

J. P.	)	
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Claimant-Petitioner	)	
	)	
v.	)	
	)	
POMTOC	)	DATE ISSUED: 10/31/2008
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Barry R. Lerner (Barnett & Lerner, P.A.), Dania Beach, Florida, for claimant.

Laurence F. Valle (Valle, Craig & Vazquez, P.A.), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2006-LHC-00757) of Administrative Law Judge Alan L. Bergstrom 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).

Claimant injured his right ankle and foot on March 23, 2001, when he stepped into a hole during the course of his employment as a checker. Claimant was examined by Dr. Aronoff, a podiatrist, who diagnosed a small fracture of the right cuboid bone. Claimant's pain increased over time and, in his June 28, 2001 report, Dr. Aronoff noted that claimant walked with an antalgic gait. Claimant reported back pain to Dr. Zarat in October 2001. After claimant's cuboid fracture had healed, Dr. Aronoff referred claimant to Dr. Tannenbaum, who specializes in physical medicine and rehabilitation, and Dr. Gelblum, a neurologist, to treat claimant's pain in his right foot and ankle area. They diagnosed complex regional pain syndrome (CRPS). Employer paid claimant compensation for temporary total disability from March 23, 2001, to April 6, 2005, and for a 25 percent permanent partial disability of the right foot. 33 U.S.C. §908(b), (c)(4). The parties agreed that claimant's initial right foot and ankle injury reached maximum medical improvement on July 11, 2002. Claimant sought continuing compensation for total disability due to CRPS and a back condition, which he alleged was caused or aggravated by an antalgic gait as a consequence of the initial work injury.

The administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking claimant's alleged CRPS and back condition to his work injury and that employer rebutted the presumption. The administrative law judge found that claimant failed to establish that he has CRPS based on objective test results and the description of CRPS provided by Drs. Herskowitz and Millheiser. The administrative law judge also found that claimant failed to establish that he has back pain or that he has or ever had an abnormal gait. Therefore, the administrative law judge concluded that claimant failed to establish that his back condition was caused or aggravated by his work injury.

On appeal, claimant challenges the administrative law judge's findings that he does not have CRPS and a back condition related to his work injury. Moreover, claimant alleges that he remains disabled by narcotic medication prescribed for his pain resulting from these alleged work injuries. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

Employer is liable for the sequelae of the original injury or for the work-related aggravation of a pre-existing condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5<sup>th</sup> Cir. 1986) (*en banc*); *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). Where, as here, the administrative law judge finds that the Section 20(a) presumption is invoked and 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.<sup>1</sup> See *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11<sup>th</sup> Cir. 1990).

Claimant asserts that the administrative law judge erred by not crediting the opinions of his treating physicians, Drs. Gelblum, Tannenbaum, and Zaret to find that he has CRPS and a back condition arising out of the work injury to his right foot and ankle. The administrative law judge extensively reviewed the evidence in this case. He initially found that claimant is not a credible witness, noting that the veracity of claimant's CRPS-related pain complaints and testimony is contradicted by the absence of any objective findings noted by Drs. Hershkowitz, Millheiser, and Schou, who examined claimant on six different occasions. EXs 1 at 13-14, 18-19, 23-24; 20 at 17, 20-22, 34, 47-48; 21 at 16-17, 23-24, 30-31. The administrative law judge rejected claimant's testimony that he walks with a constant limp as it is contradicted by the testimony of employer's private investigators and by Drs. Hershkowitz, Millheiser, and Schou, who watched several surveillance videotapes and opined that claimant did not appear to have a limp or any type of abnormal gait. EXs 1 at 52-53; 20 at 25-27, 51-56; 21 at 27; EXs 3B, 17B, 18B. The administrative law judge credited the opinions of Drs. Hershkowitz and Millheiser that claimant's right leg appears normal and that he is using it in a normal manner. EXs 20 at 17, 20-22; 21 at 16, 22-24, 30-31. The administrative law judge credited the deposition testimony of Dr. Schou's medical assistant, Mr. Irvin, that claimant walked with a significant limp and used a cane inside Dr. Schou's office, but walked to his car without any sign of a limp or the assistance of his cane. EX 2 at 4-6. The administrative law judge thus found that claimant failed to establish that he suffers any ongoing pain in his right foot or ankle. Decision and Order at 106.

The administrative law judge found that while claimant at times exhibited minor objective signs of CRPS, the record also contains evidence documenting the absence of such signs. EXs 1 at 13, 18-19, 23-24; 20 at 14, 17, 20-22; 21 at 13-17, 23-24, 33-36. The administrative law judge found that the objective test evidence, consisting of a triple-phase bone scan, nerve conduction studies, and ankle and foot MRI scans, reveals non-specific findings. CX 15 at 5; EXs 8 at 14-15; 10 at 4, 13. The administrative law judge found that Drs. Hershkowitz and Millheiser provided the most comprehensive and reasonable description of CRPS and that their opinions that claimant does not have this condition are therefore entitled to greater weight. Decision and Order at 107 n.66. Moreover, the administrative law judge found Dr. Hershkowitz's opinion more credible than that of Dr. Gelblum because, while both doctors are board-certified and have

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<sup>1</sup> Claimant does not challenge the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption.

teaching experience, Dr. Hershkowitz is Chief of Neurology at Florida Hospital. Decision and Order at 107 n.65; *see* EX 21 at 3-4, 6. In view of this evidence, the administrative law judge concluded that the occasional objective findings noted by other physicians are insufficient to establish that claimant has CRPS and that the medical opinions that claimant has CRPS are not well-reasoned.

The administrative law judge next found that claimant failed to establish that he has back pain or that his work injury caused, contributed to or aggravated a pre-existing back condition. In addressing claimant's credibility, the administrative law judge found that claimant's first documented back complaint was on October 2, 2001, during an evaluation performed by Dr. Zaret. CX 15 at 4. Contrary to claimant's testimony, the administrative law judge properly found that Dr. Aronoff's notes do not document back pain. CXs 5, 13. The administrative law judge found that claimant's back complaints began after Dr. Zarat questioned whether claimant's foot and ankle pain was caused by an L5 radiculopathy. CX 15 at 4-5. Thereafter, Dr. Tannenbaum noted claimant's report that he experienced a burning-type sensation from his back down to his right foot. CX 13 ex 1 at 5. The administrative law judge found that whereas there is evidence that claimant has degenerative disc disease, there is no objective evidence that claimant's nerves are affected or that his back condition is causing any pain. CXs 10 at 7; 15 at 3; EXs 1 at 38-39, 42; 20 at 17, 31-38. The administrative law judge found that, given his field of expertise, the opinion of Dr. Rodriquez, a radiologist, that an October 27, 2007, lumbar MRI revealed bulging discs is entitled to greater weight than the opinion of Dr. Zarat, a neurologist, that the scan showed a disc herniation.<sup>2</sup> CX 10 at 7-8. The administrative law judge also found claimant's back pain contradicted by the surveillance videotapes and reports, Mr. Irvin's testimony, and Dr. Millheiser's July 25, 2006 report documenting that claimant over-exaggerated his back symptoms. EX 14 at 2-3. Moreover, based on the credible evidence documenting that claimant was observed on various occasions bending from the waist, driving, and walking without a limp, the administrative law judge found claimant failed to establish that he has or ever had an antalgic gait. Therefore, the administrative law judge found that the opinions of physicians that claimant has back pain due to an altered gait are not well-reasoned as they are based on claimant's subjective complaints or responses to test maneuvers and are not based on the objective evidence of record. Decision and Order at 107. The administrative law judge concluded that, as there is no credible evidence that claimant has foot or ankle pain, CRPS, or low back injuries due to or aggravated by the original right foot injury, claimant has failed to establish that his alleged pain is caused, contributed to or aggravated by the work injury. Decision and Order at 108.

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<sup>2</sup> The administrative law judge credited Dr. Zarat's opinion that claimant's nerve root was not affected. CX 15 at 3.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. See *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5<sup>th</sup> Cir. 2000); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5<sup>th</sup> Cir. 1991); see also *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Moreover, an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom; he has the prerogative to credit one medical opinion over that of another and is not bound to accept the opinion or theory of any particular medical examiner. See *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5<sup>th</sup> Cir. 1995); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999). The administrative law judge rationally concluded that claimant's complaints of ongoing right foot and lower back pain are not credible in view of the medical opinions of Drs. Hershkowitz, Millheiser, and Schou who found no objective evidence of CRPS, claimant's inconsistent testimony, the videotape surveillance and related testimony, and Mr. Irvin's testimony. Moreover, the administrative law judge was not required to credit the opinions of Drs. Tannenbaum and Gelblum that claimant has work-related CRPS and the opinion of Dr. Tannenbaum that claimant has back pain due, in part, to an altered gait related to his CRPS. In weighing a treating physician's opinion, the administrative law judge must consider its underlying rationale as well as the other medical evidence of record. See *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); see also *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005). In this case, the administrative law judge rationally found more credible the opinions of Drs. Hershkowitz, Millheiser, and Schou based on the objective evidence of record, the description of CRPS provided by Drs. Hershkowitz and Millheiser, and Dr. Hershheiser's superior credentials. The administrative law judge also credited substantial evidence to find that claimant failed to establish that he has, or ever had, an antalgic gait. Therefore, the administrative law judge's denial of benefits premised on claimant's failure to establish a causal link between his alleged CRPS and back condition and his March 23, 2001, work injury is affirmed. See *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

Claimant also argues that he requires detoxification from narcotic medication prescribed by Dr. Tannenbaum before he would be able to return to work. Dr. Millheiser testified in his June 2007 deposition that, based on claimant's recitation of his prescription medication regimen, claimant is physically dependent on narcotic medication and would require detoxification before he could return to work. EX 20 at 39-44. In his decision, the administrative law judge implicitly found that claimant is not impaired by prescription medication nor does he require medically-supervised detoxification. Decision and Order at 104, 106. The record shows that claimant was prescribed narcotic medication on a regular basis in 2003 for his alleged pain due to CRPS. CXs 7 at 5, 9; 13 at 7-8, 9-10, 40. The administrative law judge accepted the parties' stipulation that

claimant's initial foot and ankle injury reached maximum medical improvement on July 11, 2002, and that claimant did not allege any permanent disability from this injury. Decision and Order at 2, 108. Thus, claimant's alleged physical dependence on narcotic medication, which arose subsequent to his compensable injury's reaching maximum medical improvement, is attributable to his alleged CRPS. We have affirmed the administrative law judge's rational rejection of the CRPS claim. Accordingly, as claimant's alleged dependence on narcotic medication is not related to his employment, employer is not liable for any resulting disability. *See generally Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed. Appx. 126 (5<sup>th</sup> Cir. 2002) (table); *Wright v. Connelly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 3 F.3d 34 (9<sup>th</sup> Cir. 1993).

Accordingly, the administrative law judge's Decision and Order denying the claim for additional compensation and medical 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