

BRB No. 03-0158

JEREMIAH BRUNSON )  
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 Claimant-Petitioner )  
 )  
 v. )  
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 RYAN WALSH, INCORPORATED ) DATE ISSUED: Oct. 21, 2003  
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 Self-Insured )  
 Employer-Respondent ) DECISION and ORDER

Appeal of the Decision and Order on Second Remand - Denying Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Edward E. Boshears, Brunswick, Georgia, for claimant.

Shari S. Miltiades, Savannah, Georgia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Second Remand - Denying Benefits (97-LHC-0411) of Administrative Law Judge David W. Di Nardi 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. *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. '921(b)(3).

This case is before the Board for the third time. On July 20, 1994, claimant suffered an injury during the course of his employment as a longshoreman with employer. Specifically, while bending over to straighten a mat on the dock, claimant was struck from behind and knocked down by a forklift truck. Claimant sought medical treatment on the day of his accident at Glynn Immediate Care, complaining of pain in his left shoulder and both knees. Claimant, who was diagnosed with a sprained left shoulder for which Naprosyn was prescribed, was released to return to work the following day with lifting restrictions.<sup>1</sup> Employer paid for the medical services provided by Glynn Immediate Care, but did not voluntarily pay any compensation benefits. Claimant sought permanent total disability benefits from January 1, 1995, based on back and shoulder injuries and heart problems, all of which he asserted were related to his July 20, 1994, work injury.

In a Decision and Order issued on March 5, 1998, Administrative Law Judge Edward J. Murty, Jr., determined that claimant's back and heart problems were unrelated to the July 20, 1994, work accident, and, accordingly, he denied the claim for compensation. Claimant's subsequent motion for reconsideration was denied on April 21, 1998. Claimant thereafter appealed Judge Murty's decisions to the Board. In a Decision and Order issued on April 20, 1999, the Board agreed with claimant that Judge Murty erred by addressing the causation issues without invoking the Section 20(a), 33 U.S.C. § 920(a), presumption, holding that claimant is entitled as a matter of law to invocation of the presumption that his shoulder and heart conditions are causally related to his employment. Accordingly, the Board vacated the administrative law judge's decision in part and remanded the case to the administrative law judge for further consideration. *Brunson v. Ryan Walsh Stevedoring, Inc.*, BRB No. 98-1064 (Apr. 20, 1999)(unpub.)(*Brunson I*).

On remand, the case was assigned to Administrative Law Judge David W. Di Nardi (the administrative law judge), as Judge Murty had retired. In his Decision and Order on Remand - Denying Benefits issued on January 5, 2001, the administrative law judge, without specifically identifying the evidence which he found sufficient to establish rebuttal, stated that employer had produced sufficient evidence to rebut the Section 20(a) presumption with respect to claimant's cardiac and shoulder conditions. Next, the administrative law judge weighed all of the record evidence and concluded that neither of claimant's conditions is causally related to his employment. Accordingly, the administrative law judge denied the claim for benefits. Claimant again appealed to the Board. In a Decision and Order issued on

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<sup>1</sup> On the day after his injury, claimant returned to work driving cars off ships for another employer, and was involved in a car accident. Claimant was suspended from his union, initially for 90 days and then permanently, because he tested positive in drug testing on July 20, 1994, and July 21, 1994, following each accident, and again in a subsequent random drug test. He has not worked since July 21, 1994.

January 30, 2002, the Board determined that, notwithstanding the administrative law judge's omission of the specific evidence supporting rebuttal of the Section 20(a) presumption, his discussion of the evidence relevant to the causation issue provided an adequate basis for the Board's review of his decision. With respect to claimant's cardiac condition, the Board affirmed the administrative law judge's determination that such condition is not causally related to his employment. Next, the Board held that the factual findings made by the administrative law judge with respect to claimant's shoulder condition were not supported by substantial evidence, and, accordingly, vacated the administrative law judge's determination that claimant's shoulder condition is unrelated to his employment and remanded the case for the administrative law judge to reconsider the issue of the causation of claimant's shoulder condition in accordance with Section 20(a). Lastly, the Board stated that if the administrative law judge found a causal relationship between claimant's shoulder condition and his employment, he must consider the nature and extent of claimant's work-related disability and award Section 7(a), 33 U.S.C. '907(a), benefits for the medical treatment found to be reasonable and necessary for the treatment of the condition. *Brunson v. Ryan Walsh Stevedoring, Inc.*, BRB No. 01-0423 (Jan. 30, 2002)(unpub.)(*Brunson II*).

In his Decision and Order on Second Remand B Denying Benefits, the administrative law judge found that employer had rebutted the Section 20(a) presumption and concluded, on the basis of the evidence considered as a whole, that claimant's shoulder condition is not work-related. Next, the administrative law judge determined that even if claimant's shoulder condition were held to be causally related to his employment, claimant did not establish that he sustained any disability as a result of his shoulder injury. The administrative law judge additionally found that the claim for compensation could be denied on the basis that it was not timely filed pursuant to Section 13(a) of the Act, 33 U.S.C. '913(a).<sup>2</sup> Lastly, the administrative law judge found that claimant is not entitled to medical benefits for his shoulder condition. Accordingly, the administrative law judge once again denied claimant's claim for compensation and medical benefits.

On appeal, claimant contends that the administrative law judge's finding that employer rebutted the Section 20(a) presumption that claimant's shoulder condition is work-related is erroneous and that the factual findings underlying the administrative law judge's decision are not supported by substantial evidence. Employer responds, urging affirmance.

As set forth in the Board's previous decisions in this case, claimant is entitled as a matter of law to invocation of the Section 20(a) presumption that his shoulder condition is causally related to his employment. *See Brunson II*, slip op at 2-3; *Brunson I*, slip op. at 3. Accordingly, the burden shifts to the employer to rebut the presumption by presenting substantial evidence that claimant's condition was not caused or aggravated by his

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<sup>2</sup> In the original Decision and Order in this case, Administrative Law Judge Murty found that the claim was timely filed under Section 13(a); this finding was never challenged on appeal.

employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT)(11<sup>th</sup> Cir. 1990); *see also Jones v. Aluminum Company of America*, 35 BRBS 37 (2001). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the presumption no longer controls, and the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the ultimate burden of persuasion. *See Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994). In the present case, however, the administrative law judge on remand did not precisely follow this analysis. Rather, after summarily finding that employer rebutted the presumption, the administrative law judge engaged in a discussion of all the record evidence regarding claimant=s shoulder condition, and ultimately found that claimant=s shoulder condition is not causally related to his employment with employer. Nonetheless, despite the administrative law judge=s failure to identify the evidence relied upon to find rebuttal of the invoked presumption before weighing all of the evidence, his discussion of the evidence relevant to the causation issue provides an adequate basis for our review of his decision. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 1068, 32 BRBS 59, 61(CRT) (5<sup>th</sup> Cir. 1998).

In finding the Section 20(a) presumption rebutted, the administrative law judge apparently relied upon the opinion of Dr. Pappas. Specifically, the administrative law judge set forth that doctor=s deposition testimony that claimant=s degenerative condition was neither caused nor aggravated by the work-related incident of July 20, 1994. *See Decision and Order on Second Remand* at 44. As accurately set forth by claimant in his brief, however, the testimony of Dr. Pappas relied upon by the administrative law judge refers not to claimant=s shoulder condition, but rather to the degenerative disc disease involving claimant=s lumbar spine. *See RX 15* at 8-9, 13-16. Thus, a review of Dr. Pappas=s testimony reveals that although Dr. Pappas opined that claimant=s degenerative disc disease is not related to his July 20, 1994 work accident, *id.*, he offered no opinion as to whether claimant=s shoulder problem was causally related to his work accident. Accordingly, the testimony of Dr. Pappas is insufficient to rebut the presumption that claimant=s shoulder condition is related to his employment. Moreover, a review of the record reveals that none of the remaining medical opinions of record address the issue of whether or not a causal relationship exists between claimant=s shoulder condition and his work-related accident. Employer, therefore, has failed to meet its burden of presenting substantial evidence that claimant=s shoulder condition was not caused or aggravated by his employment. *See Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *Jones*, 35 BRBS 37. Accordingly, we reverse the administrative law judge=s determination that employer established rebuttal of the Section 20(a) presumption. In light of our reversal of the administrative law judge=s finding that employer established rebuttal of the Section 20(a) presumption, we need not address the administrative law judge=s weighing of the evidence as a whole. Causation with regard to claimant=s claim for an injury to his shoulder is established as a matter of law. *See Burley v.*

*Tidewater Temps, Inc.*, 35 BRBS 185 (2002).<sup>3</sup>

The next issue to be addressed is the administrative law judge's determination that claimant has no work-related disability related to his shoulder. Claimant has the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). To establish a *prima facie* case of total disability, claimant must demonstrate that he cannot return to his usual employment duties due to his work-related injury. The burden then shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5<sup>th</sup> Cir. 1981); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). Thus, in the instant case, claimant must establish disability sustained as a result of his work-related shoulder injury in order to be entitled to disability benefits.

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<sup>3</sup> Because claimant's shoulder injury is causally related to his employment, he is entitled to medical benefits under Section 7 of the Act, 33 U.S.C. § 907, for medical treatment reasonable and necessary for the work-related injury even if that injury is not economically disabling. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). The administrative law judge, after observing that employer paid for the medical care provided at Glynn Immediate Care on the date of claimant's work accident, determined that no further medical treatment after that date was necessary for claimant's shoulder injury. *See* Decision and Order on Second Remand at 52. In his appeal to the Board, claimant does not assign error to the administrative law judge's finding that further medical care is not necessary for his shoulder problem. Accordingly, the administrative law judge's denial of additional medical benefits is affirmed. *See generally Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214, 218 (1988).

In determining that claimant is not entitled to disability compensation, the administrative law judge found it noteworthy that on the day following his work accident, claimant performed longshore work for another employer, and during the course of that workday neither mentioned the previous day=s accident nor complained of any physical problems. *See* Decision and Order on Second Remand at 45, 50. The administrative law judge further found that claimant has provided no medical evidence of disability resulting from his shoulder injury. *Id.* In evaluating the medical evidence of record, the administrative law judge credited the opinion of Dr. Martinez, claimant=s treating physician, who testified regarding the medical conditions forming the basis for claimant=s disability. *See* Decision and Order on Second Remand at 40-41; RX 11. Specifically, the administrative law judge relied upon Dr. Martinez=s testimony that claimant is disabled based on his non-work-related hypertension, diabetes, congestive heart failure, alcoholism, and drug addiction, and that claimant=s shoulder pain is not a factor in his disability. *See* Decision and Order on Second Remand at 41; RX 11 at 35-39.<sup>4</sup>

The administrative law judge is entitled to evaluate the credibility of all witnesses and has considerable discretion in evaluating the record evidence. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5<sup>th</sup> Cir. 2000); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT)(11<sup>th</sup> Cir. 1988). Moreover, the administrative law judge is entitled to draw his own inferences from the evidence, and his selection among competing inferences must be affirmed if supported by substantial evidence and in accordance with law. *Id.* In the instant case, we hold that the administrative law judge=s credibility assessments and his inferences drawn from the record evidence regarding the issue of any work-related disability are rational. He acted within his discretion in crediting Dr. Martinez=s opinion that claimant=s shoulder condition does not contribute to his disability and in declining to rely on claimant=s complaints of shoulder pain. We therefore affirm the administrative law judge=s finding that claimant did not establish any disability as a result of his shoulder injury, and his consequent denial of disability

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<sup>4</sup> Dr. Martinez testified, in this regard, that A[i]n no way do I mention the shoulder or back problems as part of or aggravating or causing or producing [claimant=s disability].@ RX 11 at 36. The doctor added that AY insofar as listing what was important medically for his disability, YI left out anything concerning the shoulder or back painsY@ *Id.* at 37.

compensation.<sup>5</sup>

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<sup>5</sup> In light of our affirmance of the administrative law judge's determination that claimant has no work-related disability, we need not consider the administrative law judge's findings with respect to the issue of the timeliness of the claim under Section 13(a) of the Act, 33 U.S.C. '913(a).

Accordingly, the administrative law judge=s determination that employer rebutted the Section 20(a) presumption linking claimant=s shoulder injury to his employment is reversed. In all other respects, the administrative law judge=s Decision and Order on Second Remand B Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge