BRB Nos. 04-0257
and 04-0785

THOMAS SZADA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
IMC-AGRICO MP, INCORPORATED	)	DATE ISSUED: 11/30/2004
	)	
and	)	
	)	
TRAVELERS WORKERS' COMPENSATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Amended Supplemental Decision and Order Granting Attorney Fee of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Anthony V. Cortese, Tampa, Florida, for claimant.

William C. Cruse, Jennifer Cortes, Sandra J. Peacock (Blue Williams, L.L.P.), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Amended Supplemental Decision and Order Granting Attorney Fee (02-LHC-573) of Administrative Law Judge Alice M. Craft 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.[1] *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained an injury on June 5, 1999, while trying to pin a shuttle on a gantry. He was referred for treatment which initially involved primarily his low back. Claimant eventually sought treatment for his mid-back and neck. Employer accepted that claimant's mid-back condition was related to the work injury and voluntarily paid claimant temporary total disability benefits and medical expenses related to his low and mid-back injuries. 33 U.S.C. §§908(b), 907. Employer, however, contested the allegation that claimant's neck problems were related to the work injury.

In her Decision and Order, the administrative law judge determined that employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's cervical condition was work-related and that, even if the presumption were rebutted, based on the evidence as a whole claimant established that his cervical condition is related to his work injury. Next, the administrative law judge determined that claimant is unable to return to his usual longshore employment and that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant permanent total disability benefits from June 15, 2001, the date claimant achieved maximum medical improvement.

On appeal, employer contends that the administrative law judge erred in determining that it failed to present evidence sufficient to rebut the Section 20(a) presumption and asserts that substantial evidence does not support the administrative law judge's ultimate finding that claimant's cervical condition is work-related. Employer also challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

We first address employer's assertion that the administrative law judge erred in concluding that claimant's present cervical symptomatology is related to his June 5, 1999, work injury. In establishing that an injury arises out of his employment, claimant is aided by the Section 20(a) presumption which applies to the issue of whether an injury is causally related to his employment activities. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's injury was

[1] For purposes of decision, we consolidate BRB No. 04-0257 and BRB No. 04-0785.

not caused or aggravated by his employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Kelley v. Dep't of the Navy/NAF*, 34 BRBS 39 (2000); *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. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir 1999); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.2d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). If the administrative law judge finds that the Section 20(a) presumption is rebutted, she must weigh all of the evidence and resolve the causation issue based on the record as a whole. *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 the instant case, employer argues that the administrative law judge applied an erroneous standard to the issue of whether the opinion of Dr. Patterson constitutes evidence sufficient to establish rebuttal of the Section 20(a) presumption. Dr. Patterson, a physiatrist, deposed that he found no clear evidence in the records to allow him to associate claimant's neck problems with his reported injury, EX 18 at 7, based on notes following the accident and Dr. Castellvi's October 12, 1999 report, which did not mention neck pain. EX 16.

As acknowledged by the administrative law judge, the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction the instant claim arises, has stated that the presumption was not rebutted where "[n]one of the physicians expressed an opinion ruling out the possibility" of a causal relationship between claimant's work accident and his disability. *Brown*, 893 F.2d at 297, 23 BRBS at 24(CRT). *See O'Kelley*, 34 BRBS 39. The administrative law judge found Dr. Patterson's opinion that he found "no clear evidence" to associate claimant's neck condition with his work injury was insufficient to meet the Eleventh Circuit's standard. We need not address employer's specific contentions regarding this finding, however, because the administrative law judge went on to find that even if Dr. Patterson's opinion were sufficient to rebut the Section 20(a) presumption, causation is established based on the record as a whole. As this conclusion is rational and supported by substantial evidence, we affirm the administrative law judge based on his alternate reasoning.

Specifically, the administrative law judge considered all of the medical evidence and credited the opinions of Drs. Martinez and Dennison that claimant's cervical condition was related to the work accident. Dr. Dennison, a pain management specialist, deposed that in his opinion claimant's present cervical condition is related to his work

injury. CX 3 at 21, 46, 48. Dr. Martinez stated that in his opinion the cervical condition was caused by claimant's work injury. *Id.* at 10. He believed that the reason MRI scans of the low back, rather than the upper back, were taken first, was because claimant initially complained more about his low back. CX 4 at 17. In concluding that claimant's June 5, 1999, work accident caused claimant's present medical condition, the administrative law judge rationally inferred that because claimant was initially diagnosed with only a lumbar sprain, it was only later that the more severe consequences of the incident at work, including radicular symptoms which led to a recommendation for fusion surgery, were noted. Decision and Order at 10, 14-15, 18.

It is well established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom and is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge provided sufficient reasoning supporting her decision to credit the opinions of Drs. Martinez and Dennison. As these opinions constitute substantial evidence in support of her conclusion, we affirm the administrative law judge's determination that claimant's present neck problems are related to his employment with employer. *O'Keeffe*, 380 U.S. 359.

Employer next challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment; specifically, employer contends that Dr. Castellvi did not elaborate when he placed restrictions on the repetitive use of claimant's upper extremities and refused to comment on the jobs identified as establishing suitable alternate employment, because he was not treating claimant for cervical problems. Employer alleges that as Dr. Patterson was the only physician of record who elaborated on the meaning of "repetitive use," and that as the jobs identified by employer are suitable under his explanation of the activities falling into that category, the jobs it identified are suitable despite the restrictions imposed on claimant.

Where, as in this case, claimant is incapable of resuming his usual employment duties with his employer, he has established a *prima facie* case of total disability. The burden thus shifts to employer to demonstrate the realistic availability of jobs within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing, and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986).

In finding that employer did not establish the availability of suitable alternate employment, the administrative law judge found that while Dr. Castellvi testified that claimant's restrictions included no repetitive use of the upper extremities, CX 2 at 25, EX 10, EX 17 at 25, Mr. Edleston, employer's vocational expert, misunderstood claimant's restrictions and assumed that Dr. Castellvi did not put any restrictions on repetitive use of the upper or lower extremities.[2] In a labor market survey dated April 24, 2000, Mr. Edleston identified eight positions within three job titles as being suitable for claimant. The positions included jobs as a lens polisher and an eye glass assembler at Milroy Optical, and cable assemblers at Spherion. Tr. at 133, 134, 135, 151-152. The administrative law judge found that Mr. Edleston conceded that the three jobs he identified required repetitive use of the upper extremities and that, in light of claimant's restriction against repetitive use of the upper extremities, they were not suitable for someone with claimant's restrictions. *Id*. at 135, 152-154. The administrative law judge noted that although Mr. Edleston testified at the hearing that there are jobs claimant could perform, he did not conduct an additional survey, or identify any such jobs. *Id.* at 148, 150. The administrative law judge also discussed the opinion of Mr. Estrada, claimant's vocational counselor, who stated claimant was unable to work with his limitations.

Contrary to employer's contentions, in determining whether an employment position constitutes suitable alternate employment, the administrative law judge must compare the job's requirements with the totality of claimant's condition, including claimant's medical restrictions. *See Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984). The administrative law judge in this case rationally determined, based on a comparison of the restrictions imposed on claimant by Dr. Castellvi and the job requirements as conveyed by Mr. Edleston, that the positions employer proffered did not constitute suitable alternate employment. As the administrative law judge's findings are rational and in accordance with law, we affirm the administrative law judge's determination that the positions identified by employer in its April 24, 2000, labor market survey are insufficient to establish the availability of suitable alternate employment, and her consequent award of total disability compensation to claimant. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

---

[2] In a letter dated May 8, 2001, Sue Chaffman, a vocational rehabilitation counselor retained by employer, asked Dr. Castellvi to review and sign approval for several jobs for claimant. CX 2 Ex. A. The letter was marked to signify that claimant could perform four of those jobs, suggesting that claimant could perform assembly jobs. Dr. Castellvi denied having signed his approval which he stated he does not do, and maintained that he gives only limitations. He testified that his staff signed off on the jobs "trying to calm some adjustor down." CX 2 at 14-15. Dr. Castellvi wrote only "see attached W/C slip" and " needs occupational eval." *Id.* at 15.

Claimant's counsel sought an attorney's fee of $71,747.14, for services rendered from December 6, 2001, through August 1, 2002, representing 217.8 hours of services by Attorney Cortese at an hourly rate of $250 and 96.3 hours of services by Ms. Condrey, his paralegal, at an hourly rate of $75, plus expenses of $10,074.64. Employer filed objections to this fee request, and claimant's counsel filed a reply to the objections. In her Supplemental Decision and Order Granting Attorney Fee, the administrative law judge reduced the number of hours requested for various entries, awarded the requested hourly rate of $250, and approved costs in the amount of $918.69. Accordingly, the administrative law judge awarded claimant's counsel an attorney's fee in the amount of $55,432.50, plus $918.69 for expenses. Upon claimant's motion for reconsideration, the administrative law judge amended the amount of costs she awarded. Accordingly, the administrative law judge awarded claimant's counsel $65,507.14, representing $55,432.50 in services, and $10,074.64 in expenses.[3]

On appeal before the Board, employer challenges only the hourly rate awarded to counsel by the administrative law judge. The administrative law judge considered and rejected employer's argument that claimant's counsel should be awarded an hourly rate of between $150 and $175 per hour, and his paralegal $45 per hour. Specifically, in awarding the hourly rate requested, the administrative law judge stated that she reviewed the requested rates in light of the guidelines set forth at 20 C.F.R. §702.132 of the Act's implementing regulations, and felt the services rendered were reasonable and proper. *See* Supplemental Decision and Order Granting Attorney Fee at 6-7; Amended Supplemental Decision and Order Granting Attorney Fee at 7. The administrative law judge noted that: claimant's counsel has been practicing law for approximately 21 years; he has periodically handled longshore cases since 1983; counsel's representation resulted in an award of benefits; and the hourly rate requested is reasonable in light of counsel's experience and geographic area where the claim arose.[4] She also rejected employer's

[3] The administrative law judge explained that claimant's counsel had initially listed his costs as $10,074.64 in one place, and $918.69 in another, and that she initially awarded the lesser amount. In claimant's Motion for Reconsideration claimant's counsel explained the discrepancy, stating that the lower figure represents only a portion of the total costs. The administrative law judge amended her order accordingly. *See* Amended Supplemental Decision and Order Granting Attorney Fee at 1 n.1.

[4] The administrative law judge noted that pursuant to the Federal Rules of Evidence, Rules 201 and 803(17), she was taking judicial notice of Altman and Weil's THE SURVEY OF LAW FIRM ECONOMICS (2000), according to which an attorney in Florida with over 21 years of experience may receive the median billing rate of $250 per hour, and those in the Ninth Decile may receive $295 per hour, while the average hourly rate for a paralegal is $74. Amended Supplemental Decision and Order Granting Attorney Fee at 7 n.16, 17.

objections to the $75 hourly rate requested for paralegal services.[5] The administrative law judge thoroughly considered employer's objections to the hourly rates sought by claimant's counsel and paralegal, and gave rational reasons for awarding the amounts requested, and employer has not shown that the administrative law judge abused her discretion in this regard; we therefore affirm the hourly rates awarded by the administrative law judge. *See Doucet v. Avondale Industries, Inc.*, 34 BRBS 62 (2000).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Amended Supplemental Decision and Order Granting Attorney Fee are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[5] The administrative law judge noted that in support of the $75 hourly rate requested for his paralegal, claimant's counsel asserts: that the paralegal's qualifications as a registered nurse with a paralegal certificate render her in great demand in this geographic area; that she has worked for the firm for four years, throughout the course of the litigation; and that the knowledge of medical terminology and procedures which she had gained over 24 years of nursing experience had been extremely helpful to preparation of the case. Supplemental Decision and Order Granting Attorney Fee at 7; Amended Supplemental Decision and Order Granting Attorney Fee at 7.