

HERSHEL DAVIS)
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 Claimant-Respondent)
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 v.)
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 DELAWARE RIVER) DATE ISSUED: June 24, 2002
 STEVEDORES)
)
 Self Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order and Decision Denying Reconsideration of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman and Lorry, P.C.), Cherry Hill, New Jersey, for claimant.

John E. Kawczynski (Field, Womack & Kawczynski, LLC), South Amboy, New Jersey, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Decision Denying Reconsideration (00-LHC-2160) of Administrative Law Judge Ralph A. Romano awarding benefits 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, while working for employer as a crane operator, sustained injuries to his right foot and left hip when he fell through the floor of a crane on December 16, 1998. Following the accident, claimant was evaluated at U.S. Healthworks where he was diagnosed with a left hip strain, right foot strain and a fracture of his right second toe. Claimant subsequently sought and received treatment from a Board-certified orthopedic surgeon, Dr.

Mandel, beginning on February 3, 1999. Dr. Mandel initially diagnosed degenerative joint disease of the left hip and a healed fracture of the second toe of right foot, and ordered two weeks of physical therapy. Dr. Mandel cleared claimant to return to work as of March 1, 1999, and employer's records indicate that between March 3, 1999, and April 7, 1999, claimant returned to work for 77 hours.¹

Dr. Mandel next saw claimant on April 8, 1999, at which time he stated that claimant "has been working but notes increasing left hip pain." As a result of claimant's complaints, Dr. Mandel reduced claimant's work level from full duty to sedentary duty only. Dr. Mandel recommended on May 13, 1999, that claimant attend an aquatic exercise program at the local YMCA, and claimant later briefly participated in this therapy. Over the course of the next several months claimant developed multiple medical problems including the onset of diabetes, high blood pressure, a pituitary tumor, and congestive heart failure.²

At his deposition, Dr. Mandel stated that at the time of his last examination of claimant, on April 21, 2000, he observed the following work-related diagnoses: 1) a healed fracture of the second toe of the right foot; 2) aggravation of degenerative arthritis of the left hip; and 3) indirectly lumbar strain and sprain. Claimant's Exhibit (CX) 1 at 18. Dr. Mandel explained that the back strain/sprain occurred during physical therapy for his work-related problems, and additionally opined that claimant could not have returned to work for employer at any time that he had been under his care. CX 1 at 18, 21.

Employer had claimant examined by a Board-certified orthopedic surgeon, Dr. Kahn, on August 24, 2000. Dr. Kahn diagnosed a "history of lumbosacral sprain and strain," and opined that claimant has subjective complaints without any objective findings, that there was

¹Claimant however steadfastly maintains that following the December 16, 1998, accident he never went back to work. Hearing Transcript (HT) at 21, 33.

²The record establishes that claimant was removed from his water therapy as a result of hypertension. Additionally, claimant was hospitalized between September 3, 1999, and September 10, 1999, as a result of congestive heart failure. Joint Exhibit (JX) 19. The record further indicates that claimant was previously hospitalized between March 29, 1999, and April 2, 1999, for the symptoms of diarrhea, abdominal pain, and nausea. JX 19.

no evidence of a back injury, that claimant's problems appear to be cardiac in origin as well as due to his gross obesity, and that from an orthopedic standpoint, claimant could return to work full duty. JX 14. On August 20, 2000, Dr. Pickering, a cardiologist, diagnosed: 1) morbid obesity; 2) multiple compression fractures of the spine; 3) degenerative joint disease of the left hip; 4) hypertension; 5) congestive heart failure; 6) maturity onset diabetes, and he opined that claimant was totally disabled from all work due to these conditions. JX 13. In a supplemental report dated September 26, 2000, Dr. Pickering opined that claimant was fully recovered from his injury of December 16, 1998. JX 13.

In his decision, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption with regard to the aggravation of his degenerative arthritic condition of his left hip, 33 U.S.C. §920(a), and that employer has not established rebuttal. He therefore concluded that claimant is entitled to a continuing award of temporary total disability benefits from December 17, 1998, and related medical benefits under Section 7 of the Act, 33 U.S.C. §907. Employer's motion for reconsideration was summarily denied.

On appeal, employer asserts that the administrative law judge's award of benefits cannot stand as his decisions do not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). Claimant responds, urging affirmance.

Employer argues that the administrative law judge's decisions do not comply with the APA because he failed to fully discuss all of the evidence of record and did not provide the reasons why it was credited or discredited. In particular, employer asserts that the administrative law judge ignored claimant's testimony that he could not return to work because of his non-work-related excessive weight gain, the administrative law judge did not address the testimony of employer's expert cardiologist, Dr. Pickering, that claimant is disabled due to his multiple non-work-related medical problems, and that the administrative law judge misinterpreted the testimony of claimant's expert, Dr. Mandel, regarding claimant's back injury and failed to address employer's contention that Dr. Mandel's testimony was equivocal and based on facts not in evidence. In addition, employer argues that the administrative law judge erred in awarding total disability benefits during a time period in which claimant had returned to work for employer. Lastly, employer maintains that the administrative law judge exacerbated his errors by issuing a summary denial of its request for reconsideration.

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that an accident occurred or working conditions existed which could have caused the injury or harm. *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Duhagon v. Metropolitan Stevedore Co.*,

169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996). It is employer's burden on rebuttal to present substantial evidence sufficient to sever the causal connection between the injury and the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In his decision, the administrative law judge found that claimant invoked the Section 20(a) presumption based on the opinion of Dr. Mandel, that the December 16, 1998, work accident aggravated a degenerative arthritic condition of claimant's left hip rendering him incapable of the climbing requirements of that job, as well as claimant's own consistent and credible testimony that his left hip problems and consequent climbing difficulties related to his work accident. The administrative law judge then determined that employer did not establish rebuttal. Specifically, he observed that he could attach no significance to Dr. Kahn's examination and opinion because he did not examine claimant's left hip, and thus never rendered an opinion relative to whether claimant's climbing capacity is affected by any impairment thereto. He thus concluded that there exists in the record "absolutely no expert orthopedic medical opinion evidence refuting claimant's proffered expert orthopedic medical opinion evidence (from Dr. Mandel) that claimant cannot perform the climbing requirements of his job due to the left hip impairment." Decision and Order at 5. Accordingly, he found claimant entitled to continuing temporary total disability benefits from December 17, 1998.

The record establishes, and employer admits, that claimant sustained an injury to his left hip as a result of his work accident on December 16, 1998. Dr. Mandel diagnosed a work-related aggravation of degenerative joint arthritis of the left hip. Moreover, the presumption cannot be rebutted as a matter of law as employer has offered no evidence severing the causal connection between the work accident and the aggravation of claimant's degenerative joint disease of his left hip. *See Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). Neither Dr. Kahn nor Dr. Pickering provides any causation opinion contrary to the one proffered by Dr. Mandel with regard to claimant's left hip condition. Consequently, the administrative law judge's findings that claimant is entitled to the Section 20(a) presumption, that employer has not established rebuttal, and thus, that claimant has established that he sustained a work-related aggravation of his degenerative joint disease condition of his left hip are affirmed as rational, supported by substantial evidence and in accordance with law.

We observe however that the administrative law judge intermingled the issues of causation and disability. The Section 20(a) presumption does not apply to the issues of the nature and extent of disability. *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

Thus, upon determining that claimant sustained a work-related aggravation of his degenerative joint disease, the administrative law judge should have determined whether claimant established his entitlement to total disability benefits based on this hip condition.

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. *See Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987); *Elliot v. C & P Telephone Co.*, 16 BRBS 89 (1984). In the instant case, the administrative law judge, in his discussion of the Section 20(a) presumption, determined that Dr. Mandel opined that the work-related aggravation of claimant's degenerative arthritic left hip condition rendered him incapable of the climbing requirements of his usual employment. This opinion is the basis for the administrative law judge's conclusion that claimant is entitled to temporary total disability benefits. In addition, the administrative law judge rejected, as neither relevant nor persuasive, employer's contention that the numerous inconsistencies in Dr. Mandel's opinion warrant its rejection as credible evidence of claimant's condition. The administrative law judge also determined that the record did not support employer's contention that claimant had conceded he was totally disabled by non-work-related medical problems, and the administrative law judge flatly rejected as irrelevant Dr. Kahn's opinion with regard to claimant's left hip condition.

The Administrative Procedure Act requires that every adjudicatory 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). An administrative law judge must independently analyze and discuss the evidence, and must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985).

Although the administrative law judge's findings on the issue of disability were incorrectly subsumed in his consideration of the evidence of causation under Section 20(a), he nevertheless sufficiently discussed the relevant evidence of record and provided a rationale for concluding that claimant cannot perform his usual work as a result of his work-related left hip condition. This finding is supported by substantial evidence.³ *See generally Corcoran v. Preferred Stone Setting*, 12 BRBS 201 (1980). Specifically, as the administrative law judge found, Dr. Mandel opined that claimant has been unable to perform his usual work as a crane operator during the time period of the doctor's treatment, *i.e.*, February 3, 1999, through November 10, 2000. CX 1 at 21. The doctor added that while he

³Moreover, we reject employer's contention that the administrative law judge erred in summarily denying its motion for reconsideration. Employer's contentions on reconsideration were virtually identical to those submitted in its post-hearing brief, which were, as evidenced above, rejected by the administrative law judge in his initial decision. As such, the administrative law judge reviewed and rejected the issues raised by employer on reconsideration.

did send claimant back to work, and that claimant attempted to work for a short period of time, claimant was physically unable to perform his usual work as a crane operator. *Id.* Dr. Mandel based this opinion on his belief that the climbing requirements associated with that position, *i.e.*, climbing a ladder anywhere from 30 to 50 feet four or five times a day, would, as a result of the condition of claimant's left hip, put a lot of stress on the hip joint and would therefore be problematic. CX 1 at 21-22. In short, Dr. Mandel attributed claimant's inability to perform his usual employment to a work-related aggravation of his left hip condition.

In crediting Dr. Mandel's opinion regarding claimant's inability to perform his usual work, albeit under his discussion of the Section 20(a) presumption, the administrative law judge specifically considered and rejected employer's contentions regarding Dr. Mandel's opinion. Both before the administrative law judge below and before the Board on appeal employer's arguments have predominantly focused on Dr. Mandel's statements regarding the work-relatedness of claimant's back strain/sprain, which the administrative law judge found is meaningless in light of the fact that the left hip injury, and not the back injury, is the disabling factor underlying Dr. Mandel's opinion. Moreover, the administrative law judge determined that the suggestion that Dr. Mandel had, in November and December 1999, released claimant to return to work despite the back impairment is neither inconsistent with his disability opinion regarding claimant's hip, nor contradictory to his December 29, 1999, office treatment note since, as Dr. Mandel explained, a later February 2000, x-ray of the left hip displayed a worsening of the degenerative arthritis of that hip.

Contrary to employer's contention, the administrative law judge similarly rejected, as unsupported, its assertion that claimant's testimony establishes that the only reason he cannot perform his usual employment is due to his non-work-related excessive weight. Specifically, the administrative law judge found that the record contains no support for this assertion and that claimant's testimony on this issue, in fact, supports the opposite conclusion. At the hearing, claimant testified that "I've seen bigger guys go up in the cranes," and that "I could have probably got up in there," but that "with my condition now, my legs and hip and back, I wouldn't want to take a chance going up in the crane." HT at 33. Moreover, the administrative law judge rationally accorded less weight to Dr. Kahn's examination and opinion on the issues of causation and disability attributable to claimant's left hip condition, because Dr. Kahn did not examine claimant's left hip, and thus, did not render an opinion relative to whether claimant's climbing capacity is affected by any impairment due to that condition.⁴

⁴In his deposition testimony, Dr. Kahn does, in fact, discuss this issue. After

referencing Dr. Mandel's statement that he did not address the issue of claimant's hip injury, Dr. Kahn acknowledged that he did not examine claimant's hip because claimant reported to him "that [claimant] does not have any problems with his hip." EX 2, Deposition at 13-14. This admission supports the basis for the administrative law judge's discrediting of Dr. Kahn's opinion.

Furthermore, while employer correctly notes that the administrative law judge did not discuss Dr. Pickering's opinion, any error is harmless. On September 26, 2000, Dr. Pickering opined that claimant is totally disabled as a result of his morbid obesity, and his chronic back pain which is augmented by his obesity. JX 13. Dr. Pickering, however, readily admitted at his deposition that he is a cardiologist and not an orthopedist and that he cannot offer an opinion on the nature or the cause of any disability relating to any orthopedic conditions which claimant may have sustained as a result of his work-related accident of December 16, 1998. EX 1 at 19. In addition, the administrative law judge's finding that claimant cannot do his usual employment rests on Dr. Mandel's opinion and the fact there is "absolutely no expert orthopedic medical opinion evidence" of record to the contrary. Decision and Order at 5. Consequently, as the credited evidence of record establishes that claimant cannot do his usual employment as a result of the work-related aggravation of his left hip, and as employer has presented no evidence of suitable alternate employment, we affirm the administrative law judge's finding that claimant is entitled to temporary total disability benefits.⁵ See generally *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

⁵Since Dr. Mandel's opinion immediately following claimant's failed attempt to return to his usual work establishes that claimant could not do this work in light of the work-related aggravation of his left hip condition and thus, that claimant should not have been released to return to that work at that time, it establishes that this job was, as opined by Dr. Mandel at his deposition, beyond his physical restrictions and therefore not suitable for him post-injury. See generally *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). In addition, the fact that claimant allegedly worked only 77 hours over the course of one month's time establishes that claimant's ability to perform this work is too speculative to satisfy employer's burden of showing the availability of suitable alternate employment. See generally *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Thus, this trial period of employment does not establish that claimant was not totally disabled during the entire period in question.

Accordingly, the administrative law judge's decisions are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge