BRB No. 09-0296

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| K.A. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| ELECTRIC BOAT CORPORATION | ) | DATE ISSUED: 09/25/2009 |
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| Self-Insured | ) | |
| Employer-Petitioner | ) | DECISION and ORDER |

Appeal of the Decision and Order Granting Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts, Groton, Connecticut, for claimant.

Conrad M. Cutcliffe (Cutcliffe, Glavin & Archetto), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2008-LHC-01063) of Administrative Law Judge Daniel F. Sutton 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, who was employed as a welder-grinder for employer, began to experience severe pain in both feet, worse in the left foot, in the fall of 2003.[1] On

[1] Claimant began work at employer's Quonsett Point facility in 1976; his work from 1976 to 2001 involved considerable walking, climbing, crawling, and the use of air tools. *See* Hearing Tr. at 23-37, 48. Following knee surgery in 2001, claimant returned to work for employer on light duty with restrictions on climbing, stooping and kneeling.

November 13, 2003, he sought treatment from podiatrists Drs. Fish and Moniz, who, after obtaining positive nerve conduction studies conducted by a neurologist, Dr. L'Europa, diagnosed claimant with bilateral tarsal tunnel syndrome. *See* Hearing Tr. at 46-48; CX 2 at 2, 37-42; EX 17 at 5-10. Because Dr. Moniz's anti-inflammatory medications and cortisone injections failed to provide claimant with lasting pain relief, he discontinued treatment after January 8, 2004. *See* Hearing Tr. at 47-48; CX 2 at 2; EX 17 at 8-10. Claimant explained that he stopped treatment because he felt that it was not helping his condition and that he would have to live with the extreme foot pain he continued to experience. *See* Hearing Tr. at 86-87. Claimant testified that his foot pain worsened from January 2004 to 2006, and that his pain was exacerbated by his work activities, including standing all day, walking, and the vibration associated with the use of air tools. *See id.* at 48-52. On February 16, 2006, claimant returned to see Dr. Moniz because he felt incapable of continuing to work with the level of pain he was experiencing.[2] *See id.* at 48, 51; CX 2 at 3; EX 17 at 10. Claimant's last day of work for employer was on April 3, 2006. *See* Tr. at 58; EXs 10, 11. Dr. Moniz performed tarsal tunnel release surgery on claimant's left foot on April 5, 2006, and on his right foot on May 25, 2006. CX 2 at 4, 7. These surgeries, as well as subsequent treatment rendered by Dr. Moniz, proved unsuccessful in relieving claimant's foot pain, and on November 30, 2006, Dr. Moniz referred claimant for an evaluation by a physiatrist.[3] *See* Hearing Tr. at 52-53; CX 2 at 7-

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*See id.* at 36, 40-41; EXs 13, 14. Claimant was assigned to a light duty area, also referred to as the fast flow center, where he performed bench work using air tools. *See* Hearing Tr. at 42-45, 74; EXs 8, 9, 12. Claimant testified that although some employees used chairs to perform bench work, he felt that he could not perform his job properly while seated; thus, he stood on a concrete floor all day to perform bench work. *See* Hearing Tr. at 43-44, 72-74. Occasionally, at his supervisor's request, claimant performed grinding and inspection work in other parts of the building that involved climbing and exceeded his work restrictions. *See id.* at 41-42, 45.

[2] Repeat nerve conduction studies performed by Dr. L'Europa on February 27, 2006, revealed that claimant's bilateral neuropathies consistent with bilateral tarsal tunnel syndrome were more severe than in the prior studies performed in 2003. CX 2 at 3-4, 28-35; EX 17 at 10.

[3] On referral from Dr. Moniz, Dr. Smith, a physiatrist, commenced treatment of claimant on January 16, 2007, which included medications and peripheral nerve injections. *See* Hearing Tr. at 53; CX 7. When that treatment proved unsuccessful, Dr. Smith referred claimant to the Interventional Pain Management Center for a consultation as to whether claimant has complex regional pain syndrome (CRPS), also referred to as reflex sympathetic dystrophy (RSD), and for consideration of a sympathetic nerve block. *See id.* Claimant was initially seen by Dr. Schneiderman of the Interventional Pain Management Center on May 8, 2007, and his care was later assumed by the Center's

12; EX 17 at 11-12, 27-28. Claimant sought continuing temporary total disability benefits commencing April 5, 2006 and medical benefits under the Act, asserting that his bilateral foot condition was caused or aggravated by repetitive work on hard surfaces in the course of his employment with employer. *See* ALJ X1; CX 1; EXs 1, 2.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), but that employer rebutted the presumption. Evaluating the evidence as a whole, the administrative law judge found that claimant's work activities for employer aggravated his bilateral foot condition. After noting that claimant had not made a claim of permanent disability, the administrative law judge determined that claimant was unable to perform his former job for employer, and that employer had not attempted to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from April 5, 2006, and continuing, and medical benefits. 33 U.S.C. §§907, 908(b).

On appeal, employer challenges the administrative law judge's finding that claimant's bilateral foot condition is causally related to his employment with employer. Claimant responds, urging affirmance.

Once, as here, claimant invokes and employer rebuts the Section 20(a) presumption, it 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 burden of persuasion. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 605, 38 BRBS 60, 65(CRT) (1st Cir. 2004); *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant disability is compensable. *See Preston*, 380 F.3d at 605, 38 BRBS at 65(CRT). This rule applies not only where the underlying condition itself is affected but also where the work causes claimant's underlying condition to become symptomatic. *See Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*,

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Director, Dr. Chopra, who is Board-certified in anesthesiology and the subspecialty of pain medicine. CXs 9-11. Dr. Chopra diagnosed claimant with CRPS of the left foot, which he attributed to trauma associated with claimant's left foot surgery. *See* CXs 9; 11 at 6-7, 12, 18-19. Dr. Chopra's attempts to treat claimant's CRPS with lumbar sympathic blocks proved unsuccessful, so he discontinued those injections and instead treated claimant with medications and desensitization exercises. *See* CXs 9; 11 at 6, 11, 13, 16-17, 20-21.

18 BRBS 212 (1986). Thus, if claimant's work activities caused his underlying condition to become symptomatic or otherwise worsened his symptoms, claimant has sustained a work-related injury. *See id.*

Employer challenges the administrative law judge's finding that claimant established causation based on the record as a whole. Specifically, employer assigns error to the administrative law judge's decision to rely on the opinion of Dr. Moniz and the testimony of claimant over the opinion of employer's medical expert Dr. Chihlas, a Board-certified orthopedic surgeon.[4] The administrative law judge weighed the evidence of record and, giving determinative weight to Dr. Moniz's opinion, as supported by claimant's testimony, found that claimant's tarsal tunnel syndrome was aggravated by his work activities with employer. Decision and Order at 13-14. In reaching this conclusion, the administrative law judge first credited Dr. Moniz's diagnosis of claimant's foot problems as bilateral tarsal tunnel syndrome, *see* CX 2; EX 17 at 7-10, over the contrary opinion of Dr. Chihlas that claimant does not have tarsal tunnel syndrome and that his foot pain is due to his having flat feet and being overweight. *See* EXs 7; 18 at 10-12, 14, 27, 30-31, 39; Decision and Order at 13-14. Specifically, having noted that Dr. Chihlas had neither treated nor examined claimant and that his opinion was based solely on a review of claimant's medical records, Decision and Order at 10; *see* EXs 7; 18 at 6, the administrative law judge accorded greater weight to Dr. Moniz's diagnosis based on his greater familiarity with claimant's condition and history and the fact that his diagnosis was confirmed by the diagnostic testing conducted by Dr. L'Europa, a neurologist. Decision and Order at 13-14.

The administrative law judge next discussed Dr. Moniz's deposition testimony regarding a causal relationship between claimant's tarsal tunnel syndrome and his employment with employer, and determined that the totality of that testimony reflects Dr. Moniz's opinion that claimant's work activities could have aggravated his tarsal tunnel syndrome.[5] Decision and Order at 14; *see* EX 17 at 15-18, 30. The administrative law judge found that Dr. Moniz's opinion regarding aggravation was supported by claimant's uncontradicted testimony that, even after being placed on light duty work, he was

[4] At the request of employer, Dr. Chihlas reviewed claimant's medical records and, based upon that review, opined that claimant has probable peripheral neuropathy related to his having flat feet and being overweight, that it is unlikely that claimant has tarsal tunnel syndrome or CRPS, and that he cannot say that claimant's work was a causative or aggravating factor in his foot complaints. EXs 7; 18 at 10, 14-16, 27, 30-31, 33-34, 39.

[5] Dr. Moniz stated, "I can definitely see where [claimant's employment] can aggravate a condition of tarsal tunnel . . ." CX 17 at 15.

required to stand all day on a concrete floor to perform bench work, to use air tools which caused severe pain in his feet, and, on occasion, to perform work, involving walking and climbing, that exceeded his restrictions. Decision and Order at 14; *see* Hearing Tr. at 41-45, 72-74. The administrative law judge concluded that, given Dr. Moniz's greater familiarity with claimant's condition and history, Dr. Moniz's opinion outweighs the less persuasive opinion of Dr. Chihlas that claimant's foot problems were not caused or aggravated by his work for employer.[6] Decision and Order at 14; *see also* Decision and Order at 10-11, 13.

We reject employer's assertion that the administrative law judge erred in weighing the evidence of record regarding the issue of causation. It is well-established that the administrative law judge is entitled to assess the credibility of all witnesses, and has considerable discretion in evaluating the evidence of record. *See Bath Iron Works Corp. v. U.S. Dept. of Labor [Knight],* 336 F.3d 51, 56, 37 BRBS 67, 70(CRT) (1st Cir. 2003); *Bath Iron Works Corp. v. Director, OWCP [Hutchins]*, 244 F.3d 222, 231, 35 BRBS 35, 40-41(CRT) (1st Cir. 2001). Moreover, the Board must accept the administrative law judge's factual findings and inferences which are supported by the record, and may not disregard the administrative law judge's findings merely on the basis that the evidence permits diverse inferences. *See id; see also Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 675, 32 BRBS 45, 46(CRT) (1st Cir. 1998); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 56, 31 BRBS 19, 21(CRT) (1st Cir. 1997). We reject employer's contention that the administrative law judge erred in evaluating the evidence of record, as the administrative law judge drew rational inferences from the medical evidence and claimant's testimony, and thereafter found that the opinion of Dr. Moniz was more persuasive than the contrary opinion of Dr. Chihlas.[7]

[6] The administrative law judge provided an extensive summary of Dr. Chihlas's report and deposition testimony, Decision and Order at 10-11, and further discussed Dr. Chihlas's opinion in his consideration of Section 20(a) rebuttal. *Id.* at 13; *see* footnote 4.

[7] Employer argues on appeal that the findings of the administrative law judge are not supported by various pieces of documentary evidence and testimony, asserting that the evidence establishes that claimant's foot condition is not causally related to his work for employer. The mere summary of evidence favorable to its position does not demonstrate error in the administrative law judge's findings. Therefore, we need not specifically address employer's assertions as the competing characterization of the record evidence and assessment of the witnesses' credibility offered by employer do not provide a basis for overturning the administrative law judge's credibility determinations and evaluations of the evidence which are rational and supported by the record. *See, e.g., Knight,* 336 F.3d at 56, 37 BRBS at 70(CRT).

As the administrative law judge's interpretation of Dr. Moniz's opinion was rational, and as Dr. Moniz's opinion is supported by claimant's testimony regarding his work activities and the effect of his work on his level of pain, the administrative law judge reasonably concluded that this credited evidence establishes that claimant's work activities aggravated his bilateral foot condition. *See Preston*, 380 F.3d 597, 38 BRBS 60; *Gardner*, 640 F.2d 1385, 13 BRBS 101. Thus, as the administrative law judge's finding that claimant's foot condition is causally related to his employment with employer is supported by substantial evidence, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order Granting 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 HALLL
Administrative Appeals Judge