

MICHAEL PHILLIPS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PMB SAFETY & REGULATORY,	)	DATE ISSUED: 03/27/2012
INCORPORATED	)	
	)	
and	)	
	)	
LOUISIANA WORKERS'	)	
COMPENSATION CORPORATION	)	
	)	
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.

Christopher A. Edwards (Edwards Law Firm), Lafayette, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2008-LHC-01922) 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the Act). 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).

This case is before the Board for the second time. Claimant was involved in an incident at work in which a co-worker pulled him off a bunk by his ankles onto the concrete floor and twisted his arm behind his back. In his initial decision, the administrative law judge found that the injury did not occur in the course of claimant's employment. Therefore, the administrative law judge denied benefits under the Act.

Claimant appealed, contending the administrative law judge erred in finding that he was not in the course of his employment at the time of the incident. The Board agreed and reversed the administrative law judge's finding that claimant was not in the course of his employment at the time of the incident. *Phillips v. PMB Safety & Regulatory, Inc.*, 44 BRBS 1 (2010). The Board thus vacated the administrative law judge's denial of benefits, and remanded the case for consideration of any remaining issues. *Id.*

On remand, the administrative law judge denied disability and medical benefits, finding that claimant sustained only a non-disabling shoulder strain that did not prevent him from returning to work. The administrative law judge found that claimant had been in two car accidents, one before the work injury and one afterwards, that these could explain his degenerative shoulder condition and the labrum tear in claimant's shoulder that was diagnosed subsequently. Decision and Order on Remand at 6-7.

On appeal, claimant contends the administrative law judge erred in denying disability and medical benefits. Specifically, claimant contends the administrative law judge erred in inferring that his shoulder pain and surgery were due to the car accidents, as there is no evidence to support this finding.

Prior to the work incident, claimant was involved in a car accident on February 25, 2005; claimant was treated for neck and right shoulder pain. EX 5 at 7; EX 2 at 1; CX 18 at 23. Immediately following the work incident on June 21, 2007, claimant initially sought treatment for right ankle and right shoulder pain from employer's doctor at Gulf Regional Occupational Medicine Center. The doctor on duty, Dr. Laborde, prescribed over-the-counter medication, and returned claimant to regular duty work. CX 9 at 1; EX 3. Claimant returned to Gulf Regional the next day, and Dr. Hutchinson diagnosed right ankle and right shoulder pain, prescribed over-the-counter medication and returned claimant to work. *Id.* Subsequently, claimant sought treatment at the emergency room on June 24, 2007, where an x-ray revealed degenerative arthritis in claimant's shoulder; claimant was given a sling to wear. CX 9 at 1; EX 6 at 8-11. Claimant saw Dr. Alleman, his family practitioner, on June 25, 2007. Dr. Alleman diagnosed a shoulder strain; he recommended physical therapy, and claimant attended three sessions with Mr. Hollier. CX 9 at 1. On July 15, 2007, claimant was involved in a non-work-related car accident, injuring his neck and back. Neither hospital records nor Dr. Alleman's notes after this

accident reference any shoulder pain. *Id.*; CX 18 at 16. Claimant did not complain to Dr. Alleman of shoulder pain during visits in August and December 2007 for unrelated conditions.

In December 2007, claimant's shoulder pain worsened and he sought treatment at University Medical Center. An x-ray revealed mild spurring of the distal acromion, but no fracture or joint abnormality. Claimant was diagnosed with a shoulder strain and given medication. Claimant continued to experience pain; Dr. Ingram diagnosed impingement syndrome on January 4, 2008. MRIs were taken of claimant's shoulder in January and April 2008; among the diagnoses was a tear of the labrum. Surgery to repair the tear was scheduled for May 23, 2008, but it was delayed until November 25, 2008, when claimant underwent a procedure to repair a superior labral anterior/posterior (SLAP) tear and a scope of scar tissue in his right shoulder at University Hospital in New Orleans. CX 16 at 8, 21, 27, 29; CX 9 at 4.

In finding that claimant was not disabled by the work injury, the administrative law judge first discredited claimant's testimony that he did not injure his shoulder as a result of the car accident on July 15, 2007, which totaled the car he was driving. HT II at 32-33; CX 9 at 2. The administrative law judge also found that claimant's actions after the work injury contradict his testimony of severe shoulder pain related to that injury.<sup>1</sup> Additionally, the administrative law judge noted that claimant did not seek further shoulder treatment for over four months after he last had his shoulder examined by his treating physician, Dr. Alleman, on June 25, 2007, and he underwent physical therapy on June 27, July 24 and July 26, 2007. CX 18 at 42; CX 19 at 22-23, 32. The administrative law judge found it significant that claimant did not mention any severe shoulder pain during office visits to Dr. Alleman after June 25, 2007, and that claimant had rated his pain at level 3 on a scale of 1 to 10 when he saw Mr. Hollier for physical therapy on July 24, 2007.<sup>2</sup> CXs 18 at 20-22, 19 at 15, 40. The administrative law judge found that Dr. Alleman's initial assessment on June 25, 2007, of a strained right shoulder therefore was accurate and that the relatively mild nature of the alleged injury did not result in claimant's experiencing the severe pain he claimed was related to this injury. Decision and Order at 5, 7; *see* EX 1. The administrative law judge therefore concluded that

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<sup>1</sup>Specifically, claimant met with employer's claims representative, Fran Cook, a week after the injury. Ms. Cook testified at the initial hearing that claimant was able to sign all necessary forms with his right hand and shook hands without any difficulty or lack of grip strength. HT I at 72-73.

<sup>2</sup>Mr. Hollier noted full shoulder extension and that claimant reported a pain level of 2 out of 10 at his last visit on July 26, 2007. CX 19 at 41.

claimant suffered no loss of wage-earning capacity as a result of the shoulder sprain and that claimant is not entitled to disability or medical benefits under the Act.

Claimant contends he established a *prima facie* case of total disability from June 21, 2007 to March 1, 2009, when he resumed working for employer after his surgery. Claimant bears the burden of establishing that he disabled by his work injury. In order to establish a *prima facie* case of total disability, claimant must show that he is unable to perform his usual work due to the work injury. *See, e.g., Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5<sup>th</sup> Cir. 1998).

In this case, there is no medical evidence that claimant was taken off work because of his shoulder condition before December 2007. The administrative law judge permissibly credited Ms. Cook's observations and claimant's failure to seek further treatment for his shoulder for a period of over four months after July 26, 2007, before he next sought treatment for his shoulder in December 2007, as evidence that claimant was not disabled during this period. Moreover, the administrative law judge credited Dr. Alleman's initial assessment on June 25, 2007, of a strained right shoulder, which is corroborated by Drs. Laborde and Hutchinson's prior evaluations on June 21 and June 22, 2007, respectively, where they diagnosed right shoulder pain and opined that claimant could return to work. EX 3. 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 (5<sup>th</sup> Cir. 1962), *cert. denied*, 373 U.S. 954 (1963), and the Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5<sup>th</sup> Cir. 2003); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). As the administrative law judge's finding that claimant was not disabled by his work injury prior to December 6, 2007, is rational and supported by substantial evidence, we affirm the denial of disability compensation prior to this period. *Gacki v. Sea-Land Services, Inc.*, 33 BRBS 127 (1998).

With respect to the period beginning December 6, 2007, we note that there is no specific medical evidence limiting claimant's ability to perform his usual work until he underwent surgery on November 25, 2008. Nonetheless, the rejection of claimant's claim of disabling pain rests on an improper foundation. Specifically, the administrative law judge impermissibly concluded that claimant's labrum tear "could just as easily come from one or more of [claimant's] car wrecks" before December 2007 and therefore that claimant did not establish he was disabled. Decision and Order on Remand at 7. With regard to the 2005 car accident, after which claimant was treated for right shoulder pain, the administrative law judge's conclusion ignores the aggravation rule. Under the

aggravation rule, claimant's work injury is fully compensable if it contributed to, accelerated or aggravated a pre-existing shoulder condition. *See generally Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5<sup>th</sup> Cir. 1986) (*en banc*); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). Moreover, Section 20(a) applies to presume that the work incident aggravated claimant's pre-existing condition. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5<sup>th</sup> Cir. 1999). With respect to the July 2007 car accident, which occurred prior to claimant's last physical therapy appointment, the medical records do not mention any shoulder pain following the accident and the fact that claimant stated the car was "totaled" does not establish that claimant injured his shoulder resulting in the labrum tear. Thus, there is no evidentiary basis for the administrative law judge's inference that the labrum tear was caused by the 2007 car accident.

Therefore, we vacate the finding that claimant was not disabled by his work injury after December 6, 2007, and we remand the case. On remand, the administrative law judge must first determine, consistent with law, if claimant's current shoulder condition is work-related. Claimant clearly had a work-related shoulder strain as a result of the work accident, and he subsequently was diagnosed with a more severe shoulder condition. The Section 20(a) presumption applies to the issue of the work-relatedness of this later condition, as does the aggravation rule insofar as claimant's 2005 car accident is concerned. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5<sup>th</sup> Cir. 2000). In order to rebut the Section 20(a) presumption, employer must produce substantial evidence that claimant's current shoulder condition is not related to the work accident.<sup>3</sup> *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5<sup>th</sup> Cir. 1998). If the presumption is not rebutted, claimant's condition is work-related as a matter of law. If the presumption is rebutted, claimant bears the burden of establishing the work-relatedness of his shoulder condition based on the record as whole. *Id.* Thus, on remand, if it is determined that claimant's later shoulder condition is work-related, the administrative law judge must reconsider whether claimant sustained a period of disability prior to his undergoing shoulder surgery. *See generally Golden v. Eller & Co.*, 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71, 12 BRBS 348 (5<sup>th</sup> Cir. 1980). Claimant's disability while recuperating from surgery for a work-related condition is compensable.

Claimant also contends that he is entitled to payment of medical bills totaling \$5,741.60 for treatment of his work injury. Section 7(a) states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. §907(a). In order

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<sup>3</sup>In this respect, there is no substantial evidence that the 2007 car accident caused any injury to claimant's shoulder. *See, e.g., Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 F.App'x 126 (5<sup>th</sup> Cir. 2002).

for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the work injury. It is claimant's burden to prove the elements of his claim for medical benefits. See *Ingalls Shipbuilding, Inc., v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5<sup>th</sup> Cir. 1993).

In denying the claim for medical benefits, the administrative law judge summarily stated, “[B]ased upon the entire record, I am convinced claimant suffered no loss of wage-earning capacity as a result of his shoulder sprain and thus, is not disabled under the Act and is entitled to no disability or medical benefits under the Act.” Decision and Order at 7. This is an insufficient basis on which to deny the claim for medical benefits. A claimant is entitled to medical benefits under the Act for necessary treatment irrespective of whether he is economically disabled by his work injury; entitlement rests on evidence of the necessity of treatment for the work injury, not on a loss of wage-earning capacity. *Baker*, 991 F.2d at 165-166, 27 BRBS at 15-16(CRT); see also *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002). Therefore, we vacate the administrative law judge's finding that claimant is not entitled to medical benefits for his work injury. Claimant submitted medical expenses, which include the evaluations by Dr. Laborde (\$146) and Dr. Hutchinson (\$500.30) on June 21 and June 22, 2007, respectively, and Dr. Alleman's (\$155) June 25, 2007 examination. CX 10. As claimant sustained at least a work-related shoulder sprain, the administrative law judge must address the compensability of the initial treatment rendered by Drs. Laborde, Hutchinson and Alleman. Additionally, Dr. Alleman prescribed physical therapy which claimant underwent on June 27, July 24 and July 26, 2007, totaling \$742.49, which also may be compensable. Moreover, claimant seeks reimbursement for the cost of his shoulder surgery. If the SLAP surgery was necessary to treat the work injury, employer is liable for the reasonable cost of the shoulder surgery and related medical treatment. On remand, the administrative law judge must address employer's liability for the claimed medical expenses consistent with law.

Accordingly, we affirm the administrative law judge's denial of disability compensation prior to December 6, 2007. The denial of disability benefits thereafter and of all medical benefits is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge