BRB No. 01-0404

BERTHARD LOTTEN, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES INCORPORATED	)	DATE ISSUED: Jan. 17, 2002
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Ford T. Hardy, Jr., New Orleans, Louisiana, for claimant.

Joseph J. Lowenthal, Jr. (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.) New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (99-LHC-2674) of Administrative Law Judge C. Richard Avery 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 sheet metal mechanic's helper, alleged that he injured his leg, back and groin on December 26, 1996, when he fell into a six foot hole in the deck of the ship on which he was working. Claimant immediately sought treatment at employer's first aid station, and thereafter continued to perform his usual job duties until May 2, 1997, when he alleged that numbness in his legs and intensified back pain forced him to cease work. Claimant underwent back surgery for a lumbar decompression on August 5, 1997; he subsequently suffered an unrelated stroke in late 1997.

In his decision, the administrative law judge concluded that claimant had established a *prima facie* case for a work-related injury, that claimant was therefore entitled to the Section 20(a), 33 U.S.C. §920(a), presumption, and that employer failed to rebut the presumption; accordingly, the administrative law judge found causation established. The administrative law judge further found that claimant reached maximum medical improvement on December 22, 1997, that claimant is unable to perform his usual work for employer, and that employer failed to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from May 2, 1997, to December 22, 1997, permanent total disability compensation from December 22, 1997 and continuing, and medical benefits under Section 7 of the Act, 33 U.S.C. §907.

Employer now appeals, arguing that the administrative law judge erred in finding that claimant established his *prima facie* case for invocation of the Section 20(a) presumption and that employer failed to establish rebuttal of that presumption. Employer additionally challenges the administrative law judge's determination that it failed to establish the availability of suitable alternate employment, and the administrative law judge's finding that it is liable for claimant's related medical expenses. Claimant responds, urging affirmance.

Employer initially contends that the administrative law judge erred in invoking the Section 20(a) presumption. Specifically, employer asserts that the administrative law judge erred in finding that claimant established the working conditions element of his *prima facie* case. We disagree. In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish his *prima facie* case by showing that he suffered a harm and that an accident occurred or working conditions existed which could have caused the injury or harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director,* OWCP, 445 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996); *Konno v. Young Bros., Ltd.,* 28 BRBS 57 (1994). In establishing his *prima facie* case, claimant is not required to introduce affirmative medical evidence proving that the accident or working conditions in fact caused the harm. Rather, claimant must show only the existence of an accident or working conditions which could conceivably cause the harm alleged. *See Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989).

In the instant case, we hold that the administrative law judge properly invoked the Section 20(a) presumption, as the parties do not dispute the fact that claimant suffered a harm and that, on December 26, 1996, claimant immediately sought first aid treatment after falling into a six foot hole while working for employer. *See Bolden*, 30 BRBS 71; *see generally Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991). Thus, because claimant successfully established that he suffered a harm and that an accident occurred at work which could have caused his injury, we affirm the administrative law's invocation of the Section 20(a) presumption. *See generally Peterson v. Columbia Marine Lines,* 21 BRBS 299 (1988).

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter,* 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director,* OWCP, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v.*

Director, OWCP, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995). This rule applies not only where the underlying condition itself is affected but also where the injury "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.*, 18 BRBS 212, 214 (1986). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence in the record and resolve the causation issue based on the record as a whole. *See Port Cooper*, 227 F.3d 284, 34 BRBS 96(CRT); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1984).

In this case, employer contends that the administrative law judge erred in finding that it failed to submit sufficient evidence to establish rebuttal. Employer argues, in essence, that claimant did not sustain, in a work-related accident, the medical conditions forming the basis of his claim for compensation. In support of this argument, employer avers that it presented evidence that claimant's back and leg conditions pre-existed his December 1996 fall, that claimant did not complain of pain until four months after the subject incident, that claimant did not initially inform his physicians about his fall, and that claimant first filed a claim with employer's group insurance for a non-occupational disability. Employer, however, has identified no evidence establishing that claimant's work accident, which included falling into a six foot hole, did not aggravate or make symptomatic claimant's back and leg complaints. Thus, it has failed to meet its burden of producing substantial evidence on rebuttal. We thus affirm the administrative law judge's finding that claimant's ongoing back and leg complaints are causally related to his employment with employer. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Employer next challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment. Specifically, employer contends that the administrative law judge erred in failing to credit the testimony of its vocational counselor and the opinion of Dr. Steck regarding claimant's post-injury employment potential. We disagree. Where, as in this case, it is uncontroverted that claimant is unable to return to his usual employment duties, the burden shifts to employer to establish the existence of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986).

The administrative law judge concluded that employer failed to establish the availability of suitable alternate employment based upon the testimony of Mr. Roberts,

claimant's vocational specialist, and claimant's credited complaints following his August 5, 1997, back surgery. Specifically, the administrative law judge concluded that, contrary to employer's assertions, claimant could not realistically compete for or perform the tasks required of a sedentary or light-duty employee post-surgery. In this regard, Mr. Roberts, after testing claimant and reviewing claimant's medical profile, determined that claimant is illiterate in reading and exhibited only gross manual skills. After further considering claimant's age and residual post-surgical back symptoms, Mr. Roberts opined that claimant was incapable of meeting the basic requirements for sedentary or light-duty work.[1] In contrast, the administrative law judge determined that the opinion of Dr. Steck, who performed claimant's decompressive laminectomy at three lumbar levels on August 5, 1997, that claimant could perform light to sedentary work post-surgery did not take into account claimant's mental skills. Similarly, the administrative law judge found that Ms. Favaloro, employer's vocational expert, did not consider whether claimant possesses the necessary skills to perform the tasks required of light or sedentary work.

[1]Claimant was sixty-six years of age at the time of the formal hearing.

It is well-established that the administrative law judge as the trier of fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961). In the instant case, Mr. Roberts's testimony, supported by claimant's continued complaints, constitutes substantial evidence in support of the administrative law judge's finding that claimant, following his back surgery, was incapable of competing for or performing sedentary or light-duty work.[2] We therefore affirm the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment, and his award of continuing total disability compensation to claimant. *See Ceres Marine Terminal v. Hinton,* 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Jones v. Genco*, 21 BRBS 12 (1988).

Moreover, employer's contention that the administrative law judge demonstrated bias by reaching his determinations based more on his sympathy towards claimant than the evidence of record is without merit. We hold that employer's various references to testimony given at the formal hearing and the administrative law judge's reliance upon it fails to rise to the level necessary to indicate prejudicial bias by the administrative law judge. *See Raimer v. Willamette Iron & Steel Co.,* 21 BRBS 98 (1988). Adverse rulings alone are insufficient to establish bias. *Orange v. Island Creek Coal Co.,* 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986). Employer has thus failed to demonstrate that the administrative law judge's actions regarding this claim were arbitrary, capricious, or an abuse of discretion.

Finally, employer alleges, without briefing, that the administrative law judge erred in assessing medical costs associated with claimant's back condition against employer. Brief at i. Section 7 of the Act, 33 U.S.C. §907, describes an employer's duty to provide medical services necessitated by its employee's work-related injuries. Entitlement to medical benefits is contingent upon a finding of a causal relationship between the injury and employment. *See generally Wendler v. American National Red Cross*, 23 BRBS 408 (1990)(McGranery, J., dissenting on other grounds). Upon establishing such a relationship, claimant is entitled to medical benefits for a work-related injury even if that injury is not economically disabling if the treatment is reasonable and necessary for the work-related injury. *See Romeike v. Kaiser Shipyards, Inc*., 22 BRBS 57 (1989); *Pardee v. Army & Air Force Exchange Service*, 13

[2]Contrary to employer's contention, the administrative law judge was not required to credit the opinion of Dr. Steck on this issue after citing his opinion with approval when addressing the issue of causation. Causation and disability are separate issues, and the administrative law judge may accept or reject all or any part of any witness's testimony. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990); *Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962); *Pimpinella v. Universal Maritime Service Inc.,* 27 BRBS 154 (1993).

BRBS 1130 (1981); 20 C.F.R. §702.402. In the instant case, the administrative law judge found, and we have affirmed, that claimant's back condition arose out of or was aggravated by his work accident. No party has contended that the subsequent surgery was either

unreasonable or unnecessary. Accordingly, the administrative law judge's award of medical benefits under Section 7 is supported by the record and is hereby affirmed.

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

BETTY JEAN HALL
Administrative Appeals Judge