

BRB Nos. 09-0513
and 09-0513A

EDWARD BELL)	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
CERES MARINE TERMINALS)	DATE ISSUED: 02/23/2010
)	
Self-Insured)	
Employer-Petitioner)	
Cross-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeals of the Decision and Order and the Decision and Order on Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr., W. Jared Vincent and V. Jacob Garbin (Law Office of William S. Vincent, Jr.), New Orleans, Louisiana, for claimant.

Lawrence P. Postal (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Ann Marie Scarpino (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order and the Decision and Order on Reconsideration (2007-LHC-01688) of Administrative Law Judge Patrick M. Rosenow 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).

Claimant was injured on November 4, 2006, during the course of his employment when his truck collided with another truck. Claimant alleged he injured his right shoulder and back in this incident. Employer voluntarily paid claimant compensation for temporary total disability from November 5, 2006 to May 21, 2007. Claimant sought compensation for temporary total disability from May 22, 2007 to January 27, 2008, and for ongoing permanent partial disability from January 28, 2008.

In his decision, the administrative law judge found that claimant's right shoulder condition is related to the work injury, but that claimant's back and an alleged resulting leg condition were not caused or aggravated by the work injury. The administrative law judge found that claimant could not return to his usual employment driving "bomb carts." The administrative law judge found that employer identified suitable alternate employment on the open market as of the date of maximum medical improvement, October 19, 2007, and also that claimant could return to modified duty at employer's facility wherein he would no longer have to lift steel pins that link containers to the bomb carts. The administrative law judge found that employer offered claimant this modified duty work on February 1, 2008. The administrative law judge awarded claimant compensation for temporary total disability from November 4, 2006 to October 18, 2007, for permanent partial disability based on a post-injury wage-earning capacity of \$293.40 from October 19, 2007 to February 1, 2008, for permanent partial disability based on a post-injury wage-earning capacity of \$767.15 from February 2 to February 28, 2008, and for ongoing permanent partial disability based on a post-injury wage-earning capacity of \$1,034.85 thereafter.

The administrative law judge found that Dr. George Murphy was claimant's choice of treating physician. *See* 33 U.S.C. §907(b). The administrative law judge remanded the case to the district director for a determination of whether employer was prejudiced by claimant's failure to timely provide medical reports from Dr. George Murphy and Dr. Charles Murphy. 33 U.S.C. §907(d)(2). The administrative law judge denied employer Section 8(f) relief, 33 U.S.C. §908(f). The administrative law judge denied employer's motion for reconsideration of this issue.

Employer appeals the denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance. Employer has filed a reply brief. Claimant cross-appeals the administrative law judge's finding that claimant's back condition is unrelated to the work injury, the determination of his post-injury wage-earning capacity, and the finding that employer did not timely receive medical reports from Drs. George and Charles Murphy. Employer responds, urging affirmance. Claimant has filed a reply brief.

We first address claimant's cross-appeal and the administrative law judge's finding that claimant's back condition was not caused or aggravated by the work injury. The administrative law judge found that Dr. George Murphy's initial report that claimant injured his shoulder and back in the work accident is sufficient to invoke the Section 20(a) presumption. Decision and Order at 56. Once, as here, claimant has established his *prima facie* case, Section 20(a) of the Act, 33 U.S.C. §920(a), provides him with a presumption that his injuries are causally related to his employment; the burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's injuries were neither caused nor aggravated by his employment. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). If the administrative law judge finds the Section 20(a) presumption rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.2d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge then must weigh all the evidence and resolve the issue of causation on the record as a whole with claimant bearing the burden of persuasion. *Id.*; *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). The administrative law judge found that the opinions of Drs. Nutik, George Murphy and Charles Murphy rebut the Section 20(a) presumption, and that, based on the record as a whole, claimant failed to establish the work-relatedness of his back condition.

Claimant contends the administrative law judge erred in finding the Section 20(a) presumption rebutted. We agree that this finding cannot be affirmed. As an initial matter, claimant correctly contends that the administrative law judge disregarded employer's stipulation that claimant injured his back in the work accident. *See* Tr. at 82-83.¹ Moreover, employer also stipulated that all of claimant's office visits, including those to Dr. George Murphy for treatment of his back condition, were reasonable and necessary. Tr. at 85-86, 116-118. Thus, the administrative law judge erred by addressing

¹ When asked by the administrative law judge if the parties could stipulate to any issues, employer's counsel stated, *inter alia*, "We can agree that the Claimant injured his right shoulder and back." Tr. at 82.

the work-relatedness of claimant's back condition without providing notice to the parties that he was rejecting their stipulation. *See Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97 (2000).

While such an error generally requires that the Board remand a case, we need not do so in this case as employer's evidence is insufficient to rebut the Section 20(a) presumption as a matter of law. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). After the work injury, claimant had an MRI and was diagnosed with a small central herniation at L5-S1, a bulge at L4-5 and congenital spinal stenosis at L3-4 and L4-5. CX 16. Dr. Nutik opined that claimant has underlying degenerative changes and mechanical problems in his back, but that claimant's neurological exam was normal, that claimant's MRI test showed no significant nerve compression, and that the findings were consistent with an uninjured person of claimant's age and weight. EX 24 at 25, 33-34, 61. Dr. Nutik opined there was no objective basis to support claimant's complaint that he is unable to sit. Although Dr. George Murphy stated at first that claimant's back injury was related to the work incident, he later stated that the degenerative changes present on the MRI could occur without any back injury at all and that, other than claimant's subjective complaints, he does not have any evidence that claimant actually injured his back in the work accident CX 18 at 45, 51. Dr. Charles Murphy stated that it is probable that claimant's MRI shows a pre-existing degenerative condition. CX 19 at 53. The administrative law judge found this evidence sufficient to rebut the Section 20(a) presumption.

This evidence is insufficient as a matter of law to rebut the Section 20(a) presumption. The mere existence of a prior back condition cannot rebut the Section 20(a) presumption as it cannot constitute substantial evidence that claimant's condition was not aggravated, at least temporarily, by the accident at work. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d. 219 (4th Cir. 2009); *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). Indeed, Dr. Charles Murphy opined that trauma can cause a pre-existing, underlying condition to become symptomatic. CX 19 at 53. Both Dr. Nutik and Dr. George Murphy initially diagnosed a back injury as a result of the work accident, EXs 24 at 14-15; 26; CX 18 at 10-13, 39, and Dr. Charles Murphy noted claimant's reports of back complaints during the course of his treatment of claimant's shoulder injury. CX 19 at 10, 74. Dr. George Murphy's later statement that he had no evidence, other than claimant's subjective complaints, that claimant injured his back in the accident also cannot rebut, as it is employer's burden to produce evidence that the accident did not cause or aggravate a back condition. As none of the physicians stated that claimant's pre-existing back condition was not aggravated by the work accident, the opinions do not constitute substantial evidence sufficient to rebut the Section 20(a) presumption. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *see also C&C Marine Maintenance Co. v. Bellows*, 538 F.3d

293, 42 BRBS 37(CRT) (3^d Cir. 2008). Moreover, as there is no other evidence of record that can rebut the Section 20(a) presumption, in conjunction with employer's stipulation that claimant injured his back in the work accident, we reverse the administrative law judge's finding that claimant's back injury is not work-related.² *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

Claimant next challenges the administrative law judge's finding that he is able to work in the modified job employer provided. Claimant contends that he cannot drive bomb carts as he is taking narcotic pain medication for back and shoulder pain, and employer stipulated that this treatment is reasonable and necessary.

The administrative law judge found that restrictions from claimant's shoulder impairment prevent him from retuning to his usual employment driving bomb carts, and thus the burden shifted to employer to establish the existence of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). A job in the employer's facility within the claimant's restrictions may meet this burden provided it is necessary work. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

The administrative law judge found that Dr. Nutik and the Drs. Murphy restricted claimant to light-duty work due to his shoulder impairment, and they agreed that claimant is not capable of lifting the steel picks that link the 20-foot container trailers to the bomb cart. Decision and Order at 57; *see* CXs 5-7.³ The administrative law judge credited the testimony of Robert Daire, employer's yard manager, that employer could modify the cart-driving position so that claimant would not be required to lift. Employer sent letters to claimant offering him such employment. Tr. at 441-442, 477; EXs 48; 49. The administrative law judge credited Dr. Nutik's opinion that claimant could perform this

² To the extent that the evidence cited by the administrative law judge in support of his rebuttal finding addresses the doctors' findings regarding the existence of any impairment in claimant's back, it is relevant to whether claimant is disabled by a back injury. *See* n.4, *infra*.

³ The physicians also opined that claimant can work an eight-hour day alternating sitting, standing, and walking, and that he can perform sedentary to light work. *See* CXs 5-7.

modified job so long as he was not on narcotic medication, as well as his opinion that there is no objective basis for claimant to require narcotic medication for pain. CX 6; EXs 33 at 2; 36 at 3-4, 47, 58. The administrative law judge found that claimant's contention that he requires narcotic medication is not credible, as his pain complaints are subjective and he is able to operate his personal vehicle. Decision and Order at 58; *see* Tr. at 216,-217; EXs 52 at 23-24; 61. The administrative law judge compared the vocational assessments of the bomb cart position by Dr. Larry Stokes and Mr. Joseph Schein. The administrative law judge credited the assessment of Mr. Schein, who visited the job site, interviewed co-workers and observed the job duties of a bomb cart driver. He opined that claimant would be able to alternate sitting, standing, and walking, and that claimant should be able to work as a bomb cart driver without significant difficulty. Tr. at 341, 345; EX 55 at 1-2; *see also* CXs 20 at 9, 16; 22 at 12, 22, 26, 31. Therefore, the administrative law judge found that the modified bomb cart driver position employer offered claimant on February 1, 2008, established the availability of suitable alternate employment. Decision and Order at 60.

We affirm the administrative law judge's finding, as it is rational and supported by substantial evidence.⁴ In this regard, the administrative law judge rationally credited the restrictions of the three physicians and Mr. Schein's vocational assessment of the specific position offered by employer. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). Moreover, the administrative law judge rationally rejected claimant's testimony that he requires narcotic medication, on the ground that medical professionals stated claimant exaggerated his symptoms and lacked motivation to heal. Decision and Order at 55; EXs 24 at 44, 57-58, 81; 31. The administrative law judge also noted claimant responded untruthfully to an interrogatory question, Tr. at 218, 284-285, 288; EXs 48; 50 at 5, and he found that claimant's hearing testimony reflected anger at employer and a lack of motivation to return to work. Decision and Order at 55-56. The administrative law judge's negative assessment of claimant's credibility is neither inherently incredible nor patently unreasonable, *see Cordero v. Triple A Machine Shop*,

⁴ We reject claimant's contention that the case must be remanded for the administrative law judge to factor in the restrictions from claimant's back condition in determining whether claimant can return to modified duty. Dr. George Murphy restricted claimant from lifting over 50 pounds due to his back condition. CX 18 at 86-87. There are no other work restrictions of record related to claimant's back condition. Since claimant's lifting restriction for his shoulder condition is greater than that for his back, and as the administrative law judge rejected claimant's subjective complaints of back pain, we need not remand this case for the administrative law judge to further address the extent of claimant's back symptomatology. Thus, claimant's entitlement for his back injury is limited to reasonable and necessary medical treatment.

580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and his decision that claimant does not require narcotic medication based on his subjective complaints of pain is rational and within his discretion. Moreover, contrary to claimant's contention that employer stipulated that he required narcotics, employer contended at the hearing that claimant did not require this medication after December 5, 2007. Tr. at 116-118; *see* EX 36 at 3-4. Accordingly, as it is supported by substantial evidence, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment at its facility as of February 1, 2008. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

Claimant next challenges the administrative law judge's finding that he has a post-injury wage-earning capacity of \$1,034.85 per week as of March 1, 2008. Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's post-injury wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). If they do not or if claimant does not have any actual earnings, the administrative law judge must determine a reasonable dollar amount that does. *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990); *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

The administrative law judge credited the testimony of Mr. Daigre that employer's workload increased from eight to twelve ships per month beginning on February 28, 2008. Decision and Order at 60; *see* Tr. at 442-443, 445, 447, 455. The administrative law judge found that claimant, working on twelve ships a month and receiving vacation pay and container royalty payments, would earn \$53,812 per year, or \$1,034.85 per week, beginning on March 1, 2008. Decision and Order at 60-61.

Claimant argues that Mr. Daigre's testimony that employer would receive twelve ships a month after February 28, 2008, is speculative and insufficient to establish claimant's post-injury wage-earning capacity as of March 1, 2008, since it is impossible to predict that employer will continue to receive the same number of ships during the course of claimant's future employment with employer. We reject this contention. Mr. Daigre testified at the March 4, 2008 hearing that employer had just contracted to service "probably 12 (ships) a month." Tr. at 442-443. This testimony constitutes substantial evidence from which the administrative law judge could calculate claimant's wage-earning capacity as of March 1, 2008. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *see generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). Moreover, claimant can request modification of his permanent partial disability award under Section 22 of the Act should Mr. Daigre's testimony prove inaccurate or if there is a negative change in the economic conditions of this job with employer. 33 U.S.C. §922; *see generally Metropolitan*

Stevedore Co. v. Rambo [Rambo I], 515 U.S. 291, 30 BRBS 1(CRT) (1995). As it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant's post-injury wage-earning capacity as of March 1, 2008, is \$1,034.85 per week.

Claimant also contends that the administrative law judge erred by finding that claimant failed to show that Drs. George and Charles Murphy timely provided employer with medical reports under Section 7(d)(2) of the Act, 33 U.S.C. §907(d)(2). Having found that the reports were not timely submitted, the administrative law judge remanded the case to the district director for a determination as to whether employer was prejudiced by not timely receiving a report of the doctors' initial treatment of claimant. See generally *Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997). In his Order on Remand, the district director stated that employer was not prejudiced, and he excused the failure of the physicians to file their initial reports within 10 days of treating claimant. Employer was ordered to pay for the treatment provided by these physicians. The district director's order renders moot claimant's contention of error in the administrative law judge's untimeliness finding. See generally *Sample v. Johnson*, 771 F.2d 1335, 18 BRBS 1(CRT) (9th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986); *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995). Thus, we need not further address this issue.

In its appeal of the denial of Section 8(f) relief, employer contends that the administrative law judge erred in finding that claimant's diabetes does not contribute to a greater disability than that resulting from the work injury alone. Employer contends that but for his diabetes, claimant would have been able to return to his usual work. Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990). Employer may establish the contribution element with medical or other evidence. See *Ceres Marine Terminal v. Director OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997).

The administrative law judge noted that all three physicians agree that claimant's diabetes hindered his recovery from shoulder surgery and contributed to his shoulder impairment. The administrative law judge addressed Dr. Charles Murphy's testimony

that he would have expected a better result from claimant's shoulder surgery if he did not have diabetes, and that, but for his diabetes, claimant "probably" would have had a better chance of returning to regular duty as a truck driver from a statistical standpoint. *See* CX 19 at 58-59. The administrative law judge nonetheless stated only that because claimant is able to return to a modified truck driver position, employer did not meet its burden of showing that claimant's diabetes made his work-related shoulder disability "materially and substantially greater" than it would have been in the absence of diabetes.

We must remand the case for further consideration of this issue as the administrative law judge's conclusion does not follow from his statement of the evidence. Claimant would not be entitled to any compensation if employer had established claimant could return to his usual truck driver duties. However, the administrative law judge found that claimant sustained a loss of wage-earning capacity since claimant is unable to return to his usual work due to his shoulder injury. If employer can establish that claimant's pre-existing diabetes contributed to claimant's shoulder impairment and thereby to claimant's inability to return to his usual work, employer would establish that claimant's disability is not due solely to his work injury. *See Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 31 BRBS 146(CRT) (5th Cir. 1997). If employer additionally established that claimant's disability is materially and substantially greater than that which claimant would have sustained from his work injury alone, employer would be entitled to Section 8(f) relief. *Id.* This inquiry "may be resolved by inferences based on such factors as the perceived severity of the pre-existing disability and the current employment injury, as well as the strength of the relationship between them." *Id.*, 125 F.3d at 307-308, 31 BRBS at 148-149(CRT), *citing Allred*, 118 F.3d at 391, 31 BRBS at 94(CRT). It is not sufficient, however, for employer merely to establish that the disability is related to both diabetes and the work injury. *Louis Dreyfus Corp.*, 125 F.3d 884, 31 BRBS 141(CRT). As the administrative law judge did not correctly analyze this issue, we must remand for him to reconsider this issue consistent with law.⁵

⁵ We express no opinion on the sufficiency of the evidence offered to establish the contribution element, as the administrative law judge must evaluate the evidence in the first instance pursuant to the proper legal standards. Moreover, if necessary, the administrative law judge should explicitly state if the pre-existing permanent partial disability and manifest elements of Section 8(f) are satisfied.

Accordingly, the administrative law judge's finding that claimant did not injure his back in the work accident on November 4, 2006, is reversed. The administrative law judge's denial of Section 8(f) relief is vacated, and the case is remanded for reconsideration of this issue. In all other respects, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge