BRB No. 10-0330

RONALD NORRIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	DATE ISSUED: 09/21/2010
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-In-Interest	)	DECISION and ORDER

Appeal of the Order Awarding Benefits and Bifurcating Section 8(f) Application/Issue of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Delos E. Flint, Jr. and Anthony D'Alto, II (Fowler, Rodriguez, Valdes-Fauli, Flint, Gray, McCoy, Sullivan & Carroll, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Order Awarding Benefits and Bifurcating Section 8(f) Application/Issue (2009-LDA-273) of Administrative Law Judge Lee J. Romero, 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In September 2004, claimant commenced employment for employer as a heavy truck driver in Iraq. On May 10, 2006, claimant hit his head on the inside roof of the truck he was driving when the truck apparently struck a pothole in the road. Upon returning to basecamp, claimant reported this incident to his convoy commander; the next day, claimant sought medical attention for neck pain. Claimant was placed on restricted duty and, when his condition did not improve, he was returned to the United States in June 2006. Claimant immediately sought medical treatment and, after he was diagnosed with, *inter alia*, degenerative disc disease and bulging in his cervical spine, he received epidural steroid injections in his neck, underwent a fusion and discectomy, and has been prescribed medications, including narcotics, for his ongoing neck pain. Claimant, who has not returned to work for employer, commenced working for his father in September 2009.

In his Decision and Order, the administrative law judge determined that claimant established that his working conditions and activities on May 10, 2006, could have caused his present complaints of pain. The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption with regard to causation, found that employer did not establish rebuttal of that presumption, and determined that, assuming *arguendo,* that employer had established rebuttal, the record as a whole establishes that claimant suffers from a compensable injury as a result his May 10, 2004, work activities. The administrative law judge found that claimant's condition reached maximum medical improvement on February 19, 2009, that claimant is unable to resume his usual employment duties with employer, and that while employer did not establish the availability of suitable alternate employment, claimant on his own has engaged in ongoing employment as of September 24, 2009. The administrative law judge awarded claimant temporary total, permanent total, and permanent partial

disability compensation, as well as medical benefits.[1] 33 U.S.C. §§908(a), (b), (c)(21); 907.

On appeal, employer argues that the administrative law judge erred in finding that claimant's current condition is due to the work-related injury claimant sustained while working for employer in Iraq. Alternatively, employer challenges the administrative law judge's findings regarding the extent of claimant's work-related disability. Claimant, responds, urging affirmance of the administrative law judge's decision.

Employer challenges the administrative law judge's finding that it did not offer substantial evidence to rebut the presumed causal relationship between claimant's subjective complaints of neck pain and his employment with employer. In support of its contentions of error, employer avers that any work-related condition sustained by claimant has healed and that claimant has engaged in symptom magnification and malingering.

Once, as in this case, the Section 20(a), 33 U.S.C. §920(a), presumption has been invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment.[2] *See Ortco*

[1] The administrative law judge noted that the Director and employer agreed to stay the issue of employer's entitlement to Section 8(f) relief until after the administrative law judge ruled on the compensability of claimant's claim. Order at 65. The administrative law judge subsequently issued an Erratum wherein he modified his initial Order to reflect claimant's entitlement to temporary total disability benefits for the period of May 10, 2006 through February 17, 2009, permanent total disability benefits for the period of February 18, 2009 through September 23, 2009, and permanent partial disability benefits from September 24, 2009, and continuing.

[2] Although employer summarily challenges the administrative law judge's invocation of the presumption at Section 20(a) of the Act, it has not briefed this issue nor has it cited any evidence that claimant did not strike his head on the roof of his truck while working for employer in Iraq and, within a day of this work incident, that claimant sought medical treatment for complaints of pain. The administrative law judge properly found that this incident could have caused claimant's current condition. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). We therefore affirm the administrative law judge's determination that claimant is entitled to invocation of the Section 20(a) presumption as it is supported by substantial evidence.

Contractors, Inc. v. Charpentier, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury.[3] *Id.* If the administrative law judge finds that the Section 20(a) presumption is rebutted, he 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. *See Orcto Contractors*, 332 F.3d 283, 37 BRBS 35(CRT); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

We affirm the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption. Employer, asserting that claimant is a malingerer and that he has not been taking the amount of medication prescribed to him by his treating physicians, first contends that claimant's credibility regarding his ongoing complaints of pain is questionable.[4] After addressing the evidence relied upon by employer regarding this issue, the administrative law judge, who credited claimant's subjective complaints of pain in invoking the Section 20(a) presumption, found employer's contentions that claimant exaggerates his symptoms, is a malingerer, and has not been taking his prescribed pain medication to be speculative and, therefore, insufficient to rebut the Section 20(a) presumption. Specifically, the administrative law judge found that while claimant's August 2007 and September 2008 functional capacity evaluations documented unreliable results and a sub-maximal performance, the test administrators stated that these results may be due to "psychological disorders, test anxiety, [or] fear of symptom exacerbation or injury." Order at 50; EX 19 at 59, 110. The administrative law judge further found that while Dr. Letchuman intended to speak to claimant regarding the taking of his prescription pain medication, the evidence did not address any subsequent

[3] The aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). This rule applies not only where the underlying condition itself is affected but also where the injury "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Employer does not challenge the diagnosis of claimant's physicians that claimant had pre-existing degenerative disc disease.

[4] Claimant has been prescribed at various times Oxycontin, Hydrocodone, Soma, Restoril and Neurontin. Employer avers that claimant cannot be in as much pain as he claims since, employer alleges, claimant is not taking his medication. A urine test taken by claimant resulted in a lower than expected level of narcotics in claimant's system.

conversation between claimant and Dr. Letchuman; accordingly, the administrative law judge concluded that the record is left to speculation as to why claimant's narcotic level was below expected levels. Employer has not established error by the administrative law judge in his evaluation of employer's contentions regarding claimant's credibility. *See generally Conoco*, 194 F.3d 684, 33 BRBS 187(CRT); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). We therefore reject employer's contentions of error regarding this issue.

We further reject employer's contention that it has produced medical evidence sufficient to rebut the presumption. While employer contends that claimant's current condition is due to his pre-existing degenerative disc disease, evidence of such a condition alone cannot rebut the presumption in view of the aggravation rule. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). Moreover, the opinions of Dr. Nanda, Dr. Letchuman and Dr. Drazner are legally insufficient to rebut the Section 20(a) presumption because, as properly found by the administrative law judge, these physicians do not state that claimant's May 10, 2006, work incident did not aggravate claimant's pre-existing degenerative cervical disc disease or render his pain symptomatic. *See id; see also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *Burley v. Tidewater Temps*, 35 BRBS 185 (2002). Rather, each of these physicians opined that a traumatic incident could contribute to or render claimant's underlying condition symptomatic.[5] *See* EXs 31 at 3, 6-7; 32 at 4; 30 at 14. If claimant's work caused his underlying condition to become symptomatic or otherwise worsened his symptoms, claimant has sustained a work injury. *See Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Accordingly, as employer has not presented substantial evidence that claimant's pre-existing condition was not aggravated by his employment with employer, we affirm the administrative law judge's determination that the Section 20(a) presumption was not rebutted and his consequent finding of a causal relationship between claimant's employment and his present symptoms.[6] *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT).

[5] Specifically, as set forth by the administrative law judge, Dr. Nanda stated that a traumatic event can precipitate an underlying degenerative condition, Dr. Letchuman testified that one event could aggravate a pre-existing degenerative condition, and Dr. Drazner acknowledged that claimant would be more prone to aggravating his cervical spine due to his pre-existing condition.

[6] Assuming, *arguendo*, that employer rebutted the presumption, the administrative law judge weighed the evidence of record regarding the issue of causation and concluded that claimant's symptoms are related to his employment with employer. *See* Order at 51 – 52. Employer has not demonstrated error in the administrative law judge's ultimate

Employer also challenges the administrative law judge's award of disability compensation to claimant subsequent to February 2009. Specifically, employer avers that the medical evidence establishes that claimant is capable of resuming his usual employment duties with employer or that, alternatively, employer's labor market surveys establish the availability of suitable alternate employment that claimant is capable of performing. Claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In order to establish a *prima facie* case of total disability, claimant must demonstrate that he is unable to return to his usual work. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

In addressing this issue, the administrative law judge relied upon the deposition testimony of claimant's treating physicians, Drs. Yorek and Letchuman, as well as the functional capacity evaluations performed in August 2007 and September 2008. Dr. Letchuman completed a work capacity evaluation of claimant on February 18, 2009, wherein he acknowledged that claimant's September 30, 2008, functional capacity evaluation stated that claimant was taking chronic pain medication and could not return to truck driving; in responding to the question of whether claimant is capable of performing his usual job, Dr. Letchuman checked the "No" box on this form, and he placed multiple restrictions on claimant's ability to return to other gainful employment. *See* CX 1 at 178; *see also* CX 1 at 168 – 171; EX 32 at 19. On November 13, 2008, Dr. Yorek opined that claimant is incapable of returning to work as a truck driver due to his use of narcotic pain medication and muscle relaxers which result in fatigue. *See* CX 1 at 177. Claimant's August 28, 2007, functional capacity evaluation concluded that claimant was not capable of safely returning to work driving trucks unless he was provided with accommodation for his functional limitations. *See* CX 1 at 87 – 89. These opinions constitute substantial evidence in support of the administrative law judge's finding that claimant is incapable of returning to work as a heavy truck driver. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Accordingly, we affirm the administrative law judge's finding that claimant established that he is incapable of performing his former employment duties with employer due to his work injury.

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findings on this issue, which are supported by substantial evidence. *See generally Mendoza v. Marine Pers. Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). We therefore affirm the administrative law judge's conclusion, based on the record as a whole, that claimant's symptoms are related to claimant's employment with employer. *See Flanagan v. McAllister Bros., Inc.*, 33 BRBS 209 (1999).

Employer next challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment as of February 2009. Where, as in this case, claimant has demonstrated his inability to perform his usual employment duties with employer, the burden shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). In order to meet this burden, employer must establish that job opportunities are available within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Ledet*, 163 F.3d 901, 32 BRBS 212(CRT). As the fact-finder, the administrative law judge must compare claimant's restrictions to the physical requirements of the jobs relied upon by employer in order to determine their suitability for claimant. *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). Once an employer establishes the availability of suitable alternate employment, claimant can nevertheless establish that he remains totally disabled if he demonstrates that he diligently tried and was unable to secure such employment. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997).

Employer submitted vocational evidence which it alleges establishes the availability of suitable alternate employment that claimant could perform; specifically, employer's vocational rehabilitation expert, Ms. Favaloro, identified positions which she deemed to be suitable for claimant. *See* EX 29. In addressing this evidence, the administrative law judge found that the five identified truck driver positions did not contain enough information to permit a comparison of claimant's restrictions with those positions. Similarly, the administrative law judge found that a route sales job, a manager trainee position, and a call center phone support position did not list the location of the job and consequently it was not possible to determine if these positions were available in claimant's geographic area. Regarding the identified positions of police dispatcher and a second route sales job, the administrative law judge determined that while these positions arguably were otherwise suitable, claimant could not secure these jobs due to his use of narcotic medication.[7] In addition, the administrative law judge accepted claimant's testimony that he had applied for the latter two positions, as well as the identified positions of hotel clerk, manager trainee, and call center phone support, but that in each instance he was not offered employment. Order at 55 – 59. Thus, the administrative law

[7] The administrative law judge further noted claimant's testimony that he had been told that the Bossier City Police Department had ceased taking applications for the police dispatcher position in March 2009. Order at 58.

judge concluded that employer did not establish the availability of suitable alternate employment.

In challenging the administrative law judge's determination that it did not establish the availability of suitable alternate employment, employer summarizes evidence favorable to its position and asserts that it has met its burden of proof on this issue. Employer, however, has failed to demonstrate error in the administrative law judge's discussion and weighing of the vocational evidence and claimant's testimony. Contrary to employer's summation of the medical evidence, both of claimant's present treating physicians, Drs. Letchuman and Yorek, have placed restrictions on claimant's ability to return to work, *see* CX 1 at 177, 178, and claimant's use of prescribed narcotic medication is a factor in assessing the suitability of the identified jobs. *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Employer does not challenge the administrative law judge's findings that eight of its identified positions lacked specificity, or that claimant unsuccessfully sought employment with five of the employers identified by its vocational expert. *See generally Fox v. West State Inc.*, 31 BRBS 118 (1997). Accordingly, as the administrative law judge addressed each of the employment positions identified by employer and his findings regarding those positions are rational and supported by substantial evidence, we affirm the administrative law judge's determination that employer did not demonstrate the availability of suitable alternate employment that claimant could realistically secure. *See generally Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT); *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004). As the administrative law judge's award of permanent partial disability compensation commencing September 24, 2009, based on claimant's work for his father, is unchallenged on appeal, it is affirmed. 33 U.S.C. §908(c)(21), (h).

Accordingly, the administrative law judge's Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge