

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



JACQUELINE
TYNES

BRB No. 07-0905

J.T.)

Claimant-Petitioner)

v.)

NEWPORT NEWS SHIPBUILDING AND)
DRY DOCK COMPANY)

Self-Insured)
Employer-Respondent)

APR 29 2008

DATE ISSUED: _____

NOT-PUBLISHED

DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2007-LHC-2142) of Administrative Law Judge Kenneth A. Krantz 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).

Claimant, a pipefitter who performed nuclear testing on ships, suffered an injury to her right knee on July 23, 2005, when she tripped over hoses on the floor and struck her knees on the concrete. Subsequent to this injury, claimant underwent a total replacement of her right knee. Claimant sought temporary total disability compensation for the period she was unable to work, February 20, 2006, through July 9, 2006, following this surgery.

Employer paid all medical benefits associated with the surgery but controverted the claim for disability benefits on the ground that the surgery was necessitated by the natural progression of a 1996 work injury.¹

In his decision, the administrative law judge found that claimant's surgery was necessitated by the natural progression of her pre-existing knee condition, which was not aggravated by her work injury on July 23, 2005. Consequently, the administrative law judge denied the claim for disability benefits. Claimant appeals, contending that the administrative law judge erred in finding that the surgery was not the result of the aggravation of her underlying condition by the 2005 work injury.² Employer responds, urging affirmance.

Claimant suffered a work injury to her right knee on April 10, 1996, and had arthroscopic surgery to repair a tear of the anterior horn of the lateral meniscus on her right knee in May 1997. EX 2. Claimant returned to her job but continued to seek medical attention periodically through December 2003. Dr. Phillips stated on September 10, 1998, that claimant had a 25 percent impairment of her right lower extremity. EX 2 at 8. Dr. Phillips diagnosed claimant as suffering from degenerative arthritis in January 1997. EX 2 at 1. As early as July 1, 1997, Dr. Phillips noted that claimant's progressive lateral compartment degenerative disease eventually would require joint replacement. EX 2 at 3. He repeated this conclusion on April 2, 1999. EX 3 at 1. Dr. Phillips noted that claimant's knee was getting progressively worse with stiffness and pain on weight

¹ It cannot be ascertained from the record whether claimant filed a claim for the 1996 injury or if employer paid any benefits as a result of this injury. The file indicates only that the 1996 injury was assigned an OWCP number. See EX 8. Claimant, however, does not contend that her disability is compensable as a natural progression of the 1996 work injury.

² The administrative law judge acknowledged that the Section 20(a) presumption, 33 U.S.C. §920(a), applies to link claimant's knee injury to her 2005 work injury. Decision and Order at 8. Nonetheless, he failed to recognize that the presumption applies to claimant's entire knee condition; thus, contrary to his statement, it would apply to whether the condition necessitating surgery and disability resulting therefrom was causally related to claimant's work. See *Seguro v. Universal Maritime Service*, 36 BRBS 28 (2002) (Section 20(a) applies to injury and its sequelae). However, error in this regard is harmless; claimant does not raise any arguments regarding Section 20(a), and if the credited medical opinion is substantial evidence to support the denial of the claim, it is also substantial evidence to rebut the presumption. See *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

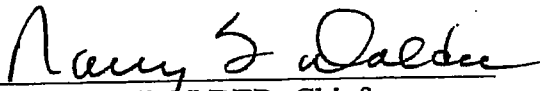
bearing. *See, e.g.*, EX 3 at 3, 4, 8. On x-rays taken in August 2001, Dr. Phillips again noted degenerative arthritis. *Id.* at 6.

On July 23, 2005, claimant suffered the subject injury to her right knee. She first saw Dr. Phillips following this injury on August 2, 2005. Dr. Phillips noted tenderness in the knee, but diagnosed only osteoarthritis. Dr. Phillips's subsequent treatment notes do not mention the 2005 work injury. EX 7. On February 20, 2006, claimant underwent a total right knee replacement. Following this surgery, Dr. Phillips issued two opinions on the etiology of the need for that surgery. On January 12, 2006, Dr. Phillips opined that claimant's "current condition and need for right knee replacement are a result of continuing problems 1996." EX 8. On August 10, 2006, Dr. Phillips opined with "reasonable medical certainty that [claimant's] injury to the knee when she tripped over some hose and fell at work, aggravated her preexisting knee problem and lead to her eventual need for a total joint replacement." CX 5. The administrative law judge credited the former opinion, finding it supported by Dr. Phillips's treatment notes over the years.

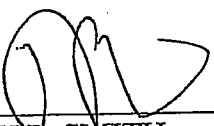
Claimant contends that the administrative law judge's decision is not consistent with the aggravation rule, which provides that employer is liable for the entire resultant disability if the work injury aggravates, accelerates, or combines with a pre-existing condition. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *see also Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). We reject this contention. The administrative law judge properly focused on whether the knee replacement surgery was necessitated by the natural progression of the 1996 injury and its sequela or was due to an aggravation of claimant's arthritic condition by the 2005 injury. *See Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). The administrative law judge rationally credited the first opinion of Dr. Phillips that the surgery was necessitated by the natural progression of the 1996 injury as it is better supported by the totality of Dr. Phillips's treatment notes. It is well established that the administrative law judge is entitled to determine the weight to be accorded to the evidence of record and that the Board cannot reweigh it. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The choice between reasonable inferences is for the administrative law judge as the fact-finder. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). As the administrative law judge's finding that claimant's 2006 knee surgery was the result of the natural progression of her underlying degenerative arthritis is rational and supported by substantial evidence, we affirm the denial of disability compensation.

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

SO ORDERED.



NANCY S. DOLDER, Chief
Administrative Appeals Judge



ROY P. SMITH
Administrative Appeals Judge



BETTY JEAN HALL
Administrative Appeals Judge

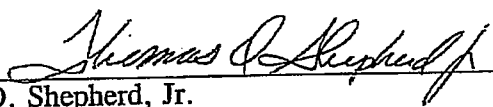
CERTIFICATE OF SERVICE

07-0905 Jacqueline Tynes v. Newport News Shipbuilding & Dry Dock Company (Case
No. 06-LHCA-2142) (OWCP No. 05-0122067)

I certify that the parties below were served this day.

APR 29 2008

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