BRB Nos. 01-0517
and 01-0517A

BOBBIE L. SUTTON	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
COOPER/T. SMITH STEVEDORING	)	DATE ISSUED: March 4, 2002
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
I.T.O. CORPORATION OF VIRGINIA, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer Black L.L.P.), Norfolk, Virginia, for Cooper/T. Smith Stevedoring.

Christopher J. Field (Field, Womack & Kawczynski, L.L.C.), South Amboy, New Jersey, for I.T.O. Corporation of Virginia, Incorporated.

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

PER CURIAM:

Cooper/T. Smith Stevedoring (CTS) appeals, and claimant cross-appeals, the Decision and Order (98-LHC-2902, 99-LHC-2321) of Administrative Law Judge Richard K. Malamphy 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 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, while working as a longshoreman for I.T.O. Corporation of Virginia (ITO) on May 17, 1996, sustained an injury to his right knee.[1] He thereafter sought treatment for his right knee from Dr. Neff who diagnosed a tear of the right lateral meniscus, and performed surgery on claimant's right knee on October 10, 1996. Following a period of physical therapy and a work-hardening program, Dr. Neff opined that claimant could return to work full-duty as of January 13, 1997. Dr. Neff also addressed claimant's complaints of back pain. In this regard, he diagnosed a lumbosacral sprain on July 23, 1996, and sciatic nerve irritation, although he apparently felt that neither condition prevented claimant's return to full-duty work. Dr. Neff further opined, in October 1999, that the right sciatica irritation was directly attributable to the May 17, 1996, work accident. ITO voluntarily paid temporary total disability benefits from June 11, 1996, until January 12, 1997, as well as a scheduled award of permanent partial disability benefits based on a ten percent impairment of claimant's right leg.

[1]The record indicates that prior to this injury, on December 8, 1995, claimant was involved in a car accident. Dr. Morales provided treatment for, among other things, severe muscle spasms in the cervical and lumbar regions, although an MRI revealed no evidence of a bulging, protruding or herniated disc. Dr. Morales found claimant unable to work from December 10, 1995, until January 22, 1996. He thereafter found claimant capable of returning to full-duty status. Drs. Holden, Pugach and Williamson also offered varying opinions regarding claimant's complaints of back pain/back condition.

After returning to work, claimant, now employed as a longshoreman by CTS, sustained work-related injuries to his right ankle and heel on January 20, 1997. Claimant received immediate treatment at Sentara Hospital and was diagnosed with an acute right ankle contusion. On January 22, 1997, claimant sought further treatment for his right ankle/foot and continuing back pain from Dr. Wardell who diagnosed a right ankle sprain, Grade III, a crush injury of the right foot and heel (*i.e.*, a broken big toe on his right foot), and right-sided sciatica. Dr. Wardell opined that claimant reached maximum medical improvement with regard to his right foot and ankle as of September 22, 1997, with a nine percent permanent partial impairment rating of the right foot, but added that claimant should remain out of work.[2] In addition, he opined that claimant's sciatica was caused by the 1996 ITO accident, that the sciatica was aggravated by his January 20, 1997, work accident with CTS, and that as a result of claimant's 1996 and 1997 work accidents he could not return to work at his pre-injury employment. CTS voluntarily paid temporary total disability from January 21, 1997, until December 7, 1998.

Claimant thereafter filed a claim seeking permanent total disability benefits from ITO and/or CTS as a result of his alleged work-related chronic back condition, and alternatively based on his work-related injuries and intellectual limitations. ITO and CTS both responded by arguing that claimant never sustained any lasting back injury, and that in any event, claimant cannot be entitled to any additional benefits as he has been fully compensated for both the May 16, 1996, and January 20, 1997, work accidents, and he is presently capable of

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[2]Dr. Wardell gave restrictions relating only to claimant's right foot injury, which allowed him to work eight hours a day but limited him to lifting no more than 75 lbs, intermittent walking/standing, two hours of kneeling and climbing one flight of stairs at a time. Dr. Wardell stated that as of the date claimant reached maximum medical improvement with regard to his foot and ankle, September 22, 1997, he returned to his pre-January 20, 1997, condition with regard to his back. He, however, added that because of the restrictions in claimant's work capabilities due to his May 17, 1996, injury (*i.e.*, his right knee and sciatica) as well as his January 20, 1997, injuries (*i.e.*, right ankle and foot), claimant cannot work longer than two hours per day unless he can lie down at work.

performing alternate work.

In his decision, the administrative law judge determined that claimant was entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to his back condition but that the presumption was rebutted. Upon review of the record as a whole, the administrative law judge concluded that claimant did not sustain any chronic lumbar impairment. The administrative law judge, however, determined that claimant is totally disabled as a result of his right lower extremity and intellectual impairments. Additionally, he determined that CTS is the responsible employer as claimant was capable of performing his usual work until the date of his last injury, January 20, 1997. Consequently, the administrative law judge ordered CTS to pay claimant temporary total disability benefits from January 21, 1997, through September 21, 1997, and permanent total disability benefits thereafter. The administrative law judge further found that CTS is entitled to Section 8(f) relief, 33 U.S.C. §908(f). Lastly, the administrative law judge ordered ITO to provide continued medical benefits to claimant for the treatment of claimant's right knee and ordered CTS to provide continued medical benefits for treatment of claimant's injuries below the right knee. At CTS's request on reconsideration, the administrative law judge rescinded his finding that CTS is entitled to Section 8(f) relief.

On appeal, CTS challenges the administrative law judge's determination that claimant is totally disabled. Claimant responds, urging affirmance. On cross-appeal, claimant challenges the administrative law judge's determination that claimant did not sustain a permanent work-related back injury. CTS and ITO each respond, urging affirmance of the administrative law judge's finding that claimant did not sustain any work-related back injury. CTS also reiterates its position that claimant is not entitled to total disability benefits.

CTS argues that, without the back impairment, claimant's only established disabilities are those related to the work injuries sustained in 1996 and 1997, with restrictions that would allow him to return to work. CTS therefore asserts that the administrative law judge's analysis of claimant's ability to work is faulty since in addressing the suitable alternate employment issue he failed to remove the back impairment from the equation.

Where, as in the instant case, it is undisputed that claimant is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT)(4th Cir. 1988). In order to meet this burden, employer must show the availability of a range of job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Lentz*, 852 F.2d 129, 21 BRBS 109(CRT); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992).

In addressing suitable alternate employment, the administrative law judge considered the physical limitations imposed by Dr. Wardell, including the separate restrictions due to claimant's alleged back injury and right leg injury, as well as the reports of three vocational counselors, Mr. Vipperman, Mr. DeMark, and Ms. Whitfield. In weighing this evidence, the administrative law judge credited the opinions of Mr. Vipperman and Mr. DeMark, that claimant is unemployable, over the contrary opinion of Ms. Whitfield, that claimant was capable of a number of alternate jobs.

Mr. Vipperman explicitly stated in his report dated May 5, 2000, that "based on my survey in the Tidewater Virginia area I have been unable to identify any viable occupational alternatives that would be suitable for this claimant in light of his education, training, experience and physical capacity." ITO Exhibit 24. Similarly, Mr. DeMark stated, on January 29, 1999, and again on April 19, 1999, that given claimant's overall vocational situation, including his physical limitations, age (61), functional illiteracy, very low IQ, and lack of transferable skills, he is unable to return to any type work. In contrast, Ms. Whitfield identified alternate work for claimant as a hustler driver and/or forklift driver within the longshore industry, and in a number of other positions in the open market, *i.e.*, jobs as a cashier, an unarmed security guard, an assembler and as a delivery driver. In addition, Ms. Whitfield testified at the hearing that Dr. Wardell approved jobs as a forklift driver on the dock, as a cashier, and as a security guard. The administrative law judge also observed that Dr. Holden approved jobs as a forklift driver, security guard, and as a cashier.

In according diminished weight to Ms. Whitfield's statements, the administrative law judge found that while Ms. Whitfield identified several jobs as suitable and testified that Dr. Wardell approved a number of those jobs, the record does not contain any physician's signature as to the approval of jobs, and no mention of jobs was made at Dr. Wardell's deposition. Moreover, the administrative law judge concluded that approval of the jobs identified by Ms. Whitfield does not seem consistent with the previous statements made by Dr. Wardell regarding claimant's physical capacity. In addition, the administrative law judge found that while Dr. Holden approved, from a physical standpoint, some jobs, all three vocational experts noted illiteracy, and that Mr. Vipperman and Mr. DeMark each stated that claimant was unemployable given all of his circumstances.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580

F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979). In the instant case, the administrative law judge reasonably relied upon the opinions of two vocational experts, Mr. Vipperman and Mr. DeMark, that claimant was not able to perform any employment, to conclude that suitable alternate employment has not been shown and thus that claimant is totally disabled as a result of his work-related injury to his right lower leg and his intellectual impairments.[3] *Wilson v. Crowley Maritime,* 30 BRBS 199 (1996); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). As these findings are supported by substantial evidence, they are affirmed. Consequently, the administrative law judge's award of temporary total disability benefits from January 21, 1997, through September 21, 1997, and of permanent total disability benefits thereafter, is affirmed.

In his appeal, claimant argues that the administrative law judge erred in finding that he did not suffer a permanent work-related back injury. He avers that the administrative law judge erred in crediting the opinions of Drs. Morales, Pugach and Williamson, who found no permanent lumbar impairment, over the opinions proffered by claimant's treating physicians, Drs. Neff and Wardell, and by Dr. Holden, all of whom opined that claimant has an ongoing back condition related to his May 17, 1996, work accident.

In order to establish a *prima facie* case, it is claimant's burden to prove the existence of an injury or harm and that a work-related accident occurred or working conditions existed which could have caused the harm. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Where 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 condition is causally related to his employment; the burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's condition was neither caused, contributed to, or aggravated by his employment. *See American Grain Trimmers v. Director, OWCP [Janich],* 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000)*; Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert denied,* 429 U.S. 820 (1976). If the administrative law judge finds the Section 20(a)

[3]CTS's argument that it was improper for the administrative law judge to include claimant's alleged back restrictions in determining his ability to perform alternate work is without merit since the administrative law judge did, in fact, factor out claimant's back injury prior to making this determination.

presumption rebutted, it drops from the case. *Moore,* 126 F.3d 256, 31 BRBS 119(CRT). The administrative law judge must then 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 also Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see generally See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In the instant case, the administrative law judge invoked the Section 20(a) presumption based on Dr. Wardell's opinion that one or both of the work-related accidents contributed to claimant's back pain, but then found rebuttal based on the fact that Dr. Morales, who treated claimant for complaints of low back pain related to the 1995 automobile accident, did not report any chronic back disability when he returned claimant to full-duty work with ITO, and since Drs. Pugach and Williamson stated that a chronic low back impairment was not present.[4] After reviewing the record as a whole, the administrative law judge credited the opinions of Drs. Morales, Pugach, Williamson that there is no permanent lumbar impairment over the contrary opinions of Drs. Neff, Wardell and Holden. The administrative law judge accorded diminished weight to the opinions of Drs. Neff, Wardell and Holden because each expressed conflicting opinions as to the onset and the nature of any existing back impairment.

[4]For the reasons noted in Footnote 5 of this decision, the opinions of Drs. Morales and Pugach are, in contrast to the administrative law judge's finding, insufficient to establish rebuttal of the Section 20(a) presumption. Nevertheless, we affirm the administrative law judge's finding of rebuttal, as Dr. Williamson's opinion, wherein he conclusively states that claimant did not have any back injury whatsoever, is sufficient to establish rebuttal. *See generally Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

The administrative law judge's decision cannot be affirmed as it does not rest on an analysis of the evidence relevant to causation; rather, his findings intermingle issues relevant to causation, disability and responsible employer. In particular, his conclusion regarding the onset and the nature of any existing back impairment and his ultimate determination, that there is no chronic lumbar impairment regardless of origin, are relevant to the nature and extent of disability. The injury at issue here involves claimant's repeated complaints of back pain, coupled with the specific diagnosis of right-sided sciatica by Drs. Neff, Wardell, and Holden. The causation inquiry must address whether claimant's back pain and sciatica are work-related. 33 U.S.C. §902(2); *see Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). It is not necessary that claimant have a permanent impairment or chronic condition in order to have a compensable injury, as complaints of pain constitute an injury under the Act. *See, e.g., Cairns,* 21 BRBS at 255. We must therefore vacate the administrative law judge's finding that claimant does not have any chronic lumbar impairment regardless of origin and remand for re-evaluation of the record as a whole for a proper determination as to whether claimant's back condition is work-related.[5] In considering this issue on remand, the administrative law judge must explicitly consider whether claimant's complaints of back pain subsequent to both the May 17, 1996, and January 20, 1997, accidents are work-related.[6] If the administrative law judge determines that claimant's complaints of back pain are work-related, then the responsible employer should be determined based on the evidence and applicable law, *see Delaware River Stevedores, Inc. v. Director, OWCP*, __ F.3d __, No. 01-1709, 2002 WL 121580(3d Cir. Jan. 30, 2000), and any other issues resolved. Regardless of whether he is disabled by his back condition,[7] claimant is entitled to medical benefits for any

[5]In this regard, the medical opinion of Dr. Morales is not relevant to causation as he last treated claimant in January 1996, prior to the work accidents sustained on May 17, 1996, and January 20, 1997, and therefore cannot comment on the impact, if any, which those work accidents may have had on claimant's back condition. Additionally, while Dr. Pugach stated that there was no impairment due to claimant's alleged back condition, he also stated that claimant may have had a relatively mild injury to the distal right sciatic nerve perhaps related to his May 16, 1996, injury. While this evidence could support a finding of no permanent impairment, it does not support the conclusion that claimant had no work-related injury. The administrative law judge must also consider the significance, if any, of the fact that neither Dr. Pugach nor Dr. Williamson specifically considered claimant's condition in terms of his January 20, 1997, work accident, as claimant's back complaints are compensable if the later work accident aggravated any pre-existing back condition.

[6]In this regard, the record shows that following each of his work accidents, claimant sought treatment for complaints of back pain, first from Dr. Neff and then from Dr. Wardell. This evidence was not discussed by the administrative law judge in his causation discussion and could support a finding that claimant had a work-related back problem.

[7]As we have affirmed the finding that claimant is totally disabled by his other injuries,

treatment necessary for his work-related condition. 33 U.S.C. §907; *see generally Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

Accordingly, the administrative law judge's award of total disability benefits is affirmed. The administrative law judge's determination that claimant did not sustain any chronic lumbar impairment regardless of origin is vacated, and the case is remanded for consideration as to whether claimant's back condition was caused, contributed to, or aggravated by his employment.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

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claimant cannot receive additional disability benefits even if his back complaints are work-related.