BRB No. 12-0195

DWIGHT DELPIT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHEVRON U.S.A., INCORPORATED	)	DATE ISSUED: 12/20/2012
	)	
and	)	
	)	
PACIFIC EMPLOYERS' INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

William R. Mustian, III (Stanga & Mustian, P.L.C.), Metairie, Louisiana, for claimant.

Christopher S. Mann (Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2011-LHC-0801) of Administrative Law Judge C. Richard Avery 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).

Claimant alleged he sustained an injury to his left knee during an offshore hitch sometime in late November 2008. He contended that he twisted his knee at work while

he was hosing down a compressor. Tr. at 14-15. Because the pain got worse after he returned from his hitch, he saw Dr. McManus on December 1, 2008, who diagnosed a torn meniscus. JX 5 at 12-13. Dr. Fong performed surgery on claimant's left knee on February 9, 2009. JX 2 at 10. Claimant filed a claim for benefits; employer disputed the compensability of this injury.

The administrative law judge found that claimant presented sufficient evidence to invoke the Section 20(a), 33 U.S.C. §920(a), presumption relating his knee injury to his employment, as claimant established he had a torn meniscus in his left knee, and he described an incident at work which could have caused that injury. Decision and Order at 8. The administrative law judge also found that employer presented substantial evidence to rebut the presumption. Specifically, he found the presumption rebutted by: (1) claimant's inconsistent reports relating to the date, time, and location of the incident; (2) claimant's failure to report a previous knee condition and past treatment when he was interviewed by employer; (3) Dr. McManus's statement that, in hindsight, claimant could have had the torn meniscus when he presented to Dr. McManus earlier in November 2008 with pain and swelling; and (4) claimant's telling Dr. Fong he injured his knee while watering his garden at home. *Id.* In weighing the evidence as a whole, the administrative law judge found that the alleged accident was unwitnessed and that claimant's inconsistent and unreliable testimony does not support his claim that he suffered an injury at work. The administrative law judge therefore denied benefits. *Id.* at 9-10. Claimant appeals the denial of benefits, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding that employer presented sufficient evidence to rebut the Section 20(a) presumption. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a prima facie case. Once claimant establishes a prima facie case, Section 20(a) applies to relate the disabling injury to the employment, and the burden is on employer to rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Ceres Gulf, Inc. v. Director, OWCP*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Employer's burden is one of production, not persuasion, and it need only introduce medical or other evidence that claimant's condition was not caused by the work incident in order to rebut the presumption. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT). In *Ceres Gulf*, the Fifth Circuit, in whose jurisdiction this case arises, stated that, in order to rebut the Section 20(a) presumption, employer must "advance evidence to throw factual doubt on the prima facie case." *Ceres Gulf*, 683 F.3d at 231, 46 BRBS at 29(CRT). If the employer rebuts the presumption, it no longer controls and the issue of a causal relationship must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *Id.; 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).

In finding the Section 20(a) presumption rebutted, the administrative law judge relied on the inconsistencies in claimant's recitations to physicians, employer, and the administrative law judge as to how and when the injury allegedly occurred. Specifically, the administrative law judge found that claimant was uncertain of the time and date of his alleged accident, as he first informed employer that it occurred on November 23, 2008, but later stated that it did not happen on that date, which was a Sunday. He also found that claimant inconsistently had reported the incident as having occurred between 12:30 p.m. and 1 p.m. and then later as having occurred between 3 p.m. and 6 p.m. JX 4; Tr. at 20-25. Additionally, the administrative law judge found that, when claimant was interviewed about the accident by employer in December 2008, he failed, when asked, to inform employer of his November 13, 2008, appointment with Dr. McManus for pain, fluid, and swelling in his left knee.[1] JX 4. On November 13, 2008, prior to the alleged work accident, Dr. McManus diagnosed arthritis and treated claimant's left knee with a steroid injection. JXs 1, 5; Tr. at 17-26. In his deposition, Dr. McManus testified that, when claimant presented to him on December 1, 2008, after the alleged incident, claimant mentioned only that he had twisted his knee but did not identify any particular accident or injury as having occurred since his November 13, 2008, appointment. The administrative law judge also relied on Dr. McManus's opinion that claimant could have had the torn meniscus on November 13, 2008, because of his symptoms that day and because claimant later reported only two days of relief from the steroid injection; relief of that short duration typically means there are problems other than degenerative disease. JX 5. The administrative law judge also found that claimant told Dr. Fong that he injured his knee when he turned it while hosing his garden at home. JX 2.

The administrative law judge rationally found that this evidence rebuts the presumption that claimant injured his knee in an accident at work.[2] *Ceres Gulf*, 683 F.3d

[1]The administrative law judge rejected claimant's attempt to reconcile his inconsistent statements. He found that, at the end of claimant's interview with employer, claimant confirmed that his answers were complete and true. Jt. Ex. 4. When questioned at the hearing, claimant stated he forgot to tell employer about the prior treatment and did not call to correct his mistake because the information was in his medical record, and he knew employer would find it. Tr. at 17, 26.

[2]This evidence also could have been considered in addressing whether claimant established a prima facie case. Based on the administrative law judge's credibility determination, he could have found that claimant failed to establish the occurrence of an accident at work. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996).

225, 46 BRBS 25(CRT); *cf. Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000) (employer did not offer substantial evidence refuting claimant's theory of how the accident occurred). It is well established that an administrative law judge is entitled to evaluate the credibility of witnesses. *See, e.g.*, *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Therefore, the administrative law judge rationally rejected claimant's allegation of an accident at work due to the inconsistencies in claimant's reports, as supported by Dr. McManus's opinion that claimant's symptoms on November 13, 2008, were consistent with a torn meniscus. Therefore, as the finding is supported by substantial evidence, we affirm the administrative law judge's finding that the Section 20(a) presumption was rebutted. *Ceres Gulf*, 683 F.3d 225, 46 BRBS 25(CRT). As the presumption has been rebutted, and as claimant does not challenge the administrative law judge's weighing of the evidence on the record as a whole, we affirm the finding that claimant's knee injury is not work related and the consequent the denial of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge