BRB No. 01-0351

ROBERT R. PIERCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIABLO SERVICE CORPORATION	)	DATE ISSUED: Dec. 19, 2001
	)	
and	)	
	)	
CONSTITUTION STATES SERVICES COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Denial/Award of Benefits of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum (Law Office of Steven M. Birnbaum), San Francisco, California, for claimant.

Judith A. Leichtnam (Law Offices of Bruyneel & Leichtnam), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial/Award of Benefits (99-LHC-391, 99-LHC-392) of Administrative Law Judge Ellin M. O'Shea rendered on claims 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 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 began working as a longshoreman in March 1948, and continued in that

capacity until his retirement on June 25, 1991. He started as a laborer and eventually became an operator of equipment such as cranes, bulldozers, forklifts, front loaders, and bobcats. In addition to his longshore work, claimant, beginning in the 1950s, operated his own part-time trucking company on a seasonal basis for the first three or four months of the year. Following his retirement from longshoring, claimant worked at his trucking company about six or seven months of the year and was, at the time of the hearing, still operating this business.

During the course of his longshore employment, claimant was exposed to petroleum coke. He testified that his greatest exposure occurred between 1981 and 1991, while he was working for employer at its Pittsburg, California, marine terminal.[1] Claimant testified that employer's use of the petroleum coke resulted in a dusty work environment which caused him to breathe in fumes, and that this exposure continued even after he began wearing a mask in the early 1970s. He also stated that during the course of his employment, he regularly inhaled the exhaust and smoke generated by the diesel engines of the equipment in use at the work site. With regard to the physical demands of his last employment with employer, wherein he primarily operated a caterpillar tractor (CAT), claimant described as "strenuous" the climbing up/down the CAT 10-12 times each day to reach his seat 6-7 feet above ground level.

Meanwhile, in 1989, claimant stated that he began to experience problems with his right hip, and that at the time of his retirement on June 25, 1991, his right hip was bothering him but that the symptoms were not bad. On December 4, 1994, claimant underwent a total right hip replacement. Diagnostic testing associated with the pre-operative clearance for this surgery revealed that claimant had a low white blood cell count and a low platelet count, and led to a diagnosis by Dr. Tanaka, of pancytopenia of unknown etiology, but perhaps

[1]Claimant worked for a number of companies over the course of his 43 years as a longshoreman. A majority of this work from 1980, including his last nine days of longshore employment, occurred with employer at its Pittsburg, California marine terminal.

secondary, to Myelodysplastic Syndrome (MDS).[2] Claimant was subsequently diagnosed with MDS on December 19, 1994.

Claimant thereafter filed two claims under the Act. The first involved an alleged occupational hearing loss. The second was based on two injuries: an alleged right hip injury due to repetitive stress and strain on the job; and a claim that his MDS was due to occupational exposure to coke dust and coke fumes of petroleum coke while working primarily for employer.

In her decision, the administrative law judge initially determined, based on the parties' stipulations, that claimant is entitled to benefits for a 2.5 percent binaural hearing loss and all reasonable medical care related to that injury. After an extensive review of the medical evidence, the administrative law judge next found that claimant did not establish by a preponderance of the evidence that either his MDS or his right hip condition occurred in the course and scope of his work with employer in June 1991. She therefore denied benefits on claimant's claim of an occupational disease exposure injury and a right hip injury.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance.

Claimant contends that the administrative law judge's decision does not comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as it does not contain a sufficient rationale for the Board to discern the reasons for her findings and thereby a means of determining whether they are supported by substantial evidence. In particular, claimant asserts that the administrative law judge's analysis of the relevant medical evidence is at many points extremely confusing, and at other places completely incomprehensible and that therefore it cannot support her ultimate findings of fact and conclusions of law. In addition, claimant maintains that the administrative law judge's

---

[2]Pancytopenia is a shortage of all types of blood cells, including red and white blood cells as well as platelets. *Dorland's Illustrated Medical Dictionary* 1124 (25th Ed. 1974). MDS represents a group of disorders which are characterized by abnormal stem cell differentiation resulting primarily in a peripheral deficiency in the cellular elements of the blood. *Id.* at 1523.

finding, that a causal relationship was not established between claimant's MDS and his employment, is not supported by substantial evidence as the medical opinion of Dr. Duhan, which he argues is far superior to the one proffered by Dr. Cayton, demonstrates the requisite causal nexus. Claimant also argues that he is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to his hip injury based upon his own testimony and the medical opinion of Dr. Fong. Additionally, claimant asserts that contrary to the administrative law judge's finding, Dr. Stark's testimony and reports are insufficient to rebut the presumption, as they are internally inconsistent in their conclusions. Claimant further contends that even if employer did rebut the presumption, Dr. Stark's opinion cannot be credited over claimant's testimony and the medical report of Dr. Fong.

APA

The APA requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). An administrative law judge must independently analyze and discuss the evidence, and must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985).

In the instant case, the administrative law judge set forth in considerable detail the evidence of record as to the issues of causation of claimant's MDS and right hip injury. Decision and Order at 7-47. In particular, the administrative law judge discussed at length claimant's testimony regarding his working conditions, Decision and Order at 7-10, the medical opinions of Drs. Duhan and Cayton regarding the cause of claimant's MDS, Decision and Order at 15-34, and the medical opinions of Drs. Fong and Stark as to the cause of claimant's right hip injury, Decision and Order at 39-44. Moreover, the administrative law judge weighed this evidence, and provided reasons for her findings, Decision and Order at 34-39, 44-47. Thus, contrary to claimant's contention, the administrative law judge's decision comports with the requirements of the APA, as she set forth the evidence with regard to causation, weighed the evidence and provided reasons for her findings based on the evidence. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41 (CRT)(2d Cir. 2001).

Causation

It is claimant's burden to prove the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm in order to establish a *prima facie* case. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Where claimant has established his *prima facie*

case, Section 20(a) of the Act provides him with a presumption that his condition is causally related to his employment; the burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's condition was neither caused nor aggravated by his employment. *See American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*); *Swinton v. J. Frank Kelley, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds the Section 20(a) presumption rebutted, it drops from the case. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *see also Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45, 46-47 (1996). The administrative law judge then must weigh all the evidence and resolve the issue of causation on the record as a whole with claimant bearing the burden of persuasion. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT)*; see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994)*; Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

MDS

The administrative law judge initially determined, based on claimant's testimony regarding his exposure to a smell/aroma of petroleum in his work with employer, and the medical report of Dr. Duhan, wherein he concluded that claimant's MDS was causally related to exposure to certain toxic substances, including coke dust and powder during the course of his longshore employment, that claimant is entitled to the Section 20(a) presumption. She next determined that Dr. Cayton's opinions, that claimant's "bone marrow dysfunction" is not causally related to his maritime employment and that claimant's exposure to petroleum coke at employer's facility did not cause, accelerate or aggravate his MDS, are sufficient to establish rebuttal; she thus weighed the evidence in the record as a whole. *See generally Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

The administrative law judge thereafter found that claimant did not establish that his MDS arose out of his June 1991 employment with DSC. In so finding, the administrative law judge determined that Dr. Duhan's opinions are no more probative and persuasive than those of Dr. Cayton regarding the potential causal relationship between exposure to petroleum coke, Bunker Fuel Oil, diesel fumes and claimant's MDS. In addition, the administrative law judge observed that in many aspects, Dr. Cayton's testimony and opinion are more persuasive than those of Dr. Duhan.

In reaching her determination that Dr. Duhan's opinion should not be credited over Dr. Cayton, the administrative law judge relied on a number of findings regarding the evidence of record. First, she noted that there is no reflection in the record that claimant's treating physicians for his MDS, Drs. Tanaka and Dighe, ever attributed his condition to any occupational exposure, including petroleum products. Second, she observed that while Dr. Duhan indicated that retrospectively he thought there were early signs of MDS in 1986 blood count test results, he did not cite to any specific testing to support this statement and the

record contains no such evidence. Third, although Dr. Duhan referenced a number of medical articles as a basis for making his causation determination, he did not have any articles that substantiated his theory that exposure to coke powder derivative of petroleum products are toxic to blood cells.

In particular, the administrative law judge found that the medical literature upon which Dr. Duhan relied in describing the harmful effects of exposure to coke pertained to the effects of exposure to carbon coke (*i.e.*, processing of coal into coke),[3] and not petroleum coke (*i.e.*, processing of crude oil into coke), the relevant exposure in this case. Dr. Cayton stated that the petroleum coke process does not produce the same emissions as the carbon coke process. Thus, in contrast, upon noting that there were no known studies involving the specific exposure situation in the case herein, Dr. Cayton looked to the biggest exposure group, people with a huge exposure to petroleum products, petroleum workers, and in his causation opinions gave claimant the benefit of every doubt. Dr. Cayton continued by noting that petroleum workers have been sufficiently studied and that standard textbooks of toxicology and industrial medicine all indicate that exposure to petroleum products causes an increased risk for bronchitis, lung cancer and bladder cancer but not blood-related cancers, leukemia or MDS.[4] HT at 236-238. Moreover, as the administrative law judge observed, Dr. Cayton, unlike his counterpart Dr. Duhan, was clear in his explanations that claimant did not work at a carbon coke plant or oven, or a facility handling such a carbon coke product.

The administrative law judge further looked at the experts' credentials. She found that while Dr. Duhan referred to experience in occupational medicine and toxicology, he did not relate this experience to the specific substances in this case.[5] In particular, the administrative law judge found that Dr. Duhan's inability to initially distinguish between the carbon coke

---

[3]Dr. Duhan stated that the best study linking exposure of polyaromatic hydrocarbons (PAHs) to MDS is the article *Toxicology of Coal Liquefaction Products: an Overview*, I. Chu, D.C. Villeneuve and G.G. Rosseaux, *Journal of Applied Technology*, November 1993, which, as the title indicates, refers to coal processing. Moreover, the administrative law judge noted that the Chu article does not specifically mention MDS but rather mentions tumors and cancer.

[4]Dr. Cayton further stated that "one of the basic premises of modern oncology is that carcinogens, things that cause cancer, are site specific." HT at 238.

[5]The administrative law judge also observed that Dr. Duhan did not indicate that he had experience with a case of exposure by a petroleum coke worker such as the basis of the claim herein, and that although he thought he had seen four or five MDS cases in his forensic practice, he did not indicate the specific circumstances of exposure in these cases.

and petroleum coke exposures and processes, made her question the extent of his expertise in the pertinent field and thus, his overall testimony on causation. In contrast, the administrative law judge found that Dr. Cayton gave detailed specifics as to the type and circumstances of the petroleum products exposure relevant to his experience with MDS. Specifically, the administrative law judge found that Dr. Cayton addressed all the particular claims made as to claimant's occupational exposure, and was specific in the bases as to why

he did not believe it was medically probable that claimant's MDS was caused, accelerated, aggravated, exacerbated or hastened by his exposure to petroleum coke and bunker fuel. In addition, the administrative law judge found that the length of Dr. Cayton's experience as a board-certified physician, his described experiences with toxic exposures and his expressed knowledge of the field relevant to the issues put forth in the instant case, qualified him as an expert in the issues pertinent to this case. *See generally Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table).

It is well-established that, in arriving at a decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979). In the instant case, the administrative law judge extensively considered the relevant evidence of record, and concluded that claimant did not establish, by a preponderance of the evidence, that his MDS arose in the course and scope of his work for employer. The administrative law judge's decision not to accord dispositive weight to the medical opinion of Dr. Duhan is not irrational. The administrative law judge's determination that claimant's MDS is not work-related is therefore affirmed. *See Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43(CRT); *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

The right hip injury

Following a considerable discussion of the relevant evidence regarding the cause of claimant's right hip injury, the administrative law judge determined that claimant was entitled to the Section 20(a) presumption. Specifically, the administrative law judge determined that claimant, via his testimony regarding his work duties, established working conditions which may, as Dr. Fong opined, establish that cumulative trauma from his longshore employment led to claimant's right hip problems. The administrative law judge, however, found that Dr. Stark's report and opinion, unequivocally stated that claimant's right hip osteoarthritis was not caused or significantly accelerated by his work activities as a longshoreman but rather was most likely a result of the natural progression of his degenerative arthritis, and thus constituted specific and comprehensive evidence to rebut the Section 20(a) presumption. We first address whether Dr. Stark's opinion provides substantial evidence to rebut claimant's *prima facie* showing of causation with regard to his right hip injury.

In her decision, the administrative law judge found persuasive a number of Dr. Stark's

statements regarding causation. First, Dr. Stark opined that if claimant's right hip osteoarthritis had been caused or significantly accelerated by work activities there would have been a similar problem on the left side because his longshore work (lifting, carrying, and climbing) required use of both legs, not just the right one. Dr. Stark opined that it is more likely that the unilateral requirement for hip replacement developed as a result of specific trauma, and there is no indication that claimant sustained any specific trauma to his right hip in the course of his longshore employment. Rather, Dr. Stark noted that claimant has a history of falling off of a motorcycle in 1941, and of several post-retirement injuries such as falling off a twelve foot ladder and falling from his truck, all of which cannot be disregarded. Second, Dr. Stark opined, based on his review of claimant's x-rays in August 1992 and December 1994 evincing a rapid progression of his right hip osteoarthritis, contemporaneous with his post-longshore self-employed trucking activities, that it is more likely that his post-retirement activities contributed to claimant's right hip problem than his longshore work. Based upon these observations, Dr. Stark specifically stated that "it is clear that the hip worsened with work and non-work related activities and with the natural progression of hip arthritis subsequent to 1991." EX 22. The administrative law judge, as fact-finder, rationally determined that it was claimant's post June 1991 work activities to which Dr. Stark was referring in his statement as to a progression of his right hip condition subsequent to 1991. Decision and Order at 41. Consequently, the administrative law judge concluded that Dr. Stark's opinion, which she found was supported by the objective evidence of record, established that claimant's longshore work did not cause or aggravate his right hip injury. As evidenced above, Dr. Stark provided specific references to the evidence to support his opinion that claimant's right hip injury occurred as a result of factors unrelated to his longshore work, *i.e.*, the natural progression of his right hip degenerative arthritis since 1991 and his post-retirement work. Accordingly, we affirm the administrative law judge's determination that Dr. Stark's opinion is substantial evidence which rebuts Section 20(a). *See O'Kelley v. Department of the Army/NAF*, 34 BRBS 39 (2000).

We further affirm the administrative law judge's finding that clamant did not establish that his right hip injury was caused or aggravated by his longshore work, based on the evidence as a whole, as the administrative law judge rationally credited the opinion of Dr. Stark over the contrary opinion of Dr. Fong. *Calbeck*, 306 F.2d 693; *see also Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT). Specifically, she found that Dr. Stark presented specific and comprehensive opinions which were better reasoned on the medical documentation.[6] In

[6]Contrary to claimant's contention, the administrative law judge did specifically consider and reject claimant's assertions that Dr. Stark's opinions "are so contradictory and inconsistent [that] they do not rise to the substantial evidence level." Decision and Order at 45. After framing claimant's contention, the administrative law judge explicitly provided her reasons for rejecting it, *i.e.*, any inconsistencies are due to claimant's own inconsistent and contradictory statements as to his symptoms with his post-longshore trucking activities and

contrast, the administrative law judge found that Dr. Fong's opinions are of little weight as they are tentatively expressed,[7] they do not specifically address and/or explain certain relevant issues, and they are based upon claimant's selective, inconsistent and contradictory representations. In particular, the administrative law judge found that Dr. Fong did not adequately explain: the lack of any indication of a significant right hip osteoarthritic condition prior to claimant's June 1991 retirement; that clinical and radiographic progression of the right hip osteoarthritis occurred subsequent to claimant's cessation of longshore work; or that his own treating evidence reflects complaints of right hip pain based on subsequent work activities and a 1994 truck fall onto his right hip side. Additionally, the administrative law judge determined that Dr. Fong was not provided with an accurate work history by

---

as reflected in his treating records; some of claimant's contentions are based on mistaken interpretations of Dr. Stark's own testimony; and that even considering any inconsistencies, Dr. Stark nevertheless persuasively explained his opinion based on the objective medical evidence of record. Decision and Order at 44, 46.

[7]Dr. Fong opined that "there is a medical probability that the work activity that [claimant] described while working on the docks accelerated an osteoarthritic process of the right hip on the basis of repetitive trauma over many years . . . ." Claimant's Exhibit 4 at 27-28. Upon being informed of claimant's post-longshore trucking work, Dr. Fong added that, "[i]t appears that although there may be a basis for industrial causation from his work on the docks, there may also be a basis for apportionment due to his work activity following the cessation of work on the docks." Claimant's Exhibit 4 at 27-28.

claimant.[8] Moreover, she found that Dr. Fong's opinions on claimant's employment with employer as the cause of his condition are of little weight since they were based on physical activities that claimant related to him which he did not perform for employer at the time of his last employment. Consequently, the administrative law judge's denial of benefits on the claim of a right hip injury is affirmed. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT).

[8]For instance, the administrative law judge found that Dr. Fong was not fully advised by claimant of his post-longshore, trucking business work activities, and added that Dr. Fong learned of this work only after reading Dr. Stark's report in connection with Dr. Fong's medical records review.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge