BRB No. 01-0290

ROBERT E. FOX	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINETTE MARINE CORPORATION	)	DATE ISSUED: Nov. 8, 2001
	)	
	)	
and	)	
	)	
CRUM & FORSTER INSURANCE	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

H. Thomas Lenz (Spector & Lenz, P.C.), Chicago, Illinois, for claimant.

Larry J. Peterson (Larry J. Peterson & Associates), St. Paul, Minnesota, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-2991) of Administrative Law Judge Stuart A. Levin 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).

Claimant, a pipefitter, alleged that he injured his right knee on February 11, 1998, while working on the hull of a ship under construction. He reported the incident the next day to his supervisor, but did not seek medical treatment until April 13, 1998. Subsequently, claimant underwent arthroscopic surgery on July 1, 1998. Claimant returned to work with employer on August 2, 1998, and presently works without restrictions. Employer paid claimant temporary total

disability benefits from July 1 through August 1, 1998, as well as medical benefits. Claimant filed a claim for future medical benefits under Section 7 of the Act, 33 U.S.C. §907, and employer controverted the claim after receiving information from claimant's then-estranged girlfriend that claimant's claim was fraudulent.

In his Decision and Order, the administrative law judge found that claimant presented sufficient evidence to establish a *prima facie* case for invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a). Specifically, the administrative law judge credited claimant's testimony that, on February 11, 1998, he noticed a popping sensation in his right knee as he walked from frame to frame, stepping from angle iron to angle iron, on the ship's hull, and experienced pain the next day. Additionally, the administrative law judge noted claimant's testimony that he had no prior knee injury on or off the job which could account for his problem. The administrative law judge found further, however, that employer produced substantial evidence to rebut the presumption. In this regard, the administrative law judge relied on the opinion of Dr. Kihm, that claimant's injury could not have been produced by the work activity claimant described. Crediting this opinion, and finding that the opinions of Drs. Mack and Tandias are silent as to the etiology of claimant's injuries, the administrative law judge concluded that claimant did not establish that his injury is work-related. Claimant appeals the denial of benefits, and employer responds, urging affirmance.

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of a harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the Section 20(a) presumption is invoked, employer may rebut it by producing substantial evidence that claimant's employment did not cause, accelerate, aggravate or contribute to his injury. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999); *cert. denied*, 120 S. Ct. 1239 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If such evidence is produced, the presumption no longer applies and the administrative law judge must weigh the competing evidence as a whole, with claimant bearing the burden of persuasion. *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).

Claimant first contends that the administrative law judge erred in finding that employer produced substantial evidence to rebut the Section 20(a) presumption. We reject this contention and affirm the administrative law judge's finding that Dr. Kihm's opinion rebuts the Section 20(a) presumption. Dr. Kihm stated that the cause of claimant's knee injury is something other than his work activities of jumping/hopping/walking from bar to bar, as a tear of the medial meniscus usually involves twisting or squatting and the description of claimant's activities on February 11, 1998, involved neither motion.[1] Emp. Ex. 1. Inasmuch as this opinion constitutes substantial evidence

[1]We reject claimant's contention that Dr. Kihm's was supplied an inaccurate hypothetical question concerning claimant's activities at the time of the alleged injury. As discussed, *infra*, the administrative law judge rationally found that claimant was in fact

severing the connection between the injury and claimant's employment, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption. *See American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT); *see also* *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998).

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walking between frames. Moreover, the absence of any prior knee injuries in claimant's medical records does not mandate the conclusion that Dr. Kihm's opinion concerning the etiology of claimant's knee injury is incorrect.

Claimant also contends the administrative law judge erred in finding that his injury is not work-related based on his weighing of the evidence as a whole.[2] The administrative law judge first found that claimant was walking from frame to frame at the time of the alleged injury, and was not actually "hopping" in the sense that he was not "skipping or leaping." Decision and Order at 7. This finding is supported by claimant's testimony. *See* Tr. at 37-39. The administrative law judge then accorded less weight to the opinions of Drs. Mack and Tandias as he found they did not evince a clear understanding that claimant was not actually "hopping." This finding is rational, as it is within the administrative law judge's discretion to draw inferences from the evidence. *See generally Todd Shipyards Corp. v. Donovan*, 300 F. 2d 741 (5th Cir. 1962). More importantly, the administrative law judge found that neither Dr. Mack nor Dr. Tandias affirmatively opined that claimant's knee injury was in fact caused by his employment. *See* Cl. Exs. A9, B1-6. Based on the lack of affirmative medical evidence linking claimant's injury to his employment, and Dr. Kihm's opinion that claimant's knee injury was not caused by his employment, the administrative law judge found that claimant did not prove his injury was work-related. As the administrative law judge's finding is rational, supported by substantial evidence, and in accordance with law, it is affirmed. *See generally Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Santoro v. Maher Terminals*, *Inc.*, 30 BRBS 171 (1996).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[2]Contrary to claimant's contention, the administrative law judge rationally gave no weight to the hearing testimony of claimant's girlfriend that claimant did injure himself at work, in view of her previous contacts with employer during which she stated that claimant fabricated the work injury in order to obtain medical coverage for his knee condition. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge