

BRB Nos. 97-0114
and 97-0114A

SUWANNEE ARNES)
)
 Claimant-Respondent)
 Cross-Petitioner)
)
 v.)
)
 CASTLE AIR FORCE BASE) DATE ISSUED:
 LODGING FUND)
)
 and)
)
 AIR FORCE INSURANCE FUND)
)
 Employer/Carrier-)
 Petitioners)
 Cross-Respondents) DECISION and ORDER

Appeals of the Decision and Order of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Matthew J. Witteman (Law Offices of Matthew J. Witteman), San Francisco, California, for claimant.

Roy H. Leonard (Office of Legal Counsel, HQ AFSVA), San Antonio, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order (95-LHC-1621, 95-LHC-1622, 96-LHC-492, and 96-LHC-493) of Administrative Law Judge Alfred Lindeman 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 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

During her employment as a housekeeper for employer, claimant suffered several

work-related injuries. On March 14, 1994, claimant reinjured her back after initially injuring it at work on December 20, 1990. Claimant was working in a light duty capacity following the initial back injury. Claimant filed a claim on June 3, 1994, for a psychological injury allegedly due to working conditions. Subsequently, claimant injured her thumb on July 15, 1994. Employer voluntarily paid claimant benefits for her back injury until August 4, 1994. In his decision, the administrative law judge awarded claimant temporary total disability benefits for the back injury from August 4, 1994 to September 27, 1995, permanent total disability benefits for the back injury from September 28, 1995, and continuing, and medical benefits for the back and thumb injuries pursuant to Section 7 of the Act, 33 U.S.C. §907. The administrative law judge denied disability and medical benefits to claimant for her psychological injury. The administrative law judge did not award disability benefits for the thumb injury after finding that the award of disability benefits for the back injury precluded claimant from obtaining additional compensation for this injury.

On appeal, employer appeals the administrative law judge's award of benefits for the back injury, and claimant cross-appeals the administrative law judge's denial of benefits for the psychological injury.

We first address employer's appeal of the administrative law judge's award of benefits for the back injury. Employer contends that the administrative law judge erred in finding that employer did not establish the availability of suitable alternate employment inasmuch as claimant performed light duty work after her 1994 back injury until August 4, 1994. Where it is undisputed that claimant cannot return to her usual work, the burden shifts to employer to establish the availability of suitable alternate employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986). In order to meet this burden, employer must show that there are jobs available in the geographic area where claimant resides which claimant is capable of performing based upon her age, education, work experience, and physical restrictions, and which she could realistically secure if she diligently tried. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988). Employer can meet its burden by providing a job for claimant at its facility which claimant is capable of performing. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 92 (CRT)(5th Cir. 1996).

The administrative law judge determined that claimant could not return to her usual employment. He then found that claimant could return to light duty housekeeping work, but he rationally concluded that none was available after June 15, 1994, based on Dr. Streeter's report of that date stating that single unit housing, which had been recommended by Dr. Wiens as light duty work, had been closed as the Base was being shut down. Decision and Order at 7, 10-11; CX 19, 23. Although claimant stopped working on August 4, 1994, almost two months after the administrative law judge found that light duty work was not available to claimant, claimant did not seek, and the administrative law judge did not award, benefits while she was working. Decision and Order at 11. Contrary to employer's contentions, employer could have attempted to establish the availability of

suitable alternate employment in places other than the lodging units on the Base.¹ RX 10-B at 54-55. Moreover, the administrative law judge rationally rejected employer's argument that claimant's loss of employment was due to a legitimate business action related to the closing of the Base as claimant was already precluded from working at the Base due to her work restrictions and the unavailability of light duty work.² Decision and Order at 11; CX 23; RX 3. We, therefore, affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment. *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444, 30 BRBS 57, 62 (CRT)(5th Cir. 1996).

¹Ms. Pettigrew, employer's former Human Resources Officer, testified that if no light duty work was available, occasionally they would accommodate an employee with light duty work restrictions in other non-appropriated fund activities such as the officers or enlisted clubs or the community activity and bowling centers. RX 10-B at 54-55.

²Claimant was separated from the Base on February 21, 1995, because it was closing, after the administrative law judge found that claimant was precluded from working at the Base on June 15, 1994 when no light duty work was available to her. Decision and Order at 11; CX 23; RX 3.

Employer also contends that the administrative law judge erred in failing to make credibility determinations concerning claimant in violation of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). Employer asserts that claimant's testimony, that she had difficulty speaking and understanding English, that she did not have a previous psychological injury and had no problems with her back prior to 1994 except for 20 years ago, and went gambling to get out of the house according to her doctor's instructions, is not credible, and therefore she is not entitled to any award of compensation, and that her credibility affects her claim for the psychological injury. Assessing witness credibility is a classic function of the administrative law judge as fact finder and the Board affords great deference to the findings of the administrative law judge. See *I.T.O. Corp. v. Director, OWCP [Aplés]*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989). Contrary to employer's contention, the administrative law judge did assess claimant's credibility in some respects. The administrative law judge determined that the testimony of Mr. Andersen, a physical therapist, that claimant had no apparent problem speaking English was inconsistent with his own observation of claimant's inability to communicate effectively in English.³ Decision and Order at 11; RX 16-B at 36-38. The administrative law judge also noted that claimant testified that she did not remember seeking help for her prior emotional problems. Decision and Order at 12; RX 13; Tr. at 151-152. Furthermore, the administrative law judge rationally accepted claimant's reason for gambling. Decision and Order at 9; Tr. at 456. As the administrative law judge's credibility determinations concerning claimant are neither inherently incredible nor patently unreasonable, *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and employer has raised no reversible error in the administrative law judge's consideration of the evidence, we reject employer's argument that the administrative law judge's decision violates the Administrative Procedure Act's requirement for a reasoned analysis and affirm the administrative law judge's award of benefits to claimant for her back injury.

We next address claimant's cross-appeal of the administrative law judge's denial of benefits for an alleged psychological injury. Claimant contends in this regard that the administrative law judge erred in failing to apply the Section 20(a) presumption, 33 U.S.C. §920(a). It is well-settled that a psychological impairment, which is work-related, is compensable under the Act. *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989)(decision on remand). Furthermore, the Section 20(a) presumption is applicable in psychological injury cases if claimant establishes her *prima facie* case. In order to invoke the Section 20(a) presumption, claimant must establish that she has a psychological injury

³In fact, the hearing in this case was conducted with the assistance of an interpreter. Tr. at 81-194. Moreover, the administrative law judge noted Mr. Andersen's opinion of claimant's physical abilities was of limited value as he did not examine claimant after the 1994 injury. Decision and Order at 10-11.

and that an accident occurred or working conditions existed which could have caused the injury. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 384 n. 2 (1990). If claimant's psychological injury is work-related, she is entitled to medical benefits. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

The administrative law judge found that claimant's depression and anxiety did not result from her employment but rather from her pre-existing psychological condition. Decision and Order at 11-12; CX 27-31; RX 14. The administrative law judge further concluded that the stress arising from claimant's employment represented no more than a temporary aggravation of her pre-existing emotional condition during the same period for which she was found to have been totally disabled due to her back condition. Decision and Order at 12. The administrative law judge discredited the opinions of Drs. Ilano and Jeffers that claimant's psychological injury is work-related because they were based on the understanding that claimant had no previous psychological problems.⁴ Decision and Order at 12. The administrative law judge, however, did not apply the Section 20(a) presumption to the issue of the cause of claimant's psychological injury. If the Section 20(a) presumption is invoked, it is employer's burden to establish that claimant's psychological condition is not caused or aggravated by her employment. See *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). We, therefore, vacate his finding that a causal relationship is not established with respect to claimant's psychological injury, and we remand this case to the administrative law judge for application of the Section 20(a) presumption to claimant's psychological injury. Although claimant cannot gain additional disability compensation, if the administrative law judge on remand finds that causation is established with respect to this claim, she may be entitled to medical benefits.⁵ See *Hoey v. Owens-Corning Fiberglas Corp.*, 23 BRBS 71 (1989)(Board affirmed the administrative law judge's denial of permanent total disability benefits for claimant's subsequent injury as claimant was previously compensated for permanent total disability which presupposed a permanent loss of all earning capacity); *Romeike*, 22 BRBS at 57.

⁴Claimant correctly asserts that the administrative law judge erred in discrediting Dr. Ilano's opinion because it was founded on a false belief that claimant's depression and anxiety were new and arose from her situation at work without considering Dr. Ilano's deposition testimony that her opinion that claimant's psychological condition was work-related would not change even if claimant had mental health consultations for family relationships in 1980. Decision and Order at 12; RX 14 at 64-65; Cl. Br. at 28-29.

⁵We reject employer's argument that claimant's psychological injury arose from the "claims process" which employer asserts is not compensable as claimant's written claim and testimony indicate that in addition to the "claims process," claimant alleges that she was also suffering from a psychological injury from ongoing medical problems and the fact that she was upset about things missing at work. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); Decision and Order at 11; CX 27; Tr. at 147-148; Emp. Resp. Br. at 11-12.

Contrary to claimant's contention, the administrative law judge acted within his discretion in excluding from the record Dr. Sandler's declaration due to its lack of probative value, after noting that Dr. Sandler was not listed as a witness on claimant's pre-trial statement and was not subject to cross-examination. See *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986); Decision and Order at 2 n. 2; CX 47. Consequently, we affirm the administrative law judge's exclusion of Dr. Sandler's declaration.

Accordingly, the administrative law judge's Decision and Order awarding benefits for claimant's back injury and excluding Dr. Sandler's declaration from the record is affirmed. The administrative law judge's denial of claimant's psychological injury claim is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge