BRB No. 02-0263

JOSEPH W. BURNETT, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRYDOCK COMPANY	)	DATE ISSUED: Nov. 27, 2002
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Order Partially Granting Employer's Motion for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Cowardin & Mason, PC), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Order Partially Granting Employer's Motion for Reconsideration (2000-LHC-3039) of Administrative Law Judge Daniel A. Sarno, Jr., awarding benefits 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).

Claimant, while working for employer as a crane operator on May 9, 1992, sustained an injury to his right knee. As a result of this work incident, claimant underwent a series of right knee surgeries culminating in a total right knee replacement by Dr. Nichols on January 19, 1999. Dr. Nichols opined that claimant reached maximum medical improvement with regard to his right knee on January 12, 2000, with a 37 percent permanent partial disability rating. Dr. Nichols also placed significant physical limitations on claimant as a result of the right knee replacement and opined that claimant's right knee condition alone would, in essence, permanently limit him to sedentary, light duty work.

[1] Dr. Nichols stated that claimant's right knee replacement permanently prevented him from squatting, crawling, kneeling and climbing. Claimant's Exhibit (CX) 7. He further limited claimant to no more than 15 minutes of walking/standing per hour for a maximum of two hours per day, and to lifting and carrying no more than 10-15 pounds intermittently throughout the day. *Id.*

Meanwhile, claimant testified that during the recovery period for his various right knee surgeries, he began to experience pain in his left knee, which has persisted and intensified over time. Dr. Nichols observed that claimant's use of a walker and cane during his recovery periods caused him to heavily favor his left leg and that the resulting increased stress on the left knee joint caused inflammation and exacerbated the pain to claimant's already arthritic left knee. On February 1, 2000, Dr. Nichols performed arthroscopic surgery on claimant's left knee. During this procedure, Dr. Nichols found degenerative arthritis to claimant's left kneecap and patellar area, as well as synovitis, or inflammation of the lining of the joint, which he attributed to the added stress on the left knee joint. Dr. Nichols acknowledged that claimant's right knee condition did not cause claimant's left knee arthritis. Nevertheless, he insisted that claimant's right knee condition exacerbated claimant's over-all left knee problems. Moreover, he opined that claimant's left knee would continue to deteriorate to the point where he would require a total left knee replacement within a couple of years.

Claimant was also examined on November 13, 2000, by Dr. O'Connell who opined, based on the examination and a review of claimant's medical records, that claimant's left knee problems were attributable solely to degenerative arthritis. Dr. O'Connell found no connection between claimant's left and right knee conditions other than the underlying degenerative arthritis that he opined is not related to any work injury. Additionally, Dr. O'Connell did not agree with Dr. Nichol's assessment that favoring one leg following the knee surgery could either unduly stress the other knee or aggravate the existing degenerative arthritis in that knee. Similarly, Dr. Tornberg attributed claimant's left knee problems to degenerative arthritis and concluded that the left knee condition was not a consequence of or causally related to claimant's right knee condition. Dr. Tornberg, however, conceded that knee replacement surgery could cause an abnormal gait, which in turn, could cause increased pain and stress on the other knee.

The record establishes that following the initial injury, claimant returned to light duty work with employer and that he continued to work in that capacity, between surgeries, until July 13, 1998, at which time employer stated it no longer had any work available to claimant within his restrictions. Claimant has not worked since July 13, 1998. Employer voluntarily paid periods of temporary total disability benefits, as well as a scheduled award based on a ten percent impairment of claimant's right knee.

In his decision, the administrative law judge determined that claimant was, with respect to the condition of both knees, entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer could not establish rebuttal. Accordingly, he determined that claimant's left knee condition, as well as his right knee injury, is work-related. The administrative law judge next determined that employer established suitable alternate employment as of February 24, 2000, and that claimant did not show that he undertook a diligent job search. He further found that claimant has not yet reached maximum medical improvement with regard to his left knee condition and thus concluded that claimant is, as a result of his left knee condition, entitled to an award of temporary partial disability benefits commencing February 24, 2000, and continuing. 33 U.S.C. §908(e). Employer's motion for reconsideration on the merits was denied.

On appeal, employer challenges the administrative law judge's findings that the Section 20(a) presumption was not rebutted, and that claimant has not yet reached maximum medical improvement with regard to his left knee injury. Claimant responds, urging affirmance.

[2] Employer argued for reconsideration citing as error an incorrect recitation of Dr. Nichol's impairment rating by the administrative law judge, and that the administrative law judge incorrectly concluded that employer did not rebut the Section 20(a) presumption. The administrative law judge granted employer's motion with regard to the first contention and modified his decision in this regard but rejected the second contention and thus denied the motion for reconsideration on the merits.

Employer argues that the administrative law judge erred in finding that its evidence, *i.e*., the opinions of Drs. O'Connell and Tornberg, is insufficient to rebut the Section 20(a) presumption. Employer's contention has merit. Once claimant presents sufficient evidence to invoke the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that the injury was not caused by the employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In this regard, the testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). An unequivocal opinion, given to a reasonable degree of medical certainty, that the employee's injury is not work-related is sufficient to rebut the Section 20(a) presumption. *See 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, he must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); s*ee also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994).

In addressing rebuttal, the administrative law judge determined, with regard to the issue of direct causation, that Drs. O'Connell and Tornberg agreed that claimant's left knee condition is due solely to his pre-existing degenerative arthritis and thus, is not in any way related to claimant's 1992 work injury. The administrative law judge, however, determined that Drs. O'Connell and Tornberg were split on the issue of whether claimant's left knee condition was aggravated by his 1992 work-related injury. Specifically, he found that Dr. O'Connell opined that only a traumatic injury to the left knee would adversely affect the pre-existing arthritis in that knee, while Dr. Tornberg, in contrast, conceded that an abnormal gait caused by knee replacement surgery could cause pain and stress on the other knee, whether that knee is normal or already arthritic. The administrative law judge thus determined that as Dr. Tornberg's opinion does not rule out the possibility that claimant's altered gait, due to knee surgeries stemming from the 1992 work-related injury, aggravated or exacerbated claimant's left knee problems, the weight of employer's evidence is insufficient to establish rebuttal of the Section 20(a) presumption.

Initially, Dr. O'Connell's opinion that claimant's left knee condition is attributable solely to degenerative arthritis and is not related to any work injury, including the right knee injury sustained in 1992, Employer's Exhibit (EX) 11, Dep. at 8-9, is, in and of itself, sufficient to establish rebuttal of the Section 20(a) presumption. *See O'Kelley*, 34 BRBS 39 (2000); *see also Conoco, Inc. v. Director, OWCP,* 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998). Thus, Dr. Tornberg's opinion is not required to corroborate Dr. O'Connell's conclusions in order for Section 20(a) to be rebutted, as employer's burden to produce substantial evidence is met by Dr. O'Connell's opinion. In any event, Dr. Tornberg's report as a whole is not, contrary to the administrative law judge's decision, in conflict with Dr. O'Connell's opinion.

In his report, Dr. Tornberg stated that "the record indicates that there is no work-related injury that has caused or advanced the degenerative joint disease present in [claimant's] left knee;" thus, he opined, "there is no industrial component or causation with respect to his underlying illness." EX 7. In addition, Dr. Tornberg stated that "the left knee has not been affected by the condition present in the right knee," and that "it would be wrong, in [his] opinion, to conclude that any accommodation for the right knee caused advancement of the condition in the left knee." EX 7. At the hearing, Dr. Tornberg reiterated his position that he did not believe that the degenerative condition of the left knee is a consequence of or caused by the condition of claimant's right knee. Hearing Transcript (HT) at 16. Dr. Tornberg further stated that he could foresee pain if someone with pre-existing osteoarthritis started increasing the stress on that knee, but added that since "osteoarthritis is associated with pain, . . . it would be impossible to quantitate or say with any reasonable degree of certainty that [the left] knee hurt more simply because the [right] knee had had surgery." HT at 23. Dr. Tornberg explained that this determination is impossible because claimant has an osteoarthritic left knee, which over time will advance, and will, in and of itself, cause increased pain.

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[3]Moreover, a physician need not rule out all possibilities regarding the cause of the claimant's condition before his opinion that the condition is not work-related may be found sufficient to rebut the Section 20(a) presumption. *See Bath Iron Works Corp. v. Director, OWCP,* 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1999); *see also Conoco, Inc. v. Director, OWCP,* 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997). Thus, the administrative law judge's rejection of Dr. Tornberg's opinion since it "does not rule out the possibility that claimant's altered gait, due to knee surgeries stemming from a 1992 work-related injury, aggravated or made worse claimant's left knee problems," rests on an incorrect application of the law. *Id.*

Consequently, as the opinions of Drs. O'Connell and Tornberg were rendered with reasonable medical certainty, they are substantial evidence to rebut the presumption. *See O'Kelley*, 34 BRBS 39; *see also Conoco*, 194 F.3d 684, 33 BRBS 187(CRT); *Harford*, 137 F.3d 673, 32 BRBS 45(CRT). We must therefore reverse the administrative law judge's finding that employer did not establish rebuttal of the Section 20(a) presumption and remand this case for a determination, based on the record as a whole, as to whether claimant's left knee condition is causally related to his 1992 work injury, with claimant bearing the burden of persuasion.

Moore, 126 F.3d 256, 31 BRBS 119(CRT); *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT).

[4]We reject employer's request for the Board to reverse the administrative law judge's finding that claimant's left knee condition is related to his work-related right knee injury, as the evidence in the record as a whole must be weighed, and the Board is not empowered to perform this task. *See generally Norfolk Shipbuilding & Dry Dock Corp. v. Faulk,* 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000). In addition we have received employer's motion to stay the appeal pending a ruling by the administrative law judge on its motion for modification. In view of our decision herein, employer's motion is moot.

Employer next challenges the administrative law judge's finding that claimant's left knee condition has not reached maximum medical improvement. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.,* 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.,* 20 BRBS 184 (1988). A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.,* 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Leech v. Service Engineering Co.,* 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. *Kuhn v. Associated Press,* 16 BRBS 46(1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. *McCaskie v. Aalborg Ciserv Norfolk, Inc.,* 34 BRBS 9, 12 (2000); *White v. Exxon Corp.*, 9 BRBS 138 (1978), *aff'd mem.,* 617 F.2d 292 (5th Cir. 1982).

In the instant case, the record supports the administrative law judge's determination that claimant has not yet reached maximum medical improvement with regard to his left knee condition. As the administrative law judge found, Dr. Nichols opined that claimant would be in need of a total left knee replacement within one year, that such surgery would probably reduce the pain and provide better function, and thus that claimant would be better off having the left knee replacement surgery. CX 16 at 15. The opinions of Drs. O'Connell and Tornberg do not dispute Dr. Nichols' assessment. As Dr. Nichols' opinion regarding the need for continued treatment constitutes substantial evidence, the administrative law judge's finding that claimant's left knee condition has not yet reached maximum medical improvement is affirmed. *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT)*; Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Kuhn,* 16 BRBS 46; *see also Eckley,* 21 BRBS 120; *Ballesteros,* 20 BRBS 184.

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[5] Specifically, Dr. O'Connell stated, in his opinion of November 13, 2000, that he did not have any "specific treatment recommendations" for claimant's left knee condition, EX 5, and Dr. Tornberg explicitly conceded that claimant's left knee would "ultimately require probable surgical intervention." EX 7.

Accordingly, the administrative law judge's finding that employer has not established rebuttal of the Section 20(a) presumption is reversed, and the case is remanded for further consideration consistent with this opinion. In all regards, the administrative law judge's decision is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge