BRB No. 12-0147

TERRY L. WARD

Claimant-Petitioner

v.

VIRGINIA INTERNATIONAL TERMINALS, INCORPORATED

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED c/o ABERCROMBIE, SIMMONS & GILLETTE

Employer/Carrier-Respondents

DATE ISSUED: 11/26/2012

DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

R. John Barrett and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2011-LHC-01066) of Administrative Law Judge Richard K. Malamphy 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, while performing land bridging work for employer on October 31, 2010, slipped from the bottom step of a ladder onto the concrete below landing on his buttocks. He immediately felt a sharp pain and burning sensation across his buttocks and proceeding down the back of his legs to his ankles. Claimant worked for about 30 minutes afterwards, and then called the foreman who, in turn, called a nurse. Claimant declined to go to the emergency room that night and instead had his wife contact Dr. Arora on November 2, 2010, whom claimant had been seeing for back pain since September 2010,[1] to obtain additional pain medication. Following an MRI, Dr. Arora prescribed physical therapy followed by a series of injections, and ultimately referred claimant to Dr. Kerner for surgical intervention. Dr. Kerner performed a limited decompression at L5-S1 on May 9, 2011. Dr. Kerner excused claimant from work for the period from May 9, 2011 until July 29, 2011, at which time he opined that claimant reached maximum medical improvement and was capable of returning to work at full-duty status. Employer voluntarily paid claimant temporary total disability benefits from November 1, 2010 through February 10, 2011.

Claimant filed a claim seeking additional disability benefits and medical benefits associated with the surgery performed by Dr. Kerner on May 9, 2011. The administrative law judge found claimant entitled to the Section 20(a) presumption with regard to his back and leg pain, and that employer established rebuttal thereof. 33 U.S.C. §920(a). Addressing the evidence as a whole, the administrative law judge concluded that claimant's disability and need for treatment subsequent to the October 31, 2010 incident, including the surgical procedure performed on May 9, 2011, was not caused, aggravated or exacerbated by that work incident but rather was due entirely to his pre-existing degenerative back condition. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's decision.

After consideration of the administrative law judge's decision, the arguments raised on appeal, and the evidence of record, we affirm the administrative law judge's

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[1]Claimant stated that he underwent four back surgeries in the 1980s and that he had not experienced any problems with his back until August 2010, when he allegedly sustained a back injury while at work which he did not report to employer. Dr. Arora, on September 1, 2010, noted that this was the first episode of radicular symptoms, consisting of severe burning pain in his right buttocks, posterolateral thigh and calf, exhibited by claimant in almost 20 years. She prescribed pain medication and arranged for an MRI; the MRI appointment was cancelled several times. Claimant had an MRI, under sedation, on November 10, 2010, subsequent to his work injury of October 31, 2010.

Decision and Order as it is supported by substantial evidence and contains no reversible error. Where, as here, the Section 20(a) presumption is invoked and aggravation of a pre-existing condition is at issue, employer must produce substantial evidence that the employment event neither directly caused or contributed to the injury nor aggravated the pre-existing condition resulting in the injury. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *see also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the 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); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge found that employer rebutted the Section 20(a) presumption based on the opinions of Drs. Kerner, Skidmore and Arora. Dr. Skidmore stated that the November 10, 2010 MRI showed no acute pathology or that there were any changes, either in claimant's symptomatology or objectively documented on the MRI, attributable to the strain of October 31, 2010. CX 15. Dr. Skidmore further opined, on January 13, 2011, that claimant does not appear able to currently work because of his complaints of back pain but that "this is not related to the fall of October 31, as clearly he had ongoing symptoms that he was evaluated for in early September with 10/10 pain." *Id.* The administrative law judge relied on that portion of Dr. Arora's January 3, 2011 opinion that there were no acute findings on the MRI indicating that something occurred on October 31 that would have contributed to the degenerative disease found on that MRI.[2] CX 17. Dr. Kerner concluded that claimant's post-October 31, 2010 complaints appear to result from the progression of his pre-existing lumbar disease, that there is no objective evidence of claimant's having sustained any additional acute injury as a result of the October 31, 2010 work accident, and that it is more likely than not that the reason claimant needed surgery was due to his underlying spine condition, not his October 31, 2010 fall at work.[3] CX 23.

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[2]Previously, on December 2, 2010, Dr. Arora stated that claimant's "findings of foraminal narrowing at L5-S1 are degenerative in nature; I feel that his fall exacerbated a previous underlying condition." CX 17. Dr. Arora added, however, that the treatment she rendered to claimant following the October 31, 2010 work accident was probably the same that she would have rendered had claimant's MRI been completed on October 19, as previously scheduled. EX 1.

[3]While Dr. Kerner stated, in a letter dated June 17, 2011, that "standing on [claimant's history of events] alone, there was certainly an injury that occurred on [October 31, 2010] that precipitated his progression of pain and necessitated the surgery

Based on the reports and testimony of Drs. Skidmore, Kerner and Arora, in conjunction with the objective evidence that claimant exhibited similar symptoms of back and leg pain both prior to and following the October 31, 2010 work accident, the administrative law judge rationally found that employer satisfied its burden of producing substantial evidence that claimant's condition was not caused or contributed to by his October 31, 2010 work accident. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). The administrative law judge's finding that employer rebutted the Section 20(a) presumptions is, therefore, affirmed. *See Moore,* 126 F.3d 256, 31 BRBS 119(CRT).

The administrative law judge next found that the evidence, based on the record as a whole, establishes: that claimant began experiencing increasing pain due to his pre-existing condition in August 2010; that the pain had continued up to October 31, 2010, when claimant slipped at work; that the objective testing did not show that the October 31, 2010, incident aggravated claimant's condition but rather revealed degenerative and chronic issues; and that claimant's testimony that his pain had ceased prior to, and then recurred after, his October 31, 2010 work accident, is not credible given evidence which shows that claimant continued to pursue medical treatment during the interim period, and he reported the same symptoms after October 31, 2010, as he had reported prior to that incident.[4] The administrative law judge thus concluded that while claimant may have

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that I subsequently performed," CX 17, he further stated that, as claimant's pain appeared to be the same both prior and, subsequent to the October 31, 2010 work accident, "I cannot state that my treatment was altered at all by that episode." CX 23, Dep. at 19-20.

[4]In particular, the administrative law judge observed that, despite allegedly being pain free, claimant continued to seek treatment for his back pain, and attempted to proceed with the MRI. HT at 29-32; CX 17. Additionally, the administrative law judge rationally inferred, from the totality of claimant's testimony, that despite his statement that he was pain free and that he did not need to take Vicodin after the September 20-23 period, claimant continued to take his medication thus prompting his need for a refill on November 2, 2011. HT at 28. The administrative law judge rationally found there are inconsistencies in the record which belie claimant's statements in general, and specifically as they pertain to his allegation that he was pain free for the period from September 23, 2010 up to the date of his October 31, 2010 work accident. *See* Decision and Order at 17-18. Similarly, the administrative law judge rationally accorded diminished weight to the opinion of Dr. Arora, that claimant's fall exacerbated a previous underlying condition, because she did not sufficiently explain it in terms of her subsequent statement that there were no acute findings on the MRI to indicate that something occurred on October 31, 2010. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

fallen on October 31, 2010, a preponderance of the evidence does not support that the incident aggravated his pre-existing back condition or necessitated surgery. Accordingly, the administrative law judge's finding that claimant did not establish, based on the record as a whole, that the October 31, 2010 work incident aggravated his pre-existing back condition is affirmed as it is supported by substantial evidence, rational, and in accordance with law. *See Moore,* 126 F.3d 256, 31 BRBS 119(CRT). As claimant has raised no reversible error in the administrative law judge's consideration of the evidence, the denial of benefits is affirmed.

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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JUDITH S. BOGGS
Administrative Appeals Judge