BRB No. 00-0842

SHELTON BROOKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, for self-insured employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-2054) of Administrative Law Judge Richard E. Huddleston 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 finding of fact and conclusions of law of the administrative law judge if they 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).

The parties stipulated that claimant, a machinist, injured his back in a work-related incident on February 20, 1996. Claimant alleged that, notwithstanding the subsequent back injury he sustained in a non-work-related automobile accident on July 6, 1996, his current disability is due, at least in part, to the work injury thereby entitling him to continuing temporary total disability and medical benefits. In his Decision and Order, the administrative law judge found that the Section 20(a), 33 U.S.C.§920(a), presumption is invoked to link claimant's disabling condition to his work injury. He found, however, that employer produced sufficient evidence to rebut the Section 20(a) presumption. Consequently, the administrative law judge weighed the evidence as a whole and concluded that claimant failed to carry his burden of establishing that his current disability is related to the work accident. Thus, the administrative law judge denied claimant continuing temporary

disability benefits, and medical benefits.[1]

On appeal, claimant challenges the administrative law judge's weighing of the evidence as a whole. Employer responds, urging affirmance.[2]

Once, as here, the Section 20(a) presumption is invoked and rebutted, the presumption no longer controls. The administrative law judge must weigh all the evidence as a whole, and claimant bears the burden of proving that his disabling condition is related to the work injury by a preponderance of the evidence. *See Universal Maritime Corp v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In a case involving a subsequent injury, employer is liable for claimant's entire disability if the second injury is the natural or unavoidable result of the first injury. If, however, the second injury is the result of an intervening cause, employer is relieved of liability for that portion of the disability attributable to the second injury. *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Marsala v. Triple A Machine Shop*, 14 BRBS 39 (1981); *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981).

Claimant contends that the administrative law judge erred in rejecting the opinions of Drs. Tolson and Hoffler regarding the cause of his current back disability. Dr. Tolson, who was claimant's treating doctor following the automobile accident, opined that claimant's

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[1]Claimant was terminated by employer for failure to follow the required call-in procedure after his automobile accident.

[2]In his reply brief, claimant alleges that the administrative law judge erred in finding that employer produced sufficient evidence to rebut the Section 20(a) presumption. We decline to address this contention at length, as the regulation at 20 C.F.R. §802.213(b) limits the issues raised in reply briefs to those which reply to arguments raised in the response brief. Nevertheless, we note that the administrative law judge's finding that employer produced substantial evidence to rebut the Section 20(a) presumption is supported by substantial evidence. *See* Decision and Order at 3-5.

work injury caused or contributed in part to claimant's chronic back problems which have resulted in his total disability from work. CX 2. Dr. Hoffler, who treated claimant for a nine month period in 1998 at the Veteran's Administration Hospital, opined that the work-related injury claimant suffered with employer resulted in his disabling chronic low back pain. CX 3.

In weighing the evidence as a whole, the administrative law judge afforded greater weight to the opinion of Dr. Watson, who treated claimant following the work injury. He stated that claimant's work injury was resolved prior to the automobile accident. The administrative law judge first noted that neither Dr. Tolson nor Dr. Hoffler examined claimant prior to the automobile accident or reviewed Dr. Watson's records concerning the work injury. The administrative law judge also found that it is unclear from the records of the Veteran's Administration Hospital whether Dr. Hoffler was aware of the automobile accident. Prior to the automobile accident, Dr. Watson released claimant to return to his usual work, as he found no objective evidence of disability. He ordered an MRI, which was normal, and opined that claimant sustained a minimal low back strain that did not result in any residual permanent impairment. EX 4. As there was no indication that Drs. Tolson and Hoffler reviewed Dr. Watson's records, the administrative law judge concluded that the information Drs. Tolson and Hoffler received concerning the work injury came from claimant, who, the administrative law judge found, is a poor historian and cannot be credited.[3] The administrative law judge also relied on the fact that, following his release to

[3]The administrative law judge noted the following inconsistencies between claimant's testimony and other evidence of record. Claimant testified that his accident at work occurred on February 20, 1996, and that he reported the accident to his supervisor three days later. Shipyard records and testimony from claimant's supervisor, however, reflect that claimant did not report the incident until three weeks later. Claimant testified that he was injured while moving an elbow valve with a co-worker, but told his supervisor that he injured his back while picking up a chest. Furthermore, claimant testified that after Dr. Watson's release

work by Dr. Watson, claimant returned to his usual work, including overtime, for one month prior to the automobile accident and did not voice any complaints to his supervisor.[4] The administrative law judge thus concluded that claimant's work injury resolved prior to the automobile accident, and that this accident is the cause of claimant's current disability.

We affirm the administrative law judge's finding that claimant did not establish that the work injury is a cause of any present disability he may have. The administrative law judge rationally relied on Dr. Watson's opinion and claimant's ability to return to his usual work in finding that claimant's back sprain had resolved prior to the automobile accident. Contrary to claimant's contention, the administrative law judge is not required to credit the opinions of Drs. Tolson and Hoffler merely because they were claimant's treating physicians, particularly since they treated claimant only after the automobile accident, whereas Dr. Watson treated claimant specifically for the work injury. The administrative law judge thus rationally declined to rely on Drs. Tolson and Hoffler in view of the other evidence of record which calls into question the validity of their opinions attributing claimant's disability to the work accident. The administrative law judge's finding that claimant is a poor historian is rational, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and his conclusion that claimant failed to establish that his injury is a cause of his present disability is supported by substantial evidence and accords with law. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 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); *Merrill*, 25 BRBS 140; *Marsala*, 14 BRBS 39. Thus, we affirm the administrative law judge's determination that claimant is not entitled to temporary total disability benefits.

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

SO ORDERED.

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to return to regular duty, the clinic at work restricted him to light duty. No such restriction appears in the clinic's records.

[4]The administrative law judge noted that claimant's supervisor testified that claimant had the option to refuse overtime, but did not do so. Tr. at 53.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge