BRB No. 91-1547

RANDY W. DALTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMY & AIR FORCE EXCHANGE SERVICE	)	DATE ISSUED:_____
	)	
and	)	
	)	
EMPLOYER'S SELF INSURANCE SERVICES	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Randy W. Dalton, Riverdale, Georgia, *pro se*.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (89-LHC-676) of Administrative Law Judge Thomas M. Burke denying benefits 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 Nonappropriated Fund Instrumentalities

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

Act, 5 U.S.C. §8171 *et seq.* (the Act).[1] In considering this *pro se* appeal, we will review the administrative law judge's Decision and Order under the Board's statutory standard of review. 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant performed warehouse work for employer between March 1982 and the date of his injury, August 11, 1987. Tr. at 8-10. During a scheduled break, claimant was picked up by a co-worker driving a cart. Finding it necessary to turn the cart around, the driver put the cart in reverse and backed off the edge of the loading dock. Claimant was able to jump from the cart as it fell, landing on his feet approximately five feet below the dock. He immediately felt pain in his back and was unable to move. An ambulance took him to the hospital where x-rays were taken. Tr. at 10-12; *see also* Emp. Ex. 1. Dr. von Haam, upon reviewing the x-rays, diagnosed a compressed fracture at T12 of claimant's spinal cord. He treated claimant until November 16, 1987, when he released claimant to return to work without restrictions. Cl. Ex. 1 at 1-3. Employer ceased paying benefits as of November 18, 1987, and claimant filed a claim for additional benefits.

Thereafter, claimant still felt pain, and on November 23, 1987, while under the care of Dr. Hecht, he underwent a CT Scan which revealed normal findings, including no evidence of a herniated disc. Cl. Ex. 4. Based on those findings, Dr. Hecht sent claimant to therapy for approximately one week and then released him to work on December 7, 1987, with one week on light duty and then a return to full duty. Emp. Ex. 5 at 4, 7.

On December 1, 1987, claimant underwent an MRI, under the direction of Dr. Scarff. The MRI revealed a compression deformity at T12, and degenerative disc disease with bulging but no impairment at L4-5 and L5-S1. Cl. Ex. 5. Due to continuing back pain, claimant remained under the care of Dr. Scarff. However, on January 25, 1988, he returned to Dr. von Haam for another evaluation. Dr. von Haam, having considered claimant's continued complaints and reviewed Dr. Scarff's findings, determined that claimant's compression fracture had healed; however, he was unsure when claimant's disc bulge occurred, although he thought it was "conceivable [it] occurred as a direct result" of the August 11, 1987 accident. Cl. Ex. 1 at 4. Dr. von Haam recommended continued treatment with Dr. Scarff and, on March 21, 1988, reported that claimant had been unable to work between August 20, 1987 and January 25, 1988. Cl. Ex. 1 at 4-5.

On June 21, 1988, Dr. Scarff admitted claimant to the hospital for a myelogram, which revealed a well-healed compression fracture with no nerve compression, but it left unexplained the cause of claimant's back pain. As Dr. Scarff could find only mild degenerative discs at L4-5 and L5-

[1]Claimant's attorney filed a notice of appeal with the Board on June 17, 1991. Simultaneously, he filed a notice of intent to withdraw. In an Order dated April 21, 1992, the Board denied employer's Motion to Dismiss for failure to prosecute, as a *pro se* claimant need not file a Petition for Review and brief.

S1 which did not correlate with claimant's complaints, he released claimant from his care on June 22, 1988. Cl. Ex. 6; Emp. Ex. 7 at 5. One week later, claimant returned to Dr. Scarff's office complaining of an inability to work, so Dr. Scarff enrolled him in a work-hardening program. *Id.* On August 24, 1988, Dr. Scarff indicated he was not in a position to document any disability as he "found no physical instability at the site of [claimant's] injury and no affect [sic] on the cord." Emp. Ex. 7 at 5. Two days later, on August 26, 1988, claimant completed the work-hardening program.

On the issue of continuing benefits, a hearing was held on August 23, 1990. The parties stipulated that employer paid claimant temporary total disability benefits from August 12, 1987 through November 18, 1987, at a rate of $166.92 per week, based on an average weekly wage of $250.42. ALJ Ex. 1; Decision and Order at 2. In addition to paying $2,336.88 in disability benefits, employer also paid $2,032.36 in medical expenses. *Id.* The administrative law judge reviewed the evidence, giving the greatest weight to Dr. Scarff's opinion, and he concluded "claimant has not demonstrated that he is temporarily totally disabled from November 18, 1987 to the present as a result of his injury at work on August 11, 1987." Decision and Order at 8. Accordingly, the administrative law judge denied benefits. *Id.* Claimant appeals, *pro se*, and employer has not responded.

Claimant contends the administrative law judge erred in denying benefits. In determining whether a disability is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after the claimant establishes a *prima facie* case. *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990), *vacated in part on reconsideration*, 24 BRBS 63 (1990); *Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981), *aff'd*, 687 F.2d 34, 15 BRBS 1 (CRT) (4th Cir. 1982); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). To establish a *prima facie* case, claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at employer's facility which could have caused that harm or pain. In this case, claimant clearly suffered a compressed fracture in his back from an accident at work. Moreover, in this case, claimant is entitled to a presumption that the pain and/or the L4 disc bulge/degenerative disc disease is also a result of that accident, as claimant has a harm and a work accident occurred which could have caused or aggravated his condition. *See Kelaita*, 13 BRBS at 326.

Once the presumption is invoked, an employer may rebut it by producing facts to show that a claimant's employment did not cause, aggravate or contribute to his injury. *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1264 (1993); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). Dr. von Haam believed claimant's defective disc could be related to his work accident. The administrative law judge found, however, that Dr. von Haam "only speculated" as to the cause of claimant's continuing pain, and that he "never stated with any reasonable degree of certainty that he believed this to be the case." Decision and Order at 7. The administrative law judge's finding regarding the speculativeness of Dr. von Haam's opinion constitutes an improper shifting of the burden of proof, as claimant need not produce affirmative medical evidence establishing that the work accident in fact caused the alleged harm. *See generally Sinclair v. United Food & Commercial Workers*, 23 BRBS

148 (1989). Instead, employer must produce affirmative rebuttal evidence which severs the connection between claimant's back pain and disc bulge and his August 1987 accident. *Id.* As the record contains no such rebuttal evidence and Dr. von Haam's opinion is uncontradicted, claimant's injury is work-related as a matter of law. *See Obert*, 23 BRBS at 160. Claimant is entitled to medical treatment for his work-related injury in accordance with Section 7 of the Act, 33 U.S.C. §907.

Next, claimant contends he is disabled by his work-related back injury. In order to establish a *prima facie* case of total disability, claimant must show that he is unable to return to his usual work. *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); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In this case, claimant has not worked for employer since August 11, 1987. Although claimant was released to work on November 16, 1987 by Dr. von Haam, and on December 7, 1987 by Dr. Hecht, he continued to receive medical treatment. On January 25, 1988, Dr. von Haam referred claimant back to Dr. Scarff. Dr. Scarff, whose opinion was given the greatest weight by the administrative law judge, treated claimant between December 1, 1987 and June 22, 1988. On June 29, 1988, Dr. Scarff recommended claimant enroll in a work-hardening program, and on August 26, 1988, he noted claimant's completion of the program. Because it was not until August 24, 1988 that Dr. Scarff found claimant had no disability, and his opinion concerning claimant's disability is based on examinations and treatment which occurred after November 18, 1987, it is irrational for the administrative law judge to rely on Dr. Scarff's opinion as a basis for his finding that claimant had no disability after November 18, 1987. *See Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968). As Dr. Scarff's opinion was credited by the administrative law judge and establishes that claimant had a continuing disability after November 18, 1987, the administrative law judge erred in finding that employer did not prematurely terminate benefits at that time. Therefore, we modify the administrative law judge's decision to reflect claimant's entitlement to temporary total disability benefits until August 26, 1988 when he completed the work hardening program and Dr. Scarff stated claimant was no longer disabled. However, we affirm the administrative law judge's denial of benefits after August 26, 1988, as claimant failed to meet his burden of establishing an inability to perform his usual work after that date. *See Chong*, 22 BRBS at 242; *Turner*, 661 F.2d at 1031, 14 BRBS at 156.

Accordingly, that part of the administrative law judge's Decision and Order denying benefits after November 18, 1987 is modified to reflect claimant's entitlement to additional temporary total disability benefits from November 19, 1987 through August 26, 1988. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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ROBERT J. SHEA
Administrative Law Judge