U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0317

SHARON P. CANIELY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	DATE ISSUED: 04/12/2019
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Denying Benefits and the Decision and Order Upon Reconsideration on Remand – Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Charlene A. Morring (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Lawrence P. Postol (Postol Law Firm, P.C.), McLean, Virginia, for self-insured employer.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Barry Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand – Denying Benefits and the Decision and Order Upon Reconsideration on Remand – Denying Benefits (2013-LHC-01208) of Administrative Law Judge Alan L. Bergstrom 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case is before the Board. On December 1, 2012, claimant was working for employer as a longshoreman when she hit the inside of her left knee with a 10-15 pound iron twistlock while removing it from a crane. EXs 2; 3; 23 at 12, 15. Claimant testified that she felt pain but not enough to stop working. EX 23 at 15. She reported the incident to employer that day. EX 2. Later that evening, claimant went to the hospital complaining of left medial knee pain, which she rated as a six on a scale of zero to ten. EX 12 at 1, 3. Claimant was diagnosed with a "left knee contusion," prescribed Motrin and Vicodin, and released.[1] *Id*. at 2.

Claimant took eight days off from work after the accident, but returned to her full-duty work on December 10, 2012, and worked until December 16, 2012. EX 24. On December 17, 2012, due to continued left knee pain aggravated with walking, claimant treated with Dr. Wardell, an orthopedic surgeon. Dr. Wardell observed mild swelling and medial joint line tenderness; he diagnosed "internal derangement [of the] left knee," and prescribed physical therapy. CX 11 at 45; EX 13 at 1. Dr. Wardell excused claimant from work as he felt she was unsafe to return because of her knee symptoms. CX 11 at 21; EX 13 at 1. Due to ongoing pain, claimant underwent an MRI on February 26, 2013, which showed "articular cartilage damage over the medial femoral condyle, medial tibial plateau and medial meniscus tear." EX 13 at 2. Claimant underwent arthroscopic knee surgery in April 2013. *Id.* at 29. She continued to treat with Dr. Wardell, and she returned to full-duty work on June 20, 2013. EXs 23 at 23-24; 24.

[1] The hospital report noted there was no swelling, and an x-ray of her knee was negative. EX 12.

Employer initially accepted the injury as compensable and paid claimant temporary total disability benefits beginning December 17, 2012. It terminated those benefits on January 29, 2013, relying on the January 28, 2013 opinion of Dr. Ross, who stated there was no relationship between claimant's knee complaints and the work incident and claimant could return to work. EXs 1; 14 at 8. Employer filed a notice of controversion on January 30, 2013. EX 8.

Claimant argued before the administrative law judge that her left knee symptoms and torn meniscus were causally related to the December 1, 2012, work incident. She alternatively claimed that the work-related meniscus tear aggravated a preexisting knee condition. Employer asserted that, even if claimant suffered a work-related injury on December 1, 2012, the injury resolved, and the incident did not cause claimant's meniscal tear and resulting disability.

The administrative law judge found claimant established a harm based on her credible complaints of pain and the diagnoses of a left knee contusion and meniscal tear. As employer did not dispute that claimant struck her knee with a twistlock on December 1, 2012, and Dr. Wardell attributed claimant's knee condition to this incident, the administrative law judge found claimant established the occurrence of a work accident that could have caused her knee injury. Claimant thus established both elements of her prima facie case, and the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption.

Finding the opinions of Drs. Ross and O'Connell unpersuasive, the administrative law judge found employer did not rebut the presumption and that claimant's injury therefore is compensable as a matter of law. Decision and Order at 29-31. Further finding that claimant established she could not perform her usual employment between December 17, 2012 and June 19, 2013, and that employer did not offer any evidence of suitable alternate employment, the administrative law judge awarded benefits under the Act. 33 U.S.C. §§907, 908(b); Decision and Order at 36-37.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's invocation of the Section 20(a) presumption, but vacated his finding that the opinions Drs. Ross and O'Connell do not rebut because the administrative law judge assessed their persuasive value rather than whether they constitute substantial evidence that claimant's injury is not work-related. As the administrative law judge did not weigh the evidence as a whole, the Board vacated his finding that claimant's injury is compensable and remanded the case for further consideration. The Board directed the administrative law judge to reconsider whether employer rebutted the presumption and, if so, to weigh the evidence on the record as a whole. *Caniely v. Ceres Marine Terminals, Inc.*, BRB No. 15-0230, slip op. at 5-6 (Feb. 11, 2016).

On remand, the administrative law judge found claimant's knee contusion compensable as a matter of law because no physician opined that it was unrelated to the December 2012 work injury. Decision on Recon. at 6.[2] However, as Drs. Ross and O'Connell opined that claimant's left knee arthritis, pain, and meniscus tear were not caused or aggravated by the work incident, the administrative law judge found their opinions rebut the presumption that claimant's left knee internal derangement and meniscus tear are work related. Further finding Dr. Wardell's opinion insufficient to establish that the work injury caused claimant's meniscus tear or arthritis, the administrative law judge found the conditions not compensable. Decision on Recon. at 15. As the record contained no evidence that claimant was unable to work due to her compensable knee contusion, the administrative law judge awarded only medical benefits for this condition.

Claimant appeals the administrative law judge's decision; she filed her appeal and supporting brief on April 16, and May 29, 2018, respectively. Claimant challenges the administrative law judge's findings that employer rebutted the Section 20(a) presumption and that Dr. Wardell's opinion does not establish on the record as a whole that there is a causal relationship between her meniscus tear and the work incident. Employer responds, urging affirmance.

On August 15, 2018, claimant filed a motion to remand the case for adjudication by a different administrative law judge pursuant to *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. ___, 138 S. Ct. 2044 (2018). Employer and the Director, Office of Workers' Compensation Programs (the Director), filed separate responses, urging the Board to reject claimant's motion on the ground that her Appointments Clause argument was untimely. We agree. Claimant did not raise any issue concerning the administrative law judge's appointment in her initial petition for review to the Board, and thus forfeited her

[2] On July 14, 2017, the administrative law judge issued a "Decision and Order on Remand – Denying Benefits," in which he found "Claimant's counsel did not submit a written argument or brief on remand," and stated he would consider the issues raised in claimant's post-hearing brief. Decision on Remand at 3. Although claimant's counsel submitted a written brief on September 23, 2016, it had been misfiled. On July 31, 2017, claimant moved for reconsideration based on the mistaken fact that her counsel failed to submit a written brief on remand. On August 16, 2017, pursuant to 20 C.F.R. §18.94(a) the administrative law judge issued an Indicative Ruling stating that the substantive issues claimant raised in her brief on remand were considered in rendering his Decision on Remand. On March 23, 2018, the administrative law judge issued a "Decision and Order Upon Reconsideration on Remand – Denying Benefits" (Decision on Recon.) that is substantially similar to the July 2017 Decision on Remand.

Appointments Clause argument. *Lucia*, 138 S. Ct. at 2055 (relief available to party who makes "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [the] case"); *see Motton v. Huntington Ingalls Industries, Inc.*, 52 BRBS 69 (2018); *Luckern v. Richard Brady & Associates*, 52 BRBS 65 (2018). Consequently, we deny claimant's motion to remand the case pursuant to *Lucia*.

We next address claimant's challenge to the administrative law judge's findings on the merits of the case. Upon invocation of the Section 20(a) presumption, the burden shifts to the employer to rebut it with substantial evidence that the claimant's condition was not caused or aggravated by the accident at work. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). If the administrative law judge finds the Section 20(a) presumption rebutted, it no longer controls, and the issue of causation must be resolved on the record as a whole with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge found the opinions of Drs. O'Connell and Ross sufficient to rebut the presumption that claimant's left knee internal derangement and meniscus tear are due, at least in part, the December 1, 2012 incident. Decision on Recon. at 9, 11. These doctors stated that claimant's conditions are due to pre-existing osteoarthritis and are unrelated to the work incident. CX 1 at 4; EX 29 at 2. In challenging the administrative law judge's finding, claimant asserts the opinions of Drs. Ross and O'Connell are not well-reasoned and thus insufficient to rebut the presumption.

We reject claimant's assertion. Employer's burden on rebuttal is one of production, not persuasion. *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT). Drs. Ross and O'Connell attributed claimant's meniscus tear to pre-existing arthritis and not to the 2012 work incident. CX 1 at 4; EX 29 at 2. The administrative law judge's finding that their opinions are sufficient to rebut the Section 20(a) presumption is supported by substantial evidence and in accordance with law. *Bath Iron Works Corp. v. Director, OWCP*, 137 F.3d 673, 674-75, 32 BRBS 45, 46(CRT) (1st Cir. 1998) (physician opinion stated with reasonable degree of medical certainty sufficiently rebuts the presumption); *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT) (evidence "casting doubt on the causative link between [work incident] and [injury]" sufficient "as a matter of law" to "drop presumption from case"). Claimant thus bears the burden of persuasion based on the record as a whole. *Id.*, 126 F.3d at 262, 31 BRBS at 124(CRT).

We further reject claimant's assertion that the administrative law judge erred in finding Dr. Wardell's opinion innately insufficient to meet her burden. While the administrative law judge may have inartfully stated that Dr. Wardell's opinion did not

"outweigh" the counter-opinions of employer's experts, he plainly determined the facts undermined Dr. Wardell's opinion on its face without the need to reference employer's experts.

The administrative law judge noted Dr. Wardell provided "no rationale as to how his diagnosis of 'internal derangement of the knee'" related to the work-related injury other than claimant's statement and the existence of the injury itself. Decision on Recon. at 14. The administrative law judge further found claimant's statement to Dr. Wardell, which he characterized "as the only evidence [she] twisted her knee," belied by her other reports of a "glancing strike" by the twist lock. *Id.* Claimant's behavior and symptoms further "clouded" her account: he noted she continued to work after the incident and waited sixteen days before seeing Dr. Wardell for the first time. *Id.* Although Dr. Wardell stated that claimant's symptoms shortly after the accident were consistent with a tear caused by trauma, he also stated swelling usually manifests within three to six days of an acute meniscus tear. Because he did not explain why claimant's symptoms would present so much later than is usual, the administrative law judge reasonably questioned whether claimant may have twisted her knee outside of work or in the period after the work incident before she first sought treatment. *Id.*; EX 13 at 1.

After earlier noting Dr. Wardell's concessions that a significant number of people have meniscus tears without trauma and that a person of claimant's height and weight could have a degenerative meniscus tear caused by osteoarthritis, Decision on Recon. at 12, the administrative law judge concluded:

> [the] reasonable inference [of a possible other incident based on claimant's behavior and symptoms], the inconsistent injury event statement to Dr. Wardell from all other earlier statements by the Claimant to her supervisor and examining medical personnel, and Dr. Wardell's reliance on a self-reported twisting knee injury undermines the weight to be given Dr. Wardell's medical opinion that the December 1, 2012 work-related twist lock striking injury caused the Claimant's left knee medical meniscus tear.[3]

[3] The record thus does not support the dissent's view that the administrative law judge decided the issue "solely on the basis" that employer's experts outweighed claimant's, or that the administrative law judge relied on a separate speculative incident to explain the tear. Rather, for rational reasons, he simply did not credit claimant's expert. The administrative law judge's decision thus does not rest on his unexplained "crediting" of the employer's experts as the dissent claims; it is not the employer's burden to establish what caused the meniscus tear.

Id. at 14. He thus discredited Dr. Wardell's opinion. As claimant offered no other opinion in support of her claim, the administrative law judge found she could not "establish by a preponderance of the evidence" that the work-related incident caused her meniscus tear. *Id.*

The administrative law judge is entitled to weigh the evidence of record and to draw reasonable inferences therefrom. The Board is not empowered to reweigh the evidence or to disregard his findings on the basis that the evidence could support other inferences or conclusions.[4] *Pittman Mechanical Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.2d 122, 28 BRBS 89(CRT) (4th Cir. 1994). As claimant bears the burden of persuasion on the record as a whole and the administrative law judge permissibly found Dr. Wardell's opinion insufficient to meet claimant's burden, we affirm the administrative law judge's finding that claimant did not establish a causal relationship between her left knee derangement and meniscus tear and the December 1, 2012 work incident.[5] *Moore*, 126 F.3d at 262, 31 BRBS at 124(CRT).

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[4] We reject claimant's assertion that the administrative law judge erred in failing to consider her testimony in weighing the evidence as a whole. Although claimant testified to experiencing increased knee pain since the work accident, she did not claim that the work incident aggravated her pre-existing arthritis independent of its having caused the meniscus tear on December 1, 2012. Further, she did not discuss the onset of swelling in her knee.

[5] We disagree with our dissenting colleague's opinion that another remand is necessary for a reweighing of the evidence and additional explanation. First, the administrative law judge's decision not to credit Dr. Wardell's causation opinion on its face when weighing the record as a whole rendered the contrary opinions of Ross and O'Connell immaterial. Although the administrative law judge did not weigh employer's evidence against claimant's evidence, he found her affirmative evidence insufficient based on flaws in Dr. Wardell's opinion, the only opinion supportive of the claim. Nothing in the opinions of Drs. Ross and O'Connell, who attributed the tear to pre-existing arthritis, helps claimant meet her burden. The persuasiveness of employer's evidence thus cannot be determinative because -- even if the administrative law judge fully discredited their opinions -- the evidence of record would be in equipoise and claimant could not satisfy her burden of proof. *Greenwich Collieries,* 512 U.S. at 276, 281, 28 BRBS at 46, 48(CRT) (proponent of an order "has *both* the 'burden of proceeding with the introduction of evidence and the burden of proof" so "when the evidence is evenly balanced, the benefits claimant must lose"); *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 241, 45 BRBS 67, 70(CRT) (4th Cir. 2011) (once the administrative law judge determined "the evidence was 'equally probative,' the claimant failed to meet his burden of proof"); *see Santoro,* 30

Accordingly, the administrative law judge's Decision and Order on Remand – Denying Benefits and the Decision and Order Upon Reconsideration on Remand – Denying Benefits are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting in part:

I agree that claimant forfeited her Appointments Clause argument by failing to raise it in her initial petition for review. *See Lucia v. Sec. & Exch. Comm'n*, 585 U.S. ___, 138 S. Ct. 2044, 2055 (2018) (relief available to party who makes "a timely challenge to the

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BRBS 171 ("at best, the evidence is in equipoise, and the determination that opposing evidence warrants equal weight is enough to defeat claimant's claim").

Second, the dissent's reweighing of the administrative law judge's assessment of the record and Dr. Wardell's opinion exceeds our statutory scope of review. An administrative law judge's credibility findings "may not be disregarded on the basis that other inferences might have been more reasonable," *Newport News Shipbuilding & Dry Dock v. Tann*, 841 F.2d 540, 543, 21 BRBS 10, 16(CRT) (4th Cir. 1988); instead, we must uphold findings supported by "substantial evidence." 33 U.S.C. §921(b)(3). "Substantial evidence is more than a mere scintilla;" it is "evidence a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). While another trier-of-fact may have made different inferences regarding the ambiguity of Dr. Wardell's opinion, and the significance of claimant's symptoms and behavior after the injury, we cannot say the conclusions the administrative law judge drew from them were "inherently incredible or patently unreasonable." *Cordero v. Triple A. Mach. Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978). Thus, our review is satisfied. *Id.* Moreover, the dissent's argument that the administrative law judge's analysis does not accurately reflect the record is not raised by claimant. *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66, 69 n.3 (1992) (Stage, C.J., dissenting) (Board will not address issues not raised).

constitutional validity of the appointment of an officer who adjudicates [the] case"); *Motton v. Huntington Ingalls Industries, Inc.*, 52 BRBS 69 (2018); *Luckern v. Richard Brady & Associates*, 52 BRBS 65 (2018). I also agree that the opinions of Drs. Ross and O'Connell satisfy employer's burden to rebut the Section 20(a) presumption. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). I disagree, however, with the decision to affirm the administrative law judge's finding that claimant failed to establish the work-relatedness of her left knee meniscus injury on the record as a whole.

An administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). Remand is required, however, where such findings are unsupported by the evidence in the record, *Director, OWCP v. General Dynamics Corp. [Fantucchio]*, 787 F.2d 723, 18 BRBS 88(CRT) (1st Cir. 1986); *Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005), or where the decision lacks sufficient detail to allow a reviewing court to determine whether the underlying reasoning is proper. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 384, 28 BRBS 96, 106(CRT) (4th Cir. 1994).

Claimant injured her left knee on December 1, 2012, when she was struck by 10-15 pound iron twistlock while removing it from a crane. EXs 2; 3; 23 at 12, 15. She reported the accident, went to the emergency room that evening due to left knee pain, and remained off work for the next eight days. EXs 2; 12; 24. Although claimant returned to work between December 10 and 16, 2012, she sought treatment from Dr. Wardell, an orthopedist, on December 17, 2012, due to continuing pain. CX 4. Dr. Wardell observed swelling and tenderness and instructed claimant to remain off work and begin physical therapy. *Id*. Claimant underwent an MRI on February 26, 2013 because her pain had not improved; it revealed, among other things, a medial meniscus tear requiring surgery. *Id*. After Dr. Wardell performed the surgery in April 2013, claimant returned to full-duty work on June 20, 2013. CX 4; EXs 23 at 23; 24. Relevant to this appeal, Dr. Wardell attributed claimant's meniscus tear to her December 1, 2012 work accident, while Drs. Ross and O'Connell, employer's experts, opined that the tear was due to her preexisting osteoarthritis. CXs 2; 3; 11; EXs 29; 30.

In his initial decision, the administrative law judge found the opinions of employer's experts insufficient to rebut the Section 20(a) presumption that claimant's injury was caused by her work accident and, therefore, awarded benefits without weighing the evidence as a whole. Decision and Order at 29-31. On employer's appeal, the Board remanded the claim because the administrative law judge applied an improper standard for

determining whether employer rebutted the presumption. *Caniely v. Ceres Marine Terminals, Inc.*, BRB No. 15-0230, slip op. at 5-6 (Feb. 11, 2016).

On remand, the administrative law judge found that employer rebutted the Section 20(a) presumption and, purportedly weighing the evidence as a whole, denied benefits solely on the basis that "the medical opinion of Dr. Wardell on causation . . . does not outweigh the opinions of Dr. Ross or Dr. O'Connell on the degenerative causation of the medial meniscus tear." Decision on Recon. at 14. The administrative law judge did not, however, provide any reason for his decision to credit the opinions of employer's experts or explain why their opinions are more credible than Dr. Wardell's. *Id*. at 11-14. This finding is undermined by the fact that, in weighing this evidence in his initial decision, he specifically found the opinions of Drs. Ross and O'Connell unpersuasive and speculative. Decision and Order at 29-31. On remand, he did not provide any reason for now finding their opinions credible.

Because the administrative law judge did not provide any reason for finding employer's experts more credible than Dr. Wardell, or otherwise explain how their unpersuasive and speculative opinions now merit weight, his finding that claimant failed to establish that her work accident caused her meniscus tear cannot be affirmed. *See*, 36 F.3d at 384, 28 BRBS at 106(CRT); 5 U.S.C. §557(c)(3)(A) (every adjudicatory decision must include a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record").

The majority does not dispute that the basis for the denial of benefits, i.e., crediting the opinions of employer's experts over that of Dr. Wardell, is wholly unexplained. It nevertheless affirms the denial of benefits, reasoning that the opinions of Drs. Ross and O'Connell are "immaterial" and the administrative law judge provided a permissible reason for rejecting Dr. Wardell's opinion. As to the first argument, employer's medical experts' opinions are not irrelevant, as they bear directly on the question of what caused claimant's meniscus tear. *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT) (internal quotations omitted) (where employer rebuts the presumption, "the issue must be resolved upon the whole body of proof *pro and con*") (emphasis added). As to the second argument, the reason the administrative law judge provided for discrediting Dr. Wardell's opinion – that a subsequent non-work-related traumatic event could have caused claimant's meniscus tear – is purely speculative and unsupported by any evidence in the record. Decision on Recon. at 14.

The opinions of Drs. Ross and O'Connell, when considered in conjunction with that of Dr. Wardell, make clear that the medical dispute in this case is whether claimant's December 1, 2012 work accident or her preexisting osteoarthritis caused her meniscus tear, not whether she suffered an intervening non-work-related traumatic injury "on or after

December 11, 2012" as speculated by the administrative law judge. No doctor opined that a second traumatic event caused claimant's meniscus tear, and no evidence of record suggests that such an event occurred.[6] Dr. Ross opined that claimant's MRI "revealed degenerative tearing of the medial meniscus" caused by naturally occurring degenerative changes due to osteoarthritis, but he did not address whether the tear predated the December 1, 2012 work accident. EX 29. Dr. O'Connell concluded that claimant's meniscus tear was degenerative in nature and specifically opined that it predated the work accident.[7] EX 30 at 9-10, 13-16. Thus, although employer's medical experts disagree that claimant's injury is work-related, their attribution of that injury to a degenerative condition, especially Dr. O'Connell's opinion that the tear predated the work accident, directly conflicts with the administrative law judge's speculation that the injury might have been caused by a subsequent traumatic event. Further, the administrative law judge did not resolve the inconsistency between his speculation that claimant suffered a second traumatic injury and his unexplained crediting of employers' experts that the meniscus tear is due to degenerative causes (and thus not a traumatic event).[8] Decision on Recon. at 14-15.

[6] This is not a case where the claimant waited a significant period of time to report and seek treatment for an alleged workplace injury. She sought medical treatment on December 1, 2012, the same day as her work accident, and stayed off work for the next eight days. Although she thereafter returned to work for one week, she sought treatment with Dr. Wardell on December 17, 2012 due to continuing pain. Dr. Wardell explained that the December 1, 2012 emergency room reports of pain and an absence of swelling, as well as his December 17, 2012 finding of swelling, are consistent with claimant having torn her meniscus in the December 1, 2012 work accident. CX 11 at 27-31. Although patients "usually" appear in the office with swelling between three and six days from the date of injury, he maintained that claimant's meniscus tear, including the swelling he observed on December 17, 2012, was due to her work injury, reasoning that "[claimant] had progressive pain or the progressive onset of symptoms and eventually had to come in to see me because of the pain." *Id*. at 31.

[7] Dr. O'Connell described claimant's condition as "a preexisting degenerative tear in the meniscus" that was caused by "normal wear and tear." EX 30 at 16.

[8] Contrary to the administrative law judge's additional findings, Dr. Wardell did not state that the cause of claimant's left knee meniscus tear would be degenerative absent a twisting trauma to her knee. *See* Decision on Recon. at 14; *cf.* CX 11 at 35-36 (Wardell deposition hypothesizing that any meniscal tear in claimant's right knee would be degenerative rather than trauma-related because the difference between claimant's left and right knees is the "history of trauma"). Further, Dr. Wardell stated that direct blow injuries can damage knee cartilage, CX 2, and did not deviate from his opinion that claimant tore

Because the administrative law judge discredited Dr. Wardell's opinion based on a hypothetical traumatic event that has no support in the record, that finding cannot be affirmed.[9] *Fantucchio*, 787 F.2d 723, 18 BRBS 88(CRT); *Lynch*, 39 BRBS 29.

The administrative law judge's decision to give greatest weight to employer's experts and his speculation concerning an intervening traumatic injury is not merely inartful, it is in error. I therefore would vacate his finding that claimant failed to establish causation on the record as a whole and remand the case for him to properly weigh the evidence and set forth the rationale for his conclusions as required by the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A).

Consequently, I dissent.

GREG J. BUZZARD
Administrative Appeals Judge

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her meniscus in the work incident, despite acknowledging that he initially incorrectly documented it as involving both a direct blow and twisting event. CX 11 at 25-26.

[9] As discussed, the majority holds that the administrative law judge's error in giving more weight to employer's experts is harmless because he provided a valid reason for discrediting Dr. Wardell's opinion. *See infra* at pp. 6-7. Thus, the errors identified in this dissent regarding the weighing of Dr. Wardell's opinion are not being raised *sua sponte* as the majority suggests; their consideration is necessitated by the majority's holding that the administrative law judge's weighing of that evidence is supported by the record and remedies his other errors. Further, claimant asserts in her petition for review that the administrative law judge erred in giving greater weight to employer's experts in light of his prior finding that their opinions are unpersuasive and speculative. Claimant's Brief at 22, 24. She also sets forth an argument as to why he erred in failing to give more weight to Dr. Wardell's opinion that her onset of progressively worsening symptoms is consistent with her work injury, despite the time between the date she first sought treatment in the emergency room on December 1, 2012 and her initial visit with Dr. Wardell on December 17, 2012. *Id*. at 26, 29; *see* CX 11 at 27-31. I therefore disagree with any suggestion that claimant did not adequately raise the issue before the Board. *See* 20 C.F.R. §802.211(b) (requiring petitioner to raise an argument with respect to the issues to be considered, including references to the evidence on which she relies, legal authorities that support her position, and a short conclusion of the relief sought).