BRB No. 13-0579

CHARLOTTE McMILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: July 29, 2014
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Jerry R. McKenney and Frank W. Gerold (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2012-LDA-00478) of Administrative Law Judge Lee J. Romero, Jr., 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 sustained injuries in two accidents which occurred while she was working for employer in Iraq as a material control specialist. On January 27, 2010, claimant sustained injuries to her back and neck after she slipped down a flight of steps. She returned to the United States where she came under the care of Dr. Larkin. Dr. Larkin diagnosed claimant with acute strains of her cervical, thoracic and lumbar spines, and her abdominal and trapezius muscles, as well as with a severe contusion of the coccyx. He released claimant to return to work without restrictions on March 26, 2010. On October 12, 2011, claimant slipped and fell from a metal storage container, hitting her back and right hip on the floor. Claimant was placed on medical leave and returned to the United States. Dr. Larkin initially diagnosed claimant with an acute cervical strain and acute strains/contusions of the lower thoracic and lumbosacral spines, as well as an acute strain and contusion of the right hip. Dr. Larkin subsequently diagnosed a right lumbar disc protrusion L5-S1, with radiculopathy into claimant's right leg, which he related to her October 12, 2011 work accident. Dr. Myles diagnosed a herniated nucleus pulposus and internal disc derangement, with thoracic or lumbosacral neuritis or radiculitis. Both physicians opined that claimant was not capable of performing her usual employment, and that her condition had not yet reached maximum medical improvement. In contrast, Drs. Weigel and Wharton opined that claimant's October 12, 2011 accident caused only minimal soft tissue injuries, which resolved within several months without any residual disability. Claimant obtained alternate work as a material planner for Rose International on October 8, 2012; she testified that this was a contract position set to expire on February 4, 2013. Claimant filed a claim seeking benefits for the injuries she sustained in the October 2011 accident, which employer controverted.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking her back and right hip injuries to the October 12, 2011, work accident, that employer rebutted the presumption with regard to the back condition, and that, based on the record as a whole, claimant established she sustained a work-related injury to her back as a result of the October 12, 2011 accident. He found claimant entitled to temporary total disability benefits from October 13, 2011 through October 7, 2012, and ongoing from February 5, 2013, as well as to temporary partial disability benefits from October 8, 2012 to February 4, 2013. 33 U.S.C. §908(b), (e). The administrative law judge also found claimant entitled to medical benefits for her work-related injuries. 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's award of benefits. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer contends the administrative law judge erred in finding claimant sustained a compensable work-related back injury on October 12, 2011.[1] Employer

[1]The administrative law judge's finding that claimant established a work-related right hip injury is affirmed as it is unchallenged on appeal. *Scalio v. Ceres Marine*

specifically contends it was an abuse of discretion for the administrative law judge to credit claimant's testimony and the opinion of Drs. Larkin and Myles over the better credentialed, qualified and supported opinions of Drs. Wharton and Weigel.

Once the claimant establishes a prima facie case, Section 20(a) applies to relate her injury to her work accident, and the burden is on the employer to rebut this presumption by producing substantial evidence that the injury is not related to the accident. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If, as in this case, the employer rebuts the presumption, it no longer controls, and the issue of whether there is a causal relationship between the injury and the work accident must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Ceres Gulf, Inc. v. Director, OWCP*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In weighing the medical opinions of record, the administrative law judge gave greater weight to the opinions of Drs. Larkin and Myles, who, he found, are claimant's treating physicians.[2] The administrative law judge found it significant that Dr. Larkin evaluated claimant on at least three occasions following the 2011 incident and that he also had treated claimant following her 2010 work injury. Similarly, the administrative law judge found that Dr. Myles evaluated claimant on at least three occasions. The administrative law judge thus found that the opinions of Drs. Larkin and Myles are premised on their familiarity with claimant's symptoms,[3] her reactions to treatment, and

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Terminals, Inc., 41 BRBS 57 (2007).

[2]Contrary to employer's assertion, the administrative law judge specifically addressed and rejected employer's argument that claimant's treating physicians are not qualified to treat spinal conditions and that they did not perform appropriate testing. Decision and Order at 22. The administrative law judge found that Dr. Larkin, who is board-certified in general and vascular surgery, adequately treated claimant following her 2010 work-related back injury. Although Dr. Myles's credentials are not of record, the administrative law judge noted that his name is on the letterhead of "Texas Orthopedic & Spine Associates," that claimant sought and received employer's authorization to treat with a spine specialist, and that claimant chose Dr. Myles as this specialist. *Id.* at 14 n.2.

[3]The administrative law judge acknowledged that claimant made statements in her pre-employment physical questionnaire for employer that were inconsistent with her medical history, which detract from the weight to be accorded her testimony and her claim in general. Nonetheless, he rationally found that claimant's hearing testimony and statements to medical care providers are consistent in showing that her back pain existed and did not fully resolve. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

the need for further medical diagnostic testing. In contrast, the administrative law judge found the opinions of Drs. Weigel and Wharton "are consultative in nature, one-time exams for which no medical care was extended." Decision and Order at 22. The administrative law judge found that Drs. Larkin and Myles both opined that claimant suffers from a right lumbar disc protrusion at L5-S1, with radiculopathy into the right leg. Dr. Larkin related this condition to the October 12, 2011 work injury. EX 12 at 9-10; CX 1 at 46. The administrative law judge found this diagnosis is supported by the two MRIs performed in Texas.[4] The administrative law judge thus concluded that claimant established that she suffers from injuries to her back and right hip as a result of the work-related accident on October 12, 2011.

It is well-established that an administrative law judge is entitled to weigh the conflicting evidence and to draw his own inferences therefrom; he has the prerogative to credit one witness or medical opinion over that of another and is not bound to accept the opinion or theory of any particular medical examiner. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). In this case, the administrative law judge's decision to credit the opinions of claimant's treating physicians, Drs. Larkin and Myles, over those of Drs. Weigel and Wharton is rational and supported by substantial evidence. The administrative law judge thoroughly addressed the relevant evidence and rationally found that the opinions of Drs. Larkin and Myles are based on a closer familiarity with claimant's symptoms and are better supported by, and explained in terms of, claimant's consistent reporting as to the mechanism of her October 12, 2011 work injury, her complaints of pain subsequent to that date, and the objective results of the March 23, 2010 and December 2, 2011 MRIs, showing a protrusion at L5-S1. We, therefore, affirm the administrative law judge's finding that claimant established, based on the record as a whole, that she sustained a work-related back injury,

[4]As the administrative law judge observed, the record contains three MRIs of claimant's lumbar spine. The first and third, performed in Texas on March 23, 2010 and December 2, 2011, reveal lumbar lordosis straightening suggesting musculature pain or spasm, as well as a substance protrusion/herniation at L5-S1, which, by time of the latter MRI, had progressed to the point that it minimally indented the thecal sac. EX 12 at 26, 39. The second MRI, performed on October 19, 2011, in Dubai, UAE, was reported as "essentially normal" as the "spinal canal and neural foramina are not compromised by any soft tissue mass or disc pathology." *Id.* at 27. Given the discrepancy in the results, the administrative law judge placed "more probative weight" on the March 2010 and December 2011 MRIs performed in Texas and found that they support the opinions of Drs. Larkin and Myles better than the opinions of Drs. Weigel and Wharton. Decision and Order at 22.

as it is supported by substantial evidence.[5] *See Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011).

Employer next contends that the administrative law judge erred in finding that claimant's condition has not reached maximum medical improvement. Drs. Larkin and Myles opined that claimant's back injury has not yet reached maximum medical improvement as she remains in need of medical testing and further treatment with a view to improving her back condition.[6] CX 1 at 42, 51. Drs. Weigel and Wharton conversely opined that claimant's back condition reached maximum medical improvement without any impairment by January 31, 2012 at the latest. EX 4 at 5; EX 9 at 13. The administrative law judge permissibly accorded greater weight to the opinions of Drs. Larkin and Myles, because of their positions as claimant's treating physicians. *See generally Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005). Thus, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's disability remains temporary as she requires further treatment to improve her condition. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

Employer also contends the administrative law judge erred in finding that it did not meet its burden to establish the availability of suitable alternate employment. Employer avers that its burden was met with the evidence that claimant was working at the time of the formal hearing. Employer asserts that it does not have a renewed burden of demonstrating the availability of suitable alternate employment when claimant loses a suitable job for reasons unrelated to her disability.

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[5]As we have affirmed the finding that claimant's back injury is work-related, we reject employer's argument that the administrative law judge erred in awarding claimant medical benefits because she did not establish a causal connection between the work accident and her back and right hip symptoms. 33 U.S.C. §907(a); *see generally Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Weikert v. Universal Maritime Serv. Corp*., 36 BRBS 38 (2002); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). We therefore affirm the administrative law judge's finding that claimant is entitled to "all appropriate, necessary and reasonable medical expenses related to her [compensable] conditions." Decision and Order at 38.

[6]In his reports dated January 17 and April 28, 2012, Dr. Larkin recommended an EMG of claimant's lumbar spine, noting that her condition could not fully be evaluated until such testing was performed. CX 1 at 40, 42. In his reports dated January 12 and September 4, 2012, Dr. Myles recommended that claimant receive physical therapy and an epidural steroid injection. CX 1 at 46, 48-49. In his report dated October 2, 2012, Dr. Myles added that surgery was a possible means to treat claimant's lumbar condition. CX 1 at 51.

Where, as in this case, claimant establishes her inability to return to her usual work with employer as a result of her work-related injury,[7] the burden shifts to employer to establish the availability of realistically available jobs within the geographic area where claimant resides, which she is capable of performing, considering her age, education, work experience, and physical restrictions, and which she could secure if she diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer may fulfill its burden by showing that claimant is actually working within her work restrictions. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). However, in order to establish that claimant is not totally disabled, employer must show that any short-term post-injury job remains suitable and available. *See generally Carter v. General Elevator Co.*, 14 BRBS 90, 97 (1981).

In this case, the administrative law judge credited claimant's hearing testimony that she was working for Rose International on a short-term contract scheduled to end on February 4, 2013.[8] The administrative law judge found claimant entitled to temporary partial disability benefits during this period of employment. The administrative law judge found that the short-lived work with Rose International does not alone provide a basis for an ongoing award of partial disability, as opposed to total disability, benefits after February 4, 2013. The administrative law judge awarded claimant temporary total disability benefits as of February 5, 2013, because employer did not show the availability of any additional suitable alternate employment.

The Board has held that where an injured employee obtains various temporary jobs following her injury, such fact does not necessarily defeat a claim for total disability. *Carter*, 14 BRBS at 97; *see also Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994) (court held that short-lived employment did not establish that suitable alternate employment was realistically and regularly available on the open market); *Mendez v. National Steel and Shipbuilding Co.*, 21 BRBS 22 (1988). Employer bears the burden of establishing the ongoing availability of suitable alternate employment under such circumstances. *Carter*, 14 BRBS at 97. The administrative law judge found that employer did not offer any evidence of suitable alternate employment; thus, employer did not meet its burden of establishing the

[7]Relying on the credited opinions of Drs. Larkin and Myles, the administrative law judge found that claimant is unable to return to her former employment. Decision and Order at 32.

[8]At the January 15, 2013 hearing, claimant testified that she began working for Rose International on October 8, 2012, and that her job was "a contract to hire position, a three-month contract supposedly [which] had been up January the 8th," but "they extended my contract to February the 4th." HT at 40.

reasonable availability of suitable jobs.[9] *See Turner*, 661 F.2d 1031, 14 BRBS 156; *Carter*, 14 BRBS at 97 (job of 3.5 months not shown to be regularly available). Consequently, we affirm the administrative law judge's finding that claimant's short-lived position with Rose International is insufficient to establish that alternate employment was available to claimant after the date that job ended. We affirm the award of temporary total disability benefits as of February 5, 2013, as it is rational, supported by substantial evidence and in accordance with law. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[9]Contrary to employer's contention, this case is factually distinguishable from *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). In *Brooks*, the claimant was not entitled to total disability benefits after he was terminated from suitable alternate employment due to his own misconduct and for reasons unrelated to his work injury. Under such circumstances, the employer does not bear a renewed burden of establishing suitable alternate employment.