BRB No. 05-1017

JOE N. ROBINSON, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 08/31/2006
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2005-LHC-0485) of Administrative Law Judge Larry W. Price 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).

The parties stipulated that claimant sustained a work-related injury to his lower back on April 17, 1998, and to his neck on February 11, 2002. Employer paid claimant temporary total disability benefits after the February 2002 incident, due to claimant's neck injury. Claimant had surgery on his back on July 8, 2002. Employer paid claimant temporary total disability benefits following this surgery, but at the average weekly wage

of $375.91 in effect at the time of the 1998 back injury, as it contended that the back condition which required surgery was due to this injury. Claimant contended that his back condition resulted from the 2002 injury, at which time his average weekly wage was $456.26.

The incident at work in February 2002 occurred as claimant was carrying a ladder up a gangway and a gust of wind caused him to spin around. EX 1. The administrative law judge found that claimant invoked the Section 20(a) presumption linking his 2002 back surgery and resulting disability to this incident. 33 U.S.C. §920(a). The administrative law judge found that employer rebutted the presumption, and that, based on the record as a whole, claimant did not establish that he injured his back in the 2002 incident. Thus, he denied claimant any additional benefits for the periods during which claimant was disabled by his back condition.

Claimant appeals, contending that the administrative law judge erred in finding that he did not injure his back in the 2002 incident. Specifically, claimant asserts that he had recovered from his prior back problems and that evidence following the 2002 incident concerning his complaints of radiating pain and documenting atrophy in claimant's left leg substantiate his testimony that he injured his back in the February 2002 incident. Employer responds, urging affirmance of the administrative law judge's decision. Once, as here, the Section 20(a) presumption is invoked and rebutted,[1] the administrative law judge must weigh all the relevant evidence as whole. In this case, the administrative law judge found that claimant did not establish by a preponderance of the

[1] In finding that claimant established his *prima facie* case, the administrative law judge credited claimant's testimony concerning the pain he suffered after the 2002 accident, Tr. at 12, as corroborated by employer's records. EX 1; CX 2. The administrative law judge also relied on Dr. McAdam's opinion that claimant's July 8, 2002, surgery, which he performed, "could possibly be related to claimant's February 2002 accident." CX 1 at 1. In finding rebuttal established, the administrative law judge relied on Dr. McAdams's statements that claimant never notified him of the February 11, 2002 accident, CX 1 at 1, and that based on a review of his medical records, he could state with "reasonable medical certainty" that the lumbar spinal fusion he performed on claimant in July 2002 was most likely related to claimant's original injury in 1998. EX 15. The administrative law judge also relied on the opinion of Dr. Apostoles that claimant's current back problems are due to the pre-existing condition. Tr. at 30; EX 4. In conjunction with the medical evidence, the administrative law judge relied on "negative evidence" consisting of claimant's omission of any mention of a complaint of a back injury on February 11, 2002, to the clinic nurse, or to Mr. Lassiter who wrote up the injury report. EX 2; 4 at 5; Tr. at 44-45. These invocation and rebuttal findings are unchallenged on appeal.

evidence that the back condition that required surgery was related to his 2002 work accident. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Although it is uncontested that claimant's back condition is work-related, claimant is the proponent of the contention that he is entitled to benefits at the average weekly wage in effect at the time of the 2002 incident. Therefore, he bears the burden of proof on this issue. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *cf. Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64, *modified in part on recon.*, 40 BRBS 1 (2005) (where injury is work-related, claimant need not establish which of several employers is liable; each employer bears burden of establishing it is not liable).

In April 2001, claimant had a lumbar laminectomy resulting from the 1998 injury. Claimant was released to his regular work in August 2001 with a 25-pound lifting restriction for 30 days and 40-pound permanent lifting restriction. EX 8 at 1. After the February 11, 2002, incident, claimant reported to the clinic on February 13. The chart note states that claimant noticed numbness and a pin-sticking sensation in his left lower extremity and left arm following the ladder incident. The chart notes state that the left lower extremity symptoms started "about a month ago." EX 4 at 5. Dr. Apostoles examined claimant at the clinic on February 13 and his notes state that claimant's left lower extremity symptoms had existed for several months and "are unchanged since the wind incident." *Id.*; Tr. at 29. Dr. Apostoles did not note any muscle atrophy at that time. Tr. at 33. Dr. McAdam, claimant's surgeon, subsequently observed in May 2002 recurrent radiculopathy, as well as the new symptom of atrophy of the gastrocnemious (calf) muscle. EX 8 at 3. He performed additional back surgery in July 2002. Claimant testified that his back and leg had been pain-free prior to the 2002 work incident. Tr. at 12-15.

We reject claimant's contentions of error and affirm the administrative law judge's finding that claimant did not establish that his 2002 back condition and surgery were causally related to the February 2002 ladder incident. The fact that claimant developed additional pain and the new symptom of muscle atrophy does not establish that the cause of those symptoms was the 2002 work incident. The administrative law judge relied on Dr. McAdam's statement that claimant had not mentioned the ladder incident to him, and the administrative law judge therefore rationally credited Dr. McAdam's opinion that, with "reasonable medical certainty," claimant's 2002 back surgery was most likely related to the original injury in 1998. EX 15; *see also* CX 1. The administrative law judge also rationally relied on Dr. Apostoles's opinion that claimant's back surgery was not due the ladder incident.

It is well established that the administrative law judge is entitled to determine the weight to be accorded to the evidence of record and to draw his own inferences and conclusions therefrom. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

The Board is not entitled to re-weigh the evidence, *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994), and, in this case, claimant has not established that the administrative law judge's weighing of the evidence is irrational. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant did not establish that the back condition for which claimant had surgery in 2002 is causally related to the incident at work in February 2002. *See generally Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

Accordingly, we affirm the administrative law judge's Decision and Order denying additional benefits.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge