

BRB No. 99-0160

ERNEST JONES)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEW ORLEANS STEVEDORING)	DATE ISSUED:
COMPANY)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Lloyd N. Frischhertz (Seelig, Cosse, Frischhertz & Poulliard), New Orleans, Louisiana, for claimant.

Douglass M. Moragas, Harahan, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (90-LHC-2154) of Administrative Law Judge James W. Kerr, Jr., 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, a longshoreman, sustained injuries while at work on October 2, 1986, when

he was struck by a bale of cotton. Shortly thereafter, claimant sought treatment for his right shoulder and lower back. Dr. Johnson, treating claimant primarily for a right shoulder injury, diagnosed a torn rotator cuff tear of the right shoulder and ultimately performed surgery on February 2, 1987. Claimant also was treated by Dr. Campbell who diagnosed a resolving rotator cuff tear, and aggravation of degenerative disease of the lumbar spine. Claimant sought and was awarded benefits by the administrative law judge in his Decision and Order dated September 30, 1991, as a result of the work-related injuries sustained to his right shoulder and lower back on October 2, 1986.¹ In 1993, claimant sought treatment for increased pain in his neck and left shoulder which he alleged is related to his October 2, 1986, work accident. Dr. Vogel diagnosed claimant with a herniated cervical disc with spondylosis, and following a period of unsuccessful conservative treatment, performed an anterior cervical fusion at the C5/6 and C6/7 levels on July 20, 1994. Dr. Vogel attributed claimant's neck injury to the October 2, 1986, accident. With regard to his left shoulder, Dr. Johnson diagnosed a rotator cuff tear and performed surgery on December 30, 1994.² He opined that the work accident affected claimant's left shoulder condition.

Employer denied liability for the cervical and left shoulder conditions, prompting claimant to file the instant claim, seeking medical benefits related to those injuries. The administrative law judge determined that claimant successfully invoked the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer established rebuttal thereof. After review of the record as a whole, the administrative law judge found that causation is not established with respect to the neck and/or left shoulder conditions. Accordingly, medical benefits were

¹Specifically, based upon the parties' stipulations, the administrative law judge awarded claimant temporary total disability benefits from October 2, 1986, to February 18, 1988, and permanent partial disability benefits thereafter at the rate of \$490.41 per week. The administrative law judge also awarded medical benefits and granted employer's request for Section 8(f), 33 U.S.C. §908(f), relief based upon claimant's pre-existing back condition.

²Dr. Johnson also performed a second surgery on claimant's right shoulder on February 18, 1994. Employer did not dispute its liability for this procedure.

denied.

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

Claimant argues that the administrative law judge applied an improper standard under Section 20(a) by requiring claimant to prove that the work accident is the sole cause of the cervical and left shoulder surgery. Specifically, claimant asserts that the administrative law judge erred by finding that employer established rebuttal of the Section 20(a) presumption by merely showing that the accident was not the sole cause of the condition, rather than by additionally showing that the accident did not aggravate or accelerate the condition to a disabling point. Claimant also argues that the administrative law judge erroneously credited the opinions of Drs. Swift, Williams, and Levy, over the opinions of his treating physicians, Drs. Johnson and Vogel.

Where, as in the instant case, claimant has established his *prima facie* case, *i.e.*, shown that he has sustained a harm and that an accident occurred or working conditions existed which could have caused the harm, he is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption linking that harm to his employment. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial countervailing evidence establishing the absence of any connection between the injury and claimant's employment. *Id.*; *see also Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see generally Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995) (Decision on Recon.). If employer rebuts the presumption, it drops from the case and the administrative law judge must weigh all the relevant evidence and render a decision supported by substantial evidence. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43(CRT) (1994).

In finding rebuttal established with regard to claimant's cervical condition, the administrative law judge relied on Dr. Swift's opinion that claimant did not sustain a cervical injury from the work accident, Dr. Williams' finding that the cervical injury was not, in any way, causally related to the work incident but rather was due to changes of age, and Dr. Levy's opinion that claimant's spondylosis is due to the natural aging process and bears no relationship to the work accident on October 2, 1986. Similarly, the administrative law judge concluded that employer established rebuttal of the Section 20(a) presumption with regard to the left shoulder injury based upon the unequivocal opinion of Dr. Williams, who found that the degenerative arthritis in the left shoulder did not have any relationship to the work incident. Inasmuch as these opinions constitute substantial evidence that there is *no*

relationship between claimant's injuries and the work accident, they are sufficient to rebut the Section 20(a) presumption. *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

In considering the record as a whole, the administrative law judge determined, with regard to the cervical injury, that Dr. Johnson did not provide a definite opinion as to the cause of claimant's neck condition since he, at first, stated that he could not comment on the cause of claimant's cervical condition because he did not have comparative x-rays of the neck from 1987, CX 17 at 23, and then subsequently stated in general terms that claimant's description of the accident is consistent with developing neck injuries. CX 26 at 37. The administrative law judge also found Dr. Vogel's opinion, that claimant's cervical condition was related to the October 2, 1986, work accident, less persuasive since he did not examine claimant until over seven years after the incident in question. The administrative law judge therefore credited the opinions of Drs. Swift, Williams, and Levy, that claimant's cervical condition is not related to the October 2, 1986, work accident.

With regard to the issue of causation as it relates to claimant's left shoulder injury, the administrative law judge credited Dr. Williams' statement, that the degenerative arthritis in claimant's left shoulder is not related to the October 2, 1986, over the contrary opinion of Dr. Johnson, that the work accident did affect the left shoulder condition, since claimant did not complain to Dr. Johnson about his left shoulder until January 12, 1994, over seven years after the work-related accident on October 2, 1986. In addition, the administrative law judge found that Dr. Williams examined and took x-rays of claimant's left shoulder in 1989 and 1993, and stated that the x-rays revealed findings consistent with degenerative arthritis, which he unequivocally believed was not caused by the work accident.

As the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), and as his decision to credit the opinions of Drs. Swift, Williams and Levy over the contrary opinions of Drs. Johnson and Vogel, is rational, his determination that causation has not been established with respect to claimant's left shoulder and neck conditions is affirmed, as it is supported by substantial evidence.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge