BRB No. 12-0425

ALVIN STEWART	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TIGRESS ENVIRONMENTAL AND DOCKSIDE SERVICES	)	DATE ISSUED: 05/29/2013
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Mark L. Riley (The Glenn Armentor Law Corporation), Lafayette, Louisiana, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-LHC-01630) of Administrative Law Judge Larry W. Price 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 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).

On February 6, 2010, claimant was cleaning barges for employer. When he stepped off a ladder, his feet slid out from under him, and he landed on his back. Claimant completed his shift but felt pain that night. Employer paid claimant temporary total disability benefits from February 8, 2010, to April 4, 2011. 33 U.S.C. §908(b). Claimant has not returned to his job, and he seeks additional benefits, claiming that the work-related injury has kept him from working and requires back surgery.

The administrative law judge found that claimant established a prima facie case relating his back injury to the work accident and that, based on the opinion of Dr. Bernard, the independent examiner appointed by the Department of Labor, employer rebutted the Section 20(a), 33 U.S.C. §920(a), presumption. Decision and Order at 7-8. In weighing the evidence as a whole, the administrative law judge gave greater weight to the opinions of Drs. Bernard and Schutte who believed claimant's continuing pain is due to his pre-existing degenerative disc disease; Dr. Bernard also stated claimant's pre-existing condition was not aggravated nor was his current condition caused by the fall at work. *Id.* at 9. Thus, the administrative law judge denied disability and medical benefits. Claimant appeals the decision, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in relying on Dr. Bernard's opinion because it is biased, and in finding that Dr. Cobb, claimant's treating physician, did not relate his injuries to his work. We reject claimant's arguments and affirm the administrative law judge's decision as it is supported by substantial evidence.

After claimant was injured, employer sent him to Drs. Silar and Sonnier to treat his low back pain. Dr. Sonnier noted claimant's complaints of pain in his back and radiating into his left hip but stated that the CT scan was unremarkable. He referred claimant to Dr. Schutte. Emp. Ex. 1. Dr. Schutte saw claimant on February 23, 2010. An x-ray taken on that date revealed significant spurring at L4-5 and L5-S1 with facet hypertrophy; the clinical exam and other tests were normal. Dr. Schutte diagnosed claimant with osteoarthritis and advised a stretching program and avoiding heavy lifting. Cl. Ex. 2; Emp. Ex. 2. In March 2010, claimant presented to Dr. Cobb with low back pain radiating to his legs. Dr. Cobb diagnosed a sprain/strain and recommended an MRI, physical therapy, and medication. Claimant continued to treat with Dr. Cobb, who prescribed a steroid injection and, thereafter, recommended surgery for the protrusion, herniation, and/or fragmentation at L5-S1, but surgery has not been approved or performed. Cl. Ex. 1. In November 2010, claimant returned to Dr. Schutte, who stated that claimant had low back pain with no radiation to his legs and the motion and straight-leg raising tests were normal. Dr. Schutte stated that the x-rays revealed disc dessication, narrowing, bulging, and facet hypertrophy, and he diagnosed osteoarthritis and degenerative disc disease, opining that claimant's pain was due to the disc disease and the osteoarthritis. He recommended exercising, stretching, and weaning claimant off narcotic pain relievers, and he stated that surgery was unnecessary. Cl. Ex. 2; Emp. Ex.

2. In February 2011, claimant saw Dr. Bernard, who stated that claimant had a normal clinical examination but his MRIs showed dessication at L3-4 and L5-S1, a small protrusion at L5-S1, and spurring at three levels. Dr. Bernard concluded that claimant's current condition was pre-existing and degenerative in nature. Dr. Bernard also stated there is no medical literature stating that a minor slip-and-fall would exacerbate or cause degenerative disc disease, and he concluded claimant needed no further treatment and could return to work with no restrictions. Emp. Ex. 3.

Claimant argues that Dr. Bernard's opinion should have been given no weight because he is not an unbiased examiner, despite having been appointed by the Department of Labor. Claimant cites a number of Louisiana cases in which Dr. Bernard's opinion that the plaintiff's examination was "normal" conflicted with the opinions of other doctors who diagnosed back problems and prescribed varying treatments. He asserts these cases show that the courts have rejected Dr. Bernard's opinion or questioned his partiality, and he argues that the administrative law judge should have excluded Dr. Bernard's opinion and either found the case in his favor or appointed a new impartial examiner.[1] The administrative law judge did not address this contention; however, any error is harmless.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption. Once the claimant establishes a prima facie case, as here, Section 20(a) applies to relate the injury to the employment, and the burden is on the employer to rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The employer's burden is one of production, not persuasion; once the employer produces substantial evidence of the absence of a causal relationship, the Section 20(a) presumption is rebutted and falls from the case. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT). In this case, the administrative law judge found that Dr. Bernard's opinion constitutes substantial evidence rebutting the Section 20(a) presumption. This finding is rational. Although claimant challenges Dr. Bernard's partiality, his credibility is not at issue at the rebuttal phase. At rebuttal, employer merely must present substantial evidence that claimant's continuing disability is not related to his employment. Dr. Bernard stated that claimant's work accident did not exacerbate or cause his degenerative disc disease, which is responsible for claimant's continuing problems. Emp. Ex. 3. Thus, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT).

[1]The district director supervises the medical care of an injured employee. 33 U.S.C. §907(e). (i); 20 C.F.R. §§702.407-702.409.

Because the presumption no longer controls, the issue of whether there is a causal relationship must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In weighing the evidence as a whole, the administrative law judge credited the opinions of Drs. Schutte and Bernard that claimant's continuing back problems are due to his osteoarthritis and pre-existing degenerative disc disease and not to his work accident. Although the credibility of Dr. Bernard's opinion is relevant at this juncture, we need not address the issue or remand the case for the administrative law judge to do so. Claimant has the burden of establishing that his condition is work-related. *Id.* In his brief, he states only that "a fair reading" of Dr. Cobb's reports "clearly shows" that the work accident is the cause of claimant's present back problems and the need for surgery. Cl. Brief at 2. Dr. Cobb diagnosed claimant with a herniated disc for which he recommended surgery, Dr. Bernard found no herniation or limitations on claimant's ability to work, and Dr. Cobb thereafter summarily disagreed with Dr. Bernard's assessment and kept his recommendations intact. Dr. Cobb's disagreement with Dr. Bernard's assessment, alone, does not establish that Dr. Cobb believes there is a causal connection between claimant's fall at work and his present medical condition. Although Dr. Cobb summarized claimant's work accident in the "history" section of his report, he never concluded that the fall caused claimant's condition or aggravated his pre-existing symptoms, resulting in a herniated disc which requires surgery. Because Dr. Cobb did not relate claimant's continuing back problems to his work injury, claimant has not met his burden of establishing that his back condition is work-related. Therefore, it is not necessary to address claimant's allegations with respect to Dr. Bernard's alleged partiality. As the administrative lase judge's finding that claimant's back condition is not work-related is supported by substantial evidence of record, we affirm it. *See Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Hice v. Director, OWCP*, 48 F.Supp.2d 501 (D. Md. 1999); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000). Thus, we affirm the denial of disability and medical benefits.

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

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