BRB No. 04-0967

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| STEVEN BARROZA | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| NAVY EXCHANGE SERVICE COMMAND | ) | DATE ISSUED: 09/20/2005 |
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| | ) | |
| Self-Insured | ) | |
| Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order – Denial of Medical Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Jay Lawrence Friedheim, Honolulu, Hawaii, for claimant.

William N. Brooks II, Long Beach, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Medical Benefits (03-LHC-564, 565, 566, 567) of Administrative Law Judge Richard T. Stansell-Gamm 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On February 15, 1989, while working for employer as an automobile mechanic, claimant experienced a sensation "like a sting or an electric shock" in his neck while

replacing a suspension strut on a vehicle. Tr. at 112. Claimant, who was subsequently diagnosed with a strain to his neck, back and shoulder, underwent treatment for about one year and his symptoms subsided. On October 18, 1993, claimant woke up with a "frozen" neck. After treatment which continued until March 1994, claimant returned to work without restrictions. In 1992 or 1993, while working part-time for employer, claimant accepted a full-time position as a supervisory security chief at an apartment complex. In January 2000, employer advised claimant that it was terminating his employment position owing to the closing of employer's naval base. Claimant had bumping rights for a full-time automobile mechanic job, but he declined this position and retired on March 1, 2000. Claimant experienced an onset of neck pain on February 16, 2000, and consulted Dr. Yamashita, a primary health physician at Kaiser, who referred him to the Department of Occupational Medicine, where claimant started seeing Drs. Fyrberg and Lau. CXs 4, 5; EX 8 at 18, 19-27. An MRI performed on May 2, 2000, revealed a C6-7 disc herniation and C3-4 and C5-6 disc bulges. CX 4 at 5; CX 8 at 9. Subsequently, Dr. Gackle became claimant's treating physician.[1] EX 8 at 4.

On January 17, 2003, claimant reported constant and worsening left-sided neck pain. On February 9, 2003, Dr. Gackle found that claimant continued to experience symptoms of decreased range of motion, muscle tenderness and radiating pain in his neck and left shoulder. EX 8 at 4, 9. Dr. Gackle diagnosed a C5-6 lesion and chronic neck pain. *Id.* at 8.

At the formal hearing held on May 13, 2003, the administrative law judge allowed Dr. Gackle to testify, despite employer's objection that claimant's notification only four days prior to the hearing of his intention to call Dr. Gackle as a witness was in violation of the administrative law judge's pre-hearing Order. Tr. at 8. The administrative law judge stated that he would therefore allow employer the opportunity to submit a post-hearing medical report. *Id.* at 9-12, 95, 98-100. Employer subsequently submitted the medical report of Dr. Ma, an orthopedic surgeon, based on his examination of claimant on July 1, 2003. EX 15. Based on three cervical x-rays which he ordered, Dr. Ma opined that claimant has a normal cervical spine.

The sole issue presented for adjudication before the administrative law judge involved whether claimant's current neck problems are causally related to his employment, thus rendering employer liable for the medical expenses associated with that condition. In his Decision and Order, the administrative law judge determined that claimant's February 1, 1989 neck injury and February 9, 1998 low back injury are work-related, that employer provided medical care for these injuries until they resolved, and that therefore no further treatment is warranted for these injuries. Next, the

[1] Dr. Gackle, who is board-certified in occupational medicine and is chief of occupational medicine at Kaiser Permanente, treated claimant in 2002 and 2003. EX 8 at 4.

administrative law judge found that claimant's October 18, 1993, neck pain incident is not related to his employment, but that employer nevertheless provided medical care for this injury until claimant returned to full duty without restrictions in May 1994, and that employer is therefore not obligated to provide any further medical benefits for this injury. 33 U.S.C. §907; Decision and Order at 40. With regard to the February 16, 2000, neck injury, the administrative law judge found that while claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that this cervical condition was work-related, employer rebutted the presumption and, based on the evidence as a whole, claimant failed to meet his burden of establishing that his present cervical condition is work-related. Accordingly, the administrative law judge denied claimant medical expenses related to his present neck condition.

On appeal, claimant challenges the administrative law judge's determination that claimant failed to establish by a preponderance of the evidence that his current cervical condition is work-related, asserting that the administrative law judge erred in giving limited weight to Dr. Gackle, claimant's treating physician, on the basis that he did not review the most recent x-rays, since x-rays are inadequate for identifying disc pathology and Dr. Gackle had the benefit of an MRI and numerous visits with claimant. In addition, claimant asserts that regardless of whether the diagnosis of a cervical disc condition was correct, claimant established that his symptoms were related to his employment. Employer responds, urging affirmance of the administrative law judge's decision. Claimant replies to employer's response, arguing that it was unreasonable for the administrative law judge to decline to fully credit Dr. Gackle's opinion on the basis that he did not review the most recent x-rays when those studies were not in existence at the time of his report or the hearing.

Where, as in the present case, claimant has established entitlement to invocation of the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. It is employer's burden on rebuttal to present substantial evidence sufficient to sever the causal connection between the injury and the employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied,* 528 U.S. 1187 (2000); *Duhagon v. Metropolitan Stevedore Co.,* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir 1999); *Bath Iron Works Corp. v. Director, OWCP [Shorette],* 109 F.2d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *O'Kelley v. Dept of the Army/NAF,* 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See 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).

In the instant case, the administrative law judge found that employer established rebuttal of the presumption and that claimant did not establish by a preponderance of the medical evidence the presence of a cervical disc abnormality. In so finding, the administrative law judge considered the pertinent medical evidence. He observed that Dr. Yamashita did not express an opinion about the relationship between claimant's February 2000 neck pain and his 1989 neck injury, and that Dr. Fyrberg, who initially provisionally diagnosed an aggravation of the 1989 injury, no longer connected the two injuries following subsequent radiographic imaging. Decision and Order at 39; CX 4 at 12. The administrative law judge reasoned that while the assessments of Drs. Fyrberg, Lau and Gackle, that claimant has an abnormal neck, are consistent with claimant's 2000 MRI study, they have a documentary shortfall in that none of the three physicians considered the most recent normal cervical studies.[2] Decision and Order at 27. Moreover, the administrative law judge stated that Dr. Gackle's opinion that claimant's 1989 neck injury never healed completely is inconsistent with the administrative law judge's finding that this injury resolved by February 1990. Decision and Order at 39. The administrative law judge then noted that Dr. Ma's opinion that claimant does not have cervical disc pathology further diminishes the validity of the other physicians' disc herniation/lesion diagnoses, as Dr. Ma had the best foundation on which to base an opinion because he reviewed the entire existing medical record and had the benefit of the most recent cervical x-rays. However, the administrative law judge found that the reliability of Dr. Ma's opinion was undercut because he did not comment on the abnormal MRI result contained in the record. Decision and Order at 27. Thus, the administrative law judge concluded that the two major medical opinions of record, those of Dr. Gackle and Dr. Ma, are flawed, resulting in an "evidentiary stand-off." Decision and Order at 38. Consequently, the administrative law judge concluded that claimant did not affirmatively establish by a preponderance of the medical evidence the presence of a cervical disc abnormality.

Having reviewed the administrative law judge's decision and the record, we reject claimant's assertion that the administrative law judge erred in his weighing of the medical evidence. The 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. *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). Moreover, it is solely within the administrative law judge's discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Thus, the Board may not reweigh the evidence or interfere with an administrative law judge's credibility determinations unless they are inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir.

[2] The administrative law judge stated that "[d]ue to the timing [of] these later x-ray studies, the absence of this consideration is understandable." Decision and Order at 27.

1978), *cert. denied*, 440 U.S. 911 (1979); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981).

As the administrative law judge's determination that claimant did not carry his burden by a preponderance of the evidence is supported by substantial evidence, we affirm his conclusion that employer is not liable for claimant's medical expenses. *See Greenwich Collieries*, 512 U.S. at 281, 28 BRBS at 48(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *Holmes v. Universal Mar. Serv. Corp.*, 29 BRBS 18 (1995) (Decision on Recon.).

Accordingly, the administrative law judge's Decision and Order - Denial of Medical Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge