BRB Nos. 13-0567
and 13-0567A

CHARLES GREEN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
DYNAMIC INDUSTRIES, INCORPORATED	)	
	)	
	)	DATE ISSUED: June 25, 2014
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order and the Order Denying Claimant's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr., W. Jared Vincent, and V. Jacob Garbin (Law Offices of William S. Vincent, Jr.), New Orleans, Louisiana, for claimant.

David K. Johnson (Johnson, Rahman & Thomas), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order and the Order Denying Claimant's Motion for Reconsideration (2012-LHC-1198) 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *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 worked for employer as a welder beginning in February 2006. On May 30, 2006, claimant fell off the fixed platform into the Gulf of Mexico, a distance estimated between 40 and 80 feet. Claimant was treated at employer's clinic and released to return to work. Claimant worked two more four-day shifts for employer, but was terminated on August 18, 2006, for reasons unrelated to his work injury. Thereafter, claimant obtained work with another employer. He first reported hip pain in November 2006. CX 1. He was diagnosed with left femoral head necrosis on August 18, 2008, and underwent surgery on August 26, 2008. Following his recovery, he continued to work for other employers. On December 21, 2012, claimant was diagnosed with degenerative joint disease and potential avascular necrosis of the left hip. CXs 1, 3. Dr. Atchison performed a left hip arthroplasty on February 7, 2013, and estimated claimant's condition would reach maximum medical improvement within six months after surgery. CX 3 at 4-9. Claimant filed a claim for disability and medical benefits, alleging that his current left hip condition is causally related to his May 2006 fall at employer's facility.

The parties stipulated that claimant injured his left hip at work on May 30, 2006, and that employer has not paid any benefits to claimant for this injury. JX 1. The parties disputed the compensability of claimant's disabling hip condition, his average weekly wage, and whether he has any residual earning capacity. The administrative law judge found that claimant established a prima facie case relating his disabling hip condition to his work accident, and he invoked the Section 20(a), 33 U.S.C. §920(a), presumption. The administrative law judge found that employer did not present substantial evidence to rebut the Section 20(a) presumption. Decision and Order at 12. Nevertheless, the administrative law judge stated that, even if employer had rebutted the presumption, the evidence as a whole favors claimant, such that his left hip condition is causally related to his May 2006 work accident. *Id.* at 13. As claimant continued to work at his usual job after the fall, and as his August 2006 termination was not related to his work injury, the administrative law judge found that claimant is not entitled to receive disability compensation as of the date he was terminated by employer; however, he awarded claimant compensation for periods of temporary total disability following his surgical procedures. 33 U.S.C. §908(b). The administrative law judge also awarded claimant past and future medical benefits related to his hip condition. 33 U.S.C. §907; Decision and Order at 13-14, 16. The administrative law judge applied Section 10(c) of the Act, 33 U.S.C. §910(c), and calculated claimant's average weekly wage as $557.31. Decision and Order at 15. The administrative law judge summarily denied claimant's motion for reconsideration.

On appeal, employer challenges the administrative law judge's determination that claimant's current left hip disability is causally related to his May 2006 work accident. Employer asserts that any disability is degenerative in nature and unrelated to the work accident. Therefore, employer contends the administrative law judge erred in awarding claimant temporary total disability benefits and medical care for the treatment of and surgeries on his left hip. Employer also appeals, and claimant cross-appeals, the administrative law judge's average weekly wage calculation. Claimant responds to employer's appeal, urging affirmance of the award of benefits and stating his disagreement with employer's average weekly wage argument. Employer responds to claimant's cross-appeal, and claimant replies.

Employer first contends the administrative law judge erred in invoking the Section 20(a) presumption relating claimant's hip disability to his employment accident. Employer asserts that claimant returned to his usual job without restrictions, worked for other employers after his termination, and did not complain of hip pain until six months after his fall. 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, or aggravated a pre-existing condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *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 harm to the employment, and the employer may rebut this presumption by producing substantial evidence that the harm is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). 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. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, claimant has established a harm, the hip condition, and an incident at work that could have caused the harm, the May 2006 fall from the platform. As there is substantial medical evidence of record supporting the administrative law judge's finding that claimant sustained a harm to his hip, CXs 1-5, 7, when previously he had had no hip problems, and that doctors opined the fall could have caused the harm, *see, e.g.,* CX 4, we affirm the administrative law judge's finding that the Section 20(a) presumption relates claimant's condition to his employment accident. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

Employer next contends the administrative law judge erred in finding it did not rebut the Section 20(a) presumption. Employer asserts it presented negative evidence, as well as evidence undermining claimant's credibility,[1] and medical evidence that the hip condition is degenerative in nature, to rebut the presumption. An employer need not demonstrate an alternate cause of a claimant's condition to show a deficiency in the claimant's prima facie case; rather, to rebut the Section 20(a) presumption, the employer must produce substantial evidence that "throw[s] factual doubt" on the prima facie case. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT). If claimant claimed that the work injury aggravated a pre-existing condition, employer must produce substantial evidence that the work accident did not aggravate the pre-existing condition. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Conoco,* 194 F.3d 684, 33 BRBS 187(CRT).

In this case, the administrative law judge found that even the doctors who questioned claimant's credibility as to when his pain began or as to the subjective extent of his pain, acknowledged that objective pathology existed; they diagnosed avascular necrosis, and/or opined that the cause of the suspected acetabular fracture was the work fall. Decision and Order at 12; CXs 5-7. Moreover, the administrative law judge stated that nothing in the record indicates that the fall did not at least aggravate a pre-existing degenerative condition. Decision and Order at 12; CXs 1, 5-6. Thus, substantial evidence supports the administrative law judge's finding that employer did not rebut the Section 20(a) presumption. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT). In any event, the administrative law judge proceeded to weigh the evidence as a whole. *See generally Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984).

In this regard, employer contends the administrative law judge erred in finding claimant's hip condition work-related based on the evidence as a whole. In weighing the evidence, the administrative law judge found that: 1) claimant has consistently been diagnosed with avascular necrosis along with other degenerative conditions of the hip; 2) three physicians directly related the cause of claimant's hip condition, even if as an aggravation of pre-existing degenerative changes, to claimant's workplace fall of May 2006; and 3) no physician has suggested another cause or concluded that the fall could not have triggered claimant's condition. Decision and Order at 13. The administrative law judge stated that claimant's fall of 40 to 80 feet was significant, and that there was no

[1]In this regard, employer argues that: claimant did not seek any medical treatment for hip pain until six months after the accident; claimant worked for other employers after the accident; claimant did not have medical treatment for his hip between January 2007 and February 2008 and was fully employed during that time; and doctors questioned the degree of pain claimant alleged he was suffering.

evidence of hip problems prior to the fall. Although the administrative law judge acknowledged that Drs. McAllister and Roger questioned claimant's credibility as to the commencement or extent of his pain, the administrative law judge nevertheless found that they still linked the hip condition to the workplace injury. Moreover, he observed that claimant's reporting of the workplace fall and his complaints of pain have been consistent. The administrative law judge concluded, based on the opinions of Drs. Atchison, Murphy, and McAllister, that claimant's hip condition is work-related. Decision and Order at 13; CXs 3-5.

It is well established that an administrative law judge is entitled to weigh the evidence and draw his own inferences therefrom, and he has the prerogative to credit one witness or medical opinion over that of another and is not bound to accept the opinion or theory of any particular examiner. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *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 Board may not reweigh the evidence, but may only inquire into the existence of evidence to support the findings. *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); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981) (table). In this case, the record reflects that claimant's surgeon, Dr. Atchison, stated that because claimant had not had prior hip pain it is more likely than not the trauma claimant suffered in May 2006 is a causal factor of the progression which eventually required a total hip replacement. EX 5 at 42-43. Additionally, Dr. Murphy related claimant's condition to his fall, also noting claimant had not had hip pain prior to that incident, and Dr. McAllister concluded the fall caused a traumatic injury to claimant's hip.[2] CXs 4-5. As it is rational and supported by substantial evidence based on the record as a whole, we affirm the administrative law judge's finding that claimant's current left hip condition is a consequence of his May 2006 work fall with employer. *See Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120(1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director*,

[2]Despite employer's assertions that claimant's disability is not work-related, we note that employer stipulated that claimant suffered a left hip injury in his May 2006 fall, JX 1, and the administrative law judge did not reject that stipulation. *See Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999); *Simonds v. Pittman Mechanical 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).

OWCP, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Thus, we affirm the administrative law judge's award of disability and medical benefits.[3]

Finally, both parties challenge the administrative law judge's average weekly wage calculation. Employer offers three alternative calculations for computing claimant's average weekly wage, with results ranging from $333.81 to $474.19. Emp. Br. at 25. Claimant asserts the administrative law judge should have calculated his average weekly wage using one of three other options, with results ranging from $706.83 to $1,330.17.[4] Cl. Br. at 8-9.

Under Section 10(c) of the Act, 33 U.S.C. §910(c), the administrative law judge has broad discretion to arrive at a fair approximation of a claimant's annual earning capacity at the time of his injury.[5] *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). Absent unusual circumstances, a claimant's average weekly wage is to be based on the wages he earned at or before the time of injury. *See generally Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1987). The administrative law found that the record contains evidence of claimant's earnings during the 52 weeks prior to his May 2006 fall. Decision and Order at 15; CX 15-16. He found that claimant earned $28,980.15 between May 27, 2005, and May 28, 2006, and he divided that amount by 52 weeks to arrive at an average weekly wage of $557.31. 33 U.S.C. §910(c), (d); Decision and Order at 15. While the parties offer computations which favor their own positions, neither party has demonstrated that the administrative law judge's calculation is irrational or not supported by substantial evidence. The administrative law judge's calculation takes into account claimant's earnings from the full year prior to his injury, including those earned from employer and a prior employer, and thus reasonably represent claimant's annual earning capacity at the time of injury. As the administrative law judge has broad discretion in determining average weekly wage

[3]Because claimant's hip condition is work-related, claimant is entitled to medical benefits for reasonable and necessary medical expenses related to the hip condition. 33 U.S.C. §907.

[4]The computations claimant presents to the Board differ from the options he presented to the administrative law judge. *Compare* Cl. Br. at 8-9 *with* Cl. Post-Hearing Br. at 16-17. By selecting his own calculation, the administrative law judge implicitly rejected the parties' calculations.

[5]Section 10(c) applies if either Section 10(a) or Section 10(b), 33 U.S.C. §910(a), (b), "cannot reasonably and fairly be applied." 33 U.S.C. §910(c). Neither party disputes the applicability of Section 10(c).

under Section 10(c), and as his finding is rational and supported by substantial evidence, we affirm the calculation of $557.31 as claimant's average weekly wage. *See generally James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

Accordingly, we affirm the administrative law judge's Decision and Order and the Order Denying Claimant's Motion for Reconsideration.

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