BRB No. 01-0172

EARL LAWRENCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	)
	)	
STEVENS SHIPPING COMPANY	)	DATE ISSUED: 10/22/01
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Stephen E. Darling and Joseph D. Thompson, III (Sinkler & Boyd, P.A.), Charleston, South Carolina, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (93-LHC-0213) of Administrative Law Judge John C. Holmes 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).

This case is on appeal to the Board for the fourth time. To summarize, claimant injured his neck, back, shoulders, and knees at work on January 16, 1991, after being involved in a truck accident. Employer voluntarily paid claimant temporary total disability benefits from January 29, 1991, through April 4, 1991, and temporary partial disability benefits from April 4, 1991, through April 16, 1991. Claimant returned to work in May 1991 and stopped working in March 1992, due to alleged pain. In a 1994 decision, the

administrative law judge initially awarded claimant temporary total disability benefits from January 16, 1991, through September 18, 1992, and a scheduled award for a ten percent permanent impairment to his left lower extremity for the knee injury. 33 U.S.C. §902(c)(2). He denied claimant's back injury claim. On May 19, 1995, claimant filed a motion for modification, seeking benefits for a 17 percent impairment to his left lower extremity, and an award for a loss in wage-earning capacity due to his back injury. *See* 33 U.S.C. §922. The administrative law judge denied claimant's motion for modification. Claimant appealed to the Board.

In *Lawrence v. Stevens Shipping Co.*, BRB No. 96-1574 (July 17, 1997)(unpub.), the Board vacated the administrative law judge's decision on modification and remanded for him to reconsider claimant's entitlement to an award for a 17 percent impairment to the left lower extremity based on Dr. Friedman's report, and to an award for his back injury based on a loss in wage-earning capacity. On remand, the administrative law judge reinstated his temporary total disability award, his 10 percent scheduled permanent partial disability award to the left lower extremity, and his denial of benefits for claimant's back injury. Claimant appealed.

In *Lawrence v. Stevens Shipping Co.*, BRB No. 98-0678 (Feb. 2, 1999)(unpub.), the Board modified the administrative law judge's decision to award benefits for a 17 percent impairment to the left lower extremity and held that claimant established that his back injury is work-related as a matter of law. The Board remanded the case to the administrative law judge to consider the remaining issues relating to claimant's work-related back injury. On remand, the administrative law judge did not consider the nature and extent of claimant's disability with regard to the back injury, but merely held employer liable for medical expenses for claimant's work-related back injury. Claimant appealed the administrative law judge's denial of disability benefits for his back injury.

In *Lawrence v. Stevens Shipping Co.*, BRB No. 99-0844 (May 10, 2000)(unpub.), the Board remanded the case for the administrative law judge to consider whether claimant established a *prima facie* case of total disability with regard to his back injury. In the decision currently being appealed to the Board, the administrative law judge again denied benefits for claimant's back condition. The administrative law judge found that claimant did not establish a *prima facie* case of total disability, and alternatively, that claimant does not have a permanent work-related back condition.

On appeal, claimant argues that the administrative law judge erred in finding that he can return to his usual employment. Alternatively, claimant contends that the administrative law judge failed to discuss the issues of whether employer established the availability of suitable alternate employment, and whether he sustained a loss in wage-earning capacity and is entitled to an award of partial disability benefits. We agree that the administrative law judge's failure to fully address these issues requires that we again remand this case.

To establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual employment due to his work-related injury. *See Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170 (CRT)(4th Cir. 1999); *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). Where claimant is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See id.; Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

In discussing claimant's ability to work, the administrative law judge declined to credit claimant's allegation that there are no longshore jobs which he could perform, because he found that claimant exaggerates his symptoms and suffers what may be referred to as "compensation neurosis." The administrative law judge noted that several doctors specifically stated that they suspected claimant of malingering or exaggeration, while others cited inconsistent results. Decision and Order at 8. The administrative law judge also reasoned that claimant worked for an additional nine months as a longshoreman after his accident and initial treatment, which seems at odds with the amount of pain of which he was complaining. In spite of claimant's assertion that he stopped working because of pain, the administrative law judge found such assertions are not fully credible. Decision and Order at 8. As it is within the administrative law judge's discretion to make credibility determinations, *see Calback v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 373 U.S. 954 (1963), we hold that the administrative law judge rationally discredited claimant's testimony that he cannot perform any longshore work.[1] *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

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[1]Claimant alleges that his knee problems, as well as his back, keep him from returning to his work. Claimant has obtained compensation for a 17 percent impairment to the left lower extremity under Section 8(c)(2) of the schedule, and thus only his ability to perform his usual work in light of his back condition is at issue here.

Nonetheless, we hold that the administrative law judge's decision cannot stand for the following reasons. In remanding this case, the Board observed that there is contradictory medical evidence in the record as to whether claimant is unable to return to his usual work as a longshoreman, and directed the administrative law judge to weigh these opinions. The Board stated that the May 14,1996, opinion of Dr. DuBois that claimant is unable to work as a longshoreman due to his back injury, Ex. 4 to Employee's Brief in Support of His Request for Modification, could establish claimant's *prima facie* case,[2] 1999 Board Decision and Order at 4 n.2. On the other hand, Dr. Thompson returned claimant to normal activities with no permanent impairment as of May 1991, Emp. Ex. A 7, and Dr. Nicholson recommended that claimant return to work on January 15, 1993, Cl. Ex. 13. In summarizing the medical evidence in his most recent decision, the administrative law judge focused exclusively on the medical evidence compiled prior to the initial 1994 decision, including the opinion of Dr. DuBois at that time. Decision and Order on Remand at 5. However, the administrative law judge did not refer to Dr. DuBois's May 1996 report, which is the basis for claimant's request for modification, nor did he discuss this opinion in analyzing whether claimant established a *prima facie* case of disability.[3] On remand, the administrative law judge must specifically address the 1996 opinion of Dr. DuBois that claimant "is unable to work as a longshoreman because of continued myofascial pain and fibromyalgia causing muscle spasms," as well as his statement that "[b]ased on the continuing pain complaints that [claimant] has had for the past five years, I believe that it is doubtful that he was magnifying or exaggerating his symptoms." *See* Ex. 4 to Employee's Brief in Support of His Request for Modification. The administrative law judge must explain whether he credits or discredits this opinion, giving valid and rational reasons for his

[2]"Usual" employment is the employee's regular duties at the time that he was injured. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999). Claimant testified that in the last four or five years prior to his accident he did basically everything: hold man, drove a truck, forklift, and clamp, and did lashing. Tr. at 13. Thus, if claimant is unable to perform any of these activities, he has established his *prima facie* case. *See Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197 (1998).

[3]The administrative law judge stated only that he previously discussed the May 14, 1996, report of Dr. DuBois in his July 19, 1996, decision. In that decision, the administrative law judge referenced Dr. DuBois's opinion in the context of causation, focusing solely on his statement regarding a direct relationship between claimant's myofacial syndrome and fibromyalgia. As we explained in our prior opinions, a causal relationship between claimant's back condition and the work accident is established as a matter of law since none of the doctors concluded claimant's work accident did not cause or aggravate claimant's condition. The medical dispute here concerns whether claimant is disabled, and it is in the context of disability that Dr. DuBois's most recent opinion must be addressed.

assessment, and for giving it more or less weight than the contrary medical opinions of Drs. Thompson and Nicholson, who felt claimant could return to his usual work in 1991 and 1993, respectively.

In this regard, we note that claimant offered the opinion of Dr. DuBois in support of his petition for modification pursuant to Section 22. On its face, if credited, this opinion establishes a change in condition or mistake in fact in the administrative law judge's initial Decision and Order denying benefits for the back condition. *See generally Jensen v. Weeks Marine*, 34 BRBS 147 (2000). Employer offered no contemporaneous evidence to refute Dr. DuBois's opinion, and the administrative law judge has not addressed Dr. DuBois's 1996 opinion in the context of whether claimant established a change in condition or mistake in fact. Moreover, the administrative law judge must make findings regarding the extent of claimant's disability in light of the fact that it has already been determined that claimant established the work-relatedness of his back condition by virtue of the Section 20(a) presumption and the proposition that a work-related aggravation of a prior injury is considered to be a new injury under the Act. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); *see also Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *see* n.3, *supra*. Furthermore, the fact that Dr. DuBois stated that claimant has no demonstrated neurological lumbar deficits is not a sufficient basis for finding that claimant has no impairment, as Dr. DuBois specifically explained that claimant has a non-neurologic pain mechanism. Moreover, his opinion does not rest solely on claimant's subjective complaints as he also stated that he has clinically observed continuing muscle spasms and that these contractions of the paravertabral muscles cause pain. Thus, his opinion discusses objective evidence of impairment.

The administrative law judge also denied benefits on the alternative ground that claimant is not permanently disabled by a work-related back injury, asserting that he made this finding in his previous decisions and that the Board has ignored this finding. Where claimant has no residual impairment, his actual job duties are irrelevant to a disability finding. *See Gacki,* 33 BRBS 127. Perusal of the administrative law judge's decisions shows that he did find that claimant's back problems, if any, had resolved, but in a summary fashion, citing a 1992 opinion wherein Dr. DuBois stated that claimant's back should not be permanently disabling. Dr. DuBois's 1996 report, offered in support of claimant's petition for modification, however, expresses a differing opinion and may establish a change in condition or mistake in fact in the administrative law judge's initial 1994 decision. This most recent opinion cannot be summarily rejected based on the doctor's earlier view.

If the administrative law judge finds that claimant is unable to return to his usual employment due to his back injury, he must determine whether employer established the availability of suitable alternate employment. Ms. McCain, a rehabilitation specialist, conducted a labor market survey on May 5, 1993, listing five suitable positions she found through the Job Service of Charleston, South Carolina, and mailed a physical description of them to four of claimant's physicians. The administrative law judge stated that all four physicians approved the cab driver job, implying that this position constitutes suitable employment. As this case arises within the jurisdiction of the United states Court of Appeals

for the Fourth Circuit, the administrative law judge's cursory discussion and implicit finding of one suitable position is insufficient to establish suitable alternate employment. *See Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988).[4] Thus, on remand, the administrative law judge must provide a more thorough discussion of suitable alternate employment, considering also that if claimant retains the ability to perform some longshore jobs and such jobs are actually available, suitable alternate employment may be established. *See generally Hord,* 193 F.3d 797, 33 BRBS 170 (CRT)*; Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). If the administrative law judge finds that employer established the availability of suitable alternate employment, he must determine claimant's post-injury wage-earning capacity, 33 U.S.C. §908(h), and whether claimant has a loss thereof, 33 U.S.C. §908(c)(21). Consequently, we vacate the administrative law judge's denial of benefits for claimant's back injury, and remand this case to the administrative law judge for further consideration consistent with this decision. If the administrative law judge finds that claimant is entitled to total or partial disability benefits, the administrative law judge must determine the nature of that disability, *i.e.*, whether it is temporary or permanent. Cl. Exs. 13, 17; Emp. Exs. A 7, 9.

Accordingly, the administrative law judge's denial of benefits with regard to claimant's back injury is vacated, and the case is remanded for further findings consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[4]The administrative law judge may rely on the jobs identified by Ms. McCain even though no specific employers are identified other than the Job Service of Charleston. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997)*; Moore v. Universal Maritime Corp.,* 33 BRBS 54 (1999).