BRB No. 92-1113

KATHRYN BISHOP	)	
Claimant-Petitioner	)	
v.	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
and	)	
AETNA CASUALTY AND SURETY COMPANY	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Additional Benefits of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

Jerry L. Hutcherson, Pascagoula, Mississippi, for the claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for the employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Additional Benefits (90-LHC-2804) of Administrative Law Judge Ben H. Walley 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 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 May 20, 1986, claimant, a cable puller, was injured while working for employer on a ship under construction. She alleged she heard a "snap" in her back and subsequently received medical care for thoracic back and cervical complaints from several doctors. With the exception of a one-month stint as a telephone solicitor from April until May 1989, claimant has not returned to gainful employment since her work injury. Employer voluntarily paid claimant temporary total benefits from May 21, 1986, through August 23, 1987, at a compensation rate of $192.31 per week. Claimant also developed lower back pain, and on July 14, 1989, underwent back surgery, including an extensive bilateral L5-S1 laminectomy, medial foramenotomy, and the removal of a central L5-S1 disk herniation. Claimant sought additional compensation and medical benefits under the Act, arguing that her lower back condition and resultant surgery were due to her May 20, 1986, work injury. Employer did not dispute liability for claimant's upper back and neck problems, but asserted that her lower back problems were unrelated to the work accident.

In his Decision and Order, the administrative law judge denied the claim, finding that the credible medical evidence established that claimant's lower back condition was unrelated to the work injury. Claimant appeals the denial of benefits, arguing that the administrative law judge erred in finding that her lower back injury was not causally related to the May 20, 1986, work accident. Claimant contends that the administrative law judge erred in finding that employer submitted substantial evidence to rebut the Section 20(a), 33 U.S.C. §920(a), presumption and in finding that the record, as a whole, did not support her allegation that her lower back pain was caused by the May 20, 1986, accident. Claimant asserts that she suffered a work-related injury to her lower back in that accident which resulted in permanent total or permanent partial disability and that the Board should reverse the administrative law judge's denial of benefits and award compensation and medical benefits. Employer responds, urging affirmance.

Section 20(a) provides claimant with a presumption that the injury she sustained is causally related to her employment if she establishes a *prima facie* case by showing that she suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the onset of the injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Once claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. *Id.* If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must then weigh all the relevant evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

After careful review of the record, we affirm the administrative law judge's denial of benefits, because his finding that claimant's lower back condition is not related to the work injury is rational and supported by substantial evidence in the record. *See O'Keeffe*, 380 U.S. at 359. The administrative law judge properly found that claimant was entitled to the Section 20(a) presumption, but concluded that employer submitted sufficient evidence to rebut it. In so finding, the administrative law judge relied on negative evidence, *i.e.*, claimant's failure to complain of low back pain until 9 months subsequent to the work injury, claimant's failure to seek medical treatment for lower back pain from Dr. McCloskey thereafter for ten months after her initial February 10, 1987,

complaint, and her failure to indicate lower back pain when she completed pain diagrams during her examinations by Dr. McCloskey on August 1, 1988, and Dr. Enger on August 3, 1987. Weighing the evidence as a whole, he found that the evidence did not support a finding that claimant's lower back condition is causally related to the work accident. In so concluding, the administrative law judge cited the aforementioned negative evidence. He also declined to credit the medical opinion of Dr. Crotwell, the physician who performed claimant's back surgery, that claimant's lower back problems are related to the work accident, finding it was not based on an accurate view of claimant's medical history.[1] Instead, the administrative law judge credited the contrary conclusions of Drs. Branham, Longnecker, Enger, Keating and Rutledge.

The negative evidence which the administrative law judge relied upon does not appear to be sufficient to support his finding of rebuttal.[2] Claimant's failure to initially complain of problems with her lower back alone does not provide substantial evidence to support a finding of rebuttal. *See Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d. Cir. 1989). Moreover, the fact that the pain diagrams which claimant completed for Drs. Enger and McCloskey were not indicative of lower back pain also would not appear to constitute negative evidence which is specific and comprehensive enough to establish that claimant's lower back pain was not work-related. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Nonetheless, any error which the administrative law judge may have made in this regard is harmless on the facts presented; the administrative law judge ultimately weighed all of the evidence, and the medical reports of Drs. Enger, Keating and Rutledge, which he specifically credited, support a finding that claimant's lower back problems are not related to the work injury. *See generally, Peterson v. Columbia Marine Lines*, 21 BRBS 299, 303 (1988); *Adams v. General Dynamics Corp.*, 17 BRBS 258 (1985). These reports are sufficient to rebut Section 20(a) and establish the absence of causation in the record as a whole.

Claimant argues on appeal, however, that the administrative law judge erred in crediting the opinions of Drs. Enger[3], Keating, Longnecker, and Rutledge over Dr. Crotwell's opinion because

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[1]Dr. Crotwell testified that he assumed that claimant had complained of lower back pain since the accident and he was unaware that claimant had not reported lower back pain until nine months after the accident. He attempted to explain claimant's lack of specificity regarding her lower back pain by stating that many patients cannot accurately describe their pain.

[2]In finding rebuttal, the administrative law judge also noted that Drs. Branham, Longnecker, Enger, and Keating agreed that claimant could return to her usual work as a cable puller. This evidence, however, is irrelevant to causation; it relates to whether claimant is disabled.

[3]Claimant maintains that Dr. Enger's August 4, 1987 report (EX 7) contains several inaccuracies, starting with the description of the accident as claimant indicating that she "felt something pop in her neck." Claimant asserts that prior to this report, Drs. Branham, Longnecker and McCloskey all reported that claimant felt something snap in her neck and back. Claimant also notes that Dr. Enger stated that claimant had been treated by Dr. Branham from May 1986 until August 1986 whereas she

their findings were based on the erroneous "assumption" that claimant failed to complain of lower back pain until nine months after the original accident. Claimant asserts that because the initial medical report and subsequent medical bills of Dr. Branham indicate that she received chiropractic treatment for a lumbar sprain/strain and that she exhibited a rotational malposition of L4-5 on x-ray, the administrative law judge's determination that claimant did not experience or complain of lower back pain until nine months subsequent to the subject work accident is irrational and not supported by substantial evidence.

While the administrative law judge could have reasonably inferred from Dr. Branham's diagnosis of a lumbar strain/sprain that claimant did complain of lower back pain contemporaneous with the work accident, the record does not compel this conclusion. In finding claimant failed to report any lumbar pain, the administrative law judge properly noted that the only reference to pain contained in Dr. Branham's records is thoracic spine pain. Tr. at 23; RX 4; CX 21. In any event, any error that the administrative law judge may have made in this determination is harmless on the facts presented, as his denial of the claim was not based solely on claimant's failure to complain. Rather, he evaluated all of the evidence of record, and ultimately relied upon the affirmative medical opinions of Drs. Enger, Keating, and Rutledge, each of whom after examining claimant and reviewing various medical records, specifically opined that there was no organic basis to substantiate claimant's complaints and that claimant's lower back pain was not causally related to the May 20, 1986, work accident. While the opinions of Drs. Keating and Rutledge[4] were premised on the

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actually continued to be treated by Dr. Branham, until November 12, 1986. These allegations of factual error are insignificant. Moreover, Dr. Enger did review Dr. Longnecker's reports in rendering his opinion.

Claimant also alleges error in Dr. Enger's reporting that claimant was asymptomatic as regard to the lower back region, asserting that Dr. Enger was apparently unaware of Dr. McCloskey's April 7, 1987, discharge summary in which he noted that the myelogram showed evidence of a small disc herniation at L5, possibly explaining some mild low back pain that she was having. Dr. Enger, however, specifically considered the results of the April 1987 myelogram referred to in Dr. McCloskey's discharge summary. Moreover, Dr. Enger was referring to the results of his own examination when he reported that claimant was asymptomatic. Although claimant also asserts that Dr. Enger's determination that claimant could return to work very shortly as nothing objective had been found in her case is in direct conflict with Dr. McCloskey's findings as her treating physician that she was not going to be able to return to her usual work and should not attempt to do anything more than light work, we need not reach this argument as it relates to disability.

[4]Claimant challenges Dr. Keating's finding that "the only evidence to date that she might have something wrong" is an incidental finding on a lumbar myelogram that showed a possible L5-S1 herniation of the disk; however, her history as well as her clinical exam does not correspond to any problem in that area. EX 8. Claimant asserts that in so concluding Dr. Keating apparently did not have the benefit of the reports of Drs. Branham and McCloskey which indicate that claimant had been complaining of back pain since immediately after her injury. Claimant raises essentially the

assumption that claimant did not complain of back pain until nine months subsequent to the work accident, Dr. Enger's opinion was not. Moreover, when Dr. Rutledge was presented with Dr. Branham's medical reports at his deposition, he specifically stated that his opinion that claimant's lower back problems were unrelated to the work accident remained unchanged. Thus, the opinions of Drs. Rutledge and Enger provide substantial evidence to support the administrative law judge's denial of benefits in this case regardless of when claimant first complained of lower back pain. As claimant has failed to raise any reversible error made by the administrative law judge in weighing the conflicting medical evidence and making credibility determination, his denial of benefits based on claimant's failure to establish causation in this case is affirmed. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

Accordingly, the Decision and Order Denying Additional Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

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same argument with regard to Dr. Rutledge. Both of these doctors specifically considered the myelogram results and were unable to find any organic basis to substantiate claimant's lower back complaints.