BRB No. 04-0791

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| CHESTER FULLER | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| EASTERN SHIPBUILDING GROUP | ) | DATE ISSUED: 07/11/2005 |
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| and | ) | |
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| AMERICAN LONGSHORE MUTUAL ASSOCIATION | ) | |
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| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order and the Order Denying Employer/Carrier's Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett & Lerner, P.A.), Dania Beach, Florida, for claimant.

Lawrance B. Craig, III and Frank J. Sioli (Valle, Craig, Sioli & Lynott, P.A.), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order Denying Employer/ Carrier's Motion for Reconsideration (2002-LHC-2609) of Administrative Law Judge Clement J. Kennington 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 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).

While working as a carpenter foreman for employer on March 30, 2001, claimant experienced sharp pain in his low back and right leg when he pulled on a filter cloth which had been buried in eight to ten inches of dirt. Dr. Reed, an orthopedic surgeon, diagnosed lumbar disc disease with radiculopathy based on a lumbar MRI showing degenerative disc disease at L4-5 with inferior extrusion toward the L5-S1 disc space and moderate to severe symptoms in the right leg. JX 4 at 105-107. Dr. Reed performed a microscopic lumbar laminotomy/diskectomy at the L4-5 level on April 24, 2001. Claimant thereafter underwent a functional capacity assessment (FCE), after which time Dr. Reed released claimant for work. Claimant returned to work for employer as a carpenter foreman on September 10, 2001, working at the same hourly rate as before the injury but without working overtime. After one or two months, employer moved claimant to its carpentry shop. Claimant alleges that he had difficulty performing the less strenuous carpentry shop duties and that, as he was unable to perform his work, much of the time he did nothing. Employer subsequently released claimant in July 2002.

Claimant continued to have problems with low back pain radiating into his right leg, and additional complaints of headaches, limitation of neck motion, shoulder and arm pain, and hand swelling. Claimant was then diagnosed with chronic pain syndrome. He became depressed and anxious, and began treating with several mental health experts. Employer paid claimant temporary total disability compensation from March 31, 2001, to September 9, 2001, on November 4, 2002, and from February 19, 2003, to March 20, 2003, temporary partial disability compensation from September 10, 2001, to October 21, 2001, and medical benefits of $20,976.66. 33 U.S.C. §§908(b), (e), 907.

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 established rebuttal of that presumption, and that, based on the record as a whole, claimant established a causal relationship between his employment with employer and his upper back, shoulder, neck and head pain, or chronic pain syndrome. The administrative law judge determined that claimant was unable to return to his usual employment duties with employer, and that claimant's job in employer's facility after his injury did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from March 30, 2001, to the present, and continuing. 33 U.S.C. §908(b). The administrative law judge subsequently denied employer's motion for reconsideration.

On appeal, employer challenges the administrative law judge's findings regarding the causal relationship between claimant's chronic pain condition and his employment and the extent of claimant's disability. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer initially challenges the administrative law judge's findings on causation. Specifically, employer contends that the administrative law judge erred in relying on the opinions of Drs. Chokhawala, Finch and Renick, who diagnosed claimant with chronic pain disorder related to his employment, rather than the opinions of Dr. Reed, claimant's treating orthopedic surgeon, and Dr. Witkind, a psychiatrist, in finding that claimant's non-lumbar complaints, including neck pain, shoulder pain, elbow pain and headaches, are causally related to his March 30, 2001, lumbar spine injury.

Section 20(a) provides claimant with a presumption that his injury is causally related to his employment if he establishes a *prima facie* case by showing that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). In this regard, it is well settled that a psychological impairment which is work-related is compensable under the Act. *American Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). 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 or aggravated by his employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). 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 Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Director, OWCP, Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

After consideration of employer's arguments on appeal, claimant's response, and the administrative law judge's decision, we affirm the administrative law judge's finding that claimant's non-lumbar conditions are causally related to his employment. The administrative law judge applied the Section 20(a) presumption, found it rebutted, and concluded based on the record as a whole that claimant established a causal relationship between his employment with employer and his chronic pain disorder, *i.e.*, his upper back, shoulder, neck and headache complaints. The administrative law judge credited the three doctors, including Dr. Chokhawala, the psychiatrist retained by employer to evaluate claimant, who diagnosed claimant with chronic pain disorder secondary to his complaints of back pain, cervical spine pain and headaches.[1] The administrative law

[1] In addition to Dr. Chokhawala, the administrative law judge specifically credited and relied upon the opinions of Dr. Finch and Dr. Renick, who both opined that claimant

judge rejected employer's contention that claimant's non-lumbar conditions did not arise until "well after" his March 30, 2001, work-place accident, noting that on June 12, 2001, approximately two months after he underwent surgery, claimant reported pain in his cervical spine and head and that these complaints remained throughout his treatment with Dr. Reed and his other treating physicians. Moreover, the credited physicians diagnosed claimant with chronic pain disorder secondary to his work accident and/or surgery and did not indicate that their diagnoses were not based at least in part on claimant's cervical spine and head pains. *See* EX 61 at 41; CX 64 at 7-10; CX 65 at 7-9; Decision and Order at 30.

Additionally, each doctor who examined claimant recognized some form of psychological overlay. Decision and Order at 30. The administrative law judge found that a relationship between claimant's upper back pain and psychological chronic pain disorder is buttressed by the fact that claimant's doctors diagnosed him with chronic pain disorder rather than a specific cervical spine or head injury, and that claimant's work restrictions were based on his lumbar injury and psychological conditions, rather than cervical spine or head injuries alone. The administrative law judge noted that even Dr. Reed testified that claimant likely had underlying psychological issues and that it was medically necessary to refer claimant to a psychiatrist,[2] and that Dr. Reed conceded that he would have no problem with the opinion of a physician who concurred with the psychiatric condition's being causally related to the industrial accident. JX 3 at 34-35.

We reject employer's assertion that the administrative law judge erred in weighing the evidence of record regarding the alleged causal relationship between claimant's non-lumbar conditions and his employment with employer. The 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 Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *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). Moreover, it is impermissible for the Board to substitute its views for those of the administrative law judge; thus, the administrative law judge's findings may not be disregarded merely on the basis that other inferences might appear to be more reasonable. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003). The administrative law judge

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has chronic pain disorder with both physical and psychological factors, resulting from his industrial accident. *See* CX 64 at 7-10; CX 65 at 7-9; Decision and Order at 30.

[2] Dr. Reed testified that on physical examination claimant exhibited four out of five Waddell signs which are factors typical of non-physiological and non-anatomic findings and indicate a psychological overlay. JX 3 at 8-10.

addressed each of employer's contentions regarding the causal relationship between claimant's condition and his employment in weighing the evidence of record, and his ultimate findings are supported by substantial evidence.[3] We therefore affirm the administrative law judge's conclusion that claimant's upper back shoulder, neck and head pains are related to claimant's employment with employer. *Brown*, 893 F.2d at 297, 23 BRBS at 24(CRT); *O'Kelley*, 34 BRBS 39; *Konno*, 28 BRBS 57; *Casey v. Georgetown Univ. Medical Center*, 31 BRBS 147 (1997); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).[4]

Employer next challenges the administrative law judge's finding that claimant established a *prima facie* case of total disability; in the alternative, employer contends that the administrative law judge erred in determining that employer did not establish the availability of suitable alternate employment. We first address employer's contention that the administrative law judge erred in finding that claimant is incapable of performing his usual employment duties as a carpenter foreman. Claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRB 56 (1985). To establish a *prima facie* case of total disability, claimant must show that he can no longer perform his usual work because of his work-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Harmon v. Sea-Land Service*, 31 BRBS 45 (1997).

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[3] Moreover, employer's argument that more weight should be given to the physicians with expertise in physical problems than to those dealing with psychological issues is without merit, as a psychological impairment can be an injury under the Act if it is work-related. *Manship*, 30 BRBS 175; *Konno*, 28 BRBS 57.

[4] Employer also avers that the administrative law judge's finding on this issue should be reversed based on public policy considerations, asserting that the administrative law judge's decision creates a precedent which would allow for the compensability of physical injuries which are not causally related to the work injury in cases where an employee "psychiatrically" claims to have pain by attaching physical complaints from otherwise unrelated parts of the body to the coattails of a psychiatric claim. Employer's argument in this regard is without merit. This claim is one for chronic pain, and the evidence establishes that a psychological element is a component of this pain. Such injuries have long been compensable under the Act. *See cases cited, supra.* Claimant cannot, as employer posits, "simply" attach unrelated conditions to a psychological claim, but must have credible evidence to support his claim. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

In finding that claimant established a *prima facie* case of total disability, the administrative law judge reasoned that no doctor stated that claimant is capable of returning to his usual job as carpenter foreman with employer, that the FCE concluded that claimant's abilities do not match the physical demands of his job and indicated that he would need a modified position, and that Drs. Reed and Witkind testified that claimant may be capable of modified medium duty work, while Dr. Derbes released claimant to light duty part-time work. The administrative law judge observed that Drs. Durfey, Renick and Finch have not released claimant to any form of work, and he rejected employer's contention that claimant could do at least the administrative duties of a carpentry foreman based on the September 27, 2001, FCE, noting that that the FCE was of limited value since it lacked supporting data and was inconsistent with the Dictionary of Occupational Titles (DOT). The administrative law judge also credited claimant's testimony regarding his post-injury pain and functional limitations,[5] and he found that the physical demands of claimant's administrative duties were never fully developed by employer and that employer removed claimant from his carpentry foreman position within one to two months of claimant's return to work in that position. Decision and Order at 35; Order Denying Employer/Carrier's Motion for Reconsideration at 2.

The administrative law judge could properly rely upon the aforementioned medical opinions, in conjunction with claimant's testimony and the undisputed fact that employer removed claimant from his position as carpenter foreman within one to two months of claimant's return to work, to find that claimant established a *prima facie* case of total disability. *See Lombardi v. Universal Maritime Serv. Corp.*, 32 BRBS 83 (1978); *Anderson*, 22 BRBS 22. We therefore affirm the administrative law judge's determination that claimant cannot return to his usual employment duties with employer as a carpenter foreman and, thus, that claimant has established a *prima facie* case of total disability.

Employer next contends that the administrative law judge erred in determining that it failed to establish the availability of suitable alternate employment post-injury. We disagree. Once claimant establishes his inability to perform his usual work, the burden of proof shifts to employer to establish the availability of suitable alternate employment which claimant, by virtue of his age, education, work experience and physical restrictions, is capable of performing. *Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir.

[5] Mark McGruder, employer's human resources manager, testified that the position of carpenter foreman has a lifting requirement of 50 pounds. Mr. McGruder stated that claimant, after he returned to the job of carpenter foreman, was not performing that job, because "he can't do the job or won't do the job," Tr. at 305, and this was causing problems for his supervisor and was not good for the morale of the other employees. Tr. at 303-304; EX 3 at 100-102.

1981). Employer may meet this burden by offering claimant a suitable, light duty position in its facility.[6] *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). An employee may be found to be totally disabled despite continued employment if he works only through extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 477, 7 BRBS 838 (4th Cir. 1978); *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002); *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989).

We affirm the administrative law judge's finding that the work claimant performed in employer's carpentry shop subsequent to his removal by employer from his position as a carpenter foreman does not establish the availability of suitable alternate employment, as it was sheltered employment. Sheltered employment is a job for which claimant is paid even if he cannot do the work and which is unnecessary, and claimant is entitled to benefits under the Act for total disability while working in a post-injury job under this circumstance. *Legrow*, 935 F.2d 430, 24 BRBS 202(CRT); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989). Such employment is insufficient to constitute suitable alternate employment. *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). In addressing this position, the administrative law judge credited claimant's testimony and the corroborating testimony of claimant's wife and Mr. Adato that claimant performed no work 75 percent of the time after his transfer to employer's carpentry shop and that he spent the remaining time on menial tasks such as cutting out small items, taking some inventory, and performing some managerial duty, stenciling life jackets, building boxes and putting machinery together.[7] Tr. at 128-129; CX 63 at 15. On July 27, 2002, when employer laid him off, claimant was informed by employer that it would place claimant on workers' compensation. Tr. at 54-56.

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[6] We reject employer's contention that the position of carpenter foreman to which claimant returned in September 2001 was modified such that this position established the availability of a suitable light-duty position whose duties claimant was capable of performing. In this regard, the administrative law judge rationally found that both claimant and Jerry Albert, a vocational counselor retained by employer, testified that claimant's post-injury job as a carpenter foreman was essentially the same position that he was performing at the time his work-related injury occurred. Decision and Order at 35.

[7] Mr. McGruder testified "We were paying [claimant] for $19 an hour and not getting $19 an hour worth of work out of him We essentially were getting nothing, so it was costing us." Tr. at 305.

In adjudicating a claim, it is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses, and he is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In the instant case, the administrative law judge's finding based upon claimant's testimony, as supported by the testimony of claimant's wife and Mr. McGruder, that claimant's position in the carpentry shop was sheltered employment is rational and supported by substantial evidence.[8] *Legrow*, 935 F.2d 430, 24 BRBS 202(CRT). Thus, the administrative law judge's award of total disability benefits to claimant during his period of employment in employer's carpentry shop is affirmed.[9]

[8] The administrative law judge addressed and rejected employer's allegation that claimant's testimony is incredible because he showed signs of symptom exaggeration, malingering, drug addiction, intentional sabotage of his job and failure to conduct a diligent job search. Decision and Order at 28. The administrative law judge noted that no physician ever indicated that claimant was at any time addicted to narcotic medication, and that Drs. Reed and Derbes did not report any signs of addiction. Drs. Durfey, Renick and Finch all testified that they did not notice signs of addiction or drug abuse and claimant's urinalysis was consistent with his medication. The administrative law judge further found that the record is not overwhelmingly clear that claimant exhibited exaggeration or symptom magnification because the opinions of Drs. Witkind and Chokhawala to that effect are outweighed by the opinion of four treating physicians who did not find claimant to be a malingerer, but rather that he suffered significant psychological overlay of his symptoms. The administrative law judge concluded that he did not find any reason to discredit claimant's testimony, as he found him well-spoken, intelligent and straightforward, and a dedicated hard worker whose testimony was consistent and largely corroborated by the remainder of the record. Decision and Order at 28.

[9] The administrative law judge rejected employer's argument that it should receive credit for the salary payments it made to claimant during the period for which the administrative law judge awarded claimant temporary total disability compensation. Under 33 U.S.C. §914(j), an employer may receive credit for an "advance payment of compensation." *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988). *See* Order on Reconsideration at 2. On appeal, employer summarily states that claimant received a double recovery, but does not brief the issue. *See* Emp. Pet. for Review at 64. We need not address this issue, as mere assignment of error is not sufficient to invoke Board review. *See* 20 C.F.R. §802.211(b); *Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986).

Lastly, employer alleges that the administrative law judge did not analyze its evidence of suitable employment from a physical point of view. It is well established, however, that employer must produce evidence of jobs which claimant is capable of performing given his mental and psychological capabilities, as well as his physical restrictions. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995). In this case, employer submitted a labor market survey dated January 26, 2004, prepared by Mr. Albert, a vocational specialist, identifying openings from December 26, 2003, to January 22, 2004. Tr. at 270-273; EX 60 at 15-29. The administrative law judge found that these positions do not establish the availability of suitable alternate employment because Drs. Durfey, Renick and Finch have not released claimant for work owing to his psychiatric condition, and Drs. Reed and Derbes deferred to these physicians with regard to claimant's mental state. As claimant's psychological condition is part of his work- related chronic pain syndrome, and the administrative law judge's finding that claimant cannot work due to his psychological condition is supported by substantial evidence, we affirm the administrative law judge's consequent determination that the positions identified by employer do not constitute the availability of suitable alternate employment that claimant was capable of performing.

Accordingly, the administrative law judge's Decision and Order and Order Denying Employer/Carrier's Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge