BRB No. 04-0629

STEPHEN LEFEBER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AMERICAN PRESIDENT LINES	)	DATE ISSUED:May 4, 2005
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Robert H. Madden (Madden & Crockett, LLP), Seattle, Washington, for claimant.

John P. Hayes (Forsberg & Umlauf, P.S.), Seattle, Washington, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2002-LHC-01650) of Administrative Law Judge Jennifer Gee 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On March 30, 1998, claimant sustained injuries in the course of his employment as a refrigerator mechanic for employer, when he slipped and fell getting out of a reefer cart and landed on his left side. Claimant immediately filed an Incident Report with employer and sought medical assistance from Dr. Clyde Wilson for upper left leg, left groin and lower back pain. CXs 1, 2, 21; EX 10. Claimant resumed his regular work duties the following day, but returned to see Dr. Wilson and additionally received chiropractic

treatment from Dr. Goodwin. CX 21; EX 11. On July 7, 1998, employer filed a Notice of Controversion indicating that it would not authorize further chiropractic care. CX 3. Subsequently, claimant sought additional medical treatment for left hip pain and requested that his claim be re-opened due to his continuing left hip complaints. On July 31, 2000, employer filed a Notice of Controversion, contending that claimant's current left hip symptoms are not causally related to the March 30, 1998 work incident, and, on the following day, claimant filed a formal compensation claim. CXs 4-7. Claimant was off work from July 28, 2000 to January 7, 2001, while undergoing medical procedures for his hip condition; employer accepted the claim and voluntarily paid temporary total disability compensation for this period. CXs 8A-10; Hearing Tr. at 70. On September 20, 2001, claimant underwent surgery involving a total left hip replacement. CX 23. Employer filed Notices of Controversion on September 12, 2001 and February 27, 2002, stating that claimant's left hip condition and hip replacement surgery are unrelated to his March 30, 1998 accident. CXs 11-12. Thereafter, claimant sought temporary total disability benefits for the period from September 20, 2001 to February 10, 2002, during which he was off work for his hip replacement surgery,[1] permanent partial disability benefits from February 11, 2002 and continuing, and medical benefits.

In her Decision and Order Denying Benefits, the administrative law judge stated that the contested issues are the causal relationship between claimant's March 30, 1998 work accident and his left hip condition, the nature and extent of claimant's disability, claimant's entitlement to medical benefits, and employer's entitlement to Section 8(f) relief, 33 U.S.C. §908(f). The administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), linking his left hip condition to his employment, that employer proffered substantial evidence to rebut that presumption, and that, based on the record as a whole, claimant did not establish a causal relationship between his employment with employer and his left hip problems. The administrative law judge next found that because claimant's left hip procedures and surgeries were unrelated to the March 30, 1998 work incident, claimant is not entitled to temporary total disability compensation for either of the periods during which he was off work because of these procedures and surgeries. The administrative law judge further determined that because claimant did not establish that his hip replacement surgery was causally related to his March 30, 1998 work accident, he is not entitled to permanent partial disability compensation for any loss of wage-earning capacity following that surgery. The administrative law judge additionally denied claimant's request to recover medical and mileage expenses related to his left hip condition. Lastly, the administrative

[1] Claimant also claimed entitlement to the period of temporary total disability benefits that employer had paid from July 28, 2000 to January 7, 2001. 33 U.S.C. §908(b).

law judge declined to address employer's request for Section 8(f) relief in light of her finding that employer is not liable for payment of any compensation to claimant.

On appeal, claimant challenges the administrative law judge's findings regarding the causal relationship between claimant's hip condition and his employment with employer. Employer responds, urging affirmance of the administrative law judge's Decision and Order in its entirety.

Where, as in the case at bar, claimant has established entitlement to invocation of the Section 20(a) presumption, *see Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989), the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused, contributed to or aggravated by his employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d 1277, 27 BRBS 1(CRT) (3d Cir. 1993), *aff'd sub nom. Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge must then weigh all of the relevant evidence and determine whether a causal relationship has been established, with claimant bearing the burden of persuasion. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

In the instant case, the administrative law judge, having weighed the relevant record evidence, concluded that claimant's hip condition is not causally related to his March 30, 1998 work accident.[2] Decision and Order at 8, 11. In so finding, the administrative law judge accorded determinative weight to the opinions of employer's experts Drs. Brooks and Allan Wilson that claimant's hip condition is unrelated to the March 30, 1998 incident. Decision and Order at 9-11; EXs 19, 20, 26; Hearing Tr. at 107-201. The administrative law judge found the opinions of Drs. Brooks and Allan Wilson entitled to greater weight than the contrary opinion of claimant's treating orthopedic surgeon, Dr. Norling, CXs 23, 24, 34, on the basis of her findings that claimant failed to report any hip pain for more than two years after his work accident and that the opinions of Drs. Brooks and Allan Wilson are logically consistent with the mechanism of claimant's March 30, 1998, fall. Decision and Order at 8-11.

Claimant argues on appeal that the administrative law judge's analysis of the evidence relevant to the existence of a causal relationship between claimant's hip condition and his work-related accident rests on her erroneous finding that claimant failed to complain of hip pain for more than two years after his accident. Cl. br. at 4-11. Our review of the administrative law judge's decision, with its repeated references to claimant's failure to complain of hip pain for over two years following his accident, Decision and Order at 8, 9-10, 11, supports the conclusion that this finding of fact serves as the foundation for the administrative law judge's conclusion that claimant's hip condition is unrelated to his work accident. We are mindful that the administrative law judge is vested with the authority to make appropriate findings of fact and that the Board may not substitute its views for those of the administrative law judge. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1159, 36 BRBS 15, 15(CRT) (9th Cir. 2002); *Duhagon*, 169 F.3d at 618, 33 BRBS at 2-3(CRT). The Board's review authority, however, is such that it need not accept an ultimate finding or inference which is not supported by substantial evidence, *id.*, or which was reached in an invalid manner. *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965). Moreover, where the administrative law judge's conclusions of law are made without the proper factual underpinning, the

[2] In this case, the administrative law judge did not follow precisely the analytical framework set forth above in that she did not explicitly identify the evidence upon which she relied to find that employer met its burden of rebutting the Section 20(a) presumption. Rather, the administrative law judge first summarily found the presumption rebutted; she then engaged in a discussion of all the record evidence, and ultimately found that claimant's hip condition is not causally related to his employment. Despite the administrative law judge's omission of the specific evidence supporting rebuttal of Section 20(a), her discussion of the evidence relevant to the causation issue provides an adequate basis for our review of her decision. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068, 32 BRBS 59, 61(CRT) (5th Cir. 1998).

Board is not permitted to supplement the administrative law judge's findings with its own but rather must remand the case for the administrative law judge to make the necessary findings. *Bath Iron Works Corp. v. Director, OWCP [Jones],* 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982).

As claimant correctly asserts, the record in this case includes evidence, not addressed by the administrative law judge, which could be viewed as contradicting the administrative law judge's finding that claimant did not complain of left hip pain within the two-year period following his work accident. Specifically, the administrative law judge made no mention of the office chart notes dating from 1998 and 1999 of claimant's treating chiropractor, Dr. Goodwin, which include express references to left hip pain, to treatment involving stretching hip flexors, and to left hip x-rays taken on April 7, 1998 and November 2, 1999.[3] CX 21; EX 11. Moreover, the administrative law judge did not address the medical evidence of record associating *groin* complaints with hip pathology. In this regard, the record includes contemporaneous documentation of claimant's complaints of left groin pain on the day of his accident; specifically, both the Incident Report filed with employer on March 30, 1998 and Dr. Clyde Wilson's Physician's Initial Report of the same date record claimant's left groin pain. CXs 1, 2, 21; EX 10; Decision and Order at 3. In addition, Dr. Norling's record of claimant's initial visit on June 9, 2000 states that claimant experienced groin pain after his accident. CXs 24, 34 at 7-9. Moreover, Dr. Norling explained on deposition that the most likely cause of claimant's groin pain was hip joint pathology. CX 34 at 8-9, 60. Employer's expert Dr. Brooks, having acknowledged that claimant had complained of groin pain, Hearing Tr. at 117, concurred that "[h]ip pathology is commonly manifested as groin pain because underneath the groin is the hip joint . . . [o]r underneath and a little lateral or outward from the groin." Hearing Tr. at 172-73.

Therefore, as the administrative law judge did not address relevant evidence of record which, if credited, would undermine a significant portion of the factual basis for her decision to credit the opinions of Drs. Brooks and Allan Wilson over the opinion of Dr. Norling in finding that claimant's hip condition is unrelated to his employment, *see Jones*, 193 F.3d 27, 34 BRBS 1(CRT); *Volpe*, 671 F.2d 697, 14 BRBS 538, we must vacate the administrative law judge's summary finding that employer established rebuttal of the Section 20(a) presumption, as well as her subsequent finding that causation was not established based upon the record as a whole. On remand, the administrative law judge must address the totality of the evidence on this issue, including the medical reports

[3] Specifically, Dr. Goodwin's chart entries dated April 15, 1998, February 11, 1999, March 31, 1999, June 2, 10, 17, 23, 1999, September 3, 1999, October 14, 26, 29, 1999, refer either to left hip pain or to stretch hip flexors. CX 21; EX 11.

of record documenting claimant's complaints of left hip and groin pain in the two-year period following his work-incident.[4]

Claimant additionally asserts that if, as the administrative law judge found, it was claimant's September 2000 surgery to remove a bone fragment from his hip rather than his fall at work which accelerated claimant's osteoarthritis and ultimately required hip replacement surgery, employer is nonetheless liable for his resulting condition. Claimant's argument has merit. In the last section of her decision, relying on the reports of Drs. Brooks and Allan Wilson, the administrative law judge found that the excision of a bone fragment from claimant's hip by Dr. Norling in September 2000, and not claimant's March 30, 1998, work-related fall, accelerated claimant's osteoarthritis.[5] Decision and Order at 10 – 11. The administrative law judge thus concluded that since claimant's fall did not accelerate his osteoarthritis, his present hip condition is not related to his work injury. *Id*. at 11. While the administrative law judge's findings are supported by the evidence, her conclusion did not consider the applicable law that medical treatment for an injury, even if ultimately found unnecessary, is not an intervening cause which breaks the causal chain between an injury and disability. *See White v. Peterson Boatbuilding Co.,* 29 BRBS 1, 5 (1995); *Wheeler v. Interocean Stevedoring, Inc.,* 21 BRBS 33 (1988). In *Wheeler,* claimant's treating physician interpreted a discogram as positive for a herniated disk and performed a laminectomy. Based on the opinions of other physicians who reviewed the discogram and reports, the administrative law judge found the surgery was unnecessary. The Board affirmed this finding but held that the

[4] In assigning error to the administrative law judge's weighing of the medical opinions, claimant avers that the administrative law judge should have accorded greater weight to the opinion of Dr. Norling than to the opinions of Drs. Brooks and Allan Wilson on the basis of his status as claimant's treating physician and his superior credentials. Cl. br. at 16-17. We do not agree with claimant that the administrative law judge's failure to accord determinative weight to Dr. Norling's opinion on this basis constitutes reversible error. A physician's professional qualifications and status as treating doctor are relevant considerations, however, and may be properly considered by the administrative law judge on remand. *See generally Amos v. Director, OWCP,* 153 F.3d 1051 (9th Cir. 1998), *amended,* 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied,* 120 S.Ct. 40 (1999). *See also Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003).

[5] Dr. Brooks opined that the removal of claimant's bone fragment caused destabilization in claimant's hip joint which likely made his arthritis worse. Tr. at 137-38. Dr. Allan Wilson similarly opined that claimant's surgery could have caused his arthritic symptoms to worsen since the area of claimant's hip was traumatized during his surgery. EX 26.

resulting disability was nonetheless compensable, as a physician's treatment of a work-related condition, even to the point of malpractice, does not break the causal nexus between that condition and an employee's employment. *Wheeler*, 21 BRBS at 36. Rather, when claimant's conduct in seeking treatment for a work-related condition is reasonable, claimant may receive disability benefits for any increased disability due to the treatment. *Id.* Thus, if claimant's September 2000 surgery to excise a bone fragment was performed as treatment for his work injury, employer may be liable for the effects of that surgery, including the acceleration of claimant's arthritic condition. Accordingly, on remand, the administrative law judge must reconsider her conclusion on this issue.

This case is therefore remanded to the administrative law judge for further consideration consistent with this opinion. On remand, should the administrative law judge find a causal relationship between claimant's hip condition and his employment, she must consider the remaining issues with respect to the nature and extent of claimant's disability, medical benefits and employer's request for Section 8(f) relief.

Accordingly, the administrative law judge's decision is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge