BRB No. 00-349

SARAH C. WELLS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: Dec. 15, 2000
	)	
DEPARTMENT OF THE NAVY/NAF	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Sarah C. Wells, Elizabethton, Tennessee, *pro se*.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without legal representation, appeals the Decision and Order-Denying Benefits (96-LHC-631) of Administrative Law Judge Mollie W. Neal 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 representation, the Board will review the findings of fact and conclusions of law of the administrative law judge to determine 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). If they are, they must be affirmed.

Claimant was employed by the Morale, Welfare and Recreation Department at the Pensacola Naval Air Station as a customer services clerk. On September 27, 1985, she attempted to unplug an AM/FM radio during a hurricane warning and received an electrical shock in her right shoulder, arm and hand. She was diagnosed with reflex sympathetic dystrophy. She was awarded permanent total disability benefits in a district director's compensation order dated April 29, 1992. Subsequently, employer sought

modification of the order on the grounds that the evidence establishes that claimant's physical and economic conditions have improved such that she does not have any residual disability from the work-related injury. 33 U.S.C. §922.

In her Decision and Order, the administrative law judge found that claimant is no longer permanently totally disabled. She concluded that claimant suffers a 25 percent permanent partial impairment to her right shoulder and arm, and awarded benefits under the schedule. The administrative law judge also denied medical benefits inasmuch as claimant failed to establish that her optical problems, spinal condition, depression, or cardiac problems are causally linked to her 1985 injury. Claimant appeals the administrative law judge's decision *pro se*. Employer responds, urging affirmance of the administrative law judge's decision.

Initially, we affirm the administrative law judge's exclusion of claimant's exhibits 30-43, 46, 48-49, 55, 57-58, 77-78, 81, 83-89, 92-97. An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). The administrative law judge found that these articles, publications and newspaper clippings on reflex sympathetic dystrophy do not qualify as learned expert treatises. The administrative law judge found that this evidence consists of general information on reflex sympathetic dystrophy from support groups and other information received from the Internet and is not particularly relevant or material to claimant's case. As the administrative law judge's reasons for excluding the named exhibits are rational, we affirm the exclusion of these exhibits.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The standard for determining disability is the same for a Section 22 modification proceeding as it is for an initial proceeding under the Act. *See Rambo I*, 515 U.S. at 296, 30 BRBS at 3 (CRT); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

After consideration of the medical evidence, claimant's testimony and the surveillance tapes, the administrative law judge found that claimant is no longer permanently totally disabled. The medical evidence in the instant case includes the opinions of Drs. Aguirre, Grindstaff, and McElroy, who opine that claimant is totally disabled due to reflex sympathetic dystrophy. The administrative law judge found that Dr. Aguirre is an anesthesiologist with no expertise in diagnosing reflex sympathetic dystrophy, that he did not perform objective studies, and that employer did not have the opportunity to cross-examine him. She also found that Drs. McElroy and Grindstaff are

family practitioners with no demonstrated expertise in diagnosing reflex sympathetic dystrophy, and that neither Drs. Aguirre nor McElroy had an opportunity to view the surveillance tapes. Thus, the administrative law judge accorded greater weight to the opinions of Dr. Nadel, a neurologist; Dr. Knickerbocker, an orthopedic surgeon; Dr. Rainwater, an internist; and Dr. Killeffer, a neurologist, all of whom state that there is no evidence of reflex sympathetic dystrophy which renders claimant totally disabled. Emp. Exs. 17, 23, 37, 42. The administrative law judge found that these opinions are better reasoned opinions by highly qualified physicians. She accorded greatest weight to the opinions of these doctors based on their superior qualifications, well-documented conclusions and knowledge of the symptoms associated with reflex sympathetic dystrophy. The administrative law judge also found that there were numerous inconsistencies between claimant's testimony regarding her limitations and the surveillance tapes.

In adjudicating a claim an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather the administrative law judge may draw his own inferences and 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). We affirm the administrative law judge's finding that claimant has had a change in condition such that she is no longer totally disabled from a physical standpoint as it is rational and supported by substantial evidence.

The administrative law judge also found that the evidence establishes a change in claimant's economic condition. Employer submitted the vocational reports of Ms. Glenn which identified "numerous and precise positions" for claimant which the administrative law judge found were within claimant's capabilities and were available in her geographic area. She found that these positions paid a salary from $116.76 to $381.30 in 1985. *See* Emp. Ex. 66 at 5. In addition, the administrative law judge noted that, upon graduating from university in 1992, claimant worked for the Carter County School System and the Elizabethton Board of Education as a homeless liaison at a biweekly wage rate of $642, and that her reason for leaving this position was not related to her work-related condition. As the administrative law judge's finding that employer established the availability of suitable alternate employment is supported by substantial evidence of record, we affirm this finding as well as the modification of the award of benefits based on a change in claimant's economic condition. *See generally Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999); *Fox v. West State, Inc.*, 31 BRBS 118 (1997); *Jaros v. Nat'l Steel & Shipbuilding*, 21 BRBS 26 (1988).

The administrative law judge found that claimant has a 25 percent permanent partial disability of the right shoulder and arm and thus awarded benefits under the schedule commencing on August 29, 1996. The injury to the shoulder would be

compensated under Section 8(c)(21), 33 U.S.C. §908(c)(21), as it is an unscheduled injury. *See Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990); *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990). Under Section 8(c)(21), compensation is based on the difference between claimant's average weekly wage at the time of the injury, 33 U.S.C. §910, and her post-injury wage-earning capacity, 33 U.S.C. §908(h). The administrative law judge in the instant case found that claimant had an average weekly wage of $159.28 and that her post-injury wage-earning capacity, adjusted to 1985 wages, is as high as $381.30, as reflected by the suitable alternate employment established by the evidence of record. Therefore, as claimant has no loss in wage-earning capacity, we affirm the administrative law judge's finding that claimant is limited to compensation for the 25 percent impairment to her arm pursuant to Section 8(c)(1), 33 U.S.C. §908(c)(1). *See* Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268, 14 BRBS 363 (1980); *see generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

The administrative law judge also reviewed the evidence in order to determine the compensability of medical treatment for claimant's visual, cardiac and psychiatric conditions, and her chiropractic treatment. Section 20(a), 33 U.S.C. §920(a), which the administrative law judge did not apply in this case, provides claimant with a presumption that her injury is causally related to her employment, if claimant establishes that she has a physical harm, and that an accident or working conditions occurred that could have caused the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once invoked, employer may rebut the Section 20(a) presumption by producing facts to show that a claimant's employment did not cause, accelerate, aggravate or contribute to her injury. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT) (7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). When employer produces such substantial evidence, the presumption drops out of the case, and the administrative law judge must weigh all of the evidence relevant to the causation issues, and render a decision supported by the record. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997); *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transport Corp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987).

In the instant case, the administrative law judge found that claimant failed to establish that the conditions other than her right shoulder and right arm are causally related to the1985 injury, and thus denied medical benefits associated with these other conditions. Although the administrative law judge did not apply the Section 20(a) presumption, we affirm her finding that claimant's visual condition is not causally related to her 1985 work-related injury. Dr. Bice's opinion that claimant's symptoms are not

consistent with electrical shock injury and that there is no ocular pathology suggestive of reflex sympathetic dystrophy is sufficient to rebut the presumption. *See Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995)(Decision on Recon.). In addition, Dr. McCartt opined that claimant's vision problems are not completely consistent with a typical electrical injury. Further, the administrative law judge noted that Dr. Bice found that claimant's visual acuity is much better than 20/400, which was her subjective response. The administrative law judge's conclusion, based on the evidence as a whole, is supported by substantial evidence. Therefore, we affirm the administrative law judge's denial of medical benefits associated with the alleged optical condition.

Claimant also sought payment for medicine related to her cardiac condition. Dr. Killefer's opinion that claimant's cardio-vascular condition is not related to her 1985 injury is sufficient to establish rebuttal of the Section 20(a) presumption, *Holmes*, 29 BRBS at 21-22, assuming *arguendo* the evidence established invocation. As the administrative law judge has accorded Dr. Killefer's opinion with determinative weight, we affirm the administrative law judge's finding that medicine and equipment prescribed to treat this condition are not compensable. *Frye v. Potomac Elec. Power Co.*, 21 BRBS 194 (1988).

The administrative law judge also found that employer is not liable for continuing treatment by Dr. Ward, a chiropractor, as the evidence does not establish a causal link between claimant's alleged cervical subluxation and the injuries she suffered from the work-related shock. Chiropractic treatment is reimbursable only to the extent that it consists of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings. 20 C.F.R. §702.404; *Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (1998). In the present case, the administrative law judge did not analyze the evidence pursuant to the Section 20(a) presumption, but rather placed the initial burden of persuasion on claimant to establish a causal relationship. However, initially, claimant need only establish an injury and an accident which could have caused the injury**.** Therefore, we vacate the administrative law judge's finding that the chiropractic care claimant received from Dr. Ward is not compensable and remand the case for the administrative law judge to determine whether the evidence establishes the existence of a subluxation shown by x-ray or clinical findings. *See, e.g., Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Sinclair v. United Food & Commercial Workers*,

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[1]The administrative law judge also denied reimbursement for the tread mill, whirlpool and exercise bike because there is no evidence that they were prescribed for claimant's work-related condition, reflex sympathetic dystrophy. *See generally Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988). We affirm these findings as they are supported by substantial evidence. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993).

23 BRBS 148 (1989).

The administrative law judge also placed the burden of persuasion on claimant to establish that her psychiatric conditions, possibly post-traumatic stress disorder and depression, are causally related to her 1985 injury. Specifically, the administrative law judge found that "there is no evidence from a psychiatrist which definitively establishes that any depression claimant may suffer from results from her 1985 injury as opposed to other psychologically damaging events from her past." Decision and Order at 27. On remand, the administrative law judge must also apply a Section 20(a) analysis to this issue. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

Accordingly, the Decision and Order of the administrative law judge finding that the evidence establishes a change in claimant's physical and economic conditions is affirmed. Moreover, the administrative law judge's finding that claimant is no longer totally disabled and that her entitlement to compensation is limited to permanent partial disability compensation for a 25 percent disability to her right arm pursuant to Section 8(c)(1) is affirmed. The administrative law judge's findings that claimant is not entitled to medical treatment for her visual and cardiac conditions are also affirmed. However, the administrative law judge's findings that claimant is not entitled to medical benefits for her psychiatric condition and chiropractic treatment are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge