BRB No. 05-0252

DENISE ROSE MCDUFFIE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EAGLE MARINE SERVICES	)	DATE ISSUED: 02/01/2006
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Specifying Issues for Trial, Remedies Under the Longshore Act, and Form and Scope of Exhibits and the Decision and Order Denying Benefits of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Denise Rose McDuffie, Carson, California, *pro se*.

Michael D. Doran (Samuelsen, Gonzalez, Valenzuela & Brown), San Pedro, California, for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Specifying Issues for Trial, Remedies Under the Longshore Act, and Form and Scope of Exhibits and the Decision and Order Denying Benefits (2003-LHC-00201) of Administrative Law Judge Anne Beytin Torkington 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). In an appeal by a claimant without counsel, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law 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). If they are, they must be affirmed.

Claimant sustained injuries as a result of a collision in the course of her part-time work for employer as a UTR driver. Employer voluntarily paid temporary total disability

and medical benefits from November 6, 2001, until April 29, 2002, when Dr. Malekafzali opined that claimant's work-related conditions, *i.e.*, a contusion of the lumbar spine, a cervical sprain, possible left ankle sprain, and aggravation of a pre-existing cervical spine condition, had completely resolved such that she was capable of returning to her usual employment as a UTR driver. Claimant thereafter filed claims under the Act and pursuant to the California workers' compensation law for continuing benefits as of April 30, 2002. Claimant's claim under the state act for additional temporary total disability benefits was denied.[1]

In a preliminary order dated January 22, 2004, the administrative law judge summarily denied, under the principle of collateral estoppel, claimant's entitlement to temporary total disability benefits following April 29, 2002. She determined, however, that issues pertaining to claimant's entitlement to permanent disability and medical benefits, including those for alleged work-related gastro-intestinal complaints, from April 29, 2002, remained viable for resolution under the Act. In her subsequent decision, the administrative law judge initially concluded that claimant's neck and back injuries are work-related but that her gastrointestinal complaints are not. The administrative law judge next determined that claimant was, based on the opinion of Dr. Malekafzali, capable of returning to her work as a UTR driver by April 29, 2002, with no residual impairment or any resulting loss in wage-earning capacity related to her November 6, 2001, work injury. She thus concluded that claimant is not entitled to any additional disability benefits. Lastly, the administrative law judge denied medical benefits as she found that claimant's condition related to her November 6, 2001, accident had completely resolved. Accordingly, benefits were denied.

Claimant, appearing without representation, appeals the administrative law judge's denial of benefits.[2] Employer responds, urging affirmance.

We first address the administrative law judge's finding that claimant's gastro-intestinal problems are not work-related. In order to be entitled to the Section 20(a) presumption that claimant's condition is causally related to her employment, claimant must establish a *prima facie* case by establishing the existence of a harm and that an accident occurred or working conditions existed that could have caused the harm. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also Merrill v. Todd Pacific*

[1] In addition, claimant's claim for additional permanent benefits under the state act was deferred pending further development of the record.

[2] Claimant's appeal was initially dismissed by the Board on December 23, 2004, as untimely filed. Pursuant to claimant's request for reconsideration, the Board reinstated her appeal by Order dated February 2, 2005.

Shipyards Corp., 25 BRBS 140 (1990). The administrative law judge initially determined that the Section 20(a) presumption is invoked with regard to claimant's gastritis, but not as to her other gastrointestinal conditions. In so finding, the administrative law judge relied on Dr. Resin, who opined that claimant's use of anti-inflammatory medication, which the administrative law judge observed had been taken to treat her work-related injuries, might have contributed to her gastritis. The administrative law judge, however, found that no doctor suggested that claimant's other gastro-intestinal conditions could be related to her work accident. Decision and Order at 9. As the administrative law judge's findings in this regard are rational and supported by substantial evidence, they are affirmed. *See generally Bolden v. G.A.T.X. Terminals, Corp.*, 30 BRBS 71 (1996). *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989) (decision on remand).

Once the Section 20(a) presumption has been invoked, as in this case, the burden shifts to the employer to rebut the presumption with substantial evidence that claimant's gastritis was not caused or aggravated by her employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999*), cert. denied*, 528 U.S. 1187 (2000); *Bath Iron Works Corp. v. Director*, OWCP, 109 F.2d 53, 31 BRBS 19(CRT) (1st Cir. 1997). The administrative law judge determined that employer established rebuttal by virtue of Dr. Hyman's conclusion that claimant's gastrointestinal condition was pre-existing and that the anti-inflammatory medications she was prescribed could not have caused or aggravated her condition. We affirm the administrative law judge's finding of rebuttal as it is supported by substantial evidence. *See Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir.1954); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

Once the Section 20(a) presumption is rebutted, the presumption no longer controls, and the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS ll9(CRT) (4th Cir. 1997); s*ee also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994). In weighing the evidence as a whole, the administrative law judge credited the opinion of Dr. Hyman over that of Dr. Resin, and thus concluded that claimant's gastritis is not work-related. First, the administrative law judge found that Dr. Resin's causation opinion was speculative, in that it was couched in terms that there "may" be a connection between the anti-inflammatory use and the gastritis. In contrast, the administrative law judge found that Dr. Hyman "reviewed all of the records concerning claimant's gastrointestinal complaints," and that his conclusion that claimant's use of anti-inflammatories was not a causal factor of her gastritis is supported by the fact that claimant was taking medication less likely to cause gastric complaints and that she had stopped taking such medicine for several months prior to her endoscopy, yet still had symptoms. Relying on Dr. Hyman, the

administrative law judge found that even if those medications were harmful, they would not have been in her system to cause her gastritis at that time. Furthermore, the administrative law judge found that since claimant is no longer taking anti-inflammatory medication, her recently increased symptoms, *i.e.*, claimant testified that her gastrointestinal symptoms are now worse than they were before, could not be attributed to her prescription drug use. As the administrative law judge's weighing of the evidence is rational, her finding, based on Dr. Hyman's opinion, is supported by substantial evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *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). Therefore, her conclusion that claimant's gastrointestinal conditions are not work-related is affirmed.[3] *Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT); *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT).

We next address the administrative law judge's finding that claimant is not disabled. Claimant bears the burden of establishing a *prima facie* case of total disability by showing that she cannot return to her usual employment due to a work-related injury. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). In this case, the administrative law judge credited Dr. Malekafzali's opinion and the vocational report of Mr. Katzen over the contrary opinions of Drs. Sanders and O'Hara to find that claimant can return to her usual employment as a UTR driver, as of April 29, 2002. Initially, the administrative law judge found Dr. Sanders's opinion that claimant should remain on temporary total disability until June 12, 2002, suspect as the physician "offered no clinical findings to support this conclusion." Decision and Order at 10. The administrative law judge next questioned Dr. O'Hara's opinion that claimant should not drive a UTR, as it "was conclusionary (*sic*) and unaccompanied by any explanation."[4] Decision and Order at 11. In contrast, the administrative law judge found that Dr. Malekafzali's opinion that claimant is capable of returning to her usual work as a UTR driver is far more persuasive, as it is "more thorough and well-reasoned," Decision and Order at 10, because he reviewed claimant's prior medical records, and since his examination of claimant, particularly in contrast to Dr. O'Hara's examination, was more contemporaneous with the work-related accident.

[3] As claimant has not established that her gastrointestinal conditions are work-related, we affirm the administrative law judge's denial of medical benefits for treatment of those conditions. 33 U.S.C. §907(a).

[4] In this regard, the record reflects that Dr. O'Hara's opinion that claimant should avoid operating a UTR is predominantly based on claimant's complaints of "persistent neck pain" and reports of "upper extremity symptoms." EX 14.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). As the administrative law judge rationally credited Dr. Malekafzali's opinion,[5] and the vocational report of Mr. Katzen, which similarly indicates that claimant is capable of performing her usual work as a UTR driver, over the contrary opinions of Drs. Sanders and O'Hara, her finding that claimant can return to her usual employment as a UTR driver, as of April 29, 2002, is affirmed. Consequently, we affirm the administrative law judge's conclusion that claimant is not entitled to any total disability benefits from April 29, 2002.[6]

Pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Container*

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[5] As the administrative law judge found, Dr. Malekafzali diagnosed a work-related sprain of the cervical spine, a contusion of the lumbar spine, and a possible sprain of the left ankle. EX1. Additionally, Dr. Malekafzali opined that claimant suffers from a pre-existing condition of the cervical spine which was aggravated at the time of her November 6, 2001, accident. He added however that as of April 29, 2002, the aggravation of her pre-existing condition "has subsided without any residual impairment." EX 1. Dr. Malekafzali further opined that claimant "is not suffering any permanent impairment from the industrial accident," that she can "continue to participate in her previous work as a UTR driver," but that "she should avoid awkward positions of the cervical spine, working with hypertension of the cervical spine or hyperflexion." EX 1. Dr. Malekafzali however attributed these restrictions exclusively to her pre-existing condition and stated that they have no relationship to her November 6, 2001, work injury. As the administrative law judge rationally credited Dr. Malekafzali's opinion in its entirety, including his finding that claimant's work-related injuries, including any aggravation of her pre-existing cervical condition, completely resolved by April 29, 2002, with no residual impairment, we affirm her denial of medical benefits for her orthopedic conditions. 33 U.S.C. §907(a); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed. Appx. 126 (5th Cir. 2002)(table).

[6] Since the administrative law judge's finding, after weighing the evidence, that claimant is not totally disabled is rational and supported by substantial evidence, any error the administrative law judge may have made in finding that collateral estoppel prevented an award of temporary total disability benefits is harmless. *See Figueroa v. Campbell Industries*, 45 F.3d 311, 315 (9th Cir. 1995); *Plourde v. Bath Iron Works Corp.*, 34 BRBS 45 (2000); *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988).

Stevedoring Co. v. Director, OWCP, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991). In the instant case, the administrative law judge concluded that claimant is not entitled to permanent partial disability benefits, as she did not suffer any loss in wage-earning capacity. In making this determination, the administrative law judge relied on her finding that claimant can return to her usual work as a UTR driver, as well as the statements of Mr. Katzen and Captain Lombard that claimant could work, on average, three to four days per month in jobs, which exceeds the "average of two days a month" that claimant worked as a longshoreman prior to her November 6, 2001, accident. Decision and Order at 2. The administrative law judge thus compared claimant's pre-injury earning capacity to her post-injury capabilities to find that claimant did not sustain any loss in wage-earning capacity. As the administrative law judge's findings are rational, in accordance with law and supported by substantial evidence, the denial of permanent partial disability benefits is affirmed. *Id.*

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge