

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 20-0194

AMENRA NASRUELOH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MTC EAST/PORTS AMERICA	)	
	)	DATE ISSUED: 11/20/2020
and	)	
	)	
PORTS INSURANCE COMPANY,	)	
INCORPORATED	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Monica Markley, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum and Eric R. Gotwalt (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for Claimant.

Mark K. Eckels (Boyd & Jenerette, P.A.), Jacksonville, Florida, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Monica Markley’s Decision and Order Denying Benefits (2016-LHC-00794) rendered on a claim filed pursuant to the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must affirm the administrative law judge’s findings of fact and conclusions of law if they

are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant previously injured his left foot, head, and neck in a work-related motor vehicle accident in Savannah, Georgia, on March 13, 2004. In 2011, Claimant and Employer settled his state and Longshore Act claims for his injuries resulting from this accident. CXs 8-11; EXs 3, 6.<sup>1</sup> Claimant returned to full-duty work and sustained another injury while working for Employer on July 17, 2014, when he was assigned to lift beams in the hull of a ship. He stated he “re-injured his back due to repetitive lifting.” CX 1 at 2. Employer authorized medical treatment. CXs 4-5. From July 18, 2014 to February 29, 2016, Claimant performed full-duty work until he “couldn’t take it anymore.” JX 2; Tr. at 23.<sup>2</sup>

In September 2015, Claimant filed a claim for compensation under the Act. CX 1. He also filed a claim under the state workers’ compensation law, and the State Board held a hearing in February 2017. EX 1. In March 2017, the State Board denied Claimant’s claim, finding the “compensable aggravation of his pre-existing condition resolved by June 22, 2015 so that he is not entitled to the income and medical benefits he seeks.” EX 1 at 2.

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<sup>1</sup> The Georgia State Board of Workers’ Compensation approved a settlement agreement on April 4, 2011, and the Office of Workers’ Compensation Programs approved a Section 8(i) settlement under the Act, 33 U.S.C. §908(i), on May 12, 2011. CXs 10-11; EXs 3, 6. The state settlement discussed Claimant’s work accident (injuries to his left foot, head, and neck), the discovery of severe degenerative cervical disc disease, left upper extremity pain, an October 2004 personal auto accident (injuries to his back, neck, and left lower extremity), persistent lumbar complaints, carpal tunnel syndrome, and a March 2005 personal auto accident, and it covered all work-related medical expenses prior to the execution of the agreement. Employer agreed to pay Claimant \$27,500 to discharge its liability under the state act. CX 10 at 2-3, 5. The Section 8(i) settlement under the Act approved by the district director stated Claimant injured his left foot, head, and neck, and received temporary total disability benefits. Employer agreed to pay Claimant \$57,500 to settle the claim for disability and future medical benefits. The Section 8(i) settlement also noted the state settlement. CX 11 at 11-12.

<sup>2</sup> Per Claimant’s appellate brief, Claimant died on December 29, 2019, leaving survivors. Cl. Br. at 11; *see M.M. [McKenzie] v. Universal Mar. APM Terminals*, 42 BRBS 54 (2008).

The administrative law judge held a hearing under the Act in June 2017 on Claimant's entitlement to medical benefits, including expenses for recommended back surgery, and temporary total disability benefits commencing March 1, 2016. Tr. at 13, 15. The parties submitted the state hearing transcript and signed stipulations into the record. JXs 1-2. Employer submitted the State Board decision, EX 1, over Claimant's objection that the decision was not final. Tr. at 8. The State Board decision became final in 2018.<sup>3</sup> The parties stipulated to all issues before the administrative law judge except causal connection/natural progression, maximum medical improvement, and whether the collateral estoppel doctrine applies to bar the claim under the Act.<sup>4</sup>

After a review of the medical evidence and collateral estoppel law, the administrative law judge found the doctrine applies because, although Georgia does not have an equivalent to the Section 20(a) presumption to which Claimant is entitled, 33 U.S.C. §920(a), Employer rebutted the presumption, leaving the burdens in the claims the same. Decision and Order at 25-30. Giving the State Board's decision "preclusive effect with regard to the issue of causation[.]" the administrative law judge denied benefits under the Act. She concluded: "Under [the State's] determination, the work injury of July 2014 aggravated Claimant's pre-existing back condition temporarily and resolved as of June 22,

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<sup>3</sup> Following the hearing and while the case was pending, Employer informed the administrative law judge that the State Board's Appellate Division affirmed the State Board's decision, as did the Superior Court. The Georgia Court of Appeals denied Claimant's application for discretionary appeal. Letter 1 (April 25, 2018). Claimant argued the decision denying benefits was not final because he had appeal rights to the Supreme Court of Georgia, and he planned to invoke those rights. Letter 2 (April 26, 2018). Although Claimant timely submitted a motion for reconsideration of his discretionary appeal denial, which was also denied, and a timely notice of intention to file an appeal with the Supreme Court, ultimately he did not file the petition for certiorari. Employer asserted this rendered the State Board's denial of benefits final and asked the administrative law judge to take judicial notice of those decisions. Letter 3 (Jan. 10, 2019).

<sup>4</sup> Claimant contended he ceased work at the end of February 2016 because his injury caused pain and hastened the need for lumbar surgery. Tr. at 5-6, 12-19. Employer asserted the State Board's decision finding Claimant's work injury resolved as of June 22, 2015, controls, so Claimant is barred from re-litigating the causation issue. Alternatively, Employer asserted Claimant's work-related condition was temporary and resolved by June 22, 2015.

2015, and any worsening of Claimant's condition after June 22, 2015 is due to the natural progression of his preexisting condition." *Id.* at 30.<sup>5</sup>

Claimant appeals, contending the administrative law judge erred in denying benefits. He asserts the doctrine of collateral estoppel does not apply for a number of reasons.<sup>6</sup> Employer responds, asserting the administrative law judge properly denied the claim under the Act.

The sole issue before us is Claimant's contention that the administrative law judge erred in applying collateral estoppel to deny him benefits.<sup>7</sup> Collateral estoppel is an equitable doctrine under which a court gives preclusive effect to findings of fact or law made in previous court proceedings. "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 154 (1979); *see also Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 12 BRBS 828 (1980); *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988). Application of collateral estoppel is discretionary and

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<sup>5</sup> The state workers' compensation judge stated: "I find that the Employee aggravated his pre-existing condition on July 17, 2014 but, based on the opinion of Dr. Chai, I find that the aggravation resolved by June 22, 2015. I find that any worsening in the Employee's condition since June 2015 is due to the natural progression of his preexisting condition. For this reason, I find that the Employee is not entitled to income or medical benefits following the June 22, 2015 resolution of his work injury." EX 1 at 4.

<sup>6</sup> On October 14, 2020, Claimant moved for oral argument. We deny the motion. 20 C.F.R. §§802.305-306.

<sup>7</sup> We reject Claimant's contention that the administrative law judge erred in admitting into evidence and/or taking official notice of the state court decisions pertaining to Claimant's state workers' compensation claim for the same injury. The administrative law judge did not err in admitting the initial State Board decision into evidence or in taking official notice of the other state courts' subsequent decisions. 29 C.F.R. §18.201(b)(2), (d); *see n.3, supra*. As the documents are official court decisions regarding his state claim for the same injury and are necessary for addressing the raised collateral estoppel issue, they are subject to official notice and were properly admitted into evidence. *See Hill v. Avondale Indus., Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000); *see also Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147 (1997); 20 C.F.R. §§702.338, 702.339.

may be found to preclude re-litigation of a particular factual issue when: 1) the issue to be addressed is identical to one previously litigated; 2) the issue was fully litigated/actually determined in the prior proceeding; 3) the issue was a necessary part of the prior judgment; and 4) the prior judgment is final and valid. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Benn]*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992); *Plourde v. Bath Iron Works Corp.*, 34 BRBS 45 (2000).

Collateral estoppel may bar a claim under the Act when a prior claim was filed under state law. *Bath Iron Works Corp v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997). The point of collateral estoppel is that the first determination is binding not because it is right but because it is first and was reached after a full and fair opportunity between the parties to litigate the issue. *Id.*, 125 F.3d at 22, 31 BRBS at 112(CRT). Collateral estoppel effect may be denied where differences in legal standards between the two forums preclude such full and fair opportunity. *Id.*, 125 F.3d at 21, 31 BRBS at 111(CRT); *Plourde*, 34 BRBS 45; *Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147, 151 (1997). Re-litigation of an issue is not precluded by the doctrine of collateral estoppel where the party against whom the doctrine is invoked had a heavier burden of persuasion on that issue in the first action than he does in the second, or where his adversary has a heavier burden in the second action than he did in the first. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Jenkins]*, 583 F.2d 1273, 1278, 8 BRBS 723, 732 (4th Cir. 1978), *cert. denied* 440 U.S. 915 (1979); *see also Plourde*, 34 BRBS 45.

“Federal courts considering whether to give preclusive effect to state court judgments must apply the State’s law of collateral estoppel.” *Vazquez v. Metro. Dade Cty.*, 968 F.2d 1101, 1106 (11th Cir. 1992) (citing *Migra v. Warren City School Dist.*, 465 U.S. 75, 81 (1984) (“federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered”)); *see also* U.S. Const., Art. IV, §1 (Full Faith and Credit Clause); 28 U.S.C. §1738 (Full Faith and Credit statute for state judicial proceedings). Collateral estoppel under Georgia law “precludes the re-adjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties or their privies.” *Gen. Elec. Capital Computer Servs. v. Gwinnett Cty. Bd. of Tax Assessors*, 523 S.E.2d 651, 653 (Ga. Ct. App. 1999), *aff’d*, 538 S.E.2d 746 (Ga. 2000) (quoting *Waldroup v. Greene Cty. Hosp. Auth.*, 463 S.E.2d 5, 7-8 (Ga. 1995)); *see also Minnifield v. Wells Fargo Bank, N.A.*, 771 S.E.2d 188 (Ga. Ct. App. 2015). Only a court’s final judgment may be used as the basis for applying collateral estoppel. *Haygood v. Head*, 699 S.E.2d 588, 593 (Ga. Ct. App. 2010).

The Board has stated:

The doctrine of collateral estoppel precludes litigation by the parties in a second action of issues necessarily and actually litigated in the first action. In order for collateral estoppel effect to be given to a finding in a court proceeding by an administrative law judge deciding a claim under the Act, the same legal standards must be applicable in both forums.

*Casey*, 31 BRBS at 151; *Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1994) (Brown and McGranery, JJ., dissenting on other grounds), *aff'g on recon. en banc*, 27 BRBS 80 (1993) (Decision on Remand); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994). Claimant and Employer are the parties in both claims. The issue in both cases is whether Employer is liable for continuing disability and medical benefits due to Claimant's 2014 work-related aggravation of a prior condition or whether the continuing disability is due to the natural progression of a prior condition. Claimant contends the burdens in the state and federal claims are different, so collateral estoppel cannot apply. Claimant's argument is misplaced.

Under the Act, a claimant is entitled to the Section 20(a) presumption relating his injury to his work if he establishes a prima facie case by showing a harm and working conditions or a work accident which could have caused his harm. *Ramsay Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015). If the claimant invokes the presumption, the burden shifts to the employer to produce substantial evidence that the injury is not work-related. *Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd and modified on other grounds on recon.*, 22 BRBS 430 (1989). If the employer satisfies its burden of production, the employer rebuts the presumption, and it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 262, 31 BRBS 119, 123(CRT) (4th Cir. 1997). The claimant then bears the burden of establishing his injury is work-related by a preponderance of the evidence. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 167, 28 BRBS 43(CRT) (1994). Under Georgia workers' compensation law, the employee bears the burden of proving his claim is compensable by a preponderance of the evidence. *McKenney's, Inc. v. Sinyard*, 828 S.E.2d 639, 645 (Ga. Ct. App. 2019), *cert. denied* (Jan. 13, 2020); *Save-A-Lot Food Stores v. Amos*, 771 S.E.2d 192, 195 (Ga. Ct. App. 2015); *Pacific Emp. Ins. Co. v. West*, 103 S.E.2d 130 (Ga. Ct. App. 1958).

Claimant contends the burdens of proof for showing a work-related injury are different in the two forums because he is entitled to the Section 20(a) presumption under the Act, an advantage the Georgia law does not afford. However, the presumption controls

only if not rebutted. *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT). The administrative law judge invoked the Section 20(a) presumption that Claimant’s disabling back condition is due to his 2014 injury, but found Employer rebutted it, leaving Claimant to bear the burden of persuasion that his condition is due to his 2014 injury. Decision and Order at 27-28, 30. Concluding Claimant’s burden in the two claims is the same, the administrative law judge found “Claimant is collaterally estopped from re-litigating the issues in this claim.” Decision and Order at 30. To determine whether this conclusion is correct, we need address only whether the finding that Employer rebutted the Section 20(a) presumption is supported by substantial evidence.

As stated above, an employer rebuts the Section 20(a) presumption by producing substantial evidence of the absence of a causal relationship between the claimant’s injury and his work. *Brown*, 893 F.2d 294, 23 BRBS 22(CRT); see *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The relative weight of the relevant evidence is not assessed; rather, at rebuttal, the administrative law judge’s task is to decide, as a legal matter, whether the employer submitted evidence that could satisfy a reasonable fact-finder that the claimant’s injury is not work-related. *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *O’Kelley v. Dep’t of the Army/NAF*, 34 BRBS 39 (2000).<sup>8</sup> Employer relied on the medical records and opinion of Dr. Chai to support its position that Claimant sustained a temporary aggravation in 2014 which resolved by June 22, 2015, and he returned to his pre-2014-injury condition. EXs 4-5. That is, Employer asserted it rebutted the Section 20(a) presumption by presenting evidence showing Claimant’s current condition is due to the natural progression of his pre-existing back condition and is not the result of his 2014 injury.<sup>9</sup> In discussing rebuttal, the administrative law judge focused on

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<sup>8</sup> In a case arising within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, the Board has held a physician’s testimony regarding the lack of a causal nexus, rendered to a reasonable degree of medical certainty, is sufficient to rebut the presumption. *O’Kelley v. Dep’t of the Army/NAF*, 34 BRBS 39 (2000).

<sup>9</sup> As the parties settled the 2004 injury, any time lost or treatment related to the natural progression of Claimant’s work injuries addressed in the settlements is not compensable because Employer’s liability has been fully discharged. *Cochran v. Matson Terminals, Inc.*, 33 BRBS 187 (1999); *Kelly v. Ingalls Shipbuilding, Inc.*, 27 BRBS 117 (1993). If the affected prior condition was not work-related, Employer bears no liability for its natural progression.

Dr. Chai's letters from March 2016, April 2017, and May 2017.<sup>10</sup> Decision and Order at 28-29; EX 4 at 1-3, 254-256.

The March 2016 letter from Employer's counsel summarized a conference he held with Dr. Chai during which Dr. Chai opined Claimant's 2014 injury had resolved, and any lingering issues after June 22, 2015, are the result of the natural progression of Claimant's pre-existing back condition.<sup>11</sup> EX 4 at 1-3. On March 25, 2016, Dr. Chai signed this letter confirming his agreement with the summary. *Id.* at 3. In a letter signed on April 27, 2017, Dr. Chai acknowledged he may have spoken too quickly about Claimant's returning to his baseline or the work accident's not hastening the need for surgery and further treatment. *Id.* at 254.<sup>12</sup> In his two-page May 2017 letter, however, Dr. Chai wrote that the April 2017 letter was a form Claimant's counsel prepared. He also stated he reviewed Dr. Horn's opinion letters and: "The remark on the 4/29/17 form, in paragraph 11, is inaccurate. After reviewing my entire chart, I stand by the opinions I rendered and confirmed in the March 17[, 2016] letter." *Id.* at 255. The administrative law judge summarized Dr. Chai's May 2017 letter as having "reiterated and confirmed his conclusions originally expressed" in his March 2016 letter that the aggravation from Claimant's July 2014 injury had subsided and what remained was due to the natural progression of his pre-existing degenerative condition. Decision and Order at 29; *see* EX 4 at 1-3, 255-256.

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<sup>10</sup> Before the administrative law judge, Claimant argued he presented new evidence the state judge did not consider. Specifically, the State Board did not have Dr. Chai's April 2017 letter which agreed with Dr. Horn's opinion that Claimant's July 2014 injury hastened the need for surgery. *See* CXs 56-57; EX 4 at 254; Cl. Post-H. Br. at 5, 8. We note the State Board also did not have Dr. Chai's May 2017 letter before it. EX 4 at 255-256. Generally, if an administrative law judge has different evidence before him, a prior court's decision on the issue of causation need not be given collateral estoppel effect. *Casey*, 31 BRBS 147. However, Claimant does not raise this theory on appeal. In any event, because the state judge considered Dr. Chai's March 2016 opinion, which was restated in Dr. Chai's final May 2017 opinion, and his May 2017 opinion disavowed his April 2017 opinion, both judges effectively had the same evidence before them. Decision and Order at 17-20; EX 1; EX 4 at 1-3, 254-256. Despite this minor "change" in evidence, Claimant had a full and fair opportunity to litigate the causation issue in his state claim, and he does not argue otherwise.

<sup>11</sup> Dr. Chai, a pain management physician, treated Claimant every four to six weeks since January 2013.

<sup>12</sup> Dr. Chai stated he "did not disagree" with Dr. Horn's opinion that the 2014 injury hastened the need for surgery. EX 4 at 254.



Claimant asserts this evidence is not sufficient to rebut the Section 20(a) presumption because Dr. Chai's change of opinion makes it ambiguous. We reject this contention. The administrative law judge addressed this contention and permissibly found Dr. Chai's opinion sufficient to rebut the presumption because his final letter, following a review of his records and Dr. Horn's opinion letters, reconfirmed his initial March 2016 opinion that Claimant's condition is due to the natural progression of a non-work-related prior condition and not his work-related injury.<sup>13</sup> Dr. Chai's opinion satisfies Employer's burden to produce substantial rebuttal evidence that Claimant's condition is not work-related. *Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016); *O'Kelley*, 34 BRBS 39; *see Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

With the presumption rebutted, the administrative law judge correctly found Claimant bore the same burden of persuasion under the Act as he did in the Georgia workers' compensation case. *See Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Sinyard*, 828 S.E.2d at 645. As the parties, issues, and burdens are identical, and as the causation issue was actually and necessarily litigated in the state forum, the administrative law judge did not err in applying the doctrine of collateral estoppel to give preclusive effect to the Georgia decision. *Acord*, 125 F.3d 18, 31 BRBS 109(CRT); *Minnifield*, 771 S.E.2d at 192. As the State Board found Claimant's 2014 injury caused a temporary exacerbation which resolved by June 2015, and any treatment, surgery, or disability thereafter is due to the natural progression of Claimant's pre-existing back condition, the administrative law judge properly denied benefits under the Act.

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<sup>13</sup> Dr. Chai explained Claimant's pain from his 2014 accident subsided. He also noted he had increased Claimant's medications before this accident, and any subsequent increase in medication was not due to the aggravating injury. EX 4 at 255.

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge