

AUJEST CHERAMIE)
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 Claimant-Respondent)
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 v.)
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 FOURCHON WELDING) DATE ISSUED: April 20, 2001
 CONTRACTORS, INCORPORATED)
)
 and)
)
 LOUISIANA WORKERS')
 COMPENSATION CORPORATION)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Robert E. Lee, Sr., Lafitte, Louisiana, for claimant.

Paul D. Buffone (Egan, Johnson & Stiltner), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (98-LHC-1663) of Administrative Law Judge Clement J. Kennington 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. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On August 22, 1997, claimant suffered a back injury while moving angle irons by

hand during the course of his employment with employer. Although claimant returned to work for employer the week following his injury, his continuing back pain forced him to discontinue working on August 28, 1997. The next day, claimant was treated by Dr. Smith, who diagnosed a back strain. Dr. Smith continued to treat claimant until September 22, 1997, when he concluded that claimant needed to be seen by an orthopedic specialist. On September 29, 1997, claimant saw Dr. Landry, an orthopedist, who diagnosed lumbosacral strain and initiated a course of treatment that included epidural steroid injections and physical therapy.¹ On November 17, 1997, Dr. Landry reported that claimant still had some tightness in his back, but recommended that he return to his regular work and report back to Dr. Landry if he experienced further problems. EX 4. Claimant testified that he questioned why Dr. Landry released him to return to work inasmuch as he was continuing to experience back pain. Nonetheless, claimant contacted employer to arrange for his return to work, but was informed by employer that he no longer had a job. *See* Tr. at 35-38, 45-49. On November 25, 1997, claimant returned to Dr. Landry, who contacted employer to inquire about claimant's employment status and was told that the temporary job that claimant had been doing had been completed. Dr. Landry's November 25, 1997, office note further indicates that he saw no restrictions on claimant's work ability.² EX 4. Employer voluntarily paid claimant temporary total disability benefits for the period from October 14, 1997, through November 17, 1997, but contested claimant's claim for permanent total disability benefits under the Act.

¹On November 7, 1997, claimant's physical therapist reported that claimant continues to experience significant lumbar pain and guarding, as well as pain radiating into his left leg and numbness in two digits of his left foot. On November 14, 1997, the physical therapist again reported continuing radiating pain into claimant's left leg and absent sensation in two digits of his left foot. EX 4.

²Claimant testified that his subsequent request for an appointment with Dr. Landry was refused. *See* Tr. at 37.

In his Decision and Order, the administrative law judge accepted the parties' stipulations that claimant suffered a work-related injury on August 22, 1997, and that he reached maximum medical improvement on November 17, 1997. The administrative law judge disregarded as irrelevant employer's contention that claimant had fully recovered from the effects of his work-related injury and that his present physical restrictions, if any, are identical to those existing prior to his work injury.³ See Decision and Order 9. The administrative law judge next determined that, inasmuch as claimant's former job was not made available to him upon his release by Dr. Landry on November 17, 1997, claimant established a *prima facie* case of total disability. He concluded that, because employer offered no evidence of suitable alternate employment, claimant had established entitlement to permanent total disability benefits commencing on November 18, 1997.

On appeal, employer challenges the administrative law judge's award of permanent total disability benefits, arguing that the administrative law judge erroneously considered only the economic, and not the medical, component of claimant's disability. In addition, employer reiterates the argument it made below that claimant had fully recovered from his work injury by November 18, 1997, and that his current physical restrictions, if any, pre-existed his work injury. Claimant responds, urging affirmance of the administrative law judge's determination that claimant is entitled to ongoing permanent total disability compensation.⁴

It has long been stated that disability is an economic concept based on a medical foundation. *Owens v. Traynor* 274 F.Supp. 770 (D. Md 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). We agree with employer that the administrative

³On February 6, 1995, Dr. Logan reported that claimant had narrowed and fused discs and assigned claimant a fifty-pound lifting restriction. EX 6.

⁴We decline to consider the contention raised in claimant's response brief that the administrative law judge's average weekly wage determination is incorrect, as claimant should have raised this contention in a cross-appeal. See, e.g., *Briscoe v. American Cyanamid Corp.*, 22 BRBS 389, 392 (1989); 20 C.F.R. §§802.205(b), 802.212(b).

law judge here erred in addressing claimant's economic situation without first determining whether he had a work-related physical impairment and, if so, the degree of that impairment. Determining the medical foundation in this case, moreover, requires resolution of issues relating to both causation and the extent of disability. Employer does not challenge the occurrence of a work-related back injury on August 22, 1997, nor does employer contest claimant's entitlement to compensation for a period of temporary total disability resulting from that injury. Rather, employer contests claimant's entitlement to continuing permanent total disability benefits after November 17, 1997, contending that claimant fully recovered from his work-related back injury by that date, and that his present physical restrictions, if any, pre-existed his work injury. Resolution of the issue of whether claimant's August 22, 1997 work accident constitutes a cause of his continuing back complaints requires rendering a causation determination, to which the Section 20(a), 33 U.S.C. §920(a), presumption applies. See *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 101 (1986). Because the administrative law judge did not explicitly consider this issue in rendering his decision, the case must be remanded for consideration of whether claimant's continuing back complaints are causally related to his work injury. See *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989).

In the instant case, as it is undisputed that claimant has a back condition and that a work incident occurred on August 22, 1997, claimant is entitled to invocation of the Section 20(a) presumption that his continuing back condition is causally related to his employment. See *Kubin*, 29 BRBS at 119; *Addison*, 22 BRBS at 36; *Frye v. Potomac Electric Power Co.*, 21 BRBS 194, 196 (1988). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused by the work accident or that the work accident did not aggravate claimant's underlying condition. See *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96 (CRT)(5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998). The aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kubin*, 29 BRBS at 119. 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, 214 (1986).

Thus, on remand, the administrative law judge must consider whether employer has produced sufficient evidence to rebut the Section 20(a) presumption. See *Addison*, 22 BRBS at 36. To rebut the presumption that claimant's present back condition is causally related to his work accident, employer must have produced evidence that claimant's August 22, 1997, work injury did not cause or permanently aggravate claimant's prior back condition or his symptoms. See *Kubin*, 29 BRBS at 119; *Leone*, 19 BRBS at 101-102. See generally *Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 193-194, 33 BRBS 65, 67-

68(CRT) (5th Cir. 1999). If, on remand, the administrative law judge finds the presumption rebutted, he must weigh all of the evidence in the record and resolve the causation issue based on the record as a whole. *See Port Cooper*, 227 F.3d 284, 34 BRBS 96(CRT); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994). Following this analysis will result in findings as to whether claimant's ongoing back complaints are work-related.

The next step involves determining the extent of physical impairment resulting from claimant's work-related condition. A claimant is considered permanently disabled if he has any residual work-related impairment after reaching maximum medical improvement. *See SGS Control Services v. Director, OWCP*, 86 F.3d 438, 443, 30 BRBS 57, 61(CRT)(5th Cir. 1996).⁵ The extent of disability is evaluated on the basis of both physical and economic factors. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). To establish a *prima facie* case of total disability, claimant must demonstrate that he cannot return to his usual employment due to his work-related injury. The burden then shifts to employer to establish the availability of suitable alternate employment. *Id.*; *see also SGS Control Services*, 86 F.3d at 444, 30 BRBS at 62(CRT).

⁵In the instant case, the administrative law judge accepted the parties' stipulation that claimant reached maximum medical improvement on November 17, 1997. *See* Decision and Order at 9. Thus, the issue in this case is the extent, if any, of claimant's permanent disability.

In the instant case, the administrative law judge considered only the economic component of claimant's alleged continuing disability. We agree with employer that the administrative law judge erred in finding that, as of November 18, 1997, claimant established a *prima facie* case of total disability on the basis of the unavailability of his former job without first having found that claimant had a residual work-related medical condition as of that date. See generally *SGS Control Services*, 86 F.3d at 443, 30 BRBS at 61(CRT), *Turner*, 661 F.2d 1031, 14 BRBS 156. If, on remand, the administrative law judge finds that claimant continued to suffer from a work-related back condition as of November 18, 1997, which resulted in permanent restrictions on his work capacity, the requisite medical foundation for claimant's *prima facie* case of total disability is satisfied. *Id.* In this regard, it is well established that a finding of disability may be based on claimant's credible subjective complaints alone. See *Vina*, 168 F.3d at 194, 33 BRBS at 67(CRT); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944, 25 BRBS 78, 80-81(CRT) (5th Cir. 1991). In the instant case, claimant's complaints of continuing back pain are corroborated by the reports of his physical therapist. See EX 4. Thus, if, on remand, the administrative law judge finds that claimant had a residual work-related medical impairment as of November 18, 1997, his previous determination that claimant established a *prima facie* case of total disability may be reaffirmed, as the economic prong of this issue is satisfied. In this regard, the administrative law judge correctly stated that a finding that claimant has the physical ability to perform the tasks of his former employment is not tantamount to a determination that he has no disability within the meaning of the Act. Rather, the statute's equation of disability with wage-earning capacity requires that claimant's former employment still be available to him. See *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT)(D.C. Cir. 1988); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175, 180 (1996); *Wilson v. Todd Shipyards Corp.*, 23 BRBS 24, 28 (1989). Thus, claimant's *prima facie* case of total disability is established by a showing that claimant cannot return to his former employment because employer has not made it available to him notwithstanding evidence that claimant is physically capable of performing the duties of that employment. *Id.*⁶

In summary, we remand the case to the administrative law judge for consideration of whether employer has presented sufficient evidence to rebut the Section 20(a) presumption that claimant's present back condition is causally related to his work accident. If, on remand, the administrative law judge finds that employer met its burden on rebuttal, he must resolve the issue of causation on the basis of the record as a whole. With respect to the issue of disability, if the administrative law judge concludes, on remand, that claimant has a permanent work-related physical impairment which restricts his capabilities, the administrative law judge may reaffirm his previous determination that claimant established

⁶As employer does not contest the administrative law judge's finding that suitable alternate employment was not established, satisfaction of claimant's *prima facie* case establishes his entitlement to permanent total disability benefits.

his *prima facie* case of total disability and, thus, is entitled to an award of permanent total disability benefits.

Accordingly, the administrative law judge's Decision and Order is vacated and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge