BRB No. 00-0192

NATHANIEL CARTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ITO CORPORATION OF BALTIMORE, INCORPORATED	)	DATE ISSUED: Oct. 20, 2000
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Paul B. Hairston, Baltimore, Maryland, for claimant.

Robert J. Lynott (Thomas & Libowitz, P.A.), Baltimore, Maryland, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Order Denying Motion for Reconsideration (1999-LHC-389) of Administrative Law Judge John C. Holmes 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 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).

Claimant worked as a climber for employer. On August 22, 1997, he injured the ring finger of his left hand when he was hooking lumber to a crane and his finger got caught between the lumber and the cable. Tr. at 146-148. In treating the injury to his finger, Dr. Apostolo detected pre-existing carpal tunnel syndrome in his wrist which became

symptomatic following the work injury. Cl. Exs. 7-8. Employer paid temporary total disability benefits between August 27 and October 3, 1997. Having been released by Dr. Apostolo, claimant returned to work on October 4, 1997, and worked for three days before his hand became swollen and painful. He returned to his treating physician, Dr. Young, who referred him to an orthopedic surgeon, Dr. Pushkin, who evaluated and treated claimant until November 9, 1997, when he released claimant to return to work. Cl. Exs. 4, 9; Tr. at 175-177. In March 1998, claimant returned to Dr. Pushkin for treatment of his carpal tunnel syndrome and, due to the continuing symptoms, Dr. Pushkin assessed a 15 percent permanent impairment of the left hand and wrist. Cl. Ex. 9. Claimant filed a claim for additional temporary total disability benefits, permanent partial disability benefits and medical benefits.

The administrative law judge denied disability benefits, finding that claimant's left hand injury had healed with no residual disability as of October 1, 1997, when Dr. Apostolo, employer's expert, released claimant to return to work. Decision and Order at 6. He also stated that Dr. Pushkin's services were not compensable; however, he remanded the case to the district director for a determination on the issue of claimant's entitlement to medical benefits.[1] *Id.* at 9. Additionally, and not at issue here, the administrative law judge severed claimant's claim for compensation for carpal tunnel syndrome of the right wrist, finding it was not ripe for adjudication. *Id.* at 5. The administrative law judge denied claimant's motion for reconsideration. Claimant appeals the decisions, and employer responds, urging affirmance.

[1]Although there is no final decision on this issue, no party suggests that the appeal is interlocutory and should be dismissed.

Claimant first contends the administrative law judge erred in denying him additional temporary total disability benefits between October 7 and November 9, 1997. He asserts that, in arriving at the decision to deny these benefits, the administrative law judge made several errors in his fact-finding, including: finding claimant was not justified in seeking additional medical help; finding claimant should have relied upon Dr. Apostolo's medical advice; and finding claimant's decision to remain off work for an additional month was "self-induced." Temporary total disability benefits are appropriate when a claimant is unable to perform his usual duties but will return to work. *Martinez v. St. John Stevedoring Co.*, 15 BRBS 436 (1983). In this case, employer referred claimant to Dr. Apostolo, whom he saw on three occasions while he was also being treated by Dr. Young. On October 1, 1997, Dr. Apostolo told claimant he could return to work, and claimant did so. Claimant left work after three days and returned to Dr. Young's care. Because the administrative law judge credited Dr. Apostolo's opinion, Decision and Order at 4, and because he found that Dr. Young did not take exception to claimant's being released to return to work, *id.* at 6, he determined that claimant was not disabled after October 1, 1997. However, contrary to the administrative law judge's findings, claimant's subjective pain was not the sole reason for his remaining out of work.[2] Rather, the evidence establishes that Dr. Young kept claimant out of work after October 7, 1997, due to swelling and pain in his hand. Cl. Ex. 4. Moreover, he referred claimant to Dr. Pushkin for evaluation and treatment, Cl. Ex. 4, and Dr. Pushkin did not release claimant to return to work until November 9, 1997. Cl. Ex. 9. Dr. Apostolo testified in his deposition that claimant's August 1997 work injury had caused the symptomatic exacerbation of the carpal tunnel syndrome in September, October and November 1997, that the treatment claimant received after October 7, 1997, from Dr. Pushkin was reasonable and that, per Dr. Pushkin's reports, claimant's disability resolved in November 1997. Emp. Ex. 4A at 21, 37, 53. While the administrative law judge acted within his discretion in crediting Dr. Apostolo's opinion over claimant's testimony or Dr. Pushkin's opinion, he did not consider whether claimant's brief return to work exacerbated his condition, he did not address Dr. Apostolo's acknowledgment that claimant's work injury had caused the symptomatic exacerbation of claimant's carpal tunnel syndrome, not only in September 1997, but also in October and November. Emp. Ex. at 37, nor did the administrative law judge address Dr. Apostolo's agreement with Dr. Pushkin's course of treatment. Accordingly, the administrative law judge did not fully analyze the evidence to determine whether claimant was disabled for an additional month. Thus, we vacate the administrative law judge's denial of additional temporary total disability benefits, and we remand the case for him to reconsider this issue. *See Martinez*, 15 BRBS at 436.

Next, claimant contends the administrative law judge erred in denying him permanent

[2]The administrative law judge discredited claimant's testimony as to the condition of his hand. Decision and Order at 5-6. The reference to a "self-induced" disability may be related to this credibility determination.

partial disability benefits, asserting that the work injury aggravated or combined with his pre-existing, asymptomatic carpal tunnel syndrome and caused it to become symptomatic in his left wrist. He also argues that Dr. Pushkin's opinion, Cl. Ex. 9, should be credited on this matter, as he is the only doctor who evaluated claimant for a permanent impairment. Thus, claimant contends he is entitled to permanent partial disability benefits for a 15 percent impairment to the left wrist.

In determining whether a disabling condition is work-related, a claimant is aided by the Section 20(a) presumption, 33 U.S.C. §920(a), which may be invoked only after the claimant establishes a *prima facie* case, *i.e.*, the claimant demonstrates that he suffered a harm and that the accident occurred, or conditions existed, at work which could have caused that harm. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the claimant establishes his *prima facie* case, Section 20(a) applies to relate his disability to his employment, and the employer can rebut this presumption by producing substantial evidence that the disability is not related to the employment. *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000); *Gooden*, 135 F.3d at 1066, 32 BRBS at 59(CRT). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, and the claimant bears the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable, notwithstanding the relative contributions of the pre-existing condition or the work-related injury. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Kubin v. Pro-Football, Inc.* 29 BRBS 117 (1995). Although the administrative law judge did not invoke the Section 20(a) presumption, his error is harmless, as there is substantial evidence of record on the whole to establish that employer rebutted the presumption and that claimant's permanent partial disability due to carpal tunnel symptoms is not related to the work injury of August 1997. *Fortier v. General Dynamics Corp.*, 15 BRBS 4 (1982), *aff'd mem.*, 729 F.2d 1441 (2d Cir. 1983).

The administrative law judge found that claimant's left wrist carpal tunnel syndrome may have been temporarily exacerbated by the work injury but was not permanently aggravated by it.[3] Decision and Order at 5. This conclusion is supported by Dr. Apostolo's opinion that claimant's work-related condition, including the exacerbation of the carpal tunnel symptoms, had fully healed by November 1997 and that the symptoms claimant suffered in 1998 were the result of the natural progression of the pre-existing condition. Cl.

[3]No party argues that claimant's carpal tunnel syndrome was caused by this work injury.

Ex. 7; Emp. Ex. 4A at 24, 53, 56. Dr. Hunt agreed with the assessment that claimant's work injury had completely healed and that there was no residual disability. Emp. Ex. 5. It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and may draw his own conclusions from the evidence. *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). Additionally, the Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). We affirm the administrative law judge's decision to credit the opinions of Drs. Apostolo and Hunt over that of Dr. Pushkin, as it is rational, and claimant has identified no reversible error. Consequently, we affirm the administrative law judge's determination, based on the record as a whole, that any aggravation to claimant's left wrist carpal tunnel syndrome due to the work-related injury to his left ring finger ceased by either October or November 1997.[4] *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). As the evidence credited by the administrative law judge supports his decision that any disability related to the finger injury resolved, we also affirm the denial of permanent partial disability benefits.

Claimant also contends the administrative law judge erred in finding Dr. Pushkin's treatment unnecessary, unreasonable and not compensable. The administrative law judge made several conclusory statements in his discussion on claimant's entitlement to medical benefits, including "finding" that Dr. Pushkin's treatment is not compensable; however, in effect, he made no findings because he remanded the case to the district director for determinations on this issue. Specifically, he stated that medical services under the Act are "uniquely the province of the District Director." Decision and Order at 9. Therefore, the administrative law judge gave the district director on remand the discretion to "amend [the] findings with respect to liability for medical expenses herein based on information he may be privy to, including request for authorization of treatment." *Id.*

The district director is authorized to supervise a claimant's medical care and to change his treating physician at the request of his employer. 33 U.S.C. §907(b), (c); *Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring); 20 C.F.R. §702.401 *et seq.* However, he is not authorized to modify the findings of an administrative law judge and, absent agreement of the parties, the district director cannot engage in fact-finding. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986). If there is a dispute regarding a claimant's medical care, the district director must transfer the case to the Office of

[4]We express no opinion on the severed claim involving right wrist carpal tunnel syndrome.

Administrative Law Judges for formal adjudication, 20 C.F.R. §§702.316-702.317, 702.331, as only an administrative law judge is empowered to make factual determinations of disputed issues. *See Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Marvin v. Marinette Marine Corp.*, 19 BRBS 60 (1986); *Sans*, 19 BRBS at 29. Specifically, whether authorization for treatment was requested by claimant, whether employer refused the request, and whether the treatment subsequently obtained was necessary and reasonable are all factual issues within the administrative law judge's authority to resolve. *Anderson*, 22 BRBS at 24.

In this case, the administrative law judge's decision to remand the case to the district director on the matter of claimant's entitlement to medical benefits effectively nullified any findings he may have made on the issue. As a result, he abdicated his responsibility as the fact-finder and created unnecessary delay in the final disposition of this case. *See generally Sans*, 19 BRBS at 24. Consequently, we must vacate the administrative law judge's order to remand the issue to the district director, and we remand the case to the administrative law judge to make findings of fact concerning claimant's entitlement to medical benefits after October 7, 1997. Specifically, the administrative law judge must determine: which doctor is claimant's chosen physician; whether authorization to see a specialist had been obtained or was necessary; whether there was a refusal of treatment; whether the treatment claimant received was reasonable and necessary, and whether it was compensable.[5] 33 U.S.C. §907; *see Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 120 S.Ct. 40 (1999); *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1993) (Smith, J., dissenting on other grounds).

[5]Although Dr. Apostolo evaluated claimant's condition on three occasions, treating him once by administering a cortisone injection into the carpal canal, it was inappropriate for the administrative law judge to imply that claimant may have accepted Dr. Apostolo as his treating physician. *Compare with Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995). A claimant is permitted his initial free choice of physician. Thereafter, any changes must be authorized by employer, carrier or the district director. 33 U.S.C. §907(c)(2); *Slattery Assocs. v. Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT) (D.C. Cir. 1984); 20 C.F.R. §702.406.

Accordingly, the administrative law judge's denial of additional temporary total disability benefits, and his order remanding the case to the district director for resolution of the issue of claimant's entitlement to medical benefits are vacated, and the case is remanded for further consideration of these issues. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge