BRB No. 04-0550

DARRELL R. GRENZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CASCADE GENERAL, INCORPORATED	)	DATE ISSUED: FEB 18, 2005
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Gerald Michael Etchingham, Administrative Law Judge, United States Department of Labor.

George J. Wall (Welch, Bruun & Green), Portland, Oregon, for claimant.

Gene L. Platt, Newberg, Oregon, and Ronald W. Atwood, Portland, Oregon, for employer/carrier.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-0127) of Administrative Law Judge Gerald Michael Etchingham 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The facts of this case are not in dispute. In 1986 and 1987, claimant underwent surgical releases to resolve bilateral chondromalacia of the right and left knees. He continued to suffer some symptoms, but he returned to work and did not see his doctor for this condition after 1989. Decision and Order at 4-5; Cl. Exs. 2-11. While working for employer in late May 2000, claimant suffered a slag burn on his right thigh, three or four inches above the knee. He continued to work, but the injury became infected, and he was hospitalized from June 10 through June 15, 2000. Thereafter, claimant performed some light-duty work between July 12, 2000, and January 9, 2001, when the light-duty program was abolished. Decision and Order at 5; Emp. Exs. 2-6, 5A; Tr. at 23-24. Employer paid disability and medical benefits for this injury until May 18, 2001, when it controverted the claim and terminated benefits based on a doctor's report stating that claimant's work-related burn condition had resolved. Emp. Exs. 9A, 10, 17A. Claimant filed a claim for continuing temporary total disability and medical benefits from May 18, 2001, through August 29, 2002, the date claimant contends he was released to return to his usual work. Additionally, claimant filed a discrimination claim, contending employer violated Section 49 of the Act, 33 U.S.C. §948a, because it improperly dropped claimant from its seniority list. As of the date of the hearing, claimant had returned to work with a different employer.

The administrative law judge found that claimant is not entitled to additional disability or medical benefits because after May 18, 2001, there is no causal connection between his May 2000 slag burn and his right knee condition. Decision and Order at 17. Additionally, he rejected claimant's contention that employer violated Section 49 by treating claimant in a discriminatory manner. Therefore, he denied claimant's claim for reinstatement and back pay. *Id.* at 19-20. Claimant appeals the denial of benefits and back pay. Employer responds, urging affirmance.

Claimant first contends the administrative law judge erred in denying additional benefits after May 18, 2001. He argues that his knee pain after that date was related to his slag burn and that the administrative law judge erred in not accepting the opinion of Dr. Noall, claimant's treating orthopedist, over those of the examining doctors. In this same vein, claimant argues that the administrative law judge erred in allowing employer to submit the post-hearing report of Dr. Schilperoot, as claimant was not permitted to cross-examine the doctor and this violated his due process rights. We reject claimant's arguments, and we affirm the administrative law judge's denial of claimant's request for benefits after May 18, 2001.

In determining whether a disability 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. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Duhagon v. Metropolitan Stevedore Co.*, 169

F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). Where aggravation of a pre-existing condition is at issue, the employer must establish that the work events neither directly caused the injury nor aggravated the pre-existing condition, resulting in the injury. *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT). 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*); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kubin v. Pro-Football, Inc.* 29 BRBS 117 (1995). If the 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).

The administrative law judge found that claimant failed to establish a *prima facie* case. However, he alternatively found that if the presumption is invoked, it has been rebutted, and the presumption falls out of the case, requiring a determination on the evidence as a whole. Decision and Order at 15-16. On the evidence as a whole, the administrative law judge stated that he credited the opinions of Drs. Noall, Fuller, Vessely and Schilperoot to determine that claimant's burn condition resolved and that any post-May 18, 2001, knee pain or disability is not related to the burn injury. Decision and Order at 17. Claimant does not contest the finding that employer rebutted the Section 20(a) presumption; therefore, only the administrative law judge's weighing of the evidence is at issue before us, and the record contains substantial evidence to support his conclusion that claimant is not entitled to additional benefits.

Initially, we reject claimant's argument that the administrative law judge should have given controlling weight to the opinion of claimant's treating physician, Dr. Noall, as expressed in a June 19, 2003, letter, based on his long-term relationship with claimant. An administrative law judge may give "special weight" to a treating physician's opinion when there are conflicting opinions regarding the course of treatment and no doctor states that the course chosen by the claimant and his physician is unnecessary or unreasonable. *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999); *see also Pietrunti v.*

Director, OWCP, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997) (when a treating physician's opinion is uncontradicted, the administrative law judge cannot substitute his own opinion). The issue herein, however, is whether claimant's injury continued to cause him problems, not whether the course of his treatment was reasonable, and it is well-settled that the administrative law judge may determine how to credit and weigh the evidence of record. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 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); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The June 19, 2003, letter, which was merely a letter typed by claimant's counsel summarizing a conversation about Dr. Noall's medical opinions regarding claimant's condition on which Dr. Noall indicated whether he agreed or disagreed by marking a box, Cl. Ex. 17, does not reflect the opinion expressed in Dr. Noall's previous reports and notes, and it contradicts other medical evidence of record. The administrative law judge found that this "check-the-box" response was "unreliable[,]" and he rejected the opinion expressed therein as "unsupported by objective medical evidence. . . ." Decision and Order at 14. In his previous notes and reports, Dr. Noall consistently stated that the primary problem with claimant's right knee was the scarring that developed as a result of the earlier, release surgery. Emp. Exs. 11A, 13A, 15A, 23A. While he stated that the slag burn temporarily deconditioned the muscle and caused some symptoms to develop, he clearly stated in his February 2003 statement that the burn did not result in a lasting sequela and that there was no relationship between the burn and claimant's current complaints. Emp. Ex. 23A. The difference between the reported opinions and the checkbox summary letter is that the word "temporary" is absent from the letter. As the checkbox letter either incorrectly reflected Dr. Noall's opinion or represented a stark change of opinion from his earlier reports, the administrative law judge rationally rejected the opinion expressed in that letter. An administrative law judge is not required to give the treating physician's opinion determinative weight when he finds other medical opinions to be more credible. *See generally Newton v. Apfel*, 209 F.3d 448 (5th Cir. 2000).

Moreover, several other physicians agreed with Dr. Noall's "temporary aggravation" theory, thereby giving further support to the administrative law judge's decision to credit Dr. Noall's earlier opinion and reject the June 2003 letter. For example, in May 2001 Drs. Fuller and Reimer, together, examined claimant at employer's request and determined that claimant had recovered from the cellulitis and transient atrophy caused by the slag burn. They also concluded that the residual symptoms are from the 1987 knee release surgery, that there is no current condition caused by the burn, and that claimant could return to his usual work. Emp. Ex. 17A. Although she determined claimant could return only to light-duty work as of August 3, 2001, Dr. Wong, another treating physician, concluded that the pain in claimant's knee

was related to the previous surgery. Emp. Ex. 43. Dr. Vessely, who examined claimant at employer's request in February 2002, found no objective evidence to substantiate claimant's complaints, as there was no evidence of atrophy or aggravation and claimant had recovered from the burn injury. Emp. Ex. 20A. Additionally, in August 2003, Dr. Schilperoot examined claimant at employer's request to respond to Dr. Noall's checkbox letter. Dr. Schilperoot concluded that claimant's burn and leg infection resolved with no residual effects, that there was no objective evidence to support claimant's disproportionate complaints of pain, and that claimant could return to his usual work. Emp. Ex. 56.[1] In light of the corroborating medical evidence establishing that any injury or aggravation claimant suffered as a result of the slag burn resolved, we affirm the administrative law judge's determination that claimant's post-May 18, 2001, knee condition is not related to his May 2000 slag burn.[2] *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Hice v. Director, OWCP*, 48 F.Supp.2d 501 (D. Md. 1999). Therefore, we affirm the administrative law judge's denial of additional disability and medical benefits subsequent to May 18, 2001.

Next, claimant contends the administrative law judge erred in finding that employer did not discriminate against him when it removed him from its seniority list. Specifically, he argues that employer treated him differently from other workers because it relied on a non-treating physician's opinion to change his employment status, and it removed him from the seniority list without informing him. Employer argues its actions

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[1]Claimant contends the administrative law judge erred in accepting Dr. Schilperoot's post-hearing report into evidence or, alternatively, in failing to allow him to cross-examine Dr. Schilperoot. We reject claimant's contention. Employer obtained Dr. Schilperoot's opinion to rebut the June 2003 checkbox letter of Dr. Noall. The letter, which was submitted late but was accepted into the record, represented a change from Dr. Noall's previous reports. Accordingly, the administrative law judge gave employer a chance to rebut the opinion. ALJ Ex. 11. Further, Dr. Schilperoot's opinion corroborates the opinions of Drs. Vessely, Fuller and Reimer and is, effectively, duplicative. Claimant has not established that the administrative law judge abused his discretion. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); Decision and Order at 2; ALJ Exs. 7, 11; Tr. at 14-15 *see generally Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Smith v. Ceres Terminal*, 9 BRBS 121 (1978).

[2]The administrative law judge's determination that claimant's condition reached maximum medical improvement and resolved without impairment as of May 8, 2001, is rational and is supported by the report of Drs. Fuller and Reimer. Decision and Order 17-18; Emp. Ex. 17A.

were not discriminatory because it followed both the policy set forth in the labor contract for all employees and its established procedure. The administrative law judge credited the testimony of employer's witnesses who explained the process which resulted in the removal of claimant from the seniority list, and he determined that claimant was treated like the other employees who also lost their seniority at or near that time for lack of work. The record contains substantial evidence to support the administrative law judge's decision, and we affirm his conclusions. Decision and Order at 19; Emp. Exs. 1A, 6A, 7A.

Section 49 of the Act prohibits an employer from discharging or discriminating against an employee based on his involvement in a claim under the Act. If the employee shows he is the victim of such discrimination, he is entitled to reinstatement and back wages. 33 U.S.C. §948a. Section 49 states in pertinent part:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment *because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter.* The discharge or refusal to employ a person who has been adjudicated to have filed a fraudulent claim for compensation is not a violation of this section. Any employer who violates this section shall be liable to a penalty of not less than $1,000 or more than $5,000, as may be determined by the deputy commissioner.

33 U.S.C. §948a (emphasis added). To establish a *prima facie* case of discrimination, a claimant must demonstrate that his employer committed a discriminatory act motivated by discriminatory animus or intent. *See Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124(CRT) (4th Cir. 1988), *aff'g* 20 BRBS 114 (1987); *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103(CRT) (D.C. Cir. 1988), *aff'g Geddes v. Washington Metropolitan Area Transit Authority*, 19 BRBS 261 (1987); *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). The administrative law judge may infer animus from circumstances demonstrated by the record. *See Brooks*, 26 BRBS at 3. The essence of discrimination is that the claimant has been treated differently from other employees. *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

Paragraph 17.3.5 of the pertinent labor contract provides that an employee's seniority will be terminated if he is laid off from payroll activity for one year. Emp. Ex. 1A. Ms. Jeffers, employer's human resources administrator, testified that, upon cancellation of employer's light-duty program in January 2001, claimant's payroll code was changed to reflect that he was on a medical layoff because employer could not

accommodate his restrictions. Based on the May 2001 report of Drs. Fuller and Reimer, indicating that claimant was medically stable, employer changed claimant's payroll code, effective August 6, 2001, to indicate that he was laid off for lack of work and that he had medical restrictions, but he was eligible for rehire.[3] Tr. at 106-109. She also stated that all employees, whether injured or not, are removed from the seniority list if they have not worked in one year, and that employer provides the union with the code changes and seniority lists on a regular basis, but that employer does not inform the employee of a code change unless the employee has been terminated. Tr. at 110-111, 114-116. Two other witnesses, Mr. Wolvert and Ms. Alvares, claimant's supervisor and employer's human resources director, respectively, confirmed that claimant was laid off due to lack of work and, one year later, he was removed from the seniority list. They also testified that the process is followed for non-injured employees and that employer lost 25 to 30 percent of its work force that same year due to lack of work. Tr. at 93-95, 97-98, 122, 124, 126-129.

To show that an employer has violated Section 49, the claimant bears the burden of establishing he was treated differently, individually or as a class, from "like groups or individuals," *Holliman*, 852 F.2d at 761, 21 BRBS at 128-129(CRT); *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995), and, here, claimant has not fulfilled this burden. To the contrary, the evidence of record supports the administrative law judge's conclusion that employer did not act in a discriminatory manner, as employer treated claimant the same as its other employees. He found that, based on the May 8, 2001, report from Drs. Fuller and Reimer, employer determined that claimant's work-related condition had become medically stable and changed claimant's payroll code. He also found that, due to a lack of payroll activity for one year thereafter, employer removed claimant from the seniority list. Decision and Order at 19; Emp. Exs. 2A-4A (claimant's grievance was denied and the union declined to pursue it further). Based on the evidence of record, and particularly the testimony of Ms. Jeffers, Ms. Alvares and Mr. Wolvert explaining the actions herein, the administrative law judge's findings are rational. Although claimant alleges he should have been notified of his status change, employer, in keeping with its policy, notified the union but not claimant. Tr. at 110-111, 115, 126-127.[4] Further, although claimant

[3]We reject claimant's assertion that the occurrence of the status change on August 6, 2001, instead of May 8, 2001, establishes discriminatory conduct. Ms. Jeffers testified, and the administrative law judge found, that the status change occurred when Ms. Jeffers first saw the May 8, 2001, medical report. Decision and Order at 19; Tr. at 108-109.

[4]Both Ms. Jeffers and Mr. Wolvert testified that they did not recall hearing from claimant between January 9, 2001, and August 29, 2002. When Mr. Wolvert heard from claimant on August 29, 2002, he told claimant about his removal from the seniority list,

asserts that a code change must be based on his treating physician's opinion of his medical status, the labor contract does not so specify, and Ms. Jeffers explained that documentation showing that an employee is medically stable may come from either the employee's physician or from an "independent" examiner.[5] Emp. Ex. 1A; Tr. at 117. As claimant has not established he was subjected to disparate treatment, we affirm the administrative law judge's conclusions that employer's actions were consistent with those affecting other employees and that employer has not violated Section 49 of the Act. *See generally Holliman*, 852 F.2d at 761, 21 BRBS at 128-129(CRT); *Hunt*, 28 BRBS at 370. Therefore, we affirm the administrative law judge's denial of reinstatement and back pay.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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and he advised claimant to call the union. Tr. at 95-98, 107. The administrative law judge specifically commented on this lack of contact. Decision and Order at 13-14, 19.

[5]"Independent," as it is used by Ms. Jeffers, does not refer to a true "independent medical examination" arranged by the Department of Labor. 33 U.S.C. §907(e); 20 C.F.R. §702.408; *see* Emp. Ex. 17A; Tr. at 117.