BRB No. 96-1146

LOUIS BOOKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Mager A. Varnado, Jr., Gulfport, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for the self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Awarding Benefits (95-LHC-2517) of Administrative Law Judge David W. DiNardi 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 which 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).

Claimant, who worked for employer as a cable puller since July 17, 1990, was injured on March 16, 1994, when he slipped on a wet surface and fell while walking up a catwalk to enter a boat. He continued to work, and after his right knee became swollen, on April 5, 1994, he reported the injury to employer's yard clinic and was diagnosed with a "right knee contusion/bruise." Cl. Ex. 1. Claimant began treating with Dr. Barnes, an orthopedic surgeon, who prescribed conservative treatment for claimant's right knee pain and swelling. When the pain persisted, Dr. Barnes performed arthroscopic surgery on April 26, 1994. On three subsequent visits to Dr. Barnes on May 19, 1994, May 30, 1994, and

June 13, 1994, claimant only complained of problems relating to the right knee.

On July 5, 1994, Dr. Barnes reported that claimant was complaining of crepitus in his left knee and that "x-rays of [claimant's] *left* knee look normal." On July 18, 1994, Dr. Barnes reported that claimant was still experiencing difficulty with his left knee and that an MRI of the left knee "shows a tear mid portion of his lateral meniscus, also degenerative changes of his medial meniscus of his left knee." According to Dr. Barnes's July 18, 1994, chart note, claimant related that he injured both knees in the March 16, 1994, work accident, indicating that when he fell he came down on both knees. Claimant's left knee symptoms persisted and surgery was ultimately performed on January 11, 1995. Employer referred claimant to Dr. Crotwell, another orthopedic surgeon, for an evaluation to determine his ability to return to work. Emp. Ex. 11; Tr. at 29-33. After examining claimant on October 13, 1994, Dr. Crotwell stated that claimant could return to work in the light to medium category after six to eight weeks, and then could return to his regular work as far as the right knee is concerned. In addition, Dr. Crotwell assigned claimant a 10 percent impairment rating of the right knee upon his reaching maximum medical improvement on November 22, 1994. Employer voluntarily paid benefits for temporary total disability compensation from April 8, 1994, until October 20, 1994, permanent partial disability compensation for a 10 percent impairment of the right knee, pursuant to 33 U.S.C. §908(c)(2), (19), and medical expenses associated with the right knee. Emp. Ex. 9 at 5. Claimant has not returned to work since his March 16, 1994, injury and sought medical benefits and disability compensation for his left knee as well as disability compensation for a 20 percent impairment of the right knee.

In his Decision and Order, the administrative law judge found that claimant did not injure his left knee at work in the March 16, 1994 accident as he had claimed, and denied medical and disability benefits for the left knee accordingly. In addition, he determined that claimant was only entitled to compensation for a 10 percent impairment of the right knee. Claimant appeals the denial of benefits relating to his left knee as well as the administrative law judge's failure to award benefits for a 20 percent impairment of the right knee. Employer responds, urging affirmance.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd,* 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. *Merrill,* 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

After consideration of the Decision and Order in light of the record evidence, we affirm the administrative law judge's denial of benefits for claimant's left knee because his finding that claimant's left knee problems are not causally related to the March 16, 1994,

work accident is rational, supported by substantial evidence, and in accord with applicable law. *See O'Keeffe*, 380 U.S. at 359. Inasmuch as it is undisputed that claimant suffered a harm, left knee symptoms which required surgery, and that an incident occurred at work on March 16, 1994, claimant is entitled to invocation of the Section 20(a) presumption in this case. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Nonetheless, any error made by the administrative law judge in failing to invoke the presumption is harmless on the facts presented, because the administrative law judge weighed the relevant evidence, and the evidence he ultimately credited is sufficient to rebut the presumption and to establish the absence of causation. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988).

In finding that a causal nexus was lacking, the administrative law judge noted that although claimant's accident at work occurred on March 16, 1994, despite numerous visits to Dr. Barnes during the ensuing months, claimant failed to mention any problem with the left knee until July 5, 1994, at which time x-rays of the left knee were normal. Although claimant avers that he did not report any problems with his left knee until that time because he was preoccupied with problems with his right knee, the administrative law judge also found that claimant's credibility in general was undercut by the surveillance video recorded by Mr. Fraser, employer's senior security investigator, on October 11, 1995. This video depicted claimant driving his car, kneeling, walking, and climbing without apparent difficulty, activities which he complained to Dr. Barnes that he had problems performing. Decision and Order at 7-8, 11; Tr. at 45-57. In further support of his negative assessment of claimant's credibility, the administrative law judge observed claimant's demeanor at the hearing; he noted that while claimant informed Dr. Barnes that he needed a break every 15 minutes, claimant was able to sit at the hearing for four hours without taking a break. Decision and Order at 7-8, 11. Moreover, the administrative law judge noted that although Dr. Barnes opined that claimant's left knee problems are work-related, his opinion was based on the history and exaggerated subjective complaints claimant provided to him, which the administrative law judge found to be graphically contradicted by the surveillance evidence. Decision and Order at 7, 11. The administrative law judge's decision to discredit claimant's testimony with regard to the cause of his left knee problems on the record before us is neither inherently incredible nor patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979). Moreover, the medical opinion of Dr. Crotwell, Cl. Ex. 9, which the administrative law judge found to be better reasoned and documented than Dr. Barnes's opinion, provides affirmative evidence sufficient to rebut the Section 20(a) presumption and establish that claimant's left knee problems are not causally related to the March 16, 1994, work injury. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). Dr. Crotwell's opinion in conjunction with the administrative law judge's determination that claimant's testimony is not credible and the absence of any evidence corroborating that claimant sustained an injury to his left knee in the March 16, 1994, work accident provide substantial evidence in the record as a whole to support the administrative law judge's finding that causation was not established in this case. *See Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18, 21 (1995). As claimant has not demonstrated any reversible error in the administrative law judge's

findings, we affirm his conclusion that claimant's left knee problems are not compensable as they are not causally related to the work injury.

We also find no merit in claimant's argument that the administrative law judge erred in rejecting Dr. Barnes's 20 percent impairment rating of the right leg in favor of Dr. Crotwell's 10 percent impairment rating. Contrary to claimant's assertions, it was not unreasonable for the administrative law judge to view Dr. Barnes's rating as negated by the previously mentioned surveillance video and his personal observation of claimant at the hearing. Moreover, claimant's argument that the administrative law judge should have credited the impairment rating given by Dr. Barnes rather than that of Dr. Crotwell because Dr. Barnes was claimant's treating physician is rejected, as the administrative law judge is free to accept or reject all or any part of a medical expert's testimony according to his judgement. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge