BRB No. 03-0233

KENNETH GRIFFITH, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ADVANCED EMPLOYMENT CONCEPTS	)	DATE ISSUED: Dec. 9, 2003
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

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

Richard C. Trollope, Panama City, Florida, for claimant.

Benford L. Samuels, Jr. (Boyd & Jenerette, P.A.), Jacksonville, Florida, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2001-LHC-3285) 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 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).

On January 14, 1997, claimant sustained a work-related injury to his left ankle and knee. This injury necessitated surgery on July 29, 1999 and March 21, 2002. The parties stipulated that prior to the second surgery, claimant's condition had reached maximum medical improvement on October 26, 2000. Employer voluntarily paid temporary total disability benefits from January 29, 1997 to May 27, 1997, and from July 29, 1999 to October 25, 2000. 33 U.S.C. §908(b). Employer also paid claimant permanent partial

disability benefits for a 10 percent impairment to his leg. 33 U.S.C. §908(c)(2). Employer resumed payment of temporary total disability benefits on March 21, 2002.

The primary issue before the administrative law judge was whether claimant's back condition, diagnosed as a herniated disc in January 2000, is causally related to his January 14, 1997, injury. Claimant contended either that he sustained an injury to his back when he fell in the work accident that caused his ankle injury or that his current back complaints are caused by his 1997 ankle injury, subsequent surgical treatment, and use of ambulatory devices such as a cane and crutches, which caused him to walk with an altered gait. Employer argued that claimant's current back complaints consisting of pain from a newly diagnosed herniated disc are not work-related based on the opinion of Dr. Rohan.

In his Decision and Order, the administrative law judge found the Section 20(a) presumption, 33 U.S.C. §920(a), invoked with regard to the cause of claimant's back pain. The administrative law judge found that employer presented insufficient evidence to rebut the Section 20(a) presumption. Assuming, *arguendo*, that the Section 20(a) presumption was rebutted, the administrative law judge credited claimant's testimony and the opinion of Dr. McArthur over that of Dr. Rohan, and concluded that claimant's current back complaints are causally related to his January 14, 1997, work accident. The administrative law judge therefore awarded claimant medical benefits for his back condition. 33 U.S.C. §907. In addressing claimant's entitlement to disability benefits, the administrative law judge found that claimant had no loss in wage-earning capacity between May 27, 1997 and July 29, 1999. The administrative law judge found that employer established the availability of suitable alternate employment as of the date of maximum medical improvement, October 26, 2000. In addition to the temporary total and permanent partial disability benefits paid by employer, the administrative law judge awarded claimant temporary partial disability benefits from October 26, 2000 to March 21, 2002, based on a residual wage earning capacity of $313.20 per week, and ongoing temporary total disability benefits from March 21, 2002, when claimant underwent surgery.

On appeal, employer argues that the administrative law judge erred in finding employer did not rebut the Section 20(a) presumption with regard to claimant's back condition Employer also contends that the administrative law judge erred in weighing the evidence as a whole. Therefore, employer argues that the administrative law judge erred in concluding that claimant's back injury is causally related to his 1997 work accident. Employer also contends that the administrative law judge erred in awarding claimant disability benefits which employer had already paid, and that the concurrent award of permanent partial and temporary partial disability benefits is inappropriate. Claimant responds, urging affirmance of the administrative law judge's decision.

Once, as here, the Section 20(a) presumption is invoked, employer may rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT)(11th Cir. 1990). The opinion of a physician, given to a reasonable degree of medical certainty, that the harm is not related to the employment, is sufficient to rebut the Section 20(a) presumption. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). If employer rebuts the presumption, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the 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). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*).

We agree with employer that the administrative law judge erred in finding Dr. Rohan's opinion insufficient to rebut the Section 20(a) presumption. Dr. Rohan stated, to a reasonable degree of medical certainty, that claimant's herniated disc has no relationship to his 1997 work accident and that any altered gait resulting from claimant's ankle injury has not caused any back problems. CX 6 at 6-7. Thus, Dr. Rohan's opinion constitutes substantial evidence severing the causal nexus between claimant's injury and his work, and we therefore reverse the administrative law judge finding that employer did not rebut the Section 20(a) presumption. *See generally Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *see also O'Kelley*, 34 BRBS at 41-42.

Nonetheless, we hold that this error is harmless as the administrative law judge rationally weighed the evidence of record as a whole and found that claimant's back condition is related to his 1997 work accident. The administrative law judge found that claimant had no prior history of back problems, and he credited claimant's testimony that he fell onto his back when the accident occurred. Decision and Order at 14. The administrative law judge credited Dr. McArthur's deposition testimony that his records show that claimant told him at his first appointment, three days after the accident, that his back was hurting. CX 3 at 8, 12. The administrative law judge also noted that both doctors agreed that an altered gait can cause back problems, and the administrative law judge found that claimant credibly testified that he walks differently now than he did before the accident and has been using orthotic devices for almost the entire time since the injury. Dr. McArthur opined that claimant probably injured his back in the work accident and that his gait abnormality aggravated claimant's back problems. CX 3 at 10-11.

In weighing the evidence, the administrative law judge gave less weight to Dr. Rohan's opinion because he examined claimant only once, in 2000, and the administrative law judge credited claimant's testimony that the examination was perfunctory. Moreover, the record supports the administrative law judge's finding that Dr. Rohan was unaware that claimant had fallen onto his back at the time of the accident. CX 6 at 9; Decision and Order at 14. Furthermore, the administrative law judge found that, while Dr. Rohan admitted that an altered gait such as claimant experiences can often lead to back pain, the doctor offered no reason for his opinion that claimant's altered gait is not the cause of at least some of his current back problems. *Id.* Inasmuch as the administrative law judge rationally weighed the evidence of record, and as claimant's testimony and Dr. McArthur's opinion constitute substantial evidence that claimant's back condition is related to the work accident, we affirm the administrative law judge's finding that a causal relationship exists between claimant's back condition and the work accident.[1] *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Simonds v. Pittman Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

Next, employer contests the basis for the administrative law judge's various awards of benefits. Employer first contends that the administrative law judge erred in awarding benefits for periods during which the parties stipulated that employer voluntarily paid benefits.[2] We perceive no error here, as the administrative law judge's Order merely incorporated the parties' stipulations, and the administrative law judge properly awarded employer a credit for its advance payments of compensation. 33 U.S.C. §914(j). We also reject employer's argument that the administrative law judge erred in awarding claimant ongoing temporary total disability benefits commencing March 21, 2002. Employer contends that since the parties stipulated to claimant's entitlement to benefits commencing March 21, 2002, the administrative law judge's incorporation of the stipulation into his Order is unnecessary. The administrative law

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[1] We reject employer's arguments that Dr. McArthur's opinion cannot be credited because he stated that he will defer to the opinion of a spine surgeon regarding the cause of claimant's back complaints, and that Dr. Rohan is such a specialist. The record reflects that Dr. Rohan is a board-certified orthopedic surgeon, but not that he is a spine specialist. CX 6 at 4. Moreover, Dr. McArthur stood by his opinion that claimant's back complaints had been aggravated by his altered gait. CX 3 at 14-15.

[2] These periods were January 17, 1997 to May 27, 1997, and July 29, 1999 to October 26, 2000, as well as the scheduled permanent partial disability benefits for a 10 percent leg impairment.

judge properly awarded claimant the benefits to which the parties agreed claimant was entitled, as it allows the parties and the district director to calculate the amount due claimant. *See generally Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); 33 U.S.C. §914. If claimant's condition changes, either party may move for modification. 33 U.S.C. §922; *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

Employer lastly contends that the administrative law judge's award of temporary partial disability benefits from October 26, 2000 to March 21, 2002, is unexplained, given that employer already paid claimant scheduled permanent partial disability benefits commencing October 26, 2000, for his leg impairment. Indeed, the administrative law judge does not state the basis for the award of temporary partial disability benefits during this period. Claimant's ankle had reached maximum medical improvement on October 26, 2000, prior to his second surgery, and the administrative law judge found that employer established the availability of suitable alternate employment. Thus, claimant is limited to benefits provided by the schedule for his ankle injury. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). However, where a harm to a body part not covered under the schedule results from the natural progression of an injury to a scheduled member, a claimant also may receive a separate award for his partial loss of wage-earning capacity for the consequential injury, in addition to an award under the schedule for the initial award. 33 U.S.C. §908(c)(21), (e); *Green v. I.T.O. Corp. of Baltimore*, 32 BRBS 67 (1998), *modified*, 185 F.3d 239, 33 BRBS 151(CRT) (4th Cir. 1999); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). It is not clear from the record whether claimant sought disability benefits for his back condition, or whether the loss of claimant's earning capacity is due to the back condition. Therefore, we must vacate the award of temporary partial disability benefits, and remand the case for the administrative law judge to fully address this issue.

Accordingly, we vacate the administrative law judge's award of temporary partial disability benefits, and we remand the case for further consideration of claimant's entitlement to these benefits. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge