BRB No. 11-0174

ROGER WILLIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 09/20/2011
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA c/o AMERICAN INTERNATIONAL UNDERWRITERS	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

John M. Schwartz (Blumenthal, Schwartz & Saxe, P.A.), Titusville, Florida, for claimant.

Frank J. Sioli and Hilary K. Jonczak (Brown Sims, P.C.), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2009-LDA-0409) of Administrative Law Judge Patrick M. Rosenow 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

On July 12, 2008, claimant was employed in concrete construction work at Camp Kalsu in Baghdad, Iraq. While carrying plywood, claimant fell backwards and twisted his knee. Claimant reported the accident on July 16, 2008, when he was working at Camp Victory, complaining only of knee pain and stating that he had been injured at Camp Victory rather than Camp Kalsu. The medic prescribed Motrin and placed him on work restriction. On July 24, 2008, claimant returned to the United States for rest and relaxation. While he was home, he treated with Dr. Christian, an orthopedic surgeon, who drained claimant's knee on August 12, 2008, and performed knee surgery on October 24, 2008. Claimant started a three-week course of physical therapy on November 6, 2008. On November 17, 2008, claimant reported pain in his buttocks. EX 21 at 6. He testified that the pain got worse and moved into his back during the course of physical therapy, and he believed he told the physical therapists that his back pain developed during physical therapy. On December 16, 2008, claimant's attorney filed a claim for compensation for a right knee injury. EX 5. On December 18, 2008, Dr. Christian discharged claimant to return to his usual work with a five percent permanent impairment to the right knee. Claimant started treating with Dr. Rizk, a pain management specialist, on March 6, 2009, complaining of back and leg pain. Claimant returned to work on October 28, 2009, as a shipping clerk. On February 22, 2010, claimant took a job as a production supervisor at a makeup packaging company where he still works. Claimant subsequently asserted that he injured his back in the fall in Iraq.

The parties stipulated that: claimant suffered a knee injury in Iraq on July 12, 2008, which reached maximum medical improvement on December 18, 2008; claimant has a five percent impairment of the right knee; and employer paid permanent partial disability benefits for the knee injury. With respect to the claim for claimant's knee injury, the administrative law judge found that claimant could return to his usual work following Dr. Christian's release on December 18, 2008. Therefore, the administrative law judge found that claimant was temporarily totally disabled from the date of his fall through December 18, 2008, at which time he became entitled to a scheduled award for a five percent partial loss of use of his leg. 33 U.S.C. §908(c)(2), (19). The administrative law judge found that claimant is not entitled to the Section 20(a), 33 U.S.C. §902(a), presumption that his back injury is work-related because the only evidence of a back injury is claimant's testimony and Dr. Rizk's opinion, which was based on claimant's history and subjective complaints, and the administrative law judge found claimant to be unreliable. However, the administrative law judge made alternative findings, stating that even if claimant were entitled to the Section 20(a) presumption, employer rebutted the presumption with the opinions Drs. Christian and Lochemes that any back injury claimant suffered was not related to the July 12, 2008, work accident. Absent the

presumption, the administrative law judge weighed the evidence as a whole and determined that the preponderance of evidence does not establish that claimant's back injury, if he had one, was due to the July 12, 2008, work accident. Accordingly, the administrative law judge denied the claim for the back injury. Claimant appeals the decision. Employer responds, urging affirmance.

Claimant asserts that the administrative law judge abused his discretion by allowing employer to file its response to claimant's request for admissions beyond the thirty days permitted for a response. Claimant submitted a Request for Admissions to employer on September 4, 2009, and employer averred that it inadvertently did not respond within thirty days.[1] *See* 29 C.F.R. §18.20(a), (b). On April 8, 2010, employer moved to amend the admission resulting from its inaction, stating that it refused to authorize treatment for claimant's lower back by Dr. Rizk because "treatment for the lower back is not causally related to the alleged accident in the subject claim." At the April 16, 2010, hearing, claimant objected to employer's motion, arguing that permitting employer to withdraw the admission would unfairly prejudice claimant because he would have to prove his case. HT at 34-35. The administrative law judge granted employer's motion at the hearing. HT at 35, 37; *see* 29 C.F.R. §18.20(c); Fed. R. Civ. P. 36(b).[2]

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[1]Employer explained at the hearing that it thought it had responded, but was unable to confirm that the response had actually been mailed and was surprised to learn that claimant's attorney did not get its response. HT at 30.

[2]Federal Rule 36(b) states in its entirety:

> A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

Fed. R. Civ. P. 36(b). The Federal Rules of Civil Procedure apply to Office of Administrative Law Judges' proceedings unless the Longshore Act or regulations address the issue. *Adams v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 78 (1989).

We reject claimant's conclusory allegation of error. Case law establishes that a party may not establish it is prejudiced by the withdrawal of an admission merely because that party will now have to convince the fact finder of the truth of the fact previously admitted. Rather, prejudice relates to the difficulty a party may face in proving its case because of the sudden need to obtain evidence required to prove the matter that had been admitted. *American Auto Assoc. v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117 (5th Cir. 1991); *see also U.S. v. Kasuboski*, 834 F.2d 1345 (7th Cir. 1987); *Clark v. City of Munster*, 115 F.R.D. 609 (N.D. Ind. 1987). As claimant did not argue that he was less able to prove his case than he would have been at the time the admission was made, claimant has failed to show that the administrative law judge abused his discretion in permitting employer to withdraw its admission as to the work-relatedness of claimant's back condition. The administrative law judge's ruling therefore is affirmed.

Claimant next contends the administrative law judge erred in failing to find that his back injury is work-related. Specifically, claimant asserts that the administrative law judge erred in failing to invoke the Section 20(a) presumption in this regard. The administrative law judge premised his finding that the Section 20(a) presumption was not invoked on the fact that claimant's testimony and allegations of back pain are not credible given his various misrepresentations.[3] As claimant correctly notes, Dr. Rizk did find objective evidence of a back injury unrelated to the knee injury.[4] CX 2.

Nonetheless, we need not address this contention as the administrative law judge made the alternative findings that employer rebutted the Section 20(a) presumption and that claimant did not establish the work-relatedness of any back condition based on the record as a whole. Dr. Christian stated that he was 95 percent confident that claimant did

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[3]Claimant conceded that he told different versions of where and how the accident occurred. His explanation that Mr. Molinar and Mr. Beavers, claimant's supervisor and coworker, respectively, told him to lie about the location of the injury is not corroborated by their testimonies. EX 36, 37. Further, despite repeatedly seeking to return to work for employer in any job in October and November of 2009, claimant testified that his knee would prevent him from doing his usual job. EX 29, 32, 37; HT 61-118. Claimant testified that he repeatedly complained of back pain to Dr. Christian; however, Dr. Christian's records and testimony contradict claimant's testimony. EX 29, 35; HT 61-118.

[4]The administrative law judge accurately observed that Dr. Rizk examined claimant's back and found that claimant had a positive maneuver of the right sacroiliac joint dysfunction. Decision and Order at 25; CX 2. The administrative law judge rejected Dr. Rizk's finding of muscle wasting as evidence of a back injury, as Dr. Rizk stated this could have been caused by either the knee injury or a back injury.

not injure his back at the time of injury or during physical therapy treatment for his knee because: (1) if claimant had injured his back at the time of the accident, he would have told a doctor earlier; (2) there is no evidence that claimant's knee pain masked any back pain; and, (3) claimant's knee was better in November 2008 than in September 2008, and his gait had improved before he first mentioned any back pain, which mitigates against any relationship between claimant's back pain and any gait problems caused by the knee injury. EX 35 at 33-38. Similarly, Dr. Lochemes stated that "within a reasonable degree of medical certainty, I don't think the on-the-job injury caused [claimant's] back complaints." EX 31 at 40. Dr. Lochemes supported his opinion, stating that: (1) claimant did not complain of a back injury until five-to-six months after the accident, which is outside the three month's timeframe he would expect a condition that was significant enough to become a level of concern to present itself; (2) although a knee injury might cause a limp and temporarily cause back pain, the pain would not be ongoing after claimant's gait returned to normal; and (3) claimant's gait improved following the surgeries. EX 31 at 42-43, 51, 53, 57. We affirm the finding that these opinions rebut the Section 20(a) presumption as they constitute substantial evidence of the absence of a causal relationship between claimant's back condition and the work accident. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986).

Similarly, on the record as a whole, the administrative law judge permissibly credited the opinions of Drs. Christian and Lochemes over that of Dr. Rizk.[5] *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990); Decision and Order at 37. The administrative law judge also found that claimant's alleged back injury was not corroborated by his claim for compensation, which listed only a right knee injury. Decision and Order at 28, 37-38. Therefore, as claimant does not challenge the administrative law judge's weighing of the evidence and as the administrative law judge's finding that any back injury is not work-related is supported by substantial evidence of record, we affirm the denial of benefits for claimant's alleged back injury. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

Claimant also contends that the administrative law judge erred in failing to find him entitled to total disability benefits between December 18, 2008, the date his knee injury reached maximum medical improvement and claimant was released to full duty

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[5] Dr. Rizk opined that claimant's back condition is most probably related to his fall. CX 16 at 19. Dr. Rizk further explained that going through physical therapy for knee problems without knowing that something is wrong with the back can cause the therapist to do something that might cause flare ups. *Id*. at 20.

work, and October 29, 2009, the date he actually returned to work, because claimant testified that he was unable to return to his usual work, and the administrative law judge did not address whether suitable alternate employment was available. We reject claimant's assertion of error.

In order to establish a *prima facie* case of total disability, a claimant must demonstrate an inability to return to his usual work as a result of his work injury. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The administrative law judge found that although claimant stated he was unable to perform his pre-accident employment, claimant's testimony was unreliable and less credible than Dr. Christian's testimony and records. In so finding, the administrative law judge found that Dr. Christian cleared claimant to return to work "full duty" "without restrictions," EX 18; EX 35 at 44, and Dr. Lochemes opined that there was no reason claimant could not return to work because there was no substantial impairment from a structural standpoint. EX 31 at 14. Further, the administrative law judge observed that claimant repeatedly sought to return to work with employer in any capacity and that claimant's explanation that he was in a difficult financial situation and had to find work indicated to the administrative law judge that claimant may be less than candid. Decision and Order at 36. As his finding that claimant did not establish an inability to return to his usual work is supported by substantial evidence, the administrative law judge properly concluded that claimant was not totally disabled by his work-related knee condition after December 18, 2008. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). Therefore, he is not entitled to total disability benefits after that date, and the administrative law judge properly awarded payment of permanent partial disability benefits under the schedule. *See* 33 U.S.C. §908(a), (b), (c)(21); *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge