BRB No. 05-0660

LAURYN BRUCE STEWART	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: 05/05/2006
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits Claim and the Order Granting Reconsideration and Modifying Award of Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland, Topsham, Maine, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

Before: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits Claim and the Order Granting Reconsideration and Modifying Award of Benefits (2003-LHC-01885, 2003-LHC-01886, 2003-LHC-01887, 2003-LHC-01888) of Administrative Law Judge Colleen A. Geraghty 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant had worked for employer since 1989, most recently as a pipefitter. He used high pressure hydraulic equipment to perform his duties and grinders called flapper wheels approximately 50 percent of each day. Claimant testified that on February 14, 2000, he hit his head on a drain tap and pulled his neck back. He sought treatment at the

shipyard's medical department, where he was referred to several places for physical therapy and to chiropractors. Eventually, claimant began treatment with Dr. Pavlak for neck pain. He returned to work as a pipefitter with no restrictions shortly thereafter, but continued treating with Dr. Pavlak. On January 30, 2001, claimant reported to Dr. Pavlak that he was experiencing tingling in his fingers and numbness in his hands. He also reported that his shoulder had become painful over the previous two weeks. After an examination, Dr. Pavlak diagnosed a possible impingement, he treated claimant's shoulder with an injection of Depo-Medrol and Marcaine, and referred him to physical therapy. He also diagnosed carpal tunnel syndrome and recommended that claimant use night splints. Claimant returned to his regular duties, and by the end of February 2002, Dr. Pavlak reported that claimant's shoulder condition had resolved. Claimant continued to work until February 7, 2002, when he left work due to a knee injury. Claimant alleged that his knee had been bothering him "for quite sometime," but did not allege that there was a traumatic injury to the knee. Claimant was treated conservatively with rest and a cortisone injection, and was cleared to return to work with restrictions against kneeling, squatting and crawling. Claimant has not returned to work and sought benefits under the Act for his neck, shoulder, and knee injuries, and for carpal tunnel syndrome.

In her decision, the administrative law judge found that claimant's chronic neck pain is causally related to his work. However, the administrative law judge found that the evidence does not establish that claimant suffers from bilateral carpal tunnel syndrome, that claimant has a right knee disability, or that claimant has a work-related shoulder impairment. The administrative law judge found that claimant's neck injury has reached maximum medical improvement, that claimant established he cannot return to his former duties due to the work-related neck injury, and that employer failed to establish the availability of suitable alternate employment. Thus, the administrative law judge awarded claimant permanent total disability benefits pursuant to Section 8(a), 33 U.S.C. §908(a), based on an average weekly wage of $618.88.

Employer filed a motion for reconsideration regarding whether claimant's neck injury is causally related to his employment and the extent of claimant's disability due to his neck injury. The administrative law judge reaffirmed her finding that claimant's neck condition is causally related to his employment, but agreed with employer that her analysis of the extent of claimant's disability due to his neck injury erroneously considered the effects of a subsequent shoulder injury, which the administrative law judge had found was not work-related. Thus, the administrative law judge considered the suitability of the jobs identified in the labor market survey submitted by employer and found that three of the five positions identified are suitable given claimant's age,

education, experience and physical limitations.[1] The administrative law judge concluded that employer established claimant's earning capacity as $500 per week, based on the average salary of the three positions. Accordingly, the administrative law judge modified her decision to award claimant permanent partial disability benefits of $79.25 per week. 33 U.S.C. §908(c)(21), (h).

On appeal, claimant contends that the administrative law judge erred in finding that his shoulder and knee injuries, and the carpal tunnel syndrome, are not work-related. In addition, claimant contends that the administrative law judge erred in reversing her prior decision that suitable alternate employment was not established as this was beyond the scope of a decision on reconsideration and the finding is not supported by the evidence. Claimant also contends that the administrative law judge failed to account for the effects of inflation in her determination of claimant's wage-earning capacity. Employer responds, urging affirmance of the administrative law judge's findings that claimant's shoulder injury, knee injury, and carpal tunnel syndrome are not work-related and of the administrative law judge's decision on reconsideration that claimant is limited to an award of permanent partial disability benefits.[2] Claimant filed a reply brief.

Carpal Tunnel Syndrome

Claimant contends that the administrative law judge erred in finding that Dr. Herzog's opinion is sufficient to establish rebuttal of the presumption that claimant has work-related symptoms involving numbness and tingling in his hands which require work restrictions. In order to be entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the Section 20(a) presumption is invoked, employer bears the burden of producing substantial evidence that the claimant's condition was not caused or

[1] The administrative law judge found that employer did not establish the nature, terms and availability of alternate positions identified at its own facility, and thus concluded that those positions do not establish suitable alternate employment.

[2] In its response brief, employer also urges the Board to reverse the administrative law judge's finding that claimant's current neck condition is work-related. However, this contention does not support the result below, and thus, we decline to address this contention as it was not raised in a cross-appeal. *Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

aggravated by his employment. *See Bath Iron Works Corp. v. Director, OWCP*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). If it does, the presumption falls from the case and the administrative law judge must weigh all of the evidence, with claimant bearing the burden of persuasion on the issue of the work-relatedness of his condition. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

In the present case, the administrative law judge found that Dr. Herzog's opinion that claimant does not have carpal tunnel syndrome is supported by the objective evidence of record. Specifically, Dr. Herzog, who is board-certified in nerve testing (electrophysiology), testified that the results of the nerve conduction studies showed "normal motor conductions and the delay on the sensory conduction was so mild that I didn't think that [claimant] met the criteria for carpal tunnel." Emp. Ex. 56 at 12. Dr. Herzog also reported that the Phalen's maneuver and the Tinel's test were inconsistent, which led him to the conclusion that claimant does not have carpal tunnel syndrome. *Id.* at 18. After watching the surveillance videotape, and also watching claimant walk through the parking lot of the office without the symptoms of pain (in his leg and shoulder) claimant exhibited in the office, Dr. Herzog testified that the inconsistencies observed on claimant's physical examination could be explained by a behavioral component or malingering. *Id.* at 22. He concluded that claimant did not require any work restrictions because of any wrist conditions, whether he had carpal tunnel syndrome or not. *Id.* at 33.

While this evidence would have been more appropriately addressed in determining whether claimant established the harm portion of his *prima facie* case rather than on rebuttal, any error is harmless as substantial evidence supports the administrative law judge's finding that claimant failed to establish an essential element of his claim for benefits. *See generally Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989) (it is claimant's burden to establish each element of his *prima facie* case by credible affirmative proof). The administrative law judge found that Dr. Herzog's opinion that claimant does not have carpal tunnel syndrome is better supported by the other evidence of record, including the nerve conduction tests and the surveillance videotape showing claimant actively using his hands in a forceful and repetitive manner. Emp. Exs. 31-38. Moreover, in reviewing the EMG test results, Dr. Pavlak noted that the results were "barely positive at the limit of electrophysiologic detectablility" for carpal tunnel syndrome. Cl. Ex. 6 at 47. As the administrative law judge is entitled to determine the weight to be accorded to the evidence of record and as she rationally credited the opinion of Dr. Herzog, we affirm the administrative law judge's finding that claimant did not establish that he suffers from carpal tunnel syndrome, or any disabling hand or wrist injury, as it is supported by substantial evidence. *See generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Shoulder Injury

Claimant contends that the administrative law judge erred in finding that his right shoulder impairment is not causally related to his employment. Claimant initially injured his right shoulder in a work-related traumatic injury in 1995. He was treated conservatively with ice, rest and muscle-relaxers, and was released for work with no restrictions. Cl. Ex. 8; Emp. Ex. 43. Claimant again complained of right shoulder pain in January 2001, alleging that his shoulder condition gradually worsened due to his overhead work. Cl. Ex. 6. Upon examination, Dr. Pavlak found positive signs of impingement and crepitus on rotation of the right shoulder. He diagnosed impingement syndrome with some bursitis in the right shoulder, and treated the shoulder condition with a cortisone injection and recommended physical therapy. When claimant returned to Dr. Pavlak in February 2001, claimant reported that his shoulder condition had substantially improved. *Id.* at 36. In July 2001, Dr. Pavlak reported that an examination of the right shoulder showed no sign of pain and that the impingement sign was negative. *Id.* at 40. Claimant did not complain of shoulder pain to Dr. Pavlak from July 2001 until September 2002, although he saw the doctor for treatment of other conditions. Claimant left his work with employer in February 2002. Claimant reported right shoulder pain again on September 13, 2002, and Dr. Pavlak reported significant crepitus on all ranges of motion and a positive impingement sign. *Id.* at 53. Dr. Pavlak treated the shoulder with another steroid injection and arranged for an MRI. Following the MRI, which showed a partial tear to the supraspinatus of the right shoulder, claimant underwent arthroscopic surgery in the fall of 2003 by Dr. Mancini to correct the impingement syndrome. Tr. at 52. Both Drs. Pavlak and Mancini attributed claimant's impingement syndrome to his overhead work for employer. Therefore, the administrative law judge invoked the Section 20(a) presumption that claimant's shoulder condition is work-related.

Dr. Herzog reported in June of 2002 that claimant's presenting problems were neck pain and right knee pain. Emp. Ex. 52. Claimant did not relate any shoulder problems at that time, and Dr. Herzog did not notice any abnormalities on the shoulder exam. By contrast, in June 2003, claimant complained of shoulder pain and Dr. Herzog diagnosed impingement syndrome of the right shoulder. However, Dr. Herzog opined that this condition was not related to his work for employer as there was no reference to shoulder pain when claimant was seen a year earlier, and claimant had not been working for employer in the interim. Emp. Ex. 56 at 27-28. Moreover, Dr. Herzog opined that the activities he observed claimant performing in the surveillance tapes could have caused the condition. *Id.* at 32. Dr. Herzog did not dispute that claimant suffered a shoulder condition while he was working for employer, but opined that that condition had resolved and that the current condition is not causally related, even in part, to claimant's duties with employer. *Id.* We affirm the administrative law judge's finding that this opinion is sufficient to establish rebuttal of the Section 20(a) presumption. *See Bath Iron*

Works Corp., 137 F.3d 673, 32 BRBS 45(CRT); *Coffey v. Marine Terminals Corp.*, 24 BRBS 85 (2000).

Moreover, in weighing the evidence as a whole, the administrative law judge accorded Dr. Herzog determinative weight as she found that his opinion was supported by the surveillance videos and the record of claimant's treatment for his shoulder. We affirm the administrative law judge's finding as it is rational and supported by substantial evidence. *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

Knee Injury

Claimant contends that the administrative law judge erred in finding that he does not suffer from a work-related, disabling knee condition. The administrative law judge found, based on Dr. Herzog's opinion, that any problem with claimant's knee had resolved; she did not expressly address the cause of any knee condition claimant may have had.[3]

Claimant consulted with Dr. Wickenden, and was seen by Dr. Wickenden's physician's assistant, Stephen A. Bennett, on February 13, 2002. Cl. Ex. 11. Mr. Bennett diagnosed a right knee lateral meniscus degenerative tear and requested an MRI. Claimant was assigned work restrictions. Because employer was unable to provide light-duty work within those restrictions, claimant did not return to work, and has not worked since that time. Following a review of the MRI, Dr. Wickenden examined claimant on April 25, 2002, and concluded that the cortisone injection administered by Mr. Bennett had improved claimant's knee symptoms. *Id.* at 108. He noted that claimant had full extension, no instability, and no pain on patellofemoral compression. Although the MRI showed no meniscus tear, Dr. Wickenden released claimant for work on April 29, 2002, with restrictions against kneeling, squatting and crawling, but indicated that no permanent impairment was anticipated. Claimant sought continuing total disability benefits for the knee injury commencing in May 2002.

Pursuant to employer's request, Dr. Herzog reviewed claimant's medical records and examined claimant on June 11, 2002. Emp. Ex. 45. On examination, Dr. Herzog found that claimant's right knee had good alignment, that there was no effusion or joint

[3] Employer contends in its response brief that the evidence supports a finding that there was not a new injury to claimant's knee in February 2002, the date listed on the claim for compensation. However, the administrative law judge did not make that finding, but found that claimant did not have any disability resulting from any right knee injury.

line tenderness and that he had full range of motion. He also noted that that the MRI taken on February 20, 2002 was negative. He concluded that claimant had suffered a right knee strain, but that it had resolved by the date of his examination. Dr. Herzog reexamined claimant in June 2003 and again stated that claimant's right knee pain had resolved. The administrative law judge credited the reports of Dr. Herzog, noting that they were not directly contradicted by Dr. Wickenden's report. Although Dr. Wickenden assigned restrictions on claimant's return to work in April 2002, he indicated that he did not anticipate a permanent impairment. The administrative law judge also noted that claimant did not seek treatment for his knee condition following the release to work in April 2002, and that the surveillance videotapes support Dr. Herzog's conclusions that claimant's right knee condition had resolved with no impairment. As the administrative law judge's finding that claimant did not demonstrate the existence of any disabling knee impairment is rational and supported by substantial evidence, we affirm it.[4] *See generally Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

Scope of Reconsideration

Claimant contends that the administrative law judge erred in reconsidering the extent of his disability on reconsideration, as employer's motion for reconsideration did not meet the criteria for granting relief under Federal Rule of Civil Procedure (FRCP) 59(e). Employer filed a motion for reconsideration challenging the administrative law judge's findings regarding the extent of claimant's disability. Specifically, employer contended that the administrative law judge erred in finding that suitable alternate employment was not established. The administrative law judge reviewed her earlier findings and concluded that she had erroneously included the effects of medications prescribed for claimant's subsequent non-work-related shoulder injury in her evaluation of the positions identified in the labor market survey. The administrative law judge then reviewed the positions identified by employer's vocational expert and determined that three of the five jobs were suitable given claimant's education, experience and physical limitations. Thus, the administrative law judge found that employer established suitable alternate employment as of November 1, 2003, and awarded claimant continuing permanent partial disability benefits thereafter.

The general rules for proceedings before an administrative law judge at 29 C.F.R. Part 18 do not explicitly provide for motions for reconsideration, nor do the Longshore

[4] Moreover, we note that in any event, the administrative law judge found that claimant is entitled to permanent total disability benefits from the period from May 6, 2002 to October 30, 2003, due to his neck injury.

regulations at 20 C.F.R. Part 702.[5] The rules at Part 18 state that the FRCP apply to any situation not provided by in those rules or by other statutes or regulations. 29 C.F.R. §18.1. Claimant thus contends on appeal that in view of the silence in the regulations regarding criteria for seeking reconsideration of a decision, the FRCP requirements should govern such motions. Contrary to claimant's contention, however, the FRCP are not controlling as the Act specifically provides that an administrative law judge is not bound by formal rules of procedure. 33 U.S.C. §923(a). Thus, while the Board and the courts have applied the FRCP in instances involving such issues as time computations where the Act or regulations are silent, *see, e.g., Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001), or have found the rules instructive, *see Sprague v. Director, OWCP*, 688 F.2d 862, 869 n. 16, 15 BRBS 11, 21 n.16 (CRT)(1st Cir. 1982), the FRCP do not apply to limit the administrative law judge's authority in view of the Act's specific statutory language that formal rules of procedure and evidence are not binding on an administrative law judge. *See Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002). Thus, we hold that the administrative law judge properly considered an issue raised in employer's timely motion for reconsideration as it pertained to an issue addressed in her initial Decision and Order, and we will review the merits of that finding.

Suitable Alternate Employment

Claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Once, as here, claimant establishes her *prima facie* case of total disability, the burden shifts to employer to demonstrate within the geographic area where claimant resides, the availability of realistic opportunities for employment which he, by virtue of his age, education, work experience, and physical restrictions, is capable of performing and for which he can compete and could reasonably expect to secure. *CNA Ins. Co. v. Legrow* , 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991).

We reject claimant's contention that the administrative law judge erred in failing to consider the effects of claimant's narcotic medication on his ability to perform the identified jobs. The administrative law judge found that this medication was prescribed to treat claimant's shoulder injury, and we have affirmed the administrative law judge's finding that claimant's current shoulder condition is not related to his work for employer.

[5] Only the Board's regulations mention such motions and they do so in the context of providing that a timely motion for reconsideration of a decision or order of an administrative law judge shall suspend the running of the time for filing a notice of appeal. 20 C.F.R. §802.206(a), (b)(1).

Contrary to claimant's contention, employer is not liable for the effect on claimant's wage-earning capacity of a subsequent injury or condition. *See generally Wright v. Connelly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993).

In addition, we reject claimant's contention that the administrative law judge erred in failing to consider the restrictions Dr. Pavlak assigned as a result of claimant's alleged wrist condition. We have affirmed the administrative law judge's rational decision to credit Dr. Herzog's opinion that claimant did not have carpal tunnel syndrome or any work restrictions related to any hand or wrist condition.

Claimant also contends that the administrative law judge erred in not considering the effect of claimant's anxiety and depression on his ability to perform the identified positions. Claimant contends that, contrary to the administrative law judge's finding, there is evidence of these psychological conditions as Dr. Herzog diagnosed anxiety and depression, and that this diagnosis constitutes an "admission" by employer because Dr. Herzog was "employer's doctor." Dr. Herzog listed anxiety and depression in his diagnosis, but offered no basis or explanation of this impression. Moreover, while Dr. Pavlak noted that claimant had increasing signs of depression in February 2003, there is no evidence that claimant was treated for depression or anxiety and there are no medical reports assigning restrictions due to these conditions. Therefore, we reject claimant's contention that the administrative law judge erred in failing to consider the effect of anxiety and depression on claimant's ability to perform the identified positions.

Claimant does not offer any other challenges to the administrative law judge's finding that the positions of a security officer, a sales representative for building materials, and as a customer account manager with a bank establish the availability of suitable alternate employment. The administrative law judge reviewed the physical requirements of these positions and the experience required by each position and found that they are suitable given claimant's age, education, experience and physical restrictions. We affirm the administrative law judge's finding as it is rational and supported by substantial evidence. *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004).

In determining claimant's post-injury wage-earning capacity, the administrative law judge rationally averaged the wages of the suitable jobs identified in the labor market survey to determine that claimant has a wage-earning capacity of $500 per week. *See* 33 U.S.C. §908(h); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). However, as claimant correctly asserts, in order to neutralize the effects of inflation, the administrative law judge must adjust the wages of the post-injury jobs to the wages they paid at the time of the injury. *See, e.g., Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). As the administrative law judge found that the jobs identified by employer paid an average of

$500 in 2003, and claimant was injured in 2000, we remand the case to the administrative law judge for findings regarding the wages paid in 2000. If this evidence is not contained in the record, the administrative law judge may use the percentage change in the National Average Weekly Wage. *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

Accordingly, the case is remanded for the administrative law judge to determine the wages paid by the suitable post-injury jobs at the time of injury. In all other respects, the Decision and Order Awarding Benefits Claim and the Order Granting Reconsideration and Modifying Award of Benefits are affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge