BRB No. 01-0871

JOHN J. WASSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: August 6, 2002
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

James W. Case (McTeague, Higbee, Case, Cohen, Whitney & Toker), Topsham, Maine, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration (2000-LHC-1214) of Administrative Law Judge Richard D. Mills 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, while working for employer as a preservation technician on December 9, 1996, experienced severe pain in his shoulder and back. Claimant was sent to employer's medical facility where he was referred to physical therapy and placed on light duty. Claimant, who was later diagnosed with cervical disk herniations, cervical compression neuropathy, and anterior spurring in his shoulder, subsequently treated with a number of

physicians and continued with a nonsurgical course of treatment. Ultimately, claimant underwent a cervical discectomy and, following the onset of severe headaches, three lumbar punctures. The physician who performed the later procedures determined that claimant, who continued to complain of headaches as well as blurred vision, was suffering from pseudotumor cerebri. Claimant last worked for employer in January 1997, and employer voluntarily paid claimant temporary total, temporary partial, permanent total, and permanent partial disability compensation during various periods of time subsequent to January 16, 1997. *See* 33 U.S.C. §908(a), (b), (c)(21), (e).

In his Decision and Order, the administrative law judge determined that employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption of causation as it related to claimant's pseudotumor cerebri;[1] accordingly, the administrative law judge found that this condition was related to claimant's employment with employer. Next, the administrative law judge found that employer conceded that claimant was incapable of returning to his usual employment duties, and that employer failed to establish the availability of suitable alternate employment. The administrative law judge awarded claimant temporary total disability benefits from January 16, 1997 until May 2, 1997, and from May 6, 1997 until January 22, 1998, temporary partial disability benefits from February 13, 1998 until February 17, 1998, and permanent partial disability benefits from August 11, 1999, until the present. In an Errata issued June 12, 2001, the administrative law judge corrected his initial decision to reflect claimant's entitlement to permanent total, rather than permanent partial, disability benefits from August 11, 1999, until the present. Thereafter, in a Decision and Order on Reconsideration, the administrative law judge once again clarified the amounts of compensation due claimant but denied employer's request that he reverse his determinations regarding the cause of claimant's pseudotumor cerebri and the extent of claimant's work-related disability.

On appeal, employer challenges the administrative law judge's finding that claimant is entitled to invocation of the Section 20(a) presumption as it relates to claimant's pseudotumor cerebri; alternatively, employer asserts that the administrative law judge erred in determining that it failed to present evidence sufficient to rebut the presumption. Lastly, employer challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment. Claimant responds, urging affirmance of the administrative law judge's decision.

[1]At the formal hearing, employer stipulated that claimant had sustained a work-related injury to his cervical spine.

Employer initially contends that the administrative law judge erred in invoking the Section 20(a), 33 U.S.C. §920(a), presumption with regard to claimant's pseudotumor cerebri. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). It is claimant's burden to establish each element of his *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). In presenting his case, claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, claimant must show only the existence of working conditions which could have caused his harm. *See generally U.S. Industries/Federal Sheet Metal, Inc.,* 455 U.S. 608, 14 BRBS 631; *Stevens,* 23 BRBS 191.

In the instant case, employer does not dispute that claimant has suffered a harm, *i.e.*, a cervical condition as well as pseudotumor cerebri, and that claimant presented evidence of working conditions during his employment with employer that could have caused his cervical problems; rather, employer challenges the administrative law judge's invocation of the Section 20(a) presumption regarding claimant's latter condition on the ground that claimant set forth no credible evidence that working conditions or the work-related cervical condition could have caused claimant's pseudotumor cerebri.[2] In addressing this issue, the administrative law judge found that the testimony of Dr. Hedges left open the possibility that claimant's pseudotumor cerebri is causally related to his work-related accident. *See* Decision and Order at 11; Decision and Order on Reconsideration at 2. As Dr. Hedges stated that claimant's pseudotumor could be work-related, we affirm the administrative law judge's finding that claimant established his *prima facie* case, and his consequent invocation of the Section 20(a) presumption. *See Everett v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 316 (1989); *Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989); *Thompson v. Lockheed Shipbuilding & Constr. Co.,* 21 BRBS 94 (1988).

[2]Pseudotumor cerebri, also known as a phantom tumor, is defined as a condition caused by cerebral edema and is marked by raised intercranial pressure with headache, nausea, vomiting, and papilledema without neurological signs except occasional sixth-nerve palsy. *Dorland's Illustrated Medical Dictionary* (25th ed. 1974).

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997). It is employer's burden on rebuttal to present substantial evidence sufficient to sever the causal connection between the claimant's injury and his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see also Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *American Grain Trimmers, Inc. v. OWCP,* 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999); *Duhagon v. Metropolitan Stevedore Co.,* 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999). In establishing rebuttal of the presumption, however, proof of another agency of causation is not necessary. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982)(Kalaris, J., concurring and dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984). Rather, the unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See O'Kelley v. Dept. of the Army/NAF,* 34 BRBS 39 (2000); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984).

In the instant case, employer avers that the administrative law judge erred in concluding that the opinion of Dr. Hedges is insufficient to establish rebuttal of the Section 20(a) presumption. We agree. The United States Court of Appeals for the First Circuit, within whose jurisdiction the instant case arises, has specifically held that the presumption is overcome with substantial evidence stating that there is no causal relationship between the harm and the employment. *See Bath Iron Works Corp. v. Director, OWCP [Harford],* 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). In *Harford,* the court stated that for purposes of rebutting Section 20(a), a physician need not rule out the possibility that the condition is work-related. It is sufficient if the physican states that it is reasonably probable that the condition is not work-related. *Id.*, 137 F.3d at 675, 32 BRBS at 46 (CRT). The Board also addressed this issue in *O'Kelley v. Dept. of the Army/NAF,* 34 BRBS 39 (2000). In *O'Kelley*, the Board held that the testimony of a physician who stated at all times that his opinion regarding the lack of a causal nexus relationship between claimant's condition and his employment was rendered to a reasonable degree of medical certainty, but who acknowledged on cross-examination that such a causal connection was possible, was not equivocal but, rather, reflected the physician's opinion that in the medical profession there is no absolute certainty. Thus, the Board held that this opinion was sufficient to rebut the Section 20(a) presumption, since to hold otherwise would raise the standard regarding rebuttal of the presumption to an unreachable level.

In the instant case, the administrative law judge, while acknowledging Dr. Hedges's opinion that claimant's pseudotumor cerebri does not have any causal relationship to his work-related back and neck problems, nonetheless found that Dr. Hedges stated he cannot

determine a certain cause of claimant's condition. *See* Decision and Order at 9; Decision and Order on Reconsideration at 2. The administrative law judge thus concluded that Dr. Hedges's opinion is equivocal on the question of causation and therefore insufficient to rebut the Section 20(a) presumption.

We reverse the administrative law judge's finding that Dr. Hedges's opinion is insufficient to rebut the Section 20(a) presumption. Contrary to the administrative law judge's statement, employer is not required to establish another agency of causation in order to rebut the Section 20(a) presumption. *See Stevens,* 14 BRBS 626. Moreover, as employer asserts and as the administrative law judge stated in both his Decision and Order and his Decision and Order on Reconsideration, Dr. Hedges consistently opined that claimant's pseudotumor cerebri is not a causally related to his back and neck problems. *See* Dr. Hedges's depo. at 22-24, 28-30. Contrary to the administrative law judge's determination, the fact that the medical community does not know the cause of claimant's condition does not render Dr. Hedges's opinion equivocal. *See O'Kelley,* 34 BRBS 39; *Neeley v. Newport News Shipbuilding & Dry Dock Co.,* 19 BRBS 138 (1986). Rather, as Dr. Hedges's testimony expresses his opinion, rendered to a reasonable degree of medical certainty, that claimant's pseudotumor cerebri is not work-related, his opinion severs the connection between claimant's condition and his employment. We therefore hold that employer has produced substantial evidence severing the causal relationship between claimant's employment and his pseudotumor cerebri. *See Harford,* 137 F.3d 673, 32 BRBS 45 (CRT). Accordingly, we reverse the administrative law judge's finding that the Section 20(a) presumption is not rebutted.

Once employer has rebutted the Section 20(a) presumption, the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Hughes v. Bethlehem Steel Corp.,* 17 BRBS 153 (1985); *see also Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43 (CRT). In the instant case, the administrative law judge did not weigh the totality of the evidence on this issue as he found that employer did not rebut the presumption. We need not remand this case for him to do so, however, as the parties agree, and the administrative law judge acknowledged, that only Dr. Hedges testified as to the possible causal relationship between claimant's employment and his pseudotumor cerebri. As Dr. Hedges's opinion does not affirmatively establish such a causal connection, claimant has not met his burden of persuasion in this case. *See generally Greenwich Collieries,* 512 U.S. 267, 28 BRBS 53(CRT). We therefore modify the administrative law judge's decision to reflect that claimant's pseudotumor cerebri is not causally related to his employment with employer, and that employer is therefore not responsible for the medical charges incurred by claimant for the treatment of this condition.

Employer next avers that, with regard to claimant's cervical condition, the

administrative law judge erred in determining that it failed to establish the availability of suitable alternate employment. Where, as in the instant case, claimant is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate that suitable alternate employment is readily available in the claimant's community for individuals with the same age, experience, and education as the claimant. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991). In order to meet this burden, employer must establish that "there exists a reasonable likelihood that, given the claimant's age, education, and background, that he would be hired if he diligently sought the job." *Legrow*, 935 F.2d at 434, 24 BRBS at 207 (CRT), *citing New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In determining claimant's physical restrictions in the case at bar, the administrative law judge relied on the opinion of Dr. Esponnette, who opined that claimant retains the ability to lift and carry 15 pounds occasionally, push up to 30-35 pounds occasionally, and bend, stoop, crawl, climb stairs and crouch on a limited basis. *See* Decision and Order at 12; Emp. Ex. 29. Additionally, the administrative law judge noted the testimony of Dr. Hedges, who stated that claimant might want to avoid significant lifting since such an activity would make his pseudotumor cerebri headaches worse. Next, the administrative law judge found employer's March 22, 2001, labor market survey, which was prepared by Memana Abraham, to be seriously flawed and of questionable merit on the basis of Mr. Abraham's misunderstanding of Dr. Hedges's testimony and his reliance upon a vague and overly generic understanding of claimant's skills and work experience which are at odds with claimant's actual abilities. Specifically, the administrative law judge found that Mr. Abraham testified that, when preparing his labor market survey, he did not rely upon the essential job functions for a preservation technician form prepared by employer; rather, Mr. Abraham utilized a generic Dictionary of Occupational Titles job description of a shipyard laborer. *See* Clt. Ex. 24 at 20-28. Based upon these findings, the administrative law judge found that Mr. Abraham's deposition testimony demonstrates that he did not adequately understand claimant's job skills or experience with employer. The administrative law judge thus concluded that employer's March 22, 2001, labor market survey was extremely unreliable and did not establish the availability of jobs that claimant could perform without exceeding the limits of his physical capabilities. Accordingly, the administrative law judge found that this labor market survey was insufficient to meet employer's burden of establishing the availability of suitable alternate employment.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to weigh the evidence and draw his own inferences from it, *see John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); and he is not bound to accept the opinion of any particular witness. *See Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge's determination that Mr. Abraham's March 22, 2001, labor market survey is insufficient to meet employer's burden on this issue since he did

not adequately understand claimant's skills and work experience is rational, and his finding is supported by the record. Accordingly, we affirm the administrative law judge's finding that this report is insufficient to establish the availability of suitable alternate employment. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

We agree with employer, however, that the administrative law judge erred in failing to consider the August 23, 1999, labor market survey prepared by Lorraine Ketchum. *See* Emp. Ex. 21. In his decision, the administrative law judge addressed this report only in a footnote, stating that while this labor market survey did not appear to rely upon the flawed medical data used by Mr. Abraham, it did not contain accompanying testimony indicating what parameters were used in its development. Moreover, the administrative law judge noted that employer "does not argue that we should rely on the results of this labor market survey in making our decision," and thus he considered only the 2001 labor market survey. *See* Decision and Order at 13, n. 4. The fact that employer submitted into evidence a labor market survey but then did not cite to that survey in its post-hearing brief is an insufficient reason to reject that survey. Moreover, contrary to the administrative law judge's finding, the August 23, 1999, labor market survey sets forth the parameters used in its development and lists all of the contemporaneous medical reports considered by its author. Emp. Ex. 21. Therefore, as the administrative law judge did not consider all of the relevant evidence regarding the extent of claimant's disability, we must remand this case for the administrative law judge to consider whether employer's August 23, 1999, labor market survey establishes the availability of suitable alternate employment at that time. *See generally Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); 5 U.S.C. §557(c)(3)(A) .

Accordingly, the administrative law judge's finding that employer failed to establish rebuttal of the Section 20(a) presumption as it applies to claimant's pseudotumor cerebri is reversed, and his decision is modified to reflect that this condition is not work-related. The case is remanded for the administrative law judge to consider whether employer's August 23, 1999, labor market survey is sufficient to establish the availability of suitable alternate employment. In all other respects, the Decision and Order and the Decision and Order on Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge