BRB No. 00-292

BERT JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Nov. 17, 2000
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Employer's Motion for Reconsideration of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

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

Jonathan H. Walker (Mason, Cowardin & Mason), Newport News, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Employer's Motion for Reconsideration (99-LHC-0181) of Administrative Law Judge Fletcher E. Campbell, 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*. (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 was diagnosed with carpal tunnel syndrome in both arms, and he underwent carpal tunnel releases on November 5, 1992. He returned to his regular job following the surgeries, and he retired in 1995. Employer voluntarily paid claimant permanent partial disability benefits under the schedule for a ten percent impairment in each arm. 33 U.S.C.

§908(c)(1). Claimant, however, sought benefits under the Act for a 50 percent impairment of the right arm.

The administrative law judge found that it was uncontested that claimant suffered a 10 percent impairment to the left arm. In addition, the administrative law judge found that claimant established that his right arm disability was caused by conditions of his work with employer. The administrative law judge awarded claimant permanent partial disability benefits under the schedule for a 50 percent impairment of the right arm. 33 U.S.C. §908(c)(1), crediting Dr. Wardell's opinion in this regard. The administrative law judge denied employer's motion for reconsideration.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of working conditions that could have caused claimant's carpal tunnel syndrome on the date of injury listed on the claim form. In addition, employer contends that the administrative law judge erred in according greatest weight to the opinion of Dr. Wardell regarding the extent of claimant's impairment and that the rating for claimant's impairment should be limited to the effects of the claimed injury. Claimant responds, urging affirmance of the administrative law judge's decision.

Initially, employer contends that the administrative law judge erred in finding that working conditions existed on the date of injury of July 23, 1992, listed on claimant's claim form which could have caused his carpal tunnel syndrome. Employer posits that in order to invoke Section 20(a), claimant should establish a specific date of injury and that claimant has not done so with regard to this specific date. Alternatively, employer avers that if general manual labor is sufficient to establish working conditions which could have caused the alleged harm, then evidence that claimant did not experience symptoms on the date asserted should suffice to rebut Section 20(a).

In order to invoke Section 20(a), claimant must establish that he has sustained a harm; once he does so, and that an accident occurred or working conditions existed which could have caused it, he has established a *prima facie* case, and the Section 20(a) presumption is invoked to link the harm to the employment. 33 U.S.C. §920(a); *see Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Contrary to employer's argument, an injury need not be traceable to a definite time, but can occur gradually, over a period of time. *See Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981).

In this case, claimant testified that he had to consistently lift heavy pieces of lead and use tools which vibrated, H.Tr. at 16-18, and that he began to suffer from pain and tingling in his hands. H.Tr. at 18. Dr. Wardell diagnosed that claimant suffers from bilateral carpal tunnel syndrome, which was caused by his work. Cl. Ex. 4. Contrary to employer's

contention, claimant need not produce evidence to show that he began experiencing symptoms on a specific date of injury as the claim is not based on an alleged specific injury on this date. Rather, claimant's claim was based on cumulative trauma over the period of his employment at the shipyard. H.Tr. at 8; Cl. Brief to ALJ. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Pittman*, 18 BRBS at 214. Thus, Section 20(a) was properly invoked based on evidence of claimant's working conditions and his arm condition. In order to rebut the presumption, employer was required to introduce substantial evidence that claimant's carpal tunnel syndrome was not related to his working conditions. Inasmuch as the administrative law judge correctly found that employer produced no evidence to rebut the presumption, we affirm the administrative law judge's finding that claimant's carpal tunnel syndrome in his right upper extremity is work-related. *See Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

Employer also contends that the administrative law judge erred in according determinative weight to the opinion of Dr. Wardell, rather than to the opinions of Drs. Ross and Gwathmey. The administrative law judge is entitled to weigh the medical evidence, and to determine which evidence is to be accorded determinative weight. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 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 (2nd Cir. 1961). The administrative law judge noted that claimant had been diagnosed and treated for brachial plexopathy of the right upper extremity in 1982 and 1989. He found that Dr. Wardell assigned claimant a 50 percent disability of the right arm, including 10 percent disability related to his carpal tunnel syndrome and a 40 percent residual arm impairment. He also found that Drs. Ross and Gwathmey assigned 10 percent impairments based on claimant's carpal tunnel syndrome, but excluded any disability from prior injuries. The administrative law judge gave as one of the primary reasons for rejecting the opinions of Drs. Ross and Gwathmey the fact that they did not "consider claimant's pre-existing right-arm disabilities in their computation of [their] impairment percentage." Decision and Order at 8; Order Denying Employer's Motion for Reconsideration at 2. However, Dr. Wardell, the physician credited by the administrative law judge, reported that claimant has a 40 percent impairment of the right upper extremity and an additional 10 percent impairment due to strength loss, for a total 50 percent impairment of the right upper extremity due to the right carpal tunnel syndrome.[1] Cl. Ex. 4. Contrary to the administrative

[1]Dr. Wardell determined the extent of claimant's impairment using the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th edition 1993), and specifically opined that using Table 16 (a table used for measuring impairment due to median neuropathy) on page 57, he has a 40 percent impairment of the right upper extremity, and using Table 34, on page 65 he has an additional 10 percent due to strength loss, for a total 50 percent permanent impairment of the right upper extremity due to the right carpal tunnel syndrome. *See* Cl. Ex. 4.

law judge's statement, Dr. Wardell does not attribute any of this disability to claimant's pre-existing condition.

Moreover, the administrative law judge accorded Dr. Gwathmey's opinion less weight on the basis that he only reviewed the records and did not examine claimant. Decision and Order at 8; Order Denying Employer's Motion for Reconsideration at 2. However, claimant testified that he saw Dr. Gwathmey, H.Tr. at 23, and Dr. Gwathmey's report notes his findings on examination, Emp. Ex. 22 at 2. While the administrative law judge is entitled to weigh the evidence, he must provide valid reasons for his determinations in this regard. As his reasoning here is flawed, we vacate the administrative law judge's finding regarding the extent of claimant's disability and remand for further consideration of the extent of claimant's right arm impairment.[2]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2]As no physician attributes any portion of the rated disability to claimant's pre-existing brachial plexus injury, we need not address employer's contention that claimant may not be compensated under the schedule for the effects of a combination of a disability related to an unscheduled injury and a scheduled injury. *See* Cl. Ex. 4.