BRB No. 02-0873

JOANNE C. MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BILLETING, NAS CECIL FIELD, FLORIDA c/o CONTRACT CLAIMS SERVICES	)	DATE ISSUED: 09/10/2003
	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits and the Decision and Order Denying Employer's Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Martin J. Mickler, Jacksonville, Florida, for claimant.

James M. Mesnard (Seyfarth Shaw), Washington, D.C., for employer/ carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits and the Decision and Order Denying Employer's Motion for Reconsideration (2001-LHC-0522) 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 July 6, 1979, claimant injured her back while working for employer in a warehouse. Upon her subsequent return to work, claimant was placed in an accounting position due to the lifting restrictions placed upon her by her physician. On September 23,

1987, claimant alleges that she experienced back pain while lifting heavy boxes at work. Claimant was subsequently diagnosed with a herniated disc at L4-5, and she has undergone five surgical procedures relating to her continued back symptomatology. Specifically, claimant has undergone two surgeries to remove disc fragments, a foraminotomy, and an anterior and posterior lumber fusion since the alleged September 1987 work-incident. Claimant returned to work for three weeks in February 1988, but was unable to continue due to her back complaints. Employer voluntarily paid claimant temporary total disability compensation for various periods of time between October 15, 1987, and May 26, 1998, and permanent partial disability compensation from July 14, 1994 through July 9, 1996.

In his Decision and Order, the administrative law judge determined that claimant gave timely notice to employer of her alleged work-injury and that claimant established the existence of a causal connection between her employment and her back symptomatology. Next, the administrative law judge determined that claimant was incapable of gainful employment due to her chronic back pain, and he awarded claimant temporary total disability benefits from July 14, 1994, through July 9, 1996, and from May 27, 1998, and continuing. 33 U.S.C. §908(b). Employer thereafter filed a motion for reconsideration, which the administrative law judge denied.

On appeal, employer contends that it was not given timely notice of claimant's back injury, and that the instant claim is therefore time-barred pursuant to Section 12 of the Act, 33 U.S.C. §912. Alternatively, employer challenges the administrative law judge's award of disability benefits to claimant. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Section 12 of the Act provides that written notice of an injury must be given to employer within thirty days after claimant is aware or should have been aware of the relationship between the injury and her employment.[1] 33 U.S.C. §912(a). Claimant's failure to provide timely formal notice may be excused where, *inter alia*, employer has knowledge of the injury or is not prejudiced by the lack of formal notice. 33 U.S.C. §912(d)(1), (2). In the instant case, the administrative law judge considered the evidence of record regarding claimant's notice to employer and concluded that, while the record is "muddled" as to the date of claimant's notice to employer, timely notice of an injury was given by claimant to employer pursuant to Section 12. Decision and Order at 6 – 10. Specifically, claimant initially sustained a work-related back injury in July 1979, for which employer apparently paid benefits under the Act and subsequently placed claimant in alternate employment. On September 23, 1987, claimant allegedly experienced back pain while moving boxes.

[1] In the absence of evidence to the contrary, Section 20(b) of the Act, 33 U.S.C. §920(b), presumes that that employer has been given sufficient notice pursuant to Section 12 of the Act. *See Bustillo v. Southwest Marine, Inc.,* 33 BRBS 15 (1999); *Shaller v. Cramp Shipbuilding & Dry Dock Co.,* 23 BRBS 140 (1989).

Claimant testified that she reported this incident to a co-worker and her supervisor when it occurred. Tr. at 24-27. On October 15, 1987, claimant submitted an LS-201, Notice of Injury, form to employer which noted her initial 1979 back injury. Empl. Ex. 1. That same day, employer prepared an LS-202, First Report of Injury, form wherein employer acknowledged claimant's initial 1979 work-injury and stated that as a result of this injury claimant's "back is still giving trouble through the years." Empl. Ex. 2. On December 7, 1987, claimant filed a second LS-201 form in which she attributed her back condition, which had been diagnosed as a ruptured disc, to the lifting of boxes on September 23. Empl. Ex. 3. Employer immediately filed a second LS-202 form stating that while claimant's reported injury occurred on September 23, 1987, her diagnosed condition was related to her prior 1979 work-injury. Empl. Ex. 4. Thereafter, employer filed multiple LS-207, Notice of Controversion, forms regarding claimant's back condition; in each of these documents, employer set forth October 6, 1987, as the date on which it first received knowledge of claimant's alleged September 23, 1987, work-related injury.[2] *See* Empl. Exs. 5, 9, 10, 12.

Based upon this documentation, the administrative law judge's finding that claimant's notice was timely is supported by substantial evidence. Claimant gave timely formal notice within 30 days of the September 23, 1987, incident that she was experiencing work-related back problems. Although she referenced her former date of injury, the administrative law judge did not err in finding the notice timely, as the claimed injury is compensable whether due to a new event in September or an aggravation of the old injury. Employer was provided sufficient information that claimant had sustained a work-related injury or aggravation to her back. *See generally Thompson v. Lockheed Shipbuilding & Constr. Co.,* 21 BRBS 94 (1988). Moreover, even if the formal notice was deficient, this failure would be excused under Section 12(d)(1). Specifically, employer was aware as early as October 15, 1987, that claimant's 1979 work-related back injury continued to give her trouble, and it thereafter submitted multiple workers' compensation forms stating that it first received knowledge of claimant's September 23, 1987, injury on October 6, 1987. Thus, employer's own documents support the administrative law judge's finding that it had knowledge of a relationship between claimant's employment and her back complaints within 30 days of the alleged work-incident. Accordingly, employer's argument on this issue is rejected, and the administrative law judge's finding of timeliness is affirmed.

Employer next avers that the administrative law judge erred by failing to address the issue of claimant's credibility as it relates to her description of the alleged September 23, 1987, injury. Specifically, employer alleges that claimant is not credible and that, accordingly, her testimony regarding the events of September 23, 1987, cannot be accepted.[3]

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[2] Claimant apparently sought medical treatment for her back at St. Vincent's on October 6, 1987. *See* Empl. Exs. 13, 14.

[3] Employer specifically challenges claimant's statement that she informed a co-worker and her supervisor of her back pain; additionally, employer notes that claimant, while

We reject employer's assertion and affirm the administrative law judge's finding that claimant's back condition is work-related. Claimant has the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish her *prima facie* case. *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). It is claimant's burden to establish each element of her *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994). Once claimant establishes her *prima facie* case, Section 20(a), 33 U.S.C. ' 920(a), of the Act provides claimant with a presumption that her condition is causally related to her employment. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Upon invocation of the presumption, the burden shifts to employer to produce substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT).

In the instant case, the administrative law judge determined that, based upon claimant's documented back condition and her claim that she sustained back pain while lifting heavy boxes for employer on September 23, 1987, claimant is entitled to the benefit of the Section 20(a) presumption. Decision and Order at 11. Citing employer's arguments regarding the alleged inconsistencies in claimant's testimony, the administrative law judge then determined that the employer's arguments were sufficient to rebut the presumption. *Id.* at 12. Next, the administrative law weighed all of the evidence and found that claimant had described an incident occurring in 1987, specifically the lifting of heavy boxes, which could have caused her back complaints, that employer had not rebutted claimant's testimony that she informed a co-worker and her supervisor that this incident occurred, and that employer had presented no evidence disputing the possibility of a causal relationship between claimant's subsequent back surgeries and her alleged September 1987 work-incident. Accordingly, the administrative law judge concluded that claimant established that her September 1987 injury has led to her numerous lumbar spine surgeries. Decision and Order at 13.

We affirm the administrative law judge's conclusion. We note that the evidence as to whether the alleged event at work occurred as described by claimant should have been

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informing her treating physician on November 5, 1987, that her back had been troubling her for four weeks, did not specify a distinct incident. *See* Empl. Ex. 14. Lastly, employer challenges claimant's contention that she did not divulge a prior manic depressive diagnosis or personal family difficulties to her physicians, and her inability to go grocery shopping. *See* Empl. br. at 19-20.

properly weighed in determining whether the Section 20(a) presumption is invoked. *See Darnell v. Bell Helicopter, Inc.*, 16 BRBS 98 (1984), *aff'd sub nom., Bell Helicopter, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13 (CRT)(8th Cir. 1984); *Jones v. J.F. Shea Co.*, 14 BRBS 207 (1981). In this case, any error is harmless, however, as the administrative law judge fully weighed the relevant evidence and concluded that the alleged incident occurred as described by claimant. As claimant's testimony may be credited by the administrative law judge in determining whether an accident occurred, and employer has failed to establish reversible error by the administrative law judge in evaluating the evidence on this issue, claimant established her *prima facie* case. Section 20(a) thus applies to link claimant's back problems to her employment, and employer produced no medical evidence that her condition is not work-related.[4] Accordingly, the administrative law judge's finding of a causal relationship between claimant's back condition and her employment with employer is affirmed.[5]

Employer next challenges the administrative law judge's findings that it did not establish the availability of suitable alternate employment from July 14, 1994, through July 9, 1996, and from May 1998 through the present. For the reasons that follow, we reject employer's contentions of error and affirm the administrative law judge's findings regarding the extent of claimant's disability during these disputed periods of time.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). Where, as in the instant case, it is uncontroverted that claimant is unable to return to her usual employment duties as a result of her work-related injury, the burden shifts to employer to establish the availability of realistically available jobs within the geographic area where the

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[4] As the administrative law judge indicated, whether her condition is the result of a new injury or an aggravation of the 1979 injury is immaterial, as in either case her condition is compensable.

[5] The administrative law judge's failure to specifically address employer's assertion that claimant's post-1987 familial difficulties constituted an intervening cause of her disability absolving it from further liability does not alter this result. While the record contains evidence that claimant's psychological problems are related in part to the domestic difficulties she experienced after September 1987, employer has presented no evidence that claimant's current disability due to chronic pain syndrome resulting from her work-related injuries and surgeries is related to her domestic problems. As claimant's compensable disability is based on by her chronic pain syndrome, and the record contains no evidence which apportions her present disability between that syndrome and her psychological problems, employer's contention of error is without merit. *See Plappert v. Marine Corps Exch.*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997).

claimant resides, which she is capable of performing, considering her age, education, work experience, and physical restrictions, and which she could secure if she diligently tried. *See New Orleans (Gulfwide) Stevedores 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).

Employer initially contends that the administrative law judge erred in failing to find that it established the availability of suitable alternate employment from July 14, 1994, through July 9, 1996. Employer asserts that it did so through the opinions of Dr. Sury, who stated in August 1994 that claimant was capable of sedentary employment, and Dr. Miller, who opined that claimant's psychiatric problems did not require the application of work restrictions, and through labor market studies prepared in January, February, and March 1994. We reject this contention. After setting forth the medical evidence addressing claimant's condition during this period, the administrative law judge concluded that claimant was entitled to temporary total disability benefits. The administrative law judge found that claimant reported an increase in her low back pain to Dr. Nguyen in June 1994, that Dr. Arce, claimant's treating physician, provided claimant with total disability slips from July 22, 1994 through November 7, 1994, and thereafter repeatedly suggested that claimant consider undergoing a lumbar fusion, and that Dr. Fessler, who ultimately performed multiple fusions on claimant's back in July 1996, opined that it was unlikely claimant could have engaged in any significant employment requiring prolonged sitting, walking, bending or physical labor prior to those surgeries. Decision and Order at 19-20. Based upon the foregoing, the administrative law judge concluded that claimant was totally disabled during this period of time.

It is well-established that the administrative law judge as the trier-of-fact is entitled to weigh the evidence, and his decision must be affirmed if supported by substantial evidence. *O'Keeffe*, 380 U.S. 359. As the administrative law judge rationally relied upon the reports of Dr. Arce, his finding that claimant could not perform any employment during the relevant period of time is supported by substantial evidence. As we affirm the administrative law judge's finding that claimant could not perform any employment during the period of July 14, 1994, through July 9, 1996, it follows that claimant is totally disabled during that time. *See generally Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1982), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Accordingly, we affirm the administrative law judge's conclusion that claimant is entitled to temporary total disability compensation from July 14, 1994, through July 9, 1996.

Employer also challenges the administrative law judge's award of temporary total disability compensation to claimant from May 27, 1998 and continuing. Employer asserts that claimant has been capable of working, since Dr. Hogshead opined that from an orthopedic standpoint claimant could perform sedentary work, that claimant has in fact been employed during this period of time, and that there is no medical evidence of record

supportive of a finding that claimant is totally incapable of employment. We reject employer's assertions of error and affirm the administrative law judge's conclusion that claimant, as of May 27, 1998, was incapable of sedentary employment and his consequent determination that claimant was totally disabled as of that date.

Initially, it is well-established that the administrative law judge may accept or reject any witnesses' testimony and may find that a claimant's credible complaints of pain constitute substantial evidence sufficient to establish the extent of her disability. *See Perini v. Heyde,* 306 F.Supp. 1321 (D.R.I. 1969); *Thompson v. Northwest Enviro Services, Inc.,* 26 BRBS 53 (1992); *Harrison v. Todd Pacific Shipyards Corp.,* 21 BRBS 339 (1988). In the instant case, after setting forth at length claimant's testimony and the medical evidence of record, the administrative law judge determined that in view of claimant's five lumbar back surgeries, her complaints of chronic back pain are credible and, therefore, claimant is incapable of performing sedentary work. Decision and Order at 20-29. Claimant's ongoing complaints of back pain which render her unemployable, *see* Tr. at 56, are supported by the opinions of the physicians of record, including Dr. Hogshead upon whom employer relies. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991). Specifically, in a report dated May 2, 2001, Dr. Hogshead diagnosed claimant as having degenerative lumbar disc disease following multiple surgical procedures, chronic pain and disability syndrome, and severe deconditioning, and he noted that his physical examination had revealed that claimant is severely restricted in her strengths and movements; based upon these findings, Dr. Hogshead opined that claimant is unable to work and that she will be unable to return to work under any foreseeable circumstances despite accommodation and restrictions. *See* Empl. Ex. 33 (report dated May 2, 2001). On May 22, 2001, Dr. Hogshead clarified his prior report by stating that while it was his opinion that claimant's primary disabling entity is her chronic pain syndrome, considering *only* claimant's orthopaedic or musculoskeletal elements, claimant, if given the opportunity to become conditioned, would be capable of performing a sedentary job.[6] *Id.* (report dated May 22, 2001). On May 16, 2001, Dr. Miller, a psychiatrist, similarly reported that claimant continues to experience symptoms of chronic pain as well as depression, and that her continuum of pain and emotional distress is a summation of work and family-related events; significantly, Dr. Miller specifically opined that claimant's pain is real, not feigned. *See* Empl. Ex. 31. Based on this record, we affirm the administrative law judge's decision to credit the testimony of claimant regarding her ongoing complaints of dehabilitating back pain, which is supported by the medical opinions of record, as that determination is neither 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). Thus, as substantial evidence supports the administrative law judge's finding that claimant is incapable of employment as of May 27,

[6] Dr. Hogshead once again submitted an addendum to his report on June 26, 2001, in which he stated that it was his opinion that claimant, from a physical standpoint, is capable of ordinary light housekeeping. *See* Empl. Ex. 45.

1998, we affirm the administrative law judge's award of continuing temporary total disability as of that date.[7] *See generally Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

Accordingly, the Decision and Order Granting Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge

[7] Contrary to employer's contention, the presence of videotape evidence that claimant travels to and spends the day at the offices of Rose Built, Inc., a home-building company owned by a family friend, does not show that claimant has the capacity to work. *See* Empl. br. at 34, 37. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT)(2d Cir. 1997). Employer has failed to establish reversible error in the administrative law judge's conclusion that claimant is not employed by Rose Built.