

KEITH MICHAEL ROBERTS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ALLSOUTH STEVEDORING)	DATE ISSUED:
COMPANY)	
)	
and)	
)	
TRAVELERS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION AND ORDER

Appeal of the Decision and Order of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Douglas Edward Daze, (Ceballos, Shorstein, Kelly & Daze, P.A.), Jacksonville, Florida, for claimant.

Susan Smith Erdelyi (Marks, Gray, Conroy & Gibbs), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-0278) of Administrative Law Judge Charles P. Rippey 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).

On July 11, 1988, claimant, who suffered from juvenile rheumatoid arthritis, sustained an injury to his left knee when, while working for employer as a chief clerk on an automobile ship, he slipped and fell. Since that time, claimant alleges that he has been plagued by pain in and dislocation of his knee. Claimant further alleges that his pre-existing psychological problems were aggravated as a result of his work accident. After undergoing conservative treatment, claimant returned to work on a part-time basis, and continued working until September 26, 1989, when the

pain allegedly became too bad for him to continue. Claimant sought permanent total disability compensation under the Act for the combined effects of a five percent permanent impairment of his left knee and the aggravation of his rheumatoid arthritis and pre-existing psychological problems by the July 11, 1988 work injury, as well as continued payment of his psychiatric and psychological expenses.

Based on a statement contained in the deposition of Dr. Virzi, the administrative law judge denied the claim, finding that claimant sustained no work-related disability as he had been totally disabled prior to the work accident and had been employed only because of personal or family considerations. The administrative law judge determined that inasmuch as Dr. Virzi's statement established that claimant was being employed only as an act of charity, his true average weekly wage at the time of his injury was zero. The administrative law judge, however, also determined that even if claimant had an average weekly wage at the time of his injury, he sustained no loss of wage-earning capacity inasmuch as Dr. Virzi indicated that claimant was fully able to return to work.

On appeal, claimant contends that the administrative law judge's denial of benefits is not supported by substantial evidence. Claimant argues that the administrative law judge's Decision and Order must be reversed because the medical evidence establishes that he is permanently and totally disabled as a result of the residuals of his industrial accident, and there is no evidence in the record to support the administrative law judge's finding that claimant was permanently totally disabled prior to the subject work accident. Employer responds, urging affirmance.

We agree with claimant that the administrative law judge's denial of benefits cannot be affirmed. The administrative law judge intermixed his causation and disability analyses and rendered a decision which is not supported by substantial evidence. The administrative law judge initially found claimant had no work-related disability. The issue of the cause of a disability is one of causation to which Section 20(a) of the Act, 33 U.S.C. §920(a) applies. In the present case, the administrative law judge did not evaluate the cause of claimant's disability in light of the Section 20(a) presumption. Claimant alleged that he sustained an injury to his left knee and an aggravation of his pre-existing rheumatoid arthritis and psychological conditions¹ by virtue of his 1988 fall, and it is undisputed that the work-related accident occurred. The Section 20(a) presumption was thus invoked. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 96 (1991), *aff'd mem.*, No. 91-20743 (9th Cir. Sept. 17, 1993).

In order to rebut the presumption, employer must establish that claimant's disability was not caused or aggravated by his employment. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Where an employment injury aggravates or combines with a pre-existing condition, the entire

¹Claimant was diagnosed with juvenile rheumatoid arthritis at age 10, and he testified that it was not too bad until age 20. After that, he felt pain but was able to do most things. Transcript at 12-13. Claimant's psychological problems include depression and drug and alcohol abuse, for which he was hospitalized on several occasions prior to the injury.

resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). See also *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981). Employer contends that the medical opinion of Dr. Miller is sufficient to establish rebuttal of the presumption, whereas claimant avers that Dr. Miller agrees with Dr. Virzi that claimant had pre-existing psychological problems which were aggravated by his industrial injury. We cannot address the sufficiency of this evidence, as the administrative law judge did not consider any of the evidence presented by employer, including Dr. Miller's opinion, or address whether the evidence was sufficient to rebut in rendering his decision, and the Board is not empowered to engage in *de novo* review. We therefore vacate the administrative law judge's finding that claimant's disability was not work-related but pre-existed his injury, and remand this case for consideration of whether employer introduced evidence sufficient to establish that claimant's physical and psychological problems were not caused or aggravated by the work accident. See *James*, 22 BRBS 273. If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must then weigh all of the relevant evidence and resolve the causation issue based on the record as a whole. See *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

In addition, the administrative law judge erred in evaluating the extent of claimant's disability. Specifically, the finding that claimant was totally disabled prior to his work injury is not supported by substantial evidence. Claimant bears the burden of proving the nature and extent of any disability; the Section 20(a) presumption does not aid claimant in establishing the existence of a disability. See *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985); *Holton v. Independent Stevedoring Co.*, 14 BRBS 441, 443 (1982). To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). If claimant succeeds in meeting this initial burden, the burden shifts to employer to establish the availability of suitable alternate employment which claimant can perform and which he could obtain if he diligently tried. If employer succeeds in meeting this burden, claimant is partially rather than totally disabled. See *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In the case at hand, the administrative law judge determined that claimant had no work-related disability as he had an average weekly wage of zero and was totally disabled prior to his work accident. The administrative law judge relied on the following statement extracted from Dr. Virzi's deposition in reaching this conclusion:

I don't believe any person would employ him because he's not employable. I believe that the longshoremen made an exception to him and employed an unemployable person due to his family connections, and that his only job was there, and I think he knew that. And with the loss of that job, there would be no other work for him anywhere.

Deposition of Dr. Virzi at 30. The administrative law judge found that inasmuch as this statement established that claimant was totally unemployable prior to his industrial injury and was only being

employed as an act of charity, claimant was not entitled to disability compensation under the Act because his work-related fall could not have rendered him any more disabled. Crediting Dr. Virzi's opinion for a seemingly contradictory proposition, the administrative law judge also concluded, however, that even if claimant had an average weekly wage prior to his accident, he was not, in any event, entitled to disability compensation because Dr. Virzi found him fully capable of returning to work.

It is well-established that an administrative law judge is not bound to accept the opinion or theory of any particular medical examiner and must evaluate the credibility of all witnesses, including doctors, and draw his own inferences from the evidence. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990). We are unable to affirm the administrative law judge's denial of benefits in this case, as Dr. Virzi's deposition statement taken out of context does not provide a proper evidentiary basis to support his finding that claimant was totally disabled prior to the work injury. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). A finding of total disability for an employee who is working is an exception to the general rule. *See Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). As claimant, who had been performing clerical work through the union hall since 1977, had been released to return to work by Dr. Hunt without restriction just one month prior to the July 11, 1988 work accident² and had earnings prior to the work-related injury accident, we conclude that in the absence of other evidence establishing that claimant was incapable of performing his pre-injury work, that he performed this work in extreme pain, or that the work was unnecessary, the administrative law judge erred in singling out one excerpt from Dr. Virzi's testimony to conclude that claimant was totally disabled prior to his work-related injury. *See generally Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136 (1987); *Darden v. Newport News Shipbuilding and Dry Dock Co.* 18 BRBS 224 (1986). Accordingly, we vacate the administrative law judge's finding that claimant was totally disabled prior to the subject work accident and remand for reconsideration of the extent of his disability.

In this regard, we note that the administrative law judge's reliance on this single statement from Dr. Virzi's deposition is particularly troublesome when it is viewed in context. Dr. Virzi is a board-certified psychiatrist and, overall, his deposition indicates that, from a psychiatric standpoint, claimant was capable of performing his pre-injury work following the 1988 accident. Dr. Virzi testified that claimant met the criteria for major depression precipitated by the physical injury to his knee, which requires comprehensive treatment on multiple levels concerning his pain, his addiction, and his depression. Dr. Virzi stated that the injury stopped claimant from working and that this fact caused the development of his emotional problems. Dr. Virzi noted that claimant had been able to work as a clerical worker, that he had been developing quite a bit of self-esteem from this outlet, and that when he could not do this work, he became extremely depressed. Deposition of Dr. Virzi at 8-9. He further noted that although his work-related injury did not cause his chemical dependency

²After being hospitalized from March 31, 1988 until May 6, 1988 for major depression, borderline personality disorder and drug abuse, as well as physical problems relating to his rheumatoid arthritis, on June 9, 1988, claimant was released by his treating physician, Dr. Hunt, with the only restriction being that he was to continue outpatient treatment. Employer's Exhibit 1.

problems, it did aggravate them in that the injury increased his need for pain medication, which increased his addiction, which increased his inability to function and made it very difficult for treatment to take place without medical stabilization concerning these factors.

While the administrative law judge credited Dr. Virzi's opinion to the extent that it was detrimental to the claim, to the extent that Dr. Virzi's testimony favored claimant, he found it to be equivocal, unclear, qualified, vague, and imprecise. The administrative law judge also found that Dr. Virzi's active participation in seeking payment for his medical bills, and specifically his request that Dr. Green give him a "strong" letter recommending the type of treatment rendered so that he would be able to gain payment of his medical bills, undermined his credibility but only to the extent that the testimony in question was favorable to claimant.³ While the administrative law judge is free to accept or reject any part of any testimony as he sees fit, he must provide rational reasons for doing so. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991). In this case the administrative law judge did not provide sufficient explanation for his disparate treatment of Dr. Virzi's testimony. *See generally Cairns v. Matson Terminals, Inc.*, 21 BRBS 252, 256 (1988).

The administrative law judge also found claimant's average weekly wage to be zero due to his finding that claimant was already totally disabled at the time of the accident. In so finding, he discounted claimant's actual earnings without a sufficient basis for doing so. Moreover, he erred in rejecting the parties' stipulation that claimant's average weekly wage at the time of his injury was \$154.24 without providing them with notice and an opportunity to produce evidence on this issue. *Dodd v. Newport News Shipbuilding and Dry Dock Co.*, 22 BRBS 245 (1989); *Beltran v. California Shipbuilding & Dry Dock Co.*, 17 BRBS 225 n.2 (1985); *Erickson v. Crowley Maritime Corp.*, 14 BRBS 218 (1981). On remand, if the administrative law judge does not intend to accept the stipulation of the parties, he must provide them with the notice and the opportunity to provide further evidence regarding average weekly wage.

Finally, we cannot affirm the administrative law judge's alternate finding that claimant was able to return to work after the accident without restriction, as this finding also rests on the administrative law judge's evaluation of Dr. Virzi.⁴ As stated above, the administrative law judge

³The administrative law judge also rejected Dr. Virzi's conclusion that claimant's addiction problems were triggered by the accident, stating that in his view, the fact that a physical injury to a person addicted to prescription drugs causes him to be prescribed drugs that he needs for his physical condition, and thereby excites the person's addiction by making these drugs available, does not make the re-excited addiction compensable. Contrary to the administrative law judge's statement, if claimant's psychological condition combines with or was aggravated by his work accident, the entire resultant disability may be compensable. *See generally Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983).

⁴We note that inasmuch as Dr. Virzi evaluated claimant on a psychiatric basis only and did not address the physical effects of claimant's work injury on claimant's ability to work, his opinion standing alone does not support the finding that claimant was not disabled at all. Moreover, there is

credited Dr. Virzi's opinion for two directly opposite and inconsistent propositions -- that claimant was not entitled to disability compensation because he was totally disabled prior to the work accident and because he was fully able to return to work after the injury. Although an administrative law judge may choose those portions of a doctor's opinion he wishes to credit for rational reasons, *see Thompson v. Northwest Enviro Services*, 26 BRBS 53 (1992), it was patently unreasonable for the administrative law judge in the present case to rely on the same doctor's opinion to reach contradictory and inconsistent findings. *See Cordero v. Triple A Machine Shop*, 580 F. 2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, in light of this error and those previously discussed regarding the administrative law judge's crediting of Dr. Virzi's testimony, we vacate his finding that claimant was able to return to his usual work following his work injury. On remand, if the administrative law judge finds that claimant's physical and psychological conditions are work-related, he must then weigh the evidence as to whether claimant's work-related conditions preclude him from performing his pre-injury job, thereby establishing claimant's *prima facie* case of total disability. If he finds that claimant established a *prima facie* case, he should then consider whether employer has established the availability of suitable alternate work which claimant can perform based on all relevant evidence of record.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded for reconsideration in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

additional medical evidence to be weighed by the administrative law judge in reaching an opinion based on the record as a whole, including the opinions of Drs. Pierce, Miller and Hartman. While the administrative law judge found that Dr. Hartman did not provide relevant testimony because she did not discuss the effect of claimant's knee surgery upon his other underlying conditions, in fact Dr. Hartman, claimant's treating physician, stated that she would put limits on the amount of exercise claimant can do at least partly because he has to wear a knee brace and partly because he is anxious to protect the knee. Deposition of Dr. Shirley Hartman at 8. The administrative law judge must consider this evidence and all other relevant evidence in evaluating the extent of claimant's disability.

JAMES F. BROWN
Administrative Appeals Judge