BRB Nos. 10-0599

JAMES BLACKSHEAR, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 05/16/2011
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Kenneth J. Shakeshaft, Colorado Springs, Colorado, for claimant.

Jerry R. McKenney and Billy J. Frey (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-LDA-00067) of Administrative Law Judge Russell D. Pulver 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, in February 2006, commenced employment for employer as a water purification unit operator in Afghanistan, where he worked seven days a week, 12 hours per day. On April 1, 2006, claimant sustained a work-related injury to his left knee when he was knocked to the ground while moving a 300-pound water bladder liner. Claimant sought medical treatment at the hospital and was given pain medication and a knee brace which required the use of crutches. Claimant was returned to the United States within a week of this incident; claimant received medical treatment including an MRI, x-rays, knee surgery, epidural injections, physical and massage therapy, and medications, including narcotics, for his knee condition and back pain. Claimant has not been gainfully employed since his return to the United States. Employer voluntarily paid claimant temporary total disability compensation from May 17, 2006, through the date of the formal hearing at a rate of $600 per week. *See* 33 U.S.C. §908(b). Claimant sought benefits under the Act for work-related injuries he allegedly sustained to his back, as well as for an adjustment disorder with depression and anxiety.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant sustained a work-related injury to his left knee on April 1, 2006. The administrative law judge found that claimant reported symptoms of back pain within four weeks of the work incident, and that claimant was subsequently diagnosed with an adjustment reaction with depression and anxiety. Decision and Order at 21. With regard to claimant's back and psychological conditions, the administrative law judge found that claimant entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, and that employer did not establish rebuttal of the presumption. *Id.* at 21 – 22. Therefore, he found that these conditions are related to the work incident. The administrative law judge found that claimant's knee condition has reached maximum medical improvement, but that his back and psychological conditions remain temporary in nature, that claimant is unable to resume his usual employment duties with employer in Afghanistan, and that employer did not establish the availability of suitable alternate employment. Accordingly, after calculating claimant's average weekly wage as $1,593.72, based solely on the wages he earned while employed in Afghanistan, the administrative law judge awarded claimant continuing compensation for temporary total disability commencing April 26, 2006, at a rate of $1,062.48 per week. 33 U.S.C. §908(b).

On appeal, employer contends the administrative law judge erred in finding that claimant's back condition and psychological condition are related to his employment with employer. Employer also challenges the administrative law judge's findings regarding the extent of claimant's work-related disability and his calculation of claimant's average weekly wage. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer contends that the administrative law judge erred in finding that claimant's back condition and psychological condition are related to his April 1, 2006,

work incident.[1] Specifically, citing *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008),[2] employer argues that the administrative law judge erred in applying the Section 20(a) presumption to link these two conditions to claimant's employment. We disagree.

In order to invoke the Section 20(a) presumption, claimant bears the burden of establishing 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. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *see also 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); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). Upon invocation of the Section 20(a) presumption, the burden of persuasion shifts to employer to rebut the presumption with substantial evidence that the claimed conditions are not work-related. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge then must weigh all the evidence and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See Hawaii Stevedores*, 608 F.3d 642, 44 BRBS 47(CRT); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

We affirm the administrative law judge's finding that claimant invoked the Section 20(a) presumption with regard to his back and psychological conditions. It is well settled that employer is liable for sequelae resulting from the original work injury. *See, e.g., Seguro v. Universal Maritime Service*, 36 BRBS 28 (2002); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988); *Turner v. The Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984). In this case, claimant specifically claimed benefits for his knee and back conditions, as well as for a psychological condition resulting from the April 1, 2006,

[1]Employer concedes that claimant's left knee condition resulted from his April 1, 2006, work injury.

[2]As the Seattle, Washington, district director filed and served the administrative law judge's decision, Ninth Circuit law applies in this case. 42 U.S.C. §1651(b); *Service Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *Pearce v. Director, OWCP*, 603 F.2d 763, 10 BRBS 867 (9th Cir. 1979).

work incident. *See* EX 1 at 9;[3] *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). Moreover, in support of his claim for these specific conditions, claimant submitted medical evidence that his back and psychological conditions are related to his April 1, 2006, work injury.[4] Consequently, the administrative law judge properly applied the Section 20(a) presumption to these two conditions.[5] *See U.S. Industries*, 455 U.S. 608, 14 BRBS 631 (Section 20(a) presumption applies only to the claim made by claimant and "considerable liberality" allows the amendment of claims); *Turner*, 16 BRBS 255; Decision and Order at 21. Thus, as the administrative law judge's finding that claimant is entitled to the Section 20(a) presumption that his back and psychological conditions are work-related is supported by substantial evidence and in accordance with law, we reject employer's contentions of error. As employer does not challenge the administrative law judge's finding that it did not introduce substantial evidence to rebut the Section 20 (a) presumption, we affirm the administrative law judge's finding that claimant's back and psychological conditions are causally related to his April 1, 2006, work injury. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

Employer also challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment. Where, as in this case, claimant has established a *prima facie* case of total disability by demonstrating his inability to perform his usual employment because of his injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to

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[3]Although employer avers in its appellate brief that it was unaware "prior to the Formal Hearing" that claimant intended to seek compensation under the Act for his back and psychological conditions, *see* Emp. Br. at 5, employer submitted into evidence claimant's pre-hearing statement, dated approximately seven weeks prior to the formal hearing, wherein claimant alleged that he had sustained work-related injuries to his knee and back, as well as depression. *See* EX 1 at 9.

[4]In this regard, Dr. Hall opined that claimant's back condition was a direct result of his work injury, CX 17 at 2, and Dr. Fitzgerald opined that claimant has an "adjustment reaction with depression and anxiety," by which claimant perceives himself more disabled by his leg injury than perhaps he is. CX 9 at 43 – 44.

[5]Thus, while the Fifth Circuit's decision in *Amerada Hess* is not controlling in this case, *see* n.2, *supra*, that decision is nonetheless distinguishable since, in this case, claimant's claim for benefits specifically included each of the three conditions that the administrative law judge found were work-related and claimant offered medical evidence linking the back and psychological conditions to the work injury.

meet this burden, employer must establish that suitable alternate work was "realistically and regularly" available to claimant in his community. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). The administrative law judge must compare claimant's restrictions to the physical requirements of the jobs relied upon by employer in order to determine their suitability for claimant. *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998).

Employer submitted into the record vocational evidence which, it alleges, establishes the availability of suitable alternate employment that claimant could perform; specifically, employer's vocational rehabilitation expert, Mr. Stanfill, prepared a labor market survey in which he identified employment positions deemed suitable for claimant. *See* EX 15; CX 32. The administrative law judge relied upon the opinions of Drs. Fitzgerald and Danylchuk, as well as the testimony of claimant, in determining claimant's post-injury work restrictions. In this regard, Dr. Fitzgerald opined that claimant could lift 30 to 40 pounds occasionally and 10 to 20 pounds frequently, and that claimant could walk for 60 minutes if allowed a 15 minute break thereafter. CX 9. Dr. Danylchuk, who prescribed medication for claimant, agreed with the work restrictions placed on claimant by Dr. Fitzgerald. CX 18. Claimant testified that he could not stand or operate an automobile for prolonged periods of time, and that he could not perform the bending, twisting and crawling required of some the positions identified by employer.[6]

The administrative law judge found that employer did not establish the availability of employment opportunities that claimant could perform. The administrative law judge found that Mr. Stanfill relied solely on Dr. Richmond's opinion that claimant could return to work without restrictions, and that, consequently, he did not obtain information regarding the lifting, sitting and standing requirements of the employment positions he deemed suitable for claimant. In the absence of these requirements, the administrative law judge stated he was unable to ascertain whether the positions identified by Mr. Stanfill are within the restrictions placed on claimant by Dr. Fitzgerald, and approved by Dr. Danylchuk. Therefore, he concluded that employer did not establish the availability of suitable alternate employment. Decision and Order at 26 – 27.

This finding is rational and supported by substantial evidence. As the administrative law judge found, the labor market survey prepared by Mr. Stanfill was predicated solely on the opinion of Dr. Richmond that claimant could return to work with no restrictions; in this regard, Mr. Stanfill testified that he did not consider either the physical restrictions placed on claimant by Dr. Fitzgerald or the effects of claimant's

[6]In contrast, Dr. Richmond opined that claimant could return to work without any restrictions. EX 14.

prescribed pain medication on his ability to work. CX 32. The administrative law judge rationally credited claimant's testimony, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and the opinions of Drs. Fitzgerald and Danylchuk. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Consequently, the administrative law judge found that the positions identified in employer's labor market survey do not contain information regarding their respective lifting, sitting and standing requirements so as to permit a comparison of claimant's restrictions with those requirements. EX 15. Accordingly, as the administrative law judge's findings regarding employer's vocational evidence are rational and supported by substantial evidence, the conclusion that employer did not demonstrate the availability of suitable alternate employment, and the consequent award of total disability benefits to claimant, are affirmed.[7] *Beumer*, 39 BRBS 98; *Wilson*, 30 BRBS 199; *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Employer contends the administrative law judge erred in calculating claimant's average weekly wage. Employer avers that the administrative law judge erred in utilizing only claimant's actual overseas earnings at the time of his injury in determining claimant's average weekly wage; rather, employer asserts that a blended approach, that is a combination of claimant's stateside and overseas earnings, is appropriate for the calculation of claimant's average weekly wage.

The Board has held that where, as here, claimant is injured while working overseas in a dangerous environment in return for higher wages under a long-term contract, his annual earning capacity should be calculated based upon the earnings in that job as they reflect the full amount of the earnings lost due to the injury. *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009). Section 10(c), 33 U.S.C. §910(c), directs the administrative law judge to determine claimant's annual earning capacity "having regard to the previous earnings of the injured employee in the employment in which he was injured."[8] The goal of Section 10(c) is a sum that reflects the potential of claimant to earn absent injury. *See Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). Average weekly wage calculations based solely on a claimant's new, higher wages are appropriate where they reflect the potential to earn at that level. *Healy Tibbitts Builders, Inc.*, 444

[7]While, as employer states in its brief, an administrative law judge should address a claimant's refusal to cooperate with employer's vocational expert, any error committed by the administrative law judge in this regard is harmless, since employer's evidence was flawed as it lacked the necessary information for the administrative law judge to address the jobs' suitability. *See Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

[8]No party challenges the administrative law judge's use of Section 10(c) in calculating claimant's average weekly wage.

F.3d 1095, 40 BRBS 13(CRT); *Bonner*, 600 F.2d 1288; *see also Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981).

The administrative law judge rejected employer's contention that claimant's state-side earnings must be used in conjunction with claimant's earnings while employed in Afghanistan when calculating claimant's average weekly wage. The administrative law judge found that the facts in this case are indistinguishable from those in *Simons*, 43 BRBS 18.[9] Decision and Order at 29. Therefore, the administrative law judge calculated claimant's average weekly wage as $1,593.72 based on his earnings while in Afghanistan during the 7.86 weeks prior to his injury.[10]

We affirm the administrative law judge's finding that claimant's average weekly wage is properly based exclusively on the wages earned in his overseas work for employer as it is supported by substantial evidence and consistent with the decision in *Simons.* The higher wages paid to claimant were a primary reason for claimant's accepting employment under the dangerous working conditions existing in Afghanistan, and claimant's employment was to be full-time under a contract with an expected duration of twelve months.[11] To compensate claimant for his injury at a lesser rate than that paid by the job in which he was injured would distort his earning capacity by reducing it to a lower level than employer agreed to pay claimant to work under the conditions in Afghanistan. *Simons*, 43 BRBS 18. We therefore affirm the administrative law judge's rational finding that claimant's compensation is to be based on an average

[9]The administrative law judge acknowledged claimant's testimony that he worked for employer seven days a week, twelve hours per day, and that he was subject to mortar attacks. The administrative law judge concluded that claimant accepted working in these dangerous conditions in return for higher wages. Decision and Order at 29.

[10]The administrative law judge calculated claimant's average weekly wage of $1,593.72 by dividing his total earnings in Afghanistan, $12,526.66, by the 7.86 weeks worked. *See generally James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

[11]Citing claimant's contract of employment with employer, employer characterizes claimant as an "at will" employee with no reasonable expectation of continued employment. While, as employer asserts, its contract with claimant does not set forth a definitive length of employment but, rather, anticipates a duration of employment of approximately twelve months, *see* CX 1, employer did not establish that the intention of either claimant or employer was to terminate the employment agreement prior to the expiration of the contract.

weekly wage of $1,593.72. *Id.*; *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge