at 4 n.2.

[5] In this regard, the administrative law judge credited the testimony of claimant's supervisor, Chris Brewer, and employer's Human Resource Director, Tracey Binion, that following his clavicle surgeries, claimant was able to work full duty without any limitations or pain complaints, HT at 132-134, 151-153, as well as Ms. Binion's statement confirming claimant's failure to report any neck pain at his first appointment with Dr. Black. Furthermore, the administrative law judge previously noted that claimant asserted that he never returned to full ship fitter duties following his clavicle surgeries, but this was refuted by "not only the medical records but the testimony of Tracey Binion and Chris Brewer." Decision and Order at 4 n. 2.

administrative law judge rationally found they were based on claimant's discredited testimony as to his immediate post-accident cervical complaints.[6] *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996).

The administrative law judge is entitled to weigh the evidence and draw his own inferences and conclusions therefrom. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). As the administrative law judge followed the Board's remand instructions in addressing causation and as his findings are supported by substantial evidence, the conclusion that claimant did not establish that his neck condition is related to his February 25, 2005, work injury is affirmed.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[6] Although claimant argues that the administrative law judge "exhibited prejudice and bias against Spanish-speaking Claimant and repeatedly referred to the Petitioner's speech in an adverse and derogatory negative manner in the Decision and Order on Remand," he points to no specific instances of such alleged behavior. Moreover, there is nothing in the administrative law judge's decisions to support claimant's allegations.