BRB No. 99-0725

WAYNE GALLOWAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUCK KREIHS COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
THE GRAY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Claimant's Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

James E. Vinherella (Lewis & Caplan, P.L.C.), New Orleans, Louisiana, for claimant.

Robert S. Reich (Reich, Meeks & Treadway, L.L.C.), Metairie, Louisiana, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Claimant's Motion for Reconsideration[1] (94-LHC-2816) of Administrative Law Judge James W. Kerr, 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 administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in

[1]It is noted that although this Order is titled as denying claimant's motion, employer actually filed the motion for reconsideration which was denied.

accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a pipe fitter, injured his back while lifting heating coils on July 19, 1991, and has subsequently undergone two related surgeries; claimant also is being treated for depression and paranoid ideation. Employer paid claimant temporary total disability compensation from July 20, 1991, to November 28, 1994, and permanent partial disability compensation thereafter. 33 U.S.C. §908(b), (c)(21). Claimant sought continuing total disability compensation as well as reimbursement of medical expenses incurred during his hospitalization for detoxification from May 17 to May 31, 1994.

In his decision, the administrative law judge found that claimant's back injury arose out of the work accident and that his psychological problems and alcoholism were aggravated by the work injury, thus rendering employer liable for claimant's hospitalization for treatment related to these problems. Based upon claimant's latest back surgery and emotional problems, the administrative law judge determined that claimant had not reached maximum medical improvement and that employer failed to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant continuing temporary total disability compensation as well as reimbursement of the requested medical expenses. Employer's motion for reconsideration was subsequently denied.

Employer now appeals, contending that the administrative law judge erred in finding claimant's emotional problems and alcoholism to have been caused or aggravated by his work injury, and in consequently holding it liable for claimant's medical bills incurred for inpatient treatment for detoxification. Additionally, employer argues that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer initially asserts that the administrative law judge erred in finding it liable for the medical bills incurred by claimant during his hospitalization for detoxification in May 1994; specifically, employer contends that claimant's alcohol-related condition is due not to his work accident but, rather, is a result of personal problems predating the subject work injury. In the instant case, the administrative law judge properly invoked the Section 20(a), 33 U.S.C. §920(a), presumption as he found that claimant suffered a harm, specifically an injury to his back as well as a subsequent psychological impairment manifested by depression and alcoholism, and that an accident occurred which could have caused, aggravated, or accelerated these conditions. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Upon invocation of the presumption, the burden shifts to employer to rebut the presumption by producing substantial evidence that claimant's condition was not caused or aggravated by his employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); *see American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999), *cert. denied*, 120 U.S. 1239 (2000); *Swinton v. J. Frank*

Kelly, Inc., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Once the presumption is rebutted, it falls from the case, and the administrative law judge must weigh all of the evidence in the record to determine whether claimant's injury arose from his employment. *Id.* In the instant case, employer contends that the administrative law judge erred in finding that it failed to submit evidence rebutting this presumption. In support of its argument, however, employer cites only to claimant's testimony regarding his pre-existing depression and alcohol use.[2] In so doing, employer has failed to identify substantial evidence that a causal relationship between claimant's employment and his subsequent depression and alcohol-related condition does not exist; even if these conditions pre-existed claimant's injury, employer must demonstrate that they were not aggravated by it. *See Conoco, Inc.*, 194 F.3d at 691, 33 BRBS at 192 (CRT). We therefore affirm the administrative law judge's finding that the presumption is not rebutted and that claimant's psychological alcohol-related conditions are causally related to his July 1991 work accident.

[2]In addressing this issue, the administrative law judge specifically set forth claimant's testimony that he drank socially pre-injury, and that he subsequently drank post-injury to both increase the potency of his medication and to help forget his disability. *See* Decision and Order at 10-11.

Employer next asserts that even if claimant's emotional problems and alcoholism were related to his work injury, it is not responsible for the medical bills incurred during his hospitalization at the Bowling Green Psychiatric Hospital from May 17 to May 31, 1994, because claimant neither sought authorization for this hospitalization nor was it an emergency situation. In addressing this issue, the administrative law judge found that authorization was not necessary in the instant case as claimant was referred for in-patient treatment by his treating psychiatrist, Dr. Bloom. Employer concedes that Dr. Bloom at times recommended in-patient alcohol treatment for claimant, *see, e.g.*, CX 10 at 18, 21, 22, but avers that Dr. Bloom rescinded such a suggestion on May 17, 1994.[3] Contrary to employer's assertion, however, Dr. Bloom's correspondence does not indicate a change in his opinion regarding the need for an in-patient treatment program; moreover, Dr. Bloom strongly concurred with claimant's hospitalization when it finally occurred. *See* CX 10 at 26.

Under the Act, where claimant is referred by his initial physician to a specialist skilled in treating claimant's work-related condition, employer is required to consent to this treatment, and it is compensable so long as the services are necessary for the proper care and treatment of the compensable injury. *See* 33 U.S.C.§907(b), (c)(2); 20 C.F.R. §702.406(a). *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992). In the instant case, the administrative law judge specifically found that claimant had been referred to a detoxification center by Dr. Bloom, his authorized psychiatrist. We, therefore, affirm the administrative law judge's conclusion that claimant was not required to seek separate authorization for this treatment, and his consequent finding that employer is liable for the medical expenses so incurred.

Lastly, employer challenges the administrative law judge's determination that it failed to establish the availability of suitable alternate employment. Where, as in the instant case, claimant is unable to return to his usual employment duties with employer due to a work-related injury, he has established a *prima facie* case of total disability; the burden then shifts to employer to establish the availability of realistic job opportunities within the geographic area in which clamant 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 if he diligently tried. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); *Roger's Terminal & Shipping*

[3]The letter relied upon by employer is actually dated March 17, 1994. *See* CX 10 at 22. Citing this letter, employer avers that Dr. Bloom's statement that claimant has been drinking "a lot less" since his last visit, and there had been no repeated "nocturnal armed stalking about" is indicative of his changed opinion regarding the necessity of an in-patient detoxification treatment. *See* Brief at 17.

Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986). It is proper for an administrative law judge to consider whether jobs identified by the employer constitute suitable alternate employment in light of the claimant's injury-related emotional problems. *Armfield*, 25 BRBS at 303.

In support of its allegation of error, employer relies upon the testimony and report of Mr. Yent, a rehabilitation counselor, who identified job opportunities which had been approved by Dr. Bratton, the physician who treated claimant for his work-related physical injuries. Although Mr. Yent conceded that he had not obtained approval from claimant's psychiatrist for any of the identified positions and that this failure could be problematic, *see* HT at 91-94, employer contends that Dr. Bloom's statement that claimant's "psychological state of mind should not prevent him from returning to work," CX 10 at 35, is sufficient to establish the suitability of the identified positions. However, employer fails to note that Dr. Bloom began his conclusion by stating that claimant remains over-sensitive to other people, which could become a problem when he is no longer isolated in his home. CX 10 at 35. Moreover, Dr. Bloom also stated a major concern with claimant's "continued experiencing [of] moments or hours of paranoid ideation in which he will misinterpret motives or project onto other people...sinister intentions... ." CX 10 at 34. Thus, while Dr. Bloom's statement could support a finding that claimant could perform some kind of work, it does not state claimant could perform any of the proffered positions.[4]

In his Decision and Order, the administrative law judge specifically found that, although employer in the instant case concedes that claimant has psychological injuries, employer's rehabilitation specialist did not consider those psychological limitations when addressing the issue of claimant's employability; based upon this failure to analyze the totality of claimant's condition, the administrative law judge concluded that employer did not meet its burden of establishing the availability of suitable alternate employment. *See* Decision and Order at 15-16. As it is uncontroverted that employer's rehabilitation specialist reached his conclusions without factoring claimant's psychological problems into his analysis, we hold that the administrative law judge properly found that the opinion of that specialist was insufficient to establish the availability of suitable alternate employment. *See Armfield*, 25 BRBS at 303; *Jones v. Genco*, 21 BRBS 12 (1988). The administrative law judge's determination that employer failed to meet its burden of establishing the availability of suitable alternate employment, and his consequent award of temporary total disability compensation to claimant, is therefore affirmed.

[4]The record reflects that claimant continues to suffer from depression and paranoia and is being treated with psychological counseling and medications. *See, e.g.,* CX 10 at 57, 77(a).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge