

KENNETH MUTCHERSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
NEWPORT TERMINALS, LLC)	DATE ISSUED: 03/19/2007
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

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

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

G. Mason White and James K. Kreyenbuhl (Brennan, Harris & Rominger LLP), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2005-LHC-00927) of Administrative Law Judge Richard K. Malamphy 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 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).

On October 31, 2003, while working for employer in the hold of a vessel, claimant sustained injuries to his left leg and back when he fell to the ground after being struck by a roll of paper. Claimant was transported to the hospital where a rod was surgically inserted into his leg and he was diagnosed with, *inter alia*, a closed head injury. Employer voluntarily paid temporary total disability benefits from the date of this work incident through September 17, 2004. Claimant subsequently filed a claim for benefits under the Act, contending that he remained totally disabled due to the pain associated with his back and leg conditions, as well as a neuropsychiatric condition, which he averred was related to the October 31, 2003, work-incident.

In his Decision and Order, the administrative law judge initially found that Dr. Lorenzen's assessment of claimant's physical capacity, specifically that claimant could perform light or medium duty work, was not contradicted by another medical examiner of record. Next, the administrative law judge found claimant to be entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), that claimant's neuropsychiatric condition is related to his employment with employer, and that employer rebutted that presumption. The administrative law judge then considered the totality of the medical evidence and concluded that claimant has a significant neuropsychiatric impairment as a result of a closed head injury that he sustained while working for employer. Pursuant to this finding, the administrative law judge awarded claimant temporary total disability benefits commencing September 18, 2003, reimbursement for the services rendered by Dr. Adams, and future medical expenses associated with claimant's back, leg, and neuropsychiatric conditions.

On appeal, employer challenges the administrative law judge's award of disability and medical benefits to claimant based on a work-related neuropsychiatric impairment. Claimant responds, urging affirmance of the administrative law judge's decision.

Where, as in the instant case, claimant has established entitlement to invocation of the Section 20(a) presumption, *see Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1998), and employer has rebutted the presumption, *see Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000), *petition for review denied*, No. 02-12758 (11th Cir. Feb. 5, 2003), the administrative law judge 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. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In challenging the administrative law judge's award of disability and medical benefits to claimant based upon a finding that claimant established the existence of a neuropsychiatric condition which is related to his October 31, 2003, work-injury,

employer assigns error to the administrative law judge's decision to rely upon the opinions of Drs. Adams and Hartlage over that of its medical expert, Dr. Dickinson. In support of its contention of error, employer asserts that, contrary to the administrative law judge's findings, the record contains claimant's pre-injury test scores and support for Dr. Dickinson's testimony that he evaluated claimant.

In his decision, the administrative law judge determined that claimant has a significant neuropsychiatric impairment as a result of a closed head injury that he sustained at work. In reaching this conclusion, the administrative law judge initially found that the record did not contain the military test scores referenced by the witnesses. Next, the administrative law judge found that while Dr. Dickinson testified that either he or his staff performed testing on claimant, the report prepared by Dr. Dickinson and submitted into evidence as EX F does not mention or contain the results of the alleged testing. Accordingly, the administrative law judge found that since Drs. Adams and Hartlage actually evaluated claimant, their opinions were more credible than the opinion of Dr. Dickinson. The administrative law judge thus concluded that claimant has a significant work-related neuropsychiatric impairment.¹ The administrative law judge concluded that claimant was incapable of significant gainful employment, and he awarded claimant ongoing temporary total disability benefits, reimbursement for Dr. Adams services, and future medical expenses. Decision and Order at 11.

Employer's argument regarding the administrative law judge's evaluation of the evidence of record has merit. While the administrative law judge found that the "suggestion" that Dr. Dickinson or his staff performed testing on claimant was not supported by Dr. Dickinson's report identified as EX F since that report did not contain results or mention testing, *see* Decision and Order at 11, it is uncontroverted that the identified report was written prior to the date on which Dr. Dickinson examined claimant. Specifically, when questioned regarding this report, Dr. Dickinson testified that he wrote the report at issue after he had received and reviewed claimant's medical records but before he had actually met claimant. Tr. at 148-149. Dr. Dickinson testified that, upon meeting claimant, he conducted an interview and administered memory testing, a Wechsler memory scale, a forced choice follow-up test, a wide range achievement test, and the Minnesota Multiphasic Personality Inventory to claimant. *Id.* at 130-144. Dr. Dickinson's testimony regarding his administration of multiple tests to claimant is

¹ Dr. Adams opined that claimant sustained cognitive losses as a result of a work-related closed head injury and that claimant was presently incapable of employment. EX N. Dr. Hartlage similarly opined that claimant experienced some cognitive loss following his work-injury. EX P. In contrast, Dr. Dickerson opined that claimant experienced no change in his cognitive neuropsychological functioning post-injury. Tr. at 146-147.

supported by the testimony of Dr. Hartlage, who stated that he reviewed the raw data from the tests administered to claimant by Dr. Dickinson. *See* EX P at 88-91.

Moreover, while Dr. Dickinson relied in part on the results of claimant's pre-injury Armed Services Vocational Aptitude Battery test (ASVAB), which he found indicated substantially below average composite scores, when disagreeing with Dr. Adams' suggestion that claimant's post-injury test scores represented a substantial reduction in claimant's cognitive, intellectual, or neuropsychological post-injury abilities, *see* Tr. at 128, the administrative law judge found that that claimant's military test scores or other pertinent information were not contained in the record. Decision and Order at 11. Contrary to this finding, claimant's pre-injury ASVAB test scores are contained within the school records of claimant which were submitted into evidence.² *See* EX L at 17.

As the administrative law judge's findings regarding the presence of specific test scores relied upon by Dr. Dickinson, and the questionable administration of tests performed on claimant by Dr. Dickinson, are unsupported by the evidence of record, the administrative law judge's decision to credit the opinions of Drs. Adams and Hartlage over that of Dr. Dickinson solely on the basis that the former physicians actually evaluated claimant cannot be affirmed. We therefore vacate the administrative law judge's finding that claimant sustained a significant neuropsychiatric impairment as a result of his October 31, 2003, work-injury, and his subsequent award of temporary total disability and medical benefits to claimant as a result of that condition, and we remand the case to the administrative law judge for reconsideration of the totality of the evidence of record when addressing claimant's claim for ongoing disability and medical benefits.³

² The administrative law judge did acknowledge the presence of claimant's high school test scores, which he characterized as "dreadful." Decision and Order at 11.

³ Employer additionally challenges the qualifications of Drs. Adams and Hartlage in support of its assertion that the administrative law judge erred in finding causation. In addition, it argues that the administrative law judge did not make the necessary findings with regard to the extent of claimant's disability. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). On remand, the administrative law judge must address these arguments. Also, if the administrative law judge on remand again determines that claimant has sustained a work-related neuropsychiatric condition, he must fully address employer's objections to claimant's claim for medical benefits resulting from that condition. *See Hoodye v. Empore/United Stevedores*, 23 BRBS 341 (1990).

Accordingly, the administrative law judge's Decision and Order is vacated, and the case remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge