BRB No. 92-0987

CALVIN WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EAGLE MARINE SERVICES	)	DATE ISSUED:_____
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

Joseph G. Albe, New Orleans, Louisiana, for claimant.

Patrick E. O'Keefe and A. Carter Mills, IV (Montgomery, Barnett, Brown, Read, Hammond & Mintz), New Orleans, Louisiana, for self-insured employer.

BEFORE: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (90-LHC-3133) of Administrative Law Judge Ben H. Walley 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).

Claimant sustained injuries to his head, neck and back on October 10, 1988, when he was involved in a truck accident while in the course of his employment with employer. After the injury, claimant moved from southern California to New Orleans, Louisiana, to be near his family. Employer referred claimant to Dr. Williams who, after diagnosing degenerative disc disease in claimant's cervical spine and post-lumbar laminectomy and herniation at L5-S1, initiated conservative treatment. After a lengthy period of treatment and upon learning that claimant was also receiving treatment for depression, Dr. Williams recommended in August 1989 that claimant obtain a psychiatric consultation in order to assist him in the evaluation of claimant's pain symptomatology. Although employer rejected this recommendation, it referred claimant for evaluation to Dr. Schuhmacher, a neurosurgeon. Initially, Dr. Schuhmacher concurred with Dr. Williams's recommendations; however, after viewing videotape surveillance of claimant in May 1990, he

opined that no further neurodiagnostic procedures were necessary and that claimant was able to work. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from October 11, 1988, to June 2, 1990, at which time employer controverted claimant's entitlement to additional benefits under the Act. In August 1990, claimant underwent surgery at a Veterans Administration hospital to repair the herniated disc at L5-S1.

At the formal hearing, the administrative law judge informed claimant that he would accept post-hearing the medical notes of Dr. Sugar, a Veterans Administration psychiatrist who had treated claimant for depression. Employer moved to depose Dr. Sugar post-hearing, asserting that it had been unaware of claimant's treatment with this physician. The administrative law judge denied employer's motion.

In his Decision and Order, the administrative law judge awarded claimant temporary total disability compensation commencing June 3, 1990. Moreover, the administrative law judge ordered employer to pay for claimant's work-related medical expenses, including a neurological and psychiatric evaluation which had been recommended by Drs. Williams and Schuhmacher.

On appeal, employer contends that the administrative law judge erred by ordering treatment for claimant's depression and by finding that claimant is temporarily totally disabled. Additionally, employer argues that it was denied due process of law when the administrative law judge denied its motion to depose Dr. Sugar post-hearing. Claimant responds, urging affirmance.

Employer initially contends that the administrative law judge erred by implicitly finding claimant's depression to be related to his work injury. We agree. In establishing that an injury arises out of his employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption which applies to the issue of whether an injury is causally related to his employment activities. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). It is well-settled that a work-related psychological impairment is compensable under the Act. *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989). Before Section 20(a) is applicable, however, claimant must establish that he has sustained some harm or pain and that working conditions existed or an accident occurred which could have caused the harm or pain. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). An employment injury need not be the sole cause of a disability; rather, if the employment aggravates, accelerates or combines with an underlying condition, the entire resultant condition is compensable. *See Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989). Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge 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). It is sufficient for purposes of causation if claimant's employment "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986).

In the instant case, the administrative law judge did not apply the Section 20(a) presumption to link claimant's psychological problems to his work injury; rather, the administrative law judge summarily ordered employer to provide claimant with a neurological-psychiatric evaluation. *See*

Decision and Order at 21. This implicit finding fails to satisfy the Administrative Procedure Act's requirement that every adjudicative decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). We therefore vacate the administrative law judge's implicit finding that there is a causal relationship between claimant's psychological condition and his work injury, and we remand the case for the administrative law judge to consider the evidence in light of the Section 20(a) presumption and the aggravation rule.[1] *See generally Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 187-188 (1988). Should the administrative law judge determine that the presumption is not rebutted or that claimant has established a causal connection between his psychological condition and the work injury based on the record as a whole, the administrative law judge must then determine the nature and extent of claimant's disability due to that condition. *See Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989).

Employer next contends that the administrative law judge erred in denying employer's motion to depose Dr. Sugar post-hearing after he granted claimant's motion to admit post-hearing Dr. Sugar's medical notes. We agree. It is well-established that an administrative law judge has broad discretion to direct and authorize discovery; a discovery ruling by an administrative law judge will constitute reversible error only if it is so prejudicial as to result in a denial of due process. *Olsen v. Triple A Machine Shops*, 25 BRBS 40, 43-45 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). However, due process requires an opportunity to rebut and cross-examine when an *ex parte* medical report is admitted into evidence. *See Richardson v. Perales*, 402 U.S. 389, 401-402 (1971). In the instant case, the administrative law judge denied employer's motion to depose Dr. Sugar post-hearing, even though employer averred that it had been unaware of Dr. Sugar's treatment of claimant prior to the hearing. *See* Transcript at 81-83. Dr. Sugar's medical records address claimant's psychological condition and are thus relevant to the issues presented in this case. We therefore conclude that the administrative law judge erred in denying employer the opportunity to address this evidence. Accordingly, on remand, the administrative law judge shall reopen the record to afford employer the opportunity to depose Dr. Sugar.

Lastly, employer challenges the administrative law judge's award of temporary total disability compensation to claimant. It is well established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS at 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). Where claimant is unable to perform his usual employment duties, he has established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area which claimant resides, which he is capable of performing, considering his age,

[1]We note that it is uncontroverted that claimant sustained an injury while in the course of his employment with employer on October 10, 1988; furthermore, the record contains evidence that claimant subsequently experienced psychological problems that could be related to the work injury.

education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the instant case arises, has stated that a claimant's diligent, yet unsuccessful, job search may be used to rebut an employer's evidence of the availability of suitable alternate work. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 n.2, 27 BRBS 81, 84 n.2 (CRT) (9th Cir. 1993).

In the instant case, the administrative law judge credited the recommendation of Dr. Williams that claimant undergo neurological and psychiatric evaluation and treatment at an in-patient facility, and the concurring opinion of Dr. Schuhmacher contained in his January 26, 1990, report, to find that claimant is entitled to benefits for temporary total disability until his release from in-patient treatment. The administrative law judge, however, failed to take into consideration Dr. Schuhmacher's subsequent medical reports dated May 24, and May 29, 1990, which, if credited, could support a finding that claimant is capable of employment. Specifically, after viewing video surveillance tapes of claimant, Dr. Schuhmacher opined that claimant required no further neurodiagnostic procedures and is capable of working. *Compare* JX 1 at 4-5 with JX 1 at 6-7. Moreover, the administrative law judge failed to address the evidence of suitable alternate employment submitted into evidence by employer. *See* EX 9. We therefore hold that the administrative law judge erred in relying upon the opinion of Dr. Schuhmacher, as expressed in his report of January 26, 1990, to find that claimant could not return to work, without addressing Dr. Schuhmacher's two subsequent reports further expounding on his opinion regarding claimant's employability, as well the administrative law judge's failure to address employer's evidence regarding the availability of suitable alternate employment. Based upon these failures to address the totality of the evidence before him, we vacate the administrative law judge's award of temporary total disability compensation. On remand, the administrative law judge must reconsider the evidence pertaining to the extent of claimant's disability, adequately detail the rationale behind his ultimate findings, and specify the evidence upon which he relied. *See Ballesteros*, 20 BRBS at 187-188.[2]

Finally, claimant's counsel seeks an attorney's fee for work performed before the Board. Counsel will be entitled to a fee in this case should he ultimately engage in a successful prosecution of the claim. 33 U.S.C. §928. As we are remanding this case to the administrative law judge for reconsideration, claimant has yet to be successful; accordingly, claimant's request for an attorney's fee is denied at this time.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is vacated, and the case remanded for further proceedings consistent with this opinion.

SO ORDERED.

[2]Claimant's motion for a default order is hereby denied. The events supporting claimant's motion occurred after the issuance of the administrative law judge's Decision and Order, are not part of the case record, and thus are not subject to Board review. 33 U.S.C. §921(b)(3).

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge