

BRB No. 99-0339

JAMES LIVAS)
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 Claimant-Petitioner)
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 v.)
)
 COMAR INDUSTRIES) DATE ISSUED: Dec. 15, 1999
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 and)
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 CIGNA P&C CASUALTY COMPANIES)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

James Livas, Schriever, Louisiana, *pro se*.

Richard W. Withers (Sharp & Gay, P.A.), Jacksonville, Florida, for employer/ carrier.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, appearing without legal representation, appeals the Decision and Order (94-LHC-177) of Administrative Law Judge Stuart A. Levin 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). In reviewing an appeal where claimant is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine whether they are rational, supported by substantial evidence, and in accordance with law; if so, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. To recapitulate, on May 8, 1989, while working for employer as a welder, claimant fell fifteen feet onto a barge, injuring his left knee, right knee, and right ankle. Claimant received treatment for these injuries by Dr. El-Bahri, who found that claimant reached maximum medical improvement on February 23, 1990, and rated him as having a 20 percent permanent impairment of the left knee. Employer voluntarily paid temporary total disability from the date of injury until the date of maximum medical improvement, and permanent partial disability under the schedule thereafter consistent with Dr. El-Bahri's impairment rating. See 33 U.S.C. §908(c)(2), (19). Claimant, who also alleged that he injured his lower back in the May 1989 work accident, sought continuing temporary total disability benefits or, alternatively, permanent total disability compensation under the Act. In addition, claimant argued that employer erred in refusing to authorize additional medical treatment for his back condition.

In the initial Decision and Order, Administrative Law Judge Robert G. Mahony denied the contested medical benefits as unnecessary, and found that claimant did not establish that he suffered a back injury. Judge Mahony further determined that, as claimant's only work-related injury was to his left knee and employer established the availability of suitable alternate employment through the testimony of its vocational expert, Mr. Albert, claimant's recovery under the Act was limited to the permanent partial disability compensation under the schedule previously paid to claimant by employer.

Claimant appealed the administrative law judge's denial of his claim for total disability benefits to the Board. The Board vacated Judge Mahony's decision, holding that his adoption of employer's proposed Decision and Order, virtually in its entirety, resulted in a decision which reflected a selective analysis of the evidence and conclusory findings and was therefore not in compliance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). Accordingly, the case was remanded for further consideration. See *Livas v. Comar Industries*, BRB No. 97-440 (Oct. 15, 1997)(unpublished).

On remand, Administrative Law Judge Stuart A. Levin (the administrative law judge) found claimant entitled to the Section 20(a), 33 U.S.C. §920(a), presumption, which he further found that employer rebutted. In analyzing the record as a whole, the administrative law judge found that claimant failed to meet his burden of proving that his back symptomatology is related to his May 8, 1989, work injury. Alternatively, the administrative law judge found that claimant failed to establish a loss of wage-earning capacity, as he is capable of returning to his usual employment as a welder or to comparable employment. Accordingly, the administrative law judge denied claimant's request for ongoing compensation benefits.

On appeal, claimant, without the assistance of counsel, challenges the denial of his claim.¹ Employer responds, urging affirmance.

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 *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Where, as in the instant case, claimant has established his *prima facie* case, Section 20(a) of the Act, 33 U.S.C. §920(a), 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)(6th 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. *Universal Maritime Corp. v. Moore*, 126 F.2d. 256, 31 BRBS 119 (CRT)(4th Cir. 1997). 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. See *Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, the administrative law judge invoked the Section 20(a) presumption but found that the record evidence was sufficient to rebut it. Specifically, the administrative law judge determined that employer established rebuttal of the Section 20(a) presumption based upon the opinion of Dr. Lenger, who opined that claimant's back symptomatology is not related to his work injury, the normal back examinations conducted by Dr. Scharf in May 1990 and Dr. McAuley in September 1990, a normal x-ray of claimant's back taken in May 1989, and a June 1989 MRI, which was interpreted as showing no significant abnormalities. As the unequivocal opinion of Dr. Lenger, as supported by the objective tests of record, constitutes substantial evidence sufficient to rebut the presumption, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. See *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94, 96 (1988).

¹Claimant also contends that he was not paid all of the benefits for his permanent partial knee impairment that employer had asserted it voluntarily paid. The Board will not address an issue raised for the first time on appeal. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 346 (1988). We note that this issue should be initially presented to the district director.

In addressing the record as a whole, the administrative law judge initially found that claimant's subjective complaints are without credibility and, accordingly, he declined to credit the medical evidence which relied upon claimant's account of his symptoms. Thereafter, the administrative law judge credited the reports of Drs. Scharf, Fillingham, Witter and Lenger, which noted that claimant's complaints were not consistent with their findings; in this regard, the administrative law judge found that the aforementioned physicians' opinions were supported by excerpts from the reports of Drs. El-Bahri, McAuley, Scharf, Harris and Berwick. Finally, the administrative law judge credited surveillance videotapes, which he found exhibited evidence of claimant's proclivity to exaggerate his back symptoms and which undermine the opinion of any physician who relied on claimant's subjective complaints in rendering an evaluation of his condition. Lastly, the administrative law judge found no objective medical evidence in 1989 to indicate that claimant injured his back as a result of the May 8, 1989, work-incident. Thus, as claimant produced no affirmative medical evidence linking his present medical condition to his May 1989 work-incident, the administrative law judge concluded that causation was not established based upon the record as a whole. It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom and is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge's credibility determinations are rational; accordingly, we affirm the administrative law judge's determination that claimant's present back condition is unrelated to his May 1989, work-incident.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge