BRB No. 01-0320

LARRY HAND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE PORT TERMINALS	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Edward E. Boshears, Brunswick, Georgia, for claimant.

G. Mason White (Brennan, Harris & Rominger LLP), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-2939) of Administrative Law Judge Jeffrey Tureck 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 9, 1997, claimant injured his right shoulder and stomach when he jumped down from a 12-foot roll of paper during the course of his employment for employer. MRI

testing showed a massive rotator cuff tear, for which claimant had surgery on April 16, 1997. Claimant also underwent a bilateral hernia repair on May 1, 1997. Claimant was subsequently diagnosed with tinnitus, which claimant alleged commenced upon his taking pain medication after his surgeries. Claimant required a second shoulder surgery on April 8, 1998, to remove scar tissue and repair another rotator cuff tear. On October 13, 1998, claimant's treating physician for his shoulder condition, Dr. Morales, reported that claimant's shoulder had reached maximum medical improvement. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from March 28, 1997, to December 3, 1998. Claimant returned to work for employer driving a forklift on December 4, 1998. On claimant's third day of work, claimant told his supervisor that he was unable to work due to right shoulder and arm pain; claimant was told to stop working. Claimant did not return to work for employer. On April 26, 1999, claimant obtained employment as a woodworker.

In his decision, the administrative law judge found that claimant failed to establish that his tinnitus is related to his taking pain medications for the shoulder injury. The administrative law judge also determined that claimant was able to return to his usual employment as a crane operator on December 4, 1998. Accordingly, the administrative law judge denied additional benefits.

On appeal, claimant challenges the administrative law judge's denial of medical benefits for tinnitus and compensation for claimant's shoulder injury. Employer responds, urging affirmance.

Claimant first contends the administrative law judge erred by finding that claimant's tinnitus is not related to pain medication taken for the work-related shoulder injury, as employer failed to rebut the Section 20(a) presumption, 33 U.S.C. §920(a), linking claimant's tinnitus to his employment. At the formal hearing, claimant asserted that his tinnitus is related to his taking Vicodin and Endocet for pain from his shoulder surgeries, and that the tinnitus is therefore a work-related injury. 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 Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Where claimant has established his *prima facie* case, Section 20(a) of the Act 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 Brown v. Jacksonville Shipyards, Inc.*, 893 F.3d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *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 generally Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In the instant case, the administrative law judge found Dr. Friedrich's testimony insufficient to invoke the Section 20(a) presumption. The administrative law judge found that Dr. Friedrich unequivocally opined that tinnitus is not caused by taking Vicodin or Endocet, and he credited Dr. Friedrich's diagnosis that claimant's hearing loss was caused by noise-induced high frequency hearing loss and evidence that gunshot exposure may have caused claimant's hearing loss. The administrative law judge noted there are no other medical opinions addressing the cause of claimant's tinnitus. The administrative law judge concluded that claimant failed to establish his tinnitus arose as a result of his taking pain medication for his shoulder injury.

Contrary to claimant's assertion on appeal, the record contains substantial evidence that claimant's tinnitus is not due to his taking Vicodin and Endocet. An unequivocal medical opinion severing the link between claimant's injury and his employment is sufficient evidence to rebut the Section 20(a) presumption. *O'Kelley v. Dept. of the Army/NAF,* 34 BRBS 39 (2000); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94, 96 (1988). In the instant case, the administrative law judge credited the deposition testimony of Dr. Friedrich, who is claimant's treating physician for the tinnitus. EX 7. He testified that claimant's hearing loss is due to noise-induced hearing loss, and that it is not unusual for tinnitus to be caused by gunshot exposure. EX 11 at 10. Claimant testified that he owns three guns, he formerly hunted for 43 years, and he used to shoot at targets approximately twice a month. Tr. at 58-60. Dr. Friedrich testified that tinnitus is not listed as a side effect of either Vicodin or Endocet, he has never treated a patient with tinnitus caused by taking Vicodin or Endocet, nor has he read any medical literature stating a causal relationship between tinnitus and these medications.[1] EX 11 at 9-10. Finally, Dr. Friedrich testified that Vicodin and Endocet are a combination of a narcotic with acetaminophen (Tylenol), and that there is no relationship between these ingredients and tinnitus. EX 11 at 25-27. Thus, regardless of whether the administrative law judge should have invoked the Section 20(a) presumption based on the pharmacy leaflets, *see* n.1, *supra,* the opinion of Dr.

[1]Claimant received a leaflet from the drugstore with his prescriptions. These leaflets state that ringing or buzzing in the ears is a less common side effect of the medications claimant was prescribed. EX 11 at ex. 1, 2. Dr. Friedrich could not explain the inclusion of this information on the leaflet, stating that the *Physician's Desk Reference* and the product information sheet obtained from the manufacturer of Endocet do not list tinnitus as a possible side effect.

Friedrich is sufficient to rebut the Section 20(a) presumption. *O'Kelley,* 34 BRBS 39. Moreover, the administrative law judge's ultimate conclusion, based on his weighing of the relevant evidence as a whole, that claimant failed to establish a connection between Vicodin, Endocet, and his tinnitus is supported by substantial evidence and is accordingly affirmed. *See Santoro v. Maher Terminals, Inc.,* 30 BRBS 171, 173 (1996). Thus, the administrative law judge's denial of medical benefits for claimant's tinnitus also is affirmed.

Claimant next contends the administrative law judge erred in finding that he was able to return to his usual employment as a crane operator on December 4, 1998. It is axiomatic that the Board is not permitted to reweigh the evidence but may only ascertain whether substantial evidence supports the administrative law judge's decision. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also Director, OWCP v. Jaffe New York Decorating,* 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994). Claimant bears the burden of establishing that he is unable to perform his usual work due to his work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985).

Dr. Morales stated that claimant's shoulder condition reached maximum medical improvement on October 13, 1998, and that claimant could return to work as a forklift driver or crane operator. EX 1, 2. The administrative law judge found that employer offered claimant a position as either a forklift driver or a crane operator when he returned to work on December 4, 1998, and that claimant chose the forklift driver position. EX 11 at 8-11; Tr. at 98-99. The administrative law judge found that claimant made no further effort to return to work for employer after claimant reported he was unable to perform the duties of a forklift driver due to shoulder pain. Tr. at 39, 72, 99. The administrative law judge discredited claimant's hearing testimony that he was unable to operate a forklift. The administrative law judge credited evidence that claimant did not seek treatment for shoulder pain until December 31, 1998, when Dr. Morales noted that claimant reported pain and stiffness at the end of every work day; Dr. Morales, however, neither prescribed any medication nor restricted claimant from performing his usual work. EX 4 at 35, 11 at 23, 29. The administrative law judge found, based on this evidence, that claimant's actual shoulder pain and stiffness was far less than the pain to which claimant testified at the hearing. The administrative law judge also credited Dr. Morales's reiteration, after he reviewed surveillance video tape of claimant, of his opinion that claimant could perform light to medium duty, including jobs as a forklift driver and crane operator. EX 4 at 35; EX 11 at 11.

Moreover, the administrative law judge rationally found that claimant's employment in his mother's woodworking business, constructing children's furniture, requires extensive use of claimant's right shoulder. Tr. at 40, 63, 71-72. Regarding this job, the administrative law judge found that claimant could have obtained higher paying jobs that would have put

less strain on his shoulder, EX 10, and that claimant sometimes works more than 40 hours a week, Tr. at 71-72, which the administrative law judge found "unfathomable" if claimant's shoulder was causing him significant problems, Decision and Order at 8. The administrative law judge thus concluded that claimant is capable of returning to work at his usual job as a crane operator and that claimant is not entitled to any compensation after he returned to work on December 4, 1998.[2]

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, the administrative law judge considered the record as a whole, and concluded that claimant was able to return to his usual employment on December 4, 1998. On the basis of the record before us, the administrative law judge's conclusion is rational and supported by substantial evidence. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Accordingly, we affirm the administrative law judge's denial of additional compensation.

Finally, claimant argues the administrative law judge rendered unsupported findings of fact, which, therefore, establishes bias towards claimant. We hold that claimant has failed to show that the administrative law judge was biased against him. Initially, adverse rulings, alone, are insufficient to establish bias. *See Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). In the instant case, the administrative law judge's findings regarding claimant's diligence in seeking work, Dr. Morales's belief on December 31, 1998, that claimant was working regularly, and that claimant sometimes works more than 40 hours per week as a woodworker are supported by substantial evidence. Tr. at 40, 43, 63-65, 69, 72; EX 4 at 35. Accordingly, claimant's allegation of bias is rejected.

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

[2]In the absence of any contention to the contrary, the administrative law judge found that the pay rate for the crane operator one position claimant was offered by employer on December 4, 1998, was the same as the pay claimant received on the date of injury as a crane operator three. Decision and Order at 8.

affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge