BRB No. 92-1579

DORRIS D. HARRELSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Ralph G. Jorgensen, Tabor City, North Carolina, for claimant.

Jonathan H. Walker (Seyfarth, Shaw, Fairweather & Geraldson), for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (90-LHC-571 and 90-LHC-572) of Administrative Law Judge Daniel A. Sarno, 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 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 in employer's sheet metal division for over thirty years, sustained a work-related back injury on October 3, 1987 while reaching in the back of a drawer to file some drawings. On January 7, 1988, Dr. Peach, a board-certified neurological surgeon who had treated claimant previously for carpal tunnel syndrome, diagnosed arthritis and degenerative disc disease of the lumbar spine. EX-8 at 1. Although claimant missed some time from work as a result of this injury, he was released to perform light duty work on October 20, 1987, and to his regular job duties on February 12, 1988. On June 20, 1988, claimant reported to the shipyard clinic with complaints of lower back pain after tearing blueprints of submarines. After examining claimant, Dr. Peach prescribed physical therapy exclusively for the lumbar spine area, and claimant continued to work. In October 1988, claimant returned to Dr. Peach with multiple complaints, including numbness of

the hands and feet, which Dr. Peach associated with post-operative changes from a carpal tunnel syndrome operation claimant underwent in 1983. An evaluation at Riverside Hospital in March 1989 revealed a disc herniation at C3-C4. After being evaluated at the Medical College of Virginia for neck and arm pain, claimant underwent a cervical discectomy and fusion in April 1989. Claimant returned to work in July 1989. In August 1989, claimant filed a claim under the Act seeking temporary total disability compensation for the time he missed from work between April 12, 1989 and July 16, 1989, alleging that his neck injury occurred while he was tearing up submarine blueprints on June 20, 1988.

In his Decision and Order, the administrative law judge denied the claim, finding that as claimant failed to establish he actually suffered a neck injury on June 20, 1988, he was not entitled to the Section 20(a), 33 U.S.C. §920(a), presumption. The administrative law judge further concluded that assuming, *arguendo*, that the Section 20(a) presumption was invoked, causation was not established because the medical opinion and deposition of Dr. Peach were sufficient to establish rebuttal and the clinic records, opinion and deposition of Dr. Peach and the opinion of Dr. Neff outweighed the contrary evidence submitted by the claimant. Claimant appeals the denial of benefits.[1] Employer responds, urging affirmance.[2]

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 careful review of the record, we affirm the administrative law judge's denial of benefits. Inasmuch as it is undisputed that claimant suffered a harm, a cervical disc herniation which required surgery, and that an incident occurred at work on June 20, 1988, as claimant alleged, *see* EX-6 at 30, we agree with claimant that he is entitled to invocation of the Section 20(a) presumption

[1]Claimant has submitted additional evidence in his brief on appeal. The Board, however, may not consider any evidence which was not a part of the record before the administrative law judge. *See Williams v. Hunt Shipyards Geosource, Inc.*, 17 BRBS 32 (1985). Additional evidence may be submitted only by meeting the requirements of 33 U.S.C. §922.

[2]In its response brief, employer reiterates its argument, raised below, that the claim is barred pursuant to Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913. In his reply brief, claimant contends that both the claim and the notice to employer were timely. Inasmuch as the administrative law judge did not reach the timeliness issues raised by employer, having denied benefits based on his finding regarding causation, we will not address employer's Sections 12 and 13 arguments.

in this case. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Contrary to the administrative law judge's determination, the Act does not require claimant to establish that he, in fact, injured his neck in the June 20 incident in order to invoke the Section 20(a) presumption. Nonetheless, any error 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 under the proper standards. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988).

Contrary to claimant's assertions, in evaluating the evidence of record, the administrative law judge did not err in finding the opinion of claimant's treating physician, Dr. Young, which related claimant's neck condition to the June 20, 1988, work accident[3] entitled to little weight. Rather, acting within his discretionary authority to accept or reject all or any part of a medical expert's testimony as he sees fit, the administrative law judge reasonably discredited Dr. Young's opinion because it was based solely on the history provided to him by claimant, a history which the administrative law judge found to be inconsistent with the contemporaneous clinical and medical records. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990).

Claimant also contends that the administrative law judge erred in relying on the medical opinion of Dr. Peach because he was treating claimant for carpal tunnel syndrome, a condition which causes the same or overlapping symptoms as a herniated cervical disc, and accordingly did not investigate to determine if claimant had cervical disc compression. This contention is insufficient to establish that the administrative law judge erred in crediting Dr. Peach. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Dr. Peach testified that he believed that claimant's cervical condition was due to degenerative disease and was unrelated to the work incident because claimant only presented with lower back complaints when he examined him in July 1988, although he acknowledged that cervical disc herniation can be caused by trauma. Even if, as claimant asserts, Dr. Peach's testimony is insufficient to rebut Section 20(a), any error in this regard would be harmless, as the administrative law judge also credited the medical opinion of Dr. Neff. Dr. Neff's opinion provides affirmative evidence sufficient to rebut Section 20(a) and to establish the absence of causation in the record as whole. *See generally Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989).

After examining claimant and reviewing his medical records, Dr. Neff stated that he saw no evidence that claimant's ruptured disks and cervical surgery were precipitated or caused by an accident and that, in the absence of more specific documentation, he saw no reason to implicate claimant's job as being responsible for his neck condition. EX-10 at 3. Dr. Neff's opinion is specific and comprehensive evidence sufficient to sever the presumed connection between the injury and claimant's employment. *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). Moreover, the Board has also recognized that negative

[3]Dr. Young's statement was mistakenly attributed to Dr. Peach in the administrative law judge's opinion, an obvious clerical error. Decision and Order at 6.

evidence which is specific and comprehensive may be considered in addressing rebuttal of the Section 20(a) presumption and in weighing the evidence as a whole. The administrative law judge here found that claimant's testimony was not credible and noted the absence of any corroboration that a neck injury occurred on June 20, 1988, in the contemporaneous medical and clinical records.[4] *See Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18, 21 (1995). Accordingly, we conclude that Dr. Neff's affirmative rebuttal opinion in conjunction with the administrative law judge's determination that claimant's testimony was not credible and the lack of corroborating evidence 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.[5] *Holmes*, 29 BRBS at 22; *see Craig v. Maher Terminal, Inc.*, 11 BRBS 400, 403 (1979) (Miller, J., dissenting). Claimant has failed to raise any reversible error made by the administrative law judge in evaluating the conflicting medical opinions and making credibility determinations. As the administrative law judge's causation finding is supported by substantial evidence, the denial of benefits is affirmed.

[4]In discrediting claimant's testimony regarding the occurrence of a neck injury on June 20, 1988, the administrative law judge noted that although claimant testified that he told his supervisor, the clinic nurse and a clinic doctor about the neck injury on the day it happened, the contemporaneous clinic notes reflect only complaints of lower back pain. *Compare* Tr. at 25-27 *with* EX-6 at 30. The administrative law judge further determined that while claimant testified that he told Dr. Peach in July of 1988 of his neck injury, Dr. Peach recalled with certainty that claimant's complaints were not referable to the neck and were referable only to the lower back. *Compare* Tr. at 29 *with* EX-11 at 8; *see* Decision and Order at 4-7.

[5]Although claimant asserts that in evaluating the record evidence the administrative law judge erred in failing to resolve all factual doubt in his favor, the United States Supreme Court has held that the "true doubt rule" is invalid because it conflicts with Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d). *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge