BRB No. 10-0329

ERNEST L. WHEELER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	DATE ISSUED AUG 31 2010
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph H. Koonz, Jr. (Koonz, McKenney, Johnson, DePaolis & Lightfoot, LLP), Washington, D.C., for claimant.

Alan D. Sundberg (Friedlander Misler, PLLC), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-DCW-00005) of Administrative Law Judge Linda S. Chapman (the administrative law judge) 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501-502 (l973)(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 sustained a work-related back injury on May 10, 1978. Specifically, claimant was diagnosed with a musculo-ligamentous strain of the lumbosacral spine and was eventually cleared to return to his usual work on May 18, 1979. In the interim,

employer voluntarily paid temporary total disability benefits to claimant. 33 U.S.C. §908(b). Claimant re-injured his back on June 29, 1979, while working as a landscaper for employer. Claimant was diagnosed with a lumbosacral strain, and employer voluntarily paid temporary total disability benefits. Claimant briefly returned to work as a landscaper in 1985 and then subsequently returned to work in a sedentary job as a rider information agent in 1988. He worked in that capacity until November 21, 1991, when he ceased working due primarily to uncontrolled hypertension.

Claimant filed a claim for compensation under the Act for his June 29, 1979, back injury. In a decision dated December 7, 1981, Administrative Law Judge Victor J. Chao found that claimant did not establish any disability resulting from the June 29, 1979 injury, as there were no objective findings to support claimant's subjective complaints of disabling pain. This denial of benefits was affirmed.[1]

Claimant subsequently requested modification of the denial of benefits, 33 U.S.C. §922, and he also sought entitlement to medical benefits, 33 U.S.C. §907. In his Decision and Order, Administrative Law Judge Richard T. Stansell-Gamm denied claimant's claim for modification as untimely. He found, however, that claimant is entitled to medical benefits related to the treatment of his work-related back injuries. Claimant, representing himself, appealed, first to the Board, and then to the United States Court of Appeals for the District of Columbia Circuit. Both tribunals affirmed Judge Stansell-Gamm's denial of disability benefits on modification.[2]

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[1] The Board affirmed the administrative law judge's rational weighing of the medical evidence. *Wheeler v. Washington Metropolitan Area Transit Authority*, BRB No. 88-100 (Mar. 30, 1990)(unpub.). The United States Court of Appeals for the District of Columbia Circuit held that the medical evidence showed that none of the doctors who evaluated claimant following his June 29, 1979, injury reported any objective findings which would support the conclusion that claimant was disabled and, thus, Judge Chao's determination that claimant's pain symptoms were not disabling was supported by substantial evidence. *Wheeler v. Washington Metropolitan Area Transit Authority*, 948 F.2d 782 (D.C. Cir. 1991)(table).

[2] The Board affirmed the administrative law judge's finding that claimant intended to send a timely modification request, but failed to make an effective delivery of the request in a timely manner. *Wheeler v. Washington Metropolitan Area Transit Authority*, BRB No. 99-1277 (Sept. 15, 2000)(unpub.). The D. C. Circuit summarily denied claimant's appeal of the Board's decision. *Wheeler v. Washington Metropolitan Area Transit Authority*, No. 01-1038, 2001 WL 799941 (D.C. Cir. June 20, 2001).

In 2005, claimant sought medical benefits for his back, neck, and left knee. 33 U.S.C. §907. Claimant contended that he required medical testing and treatment for conditions related to his 1978 and 1979 work injuries. In her decision, Administrative Law Judge Chapman found that claimant is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his neck and left knee complaints are related to his work injury. The administrative law judge found that employer rebutted the presumption and, based on the record as a whole, that claimant's current neck and left knee complaints are not related to his work injuries. Alternatively, the administrative law judge found that there is no evidence that claimant needs additional treatment or evaluation of his neck and left knee. The administrative law judge also found that claimant did not establish that he requires any specific evaluation or treatment for his work-related back condition. Accordingly, the administrative law judge denied claimant's request for medical testing and treatment for his back injury.

On appeal, claimant challenges the administrative law judge's finding that his neck condition is not related to his work injuries and the administrative law judge's denial of his request for MRI scans of his neck and back. Employer responds, urging affirmance of the administrative law judge's decision.

Once, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that there is no causal relationship between the employee's disabling condition and his employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the judge must weigh all of the evidence in the record, and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Claimant argues that the administrative law judge erred in finding rebuttal of the Section 20(a) presumption based on her finding that the record is devoid of evidence that he injured his neck at work on June 29, 1979. Specifically, claimant points to the April 24, 1985 report of Dr. Jenkins, in which he states claimant complained of severe neck and back pain right after the 1979 injury, the January 1980 report of Dr. Dennis, which assigned claimant a five percent whole body impairment, and the December 2004 report of Dr. Tozzi, which states that he has work-related cervical and lumbar disc disease related to the work injuries. EXs 4 at 2; 6 at 7; 12. Moreover, claimant asserts that this

evidence establishes, based on the record as a whole, that his neck condition is related to the June 1979 work injury.

In her decision, the administrative law judge found that the medical records of the physicians who treated claimant in connection with his work injuries do not contain any complaints of neck pain or discomfort, no objective findings of any abnormality in the neck area, and no treatment for any neck problems. Decision and Order at 12, 14. Specifically, Drs. Lapadula, Gordon, Hartsock, Dennis, Howitz, and Collins, treated claimant after his work injuries in 1978 and 1979 through February 1992. The administrative law judge correctly found that these medical records do not note any complaints of neck pain immediately following the work injuries or at any time thereafter through 1992. EXs 1- 3, 6-7, 10. Dr. Lapudula, who treated claimant after he went to the emergency room for the May 1978 injury, noted that there was no tenderness in claimant's neck muscles. EX 1. Dr. Dennis, who treated claimant from March 1979 to February 1992, noted in his September 1985 report that claimant's neck had a full range of motion. EX 6 at 14. The administrative law judge found that claimant first complained of neck pain to Dr. Bernal in January 1992. Dr. Bernal noted claimant's statement that emotional and psychological stress from his customer service-type job for employer aggravated his back pain and caused neck and shoulder pain and headaches. EX 11 at 1. In his December 2004 report, Dr. Tozzi stated that claimant's physical findings indicate that he has cervical and lumbar disk disease, with secondary stenosis. EX 12. He suggested that claimant receive updated cervical and lumbar MRIs, and he stated that he "assumed" that claimant's possible disc disease is work-related. *Id*. The administrative law judge found that, since Dr. Tozzi's report states that he did not have before him claimant's prior medical records, his assumption does not equate to a conclusion that claimant's neck symptoms are related to his work injuries. Decision and Order at 14. In April 2006, Dr. Callan evaluated claimant and reviewed his medical records, including MRI testing. EX 13. Dr. Callan diagnosed claimant with arthritis in his neck and back. He opined that claimant's neck symptoms are secondary to arthritis and "are in no way related to either of the (work) injuries." *Id*. at 3.

Employer's burden on rebuttal is to produce substantial evidence that claimant's neck condition is not related to claimant's work injuries. *See generally Rainey*, 517 F.3d 632, 42 BRBS 11(CRT) The opinion of Dr. Callan that claimant's neck condition is unrelated to the work injuries, as well as the absence of neck complaints in the years after the work injuries, constitute substantial evidence the claimant's neck condition is not work-related. Thus, as the administrative law judge did not err in finding that employer rebutted the Section 20(a) presumption, we affirm this conclusion. *Whitmore v. AFIA Worldwide Ins.*, 837 F.2d 513, 20 BRBS 84(CRT) (D.C. Cir. 1988).

In further finding that claimant's neck condition is not work-related, the administrative law judge noted Dr. Bernal's 1992 report, wherein claimant attributed his neck complaints to work stress at that time. The administrative law judge rationally rejected Dr. Tozzi's assumption that claimant's neck complaints are related to his work injuries, since he did not have before him claimant's prior medical records. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). The administrative law judge's finding that the medical records of the physicians who treated claimant in connection with his work injuries do not contain any contemporaneous notations of complaints of neck pain or discomfort is supported by substantial evidence. Dr. Jenkins evaluated, rather than treated, claimant in April 1985. EX 4. Moreover, his April 1985 report indicates that the notation of neck pain after the June 1979 work injury is based on claimant's history to him, rather than on his review of contemporaneous medical records. *Id*. at 1-2. Dr. Dennis's report in January 1980 stating that claimant has a five percent whole body impairment does not attribute any percentage of claimant's impairment to a neck condition. EX 6 at 7. Accordingly, as the administrative law judge weighed the relevant evidence of record, and her conclusion that claimant did not meet his burden of establishing that his current neck condition was caused by his 1978 or1979 work injury is supported by substantial evidence, we affirm the administrative law judge's denial of medical treatment premised on claimant's failure to establish a causal link between his neck condition and his work for employer. *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

Claimant also challenges the administrative law judge's finding that he is not entitled to medical treatment for his work-related back injury. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment . . . medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. *See Davison v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1996); 20 C.F.R. §702.402. It is claimant's burden to prove the elements of his claim for medical benefits. *See Ingalls Shipbuilding, Inc., v. Director, OWCP*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

In this case, the administrative law judge credited the opinion of Dr. Callan that claimant's back condition has reached maximum medical improvement with respect to his work injuries and that another MRI scan is not required because there is no indication that claimant has a lesion for which surgery may be necessary or any objective evidence of neurologic abnormality. EX 13 at 3. Dr. Callan stated claimant's degenerative condition was mild in nature. The administrative law judge stated that Dr. Callan had an

opportunity to review claimant's medical records, including a 2002 MRI, and to examine him. The administrative law judge accorded Dr. Callan's report "significant weight" as the administrative law judge found that his opinions are well-reasoned and supported by the objective medical evidence. Decision and Order at 16. The administrative law judge addressed Dr. Tozzi's recommendation that claimant obtain new neck and back MRIs, but found that Dr. Tozzi did not explain why he thought updated MRIs are necessary other than to update his records. *Id*.

Claimant asserts that Dr. Tozzi recommended that claimant obtain an MRI of the back because claimant complained of back pain radiating into his right leg and claimant's physical findings suggest that he might have lumbar disc disease. EX 12. The administrative law judge, however, is entitled to weigh the evidence and is not bound to accept the opinion of any particular medical expert. *Burns*, 41 F.3d 1555, 29 BRBS 28(CRT); *Whitmore*, 837 F.2d 513, 20 BRBS 84(CRT). In this case, the administrative law judge rationally credited Dr. Callan's opinion that an MRI is not indicated to treat claimant's back condition as claimant does not have any objective symptoms, and found that claimant did not establish that any other treatment was indicated for his work-related back injury. Thus, the administrative law judge's denial of further medical treatment for claimant's back injury is affirmed as it is rational and supported by substantial evidence. *See Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed. Appx. 126 (5th Cir. 2002)(table); *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

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

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