BRB No. 97-0961

RICHARD G. BELLAN	)	
	)	
Claimant-Respondent	)	DATE ISSUED: _____
	)	
v.	)	
	)	
TECHNICO CORPORATION, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Kevin W. Grierson (Jones, Blechman, Woltz & Kelly, P.C.), Newport News, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer, Black, Meredith & Martin, L.L.P.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-159) of Administrative Law Judge
Fletcher E. Campbell, Jr., 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).

On May 12, 1994, claimant ruptured his left Achilles tendon while working for employer. He declined surgery and was thereafter placed in an immobilizing full-leg cast. Claimant's leg was thereafter placed in a short-leg cast, a walking cast, and

finally a range of motion walker. Employer voluntarily paid temporary total disability benefits to claimant from May 13, 1994, through October 30, 1994. 33 U.S.C. §908(b).

Claimant, who has a history of back complaints and surgeries, complained of back pain following this injury, and, in 1995, he underwent a laminectomy to alleviate this pain. At the formal hearing, the parties stipulated to claimant's post-injury loss of wage-earning capacity during various periods of time through the date of that hearing. In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, that employer produced sufficient evidence to rebut the presumption, and that, based upon the record as a whole, claimant established a casual relationship between his employment with employer and his back problems. Accordingly, pursuant to the stipulations of the parties regarding claimant's post-injury loss of wage-earning capacity, the administrative law judge awarded claimant temporary total disability compensation for the period June 21, 1995 through October 26, 1995, and continuing temporary partial disability benefits thereafter.

On appeal, employer contends that the administrative law judge erred in finding that claimant established his *prima facie* case for invocation of the Section 20(a) presumption; alternatively, employer challenges the administrative law judge's determination that claimant established the existence of a casual relationship between his employment and his back condition based on the record as a whole. Lastly, employer asserts that the administrative law judge erred in awarding claimant temporary partial disability benefits subsequent to the date of the hearing. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer initially contends that the administrative law judge erred in invoking the Section 20(a) presumption; specifically, employer asserts that claimant is not entitled to invocation of the presumption since he has not established the existence of working conditions that caused his current back problem. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that an accident occurred or working conditions existed which could have caused the harm. *See Konno v. Young Bros., Ltd.,* 28 BRBS 57 (1994); *Volpe v. Northeast Marine Terminals*, 14 BRBS 17 (1981), *rev'd on other grounds*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). In establishing his *prima facie* case, claimant is not required to prove by affirmative medical evidence that the working conditions in fact caused the harm; rather, claimant's burden is to establish the existence of working conditions which could conceivably cause the harm alleged. *See Stevens v. Tacoma Boatbuilding Co.,* 23 BRBS 191 (1990); *Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989). In this case, the parties

stipulated that claimant sustained an injury arising out of his employment on May 12, 1994; furthermore, it is uncontroverted that claimant subsequently developed back pain which could have been related to this accident. As these undisputed facts support invocation of the Section 20(a) presumption, we reject employer's contentions of error and affirm the administrative law judge's determination on this issue. *See Sinclair,* 23 BRBS at 148; *James v. Pate Stevedoring Co.,* 22 BRBS 271 (1989).

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused, aggravated, or rendered symptomatic by his employment. *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.,* 23 BRBS 279 (1990); *see also Director, OWCP v. Greenwich Collieries* 512 U.S. 267, 28 BRBS 43 (CRT)(1994). In this case, the administrative law judge found employer rebutted the presumption, but found causation after weighing the evidence as a whole. Employer challenges the administrative law judge's finding that claimant established a casual relationship between his employment and his back condition based upon the record as a whole; specifically, employer asserts error in the administrative law judge's decision to credit the testimony of claimant, his wife, a friend, and Dr. McAdams. We disagree.

The administrative law judge considered all of the medical evidence of record and credited the opinion of Dr. McAdams, who he determined to be uniquely qualified to render an opinion regarding causation based upon his treatment of claimant's back complaints both before and after claimant's work-incident as he was thus familiar with claimant's previous and continuing back problems. Based in part upon claimant's reported history, Dr. McAdams opined that claimant's present back condition is related to the May 12, 1994, injury and that the onset of claimant's back pain may have been masked by the presence of a full-leg cast. In declining to credit the contrary opinions of Drs. Lanoue and Spear, the administrative law judge noted that those physicians based their respective opinions on the premise that there had been a delay in the onset of claimant's back pain. The administrative law judge, however, credited the testimony of claimant, his wife, and a friend who visited him while he was in the immobilizing full-leg cast that claimant complained of back pain within a month of the May 1994 injury. It is well-established that that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom and is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge's credibility

determinations are neither inherently incredible nor patently unreasonable; accordingly, we affirm the administrative law judge's determination that claimant's present physical problems are related to his employment with employer. *See generally Sinclair*, 23 BRBS at 148.

Lastly, employer challenges the decision of the administrative law judge to award claimant temporary partial disability benefits beyond the date of the hearing; specifically, employer contends that such an ongoing award violates the Administrative Procedure Act (APA) and its due process rights. For the reasons that follow, we reject employer's contentions of error.

Initially, we note that the Act provides benefits for temporary partial disability during the "continuance of such disability" for up to 5 years, 33 U.S.C. §908(e), and thus contemplates ongoing awards. *See also* 33 U.S.C. §908(a), (b), (c)(21). Moreover, employer in the case at bar was fully aware of the claim for continuing temporary partial disability benefits, as evidenced by its acknowledgment that claimant was seeking continuing temporary partial disability benefits pursuant to the Act and its decision to stipulate to claimant's loss of wage-earning capacity during various periods of time post-injury. Employer has been afforded a full pre-deprivation hearing before the administrative law judge and thus has not been deprived of property without due process of law. *See Shell Offshore, Inc. v. Director, OWCP,* 112 F.3d 312, 31 BRBS 129 (CRT) (5th Cir. 1997). Employer, therefore, is incorrect in its assertion that it has not been given notice and the opportunity to be heard on this issue, and we hold that the administrative law judge's decision comports with the requirements of the Administrative Procedure Act. *See* 5 U.S.C. §554(c)(2), and 33 U.S.C. §919(d).

Next, contrary to employer's contention, the existing record does contain evidence to support an award of continuing temporary partial disability benefits. In *Hoodye v. Empire United Stevedores*, 23 BRBS 341 (1990), upon which employer in part relies, the Board held that it was within the authority of an administrative law judge to issue a "continuing" award of benefits if the "evidence established claimant remained disabled." *Hoodye*, 23 BRBS at 343. In addition, the Board held that "where maximum medical improvement has not been reached and claimant is disabled, the appropriate remedy is a continuing award of temporary total or partial disability." *Id.*, 23 BRBS at 343. In the instant case, there is no evidence of record that claimant has yet reached maximum medical improvement. *See* Claimant's Exhibits 8-27, 11-1; Employer's Exhibit G. Moreover, the parties stipulated as to claimant's post-injury wage-earning capacity through the date of the hearing. *See Del Vacchio v. Sun Shipbuilding & Dry Dock Co*., 16 BRBS 190 (1984). Claimant has therefore met his burden of establishing the requisite loss in wage-earning capacity for entitlement to temporary partial disability benefits. *Id*. As the record stands, employer has not shown that claimant has no loss in wage-earning capacity. We therefore affirm the administrative law judge's award of

temporary partial disability benefits as those determinations are rational and supported by substantial evidence.[1]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[1]Lastly, we note that contrary to employer's contention, a petition for modification filed pursuant to Section 22 of the Act, 33 U.S.C. §922, would not be rendered "meaningless" as a result of the administrative law judge's decision. *See* Employer's brief at 19. Modification based on a change in condition may be granted where there has been a change in claimant's economic or physical condition, *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT) (1995); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988), and thus, upon the proper showing, employer may be entitled to have the administrative law judge's initial Decision and Order Benefits modified to reflect any change.