BRB No. 05-0783

ELMER J. COLLINS, JR. Claimant-Respondent v. CRESCENT TOWING AND SALVAGE COMPANY and THE AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED Employer/Carrier-Petitioners	)	DATE ISSUED: 05/30/2006 DECISION and ORDER

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

Billy Wright Hilleren (Hilleren and Hilleren, LLP), Mandeville, Louisiana, for claimant.

Alan G. Brackett and Derek M. Mercer (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Order and the Decision and Order Awarding Benefits (2004-LHC-2557) 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).

On March 28, 2003, claimant injured his back during the course of his employment as a welder. He was prescribed three epidural steroid injections to relieve lower back and leg pain. Claimant experienced dizziness and collapsed at home on May 27, 2003, less than 24 hours after his third epidural injection. At the emergency room, he was diagnosed with atrial fibrillation, a cardiac condition. Claimant has subsequently experienced multiple recurrences of this condition. Claimant underwent a lumbar discectomy on July 8, 2003. The parties agreed that claimant's back condition reached maximum medical improvement on February 13, 2004. Claimant alleged that his recurrent atrial fibrillation is related to the work injury, and that it renders him unable to work.

In his decision, the administrative law judge found that claimant established that his cardiac condition was caused by the epidural injection and is related to the work injury. The administrative law judge found that claimant's condition has not reached maximum medical improvement, and that claimant is unable to work. Alternatively, the administrative law judge found that employer did not establish the availability of suitable alternate employment. Accordingly, claimant was awarded continuing compensation for temporary total disability, and past and future medical expenses related to the treatment of his cardiac condition.

On appeal, employer challenges the administrative law judge's order denying its motion to strike the deposition testimony of claimant's treating cardiologist, Dr. Hutchinson, and the administrative law judge's findings on the merits that claimant's cardiac condition is related to his employment, that claimant is unable to work, and that employer did not establish the availability of suitable alternate employment. Claimant responds, urging affirmance in all respects.

Employer argues that the administrative law judge erred by admitting into evidence the deposition of Dr. Hutchinson, a board-certified cardiologist; Dr. Hutchinson opined that claimant's atrial fibrillation is related to the epidural steroid injection claimant received for his work injury. *See* CXs 17 at 1; 18 at 43. Employer asserts that the basis for Dr. Hutchinson's opinion is not an accepted theory in the medical community. Therefore, pursuant to Federal Rule of Evidence (FRE) 702 and the standards expounded in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), employer contends that his opinion is inadmissible as evidence in this case. We disagree.

The standards governing the admissibility of evidence in administrative hearings are less stringent than those which govern under the Federal Rules. *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied,* 395 U.S. 920 (1969); *Brown v. Washington Metropolitan Area Transit Authority*, 16 BRBS 80 (1984), *aff'd mem.*, 764 F.2d 926 (D.C. Cir. 1985)(table). Section 23(a) of the Act specifically provides:

> In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board *shall not be bound by common law or statutory rules of evidence* or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

33 U.S.C. §923(a) (emphasis added); *see also* 20 C.F.R. §§702.338, 702.339. Under the Rules of Practice and Procedure before the Office of Administrative Law Judges, "relevant evidence" is defined as:

> evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

29 C.F.R. §18.401, and

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, pursuant to executive order, by these rules, or by other rules or regulations prescribed by the administrative agency pursuant to statutory authority.

29 C.F.R. §18.402. Because Section 23(a) provides that the administrative law judge is not bound by formal rules of evidence, he is not bound by FRE 702 and the decision in *Daubert*. *See Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997); *see also Olsen v. Triple A Machine Shops, Inc.* 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, Nos. 91-70642, 92-70444 (9th Cir. 1993); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). Accordingly, we reject employer's argument that Dr. Hutchinson's deposition is inadmissible under FRE 702.

An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if the challenging party shows them to be arbitrary, capricious, or an abuse of discretion. *See, e.g., Patterson v. Omniplex World Services,* 36 BRBS 149 (2003); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). In his order, the administrative law judge found that employer's contentions regarding Dr. Hutchinson's opinion go to its weight and not its admissibility. The opinion of Dr. Hutchinson, claimant's treating cardiologist, as to the cause of claimant's cardiac condition, moreover, is evidence which the administrative law judge should admit into the record, inasmuch as he has a duty under the Act to fully inquire into matters at issue and receive into evidence all material testimony and documents. *See Olsen*, 25 BRBS 40; 20 C.F.R. §702.338. Accordingly, we hold that the administrative law judge properly denied employer's motion to strike the

deposition testimony of Dr. Hutchinson. *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 89 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

Alternatively, employer argues that claimant did not present substantial evidence to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), that claimant's atrial fibrillation is related to his back injury. Employer asserts that the only evidence is Dr. Hutchinson's speculative opinion and the coincidence that claimant's first episode of atrial fibrillation was preceded by an epidural steroid injection in claimant's back the previous day. In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed that could have caused or aggravated the harm. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Claimant's theory as to how the harm occurred must go beyond "mere fancy." *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Harm occurring as a result of treatment for a work injury is compensable. *Everett v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 316 (1989).

In his decision, the administrative law judge found it undisputed that claimant sustained a work-related back injury, and he stated that the medical evidence was sufficient to invoke Section 20(a) to presume that claimant's initial episode of atrial fibrillation was triggered by an epidural steroid injection for claimant's back condition. Decision and Order at 6. In this regard, Dr. Hutchinson opined it is "much more likely than not," that claimant's initial episode of atrial fibrillation was either triggered by lower back pain and pain inherent to receiving an epidural injection or to increased salt and water retention from the steroid injected into claimant's back. CX 18 at 43; *see id*. at 37-47, 64; *see also* CX 17 at 1. Dr. Hutchinson knew of no medical literature to support his opinion, but he stated that pain and salt and water retention are well-accepted causes of high blood pressure, and that hypertension is a cause of atrial fibrillation. CX 18 at 7, 39-41, 59-61. Dr. Hutchinson also stated that he has witnessed epidural injections triggering hypertension and causing a heart attack. *Id*. at 44, 78-79. Dr. Hutchinson is a board-certified cardiologist. *Id*. at 54. Based on this record, we hold that Dr. Hutchinson's opinion is substantial evidence supporting the administrative law judge's finding that claimant invoked the Section 20(a) presumption that his cardiac condition is related to the work injury. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd,* 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

Employer next challenges the administrative law judge's finding that there is no evidence to rebut the Section 20(a) presumption, and that, based on the record as a whole, the weight of the evidence supports claimant's contention that his cardiac contention was triggered by an epidural steroid injection prescribed for claimant's work-related back injury. Once claimant has established his *prima facie* case, Section 20(a) of the Act

provides him with a presumption that his injury is causally related to his employment; the burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's injury was not caused by his employment. *See Ortco Contractors Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1999). If the administrative law judge finds the Section 20(a) presumption rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 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. *Id.*; *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In weighing the evidence in his decision, the administrative law judge credited claimant's testimony that he did not have a history of hypertension or heart problems, which the administrative law judge found was supported by claimant's acceptance as a blood donor a few months prior to the onset of his cardiac condition. Tr. at 22-24; *see* CX 18 at 12-13. The administrative law judge also credited Dr. Hutchinson's opinion that back pain and the epidural steroid injection elevated claimant's blood pressure, which triggered claimant's initial episode of atrial fibrillation. CXs 17 at 1; 18 at 37-47. The administrative law judge found that employer's expert witness, Dr. Mioton, is no more qualified than Dr. Hutchinson,[1] Dr. Mioton's opinion that claimant sustained a lone episode of atrial fibrillation was equivocal insofar as the doctor also thought that the probability was low that claimant's cardiac condition was related to claimant's back injury, and Dr. Mioton could offer no alternative explanation to explain the onset of claimant's atrial fibrillation. Decision and Order at 6-7; *see* EX 16 at 8-9, 18-22.

In rendering his decision the administrative law judge is entitled to weigh the evidence and assess the credibility of all witnesses, including doctors, and may draw his own inferences and conclusions from the evidence. *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). In his decision, the administrative law judge addressed the relevant medical evidence of record and concluded that claimant met his burden of establishing that his cardiac condition is related to his work injury. The Board is not empowered to reweigh the evidence, *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), and the administrative law judge rationally credited Dr. Hutchinson's opinion over that of Dr. Mioton. Dr. Hutchinson's opinion constitutes substantial evidence that claimant's cardiac condition is

[1] Both are board-certified cardiologists.

related to his work injury. Accordingly, we affirm the administrative law judge's finding that claimant established a compensable cardiac condition.[2]

Employer also challenges the continuing award of compensation for temporary total disability. Employer argues that the opinions of Drs. Hutchinson and Mioton establish that claimant is able to work, and that it identified suitable alternate employment within claimant's work restrictions. Claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1980). In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. *See, e.g., Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). In his decision, the administrative law judge found that claimant's cardiac condition has not reached maximum medical improvement based on Dr. Hutchinson's opinion that claimant would have to remain symptom free for a year before he would revise claimant's work restrictions. CX 18 at 73-74. The administrative law judge found there is no evidence that claimant is able to return to his former employment as a welder due to his work injuries. These findings are not challenged on appeal.

Once claimant has established a *prima facie* case of total disability, the burden shifts to employer to establish the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing and which he could realistically secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F. 2d 1031, 14 BRBS 156 (5th Cir. 1981). The administrative law judge credited Dr. Hutchinson's opinion that claimant is currently unable to drive or work for fear of injury to himself or others while experiencing atrial fibrillation. Decision and Order at 8; *see* CXs 17 at 58; 18 at 70, 74. Claimant's episodes occur unpredictably and affect claimant's ability to stand or walk. The administrative law judge found that Dr. Mioton deferred to Dr. Hutchinson's opinion as to claimant's disability status. *See* EX 16 at 33. The administrative law judge thus concluded that employer failed to establish the availability of suitable alternate employment.

If the administrative law judge finds that claimant cannot perform any employment, employer has not established the availability of suitable alternate

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[2] Inasmuch as we affirm the administrative law judge's finding, based on the record as a whole, that claimant established a compensable injury, any error in the administrative law judge's finding that Dr. Mioton's opinion did not rebut the Section 20(a) presumption is harmless. *See Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT) (employer is not required to "rule out" the possibility of a causal connection in order to rebut the Section 20(a) presumption).

employment. *Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom.*, *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *see also Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT). In this case, the administrative law judge found, based on Dr. Hutchinson's testimony, that claimant is unable to perform any work until his cardiac condition stabilizes. Inasmuch as the administrative law judge's finding is supported by substantial evidence, we affirm the administrative law judge's finding that claimant is unable to work, and his continuing award of compensation for temporary total disability. *Id.*

Accordingly, the administrative law judge's Order and the Decision and Order Awarding Benefits are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge