BRB Nos. 01-0366
and 01-0366A

DAVID J. ZIMMER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
TECNICO CORPORATION	)	DATE ISSUED: Jan. 3, 2002
	)	
and	)	
	)	
ABERCROMBIE, SIMMONS & GILLETTE	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason), Newport News, Virginia, for employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (2000-LHC-873) of Administrative Law Judge Richard K. Malamphy 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 marine pipefitter, injured his back at work on April 13, 1995. Employer voluntarily paid compensation through April 1, 1996. Claimant sought total disability benefits from this date. In addition, claimant asserted that his work-related condition worsened in January 1999, resulting in increased disability thereafter. The administrative law judge found that claimant established his *prima facie* case of total disability, that employer demonstrated the availability of suitable alternate employment, and that claimant did not show that he was unable to find work despite a diligent job search. Thus, the administrative law judge awarded claimant temporary partial disability benefits from April 1, 1996, and continuing, based on a loss of wage-earning capacity of $35.24 per week. With regard to the alleged worsening of his condition in 1999, the administrative law judge found that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption, that employer rebutted the presumption, and that claimant failed to carry his burden of establishing the work-relatedness of his increased symptomology by a preponderance of the evidence. Thus, total disability benefits were denied.

On appeal, claimant challenges the administrative law judge's denial of total disability benefits from February 8 through August 17, 1997, and after January 1999. In its appeal, employer contests the administrative law judge's finding that claimant established his *prima facie* case of total disability. Employer and claimant filed response briefs in support of their respective positions. Employer filed a reply brief.

We first address employer's appeal. Employer contends that the administrative law judge erred in finding that claimant established his *prima facie* case of total disability because claimant's restrictions following the 1995 injury were the same as those imposed after a 1990 injury and claimant was able to perform his usual work from 1992 to 1995 within those restrictions. Employer reasons that claimant is now able to perform his usual work within his current restrictions because he performed his usual work in the past within these same restrictions.

A claimant establishes his *prima facie* case of total disability if he is unable to perform his usual employment duties due to his work-related injury. *See Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998). In making this determination, it is appropriate for the administrative law judge to determine whether claimant is able to return to his work by comparing claimant's medical restrictions with the requirements of his job. *See Jennings v. Sea-Land Serv., Inc.,* 23 BRBS 12 (1989), *vacated on other grounds on recon.*, 23 BRBS 312 (1990); *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).

In this case, the administrative law judge compared claimant's usual job duties as a marine pipefitter, which involved lifting heavy weights (as heavy as 80

pounds) and frequent and repeated bending, to Dr. Byrd's restrictions of no lifting over 20 pounds and limited bending and walking. As claimant's job duties exceeded his restrictions, the administrative law judge rationally found that claimant established his *prima facie* case of total disability. *See Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); Decision and Order at 23, 25; Emp. Exs. 6-45, 6-46; Tr. at 25. Contrary to employer's contention, the fact that claimant was able to perform his usual work before his 1995 injury by exceeding restrictions given him in 1992 following a 1990 injury, does not lead to the conclusion that claimant could return to that job after his 1995 injury by exceeding the restrictions given him in 1995. As claimant notes, there was no determination that his medical condition was essentially the same in 1992 and 1996.[1] The administrative law judge found that while Dr. Byrd imposed restrictions in 1995 similar to those imposed in 1992, claimant testified he had been unaware of the restrictions imposed in 1992 and had worked full duty as a marine pipefitter, work he is no longer able to perform. Decision and Order at 4, 25. Consequently, we affirm the administrative law judge's finding that claimant established his *prima facie* case of total disability as it is rational and supported by substantial evidence.

We next address claimant's challenge to the administrative law judge's denial of total disability benefits from February 8 through August 17, 1997. Claimant contends that the administrative law judge erred in failing to credit Dr. Mingione's opinion that claimant should not return to work. Claimant also contends that the administrative law judge erred in crediting Dr. Byrd's opinion over that of Dr. Mingione, since Dr. Byrd addressed only claimant's physical limitations while Dr. Mingione addressed claimant's psychological limitations.[2] Claimant further contends that the administrative law judge erred in relying on Dr. Taylor's opinion.

---

[1]The administrative law judge stated that Dr. Byrd, upon examining claimant in June 1995, found claimant's back and leg pain were related to the April 1995 accident and not the prior 1990 injury.

[2]Dr. Mingione, who was treating claimant for depression and pain, stated that claimant's depression, the unpredictability of his pain, and his use of medications precluded his employment. Emp. Exs. 9-43, 17-22.

Questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and it is solely within the administrative law judge's discretion to accept or reject all or any part of any witnesses' testimony. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

In determining that claimant could return to alternate work, the administrative law judge relied on the physical restrictions imposed by Dr. Byrd, an orthopedic surgeon. The administrative law judge found unpersuasive the opinion of Dr. Mingione, a psychiatrist and pain management specialist to whom claimant was referred by Dr. Byrd. The administrative law judge accorded less weight to Dr. Mingione's opinion, that claimant was not capable of working at all, because it was based heavily on claimant's subjective complaints of pain which the administrative law judge rationally found were not credible based on opinions to that effect of Drs. Walko, Byrd, Rice, Taylor, Blasdell, and even Dr. Mingione himself.[3] *See* Cl. Exs. 2, 3-22, 3-29, 4; Emp. Exs. 6-43, 7-7, 9-43, 10-4, 13-12, 16-10, 17-12, 17-22, 18-31 - 33, 18-35, 25.3, 26.8. Moreover, two other physicians with expertise similar to that of Dr. Mingione, determined claimant was capable of returning to some type of work. Dr. Taylor, a clinical psychologist, opined that there was "no reason, from a psychological perspective, why [claimant] cannot return to some work which he is able to perform both physically and mentally." Emp. Ex. 13-14. Dr. Walko, a pain management specialist, found claimant ready to work with physical restrictions only, suggesting that claimant see a primary care physician for help with any alcohol degeneration, any psychological issues or chronic medication use. Cl. Ex. 2h. Contrary to claimant's remaining contention, the administrative law judge acted within his discretion in finding the opinion of Dr. Taylor, that claimant became incapacitated and dependent on others as a means of controlling them, very persuasive even though he saw claimant at employer's request on only one occasion. Decision and Order at 24; Emp. Ex. 13-12. We therefore affirm the administrative law judge's award of temporary partial disability benefits from April 1, 1996, and continuing, as it is rational and supported by substantial evidence.

Lastly, we address claimant's challenge to the administrative law judge's finding that claimant did not establish the work-relatedness of his disability after he

[3]These doctors believed claimant was engaging in symptom magnification. Cl. Ex. 2; Emp. Exs. 6-43, 7-7, 10-4, 13-12, 17-12, 18-31 - 18-33, 18-35. Additionally, Dr. Blasdell opined that claimant's addiction to prescription medication enhanced his perception of pain and that claimant had difficulty in distinguishing between actual pain and lack of narcotic medication. Emp. Ex. 26.8.

experienced increased symptomotology in January 1999. Claimant contends that the administrative law judge erred in finding the evidence on this issue in equipoise, and thus, in denying benefits. Once, as here, claimant has invoked the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997). If the administrative law judge finds that the Section 20(a) presumption is rebutted, as here, then all relevant evidence must be weighed to determine whether a causal relationship has been established, with claimant bearing the burden of persuasion. *Id.*; *see also Director, OWCP v. Greenwich Collieries [Santoro]*, 512 U.S. 267, 28 BRBS 43(CRT)(1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

In evaluating the evidence as a whole, the administrative law judge first considered the opinion of Dr. Walko, a physiatrist and pain management specialist, whose opinion he found to be equivocal.[4] The administrative law judge appeared to put this opinion aside after considering that claimant suffered three serious falls in 1996 and 1997 and recognizing that these falls could have caused the January 1999 symptoms. *See* n. 4, *supra.* The administrative law judge then considered the opinion of Dr. Loxley, a Board-certified orthopedic surgeon, that the April 1995 work injury caused the bulging disc condition that generated claimant's new symptoms and additional pain, Cl. Ex. 5b, as well as the contrary opinions of Drs. Blasdell and Byrd, both Board-certified orthopedic surgeons as well. Dr. Byrd opined that the new finding on the 1999 MRI was not related to the April 1995 work injury. Emp. Ex. 16-14. Dr. Blasdell opined that claimant had recovered from any soft tissue injuries that resulted from the April 1995 work injury. Emp. Exs. 25.3, 26.7, 26.8. The administrative law judge found the evidence in equipoise, and thus concluded that claimant did not meet his burden of proving his increased symptomotology is work-related by a preponderance of the evidence. In so doing, the administrative law judge fully addressed the medical evidence and the evidence of possible alternative agencies of causation.[5] *See Santoro,* 30 BRBS 171; Decision and Order at 28-30;

---

[4]Dr. Walko opined that the April 1995 work injury contributed to and led to the L4-5 disc protrusion that generated claimant's new pain symptoms in January 1999. Emp. Exs. 18-43, 18-44. However, he also admitted that the new symptoms could have resulted from a fall or from claimant's bending to pick up an object, and that his opinion would be different if he had discovered that claimant had experienced any kind of trauma shortly before January 1999 because he would have attributed the new findings to that trauma. Emp. Exs. 18-28, 18-44.

[5]Contrary to claimant's contentions, the holding in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines],* 138 F.3d 134, 32 BRBS 48(CRT)(4th

Cl. Ex. 5b; Emp. Exs. 1-8, 1-38, 1-211, 16-14, 25.3, 26.7, 26.8. Claimant has not identified any reversible error in the administrative law judge's consideration of this issue. Consequently, we affirm the administrative law judge's finding that claimant did not establish the work-relatedness of his symptoms after January 4, 1999, as it is rational, supported by substantial evidence, and in accordance with law. Thus, we affirm the administrative law judge's denial of total disability benefits after that date.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

Cir. 1998), does not require the administrative law judge to find the opinions of Drs. Byrd and Blasdell entitled to little weight. In *Carmines*, the court held that it was not rational for the administrative law judge to rely on a physician's opinion supporting the Section 8(f), 33 U.S.C. §908(f), contribution element because the physician did not treat or examine claimant and his opinion was contrary to the weight of the remaining medical evidence. In the instant case, Dr. Byrd treated claimant from June 1995 through February 1997 for the 1995 work injury, and Dr. Blasdell examined claimant once. Emp. Exs. 16-7, 16-12. Their opinions are not contrary to the weight of the remaining medical evidence on the causation issue since an equal number of physicians had contrary opinions.