BRB No. 01-0939

JOHN D. TUCKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL TERMINALS	)	DATE ISSUED: August 30, 2002
	)	
and	)	
	)	
SIGNAL MUTUAL INSURANCE COMPANY/ABERCROMBIE, SIMMONS, AND GILLETTE OF VIRGINIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Chanda W. Stepney (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Brian L. Sykes (Vandeventer Black LLP), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2000-LHC-2466) of Administrative Law Judge Richard E. Huddleston 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C.

§921(b)(3).

Claimant, a hustler driver, injured his back at work on February 24, 2000. An MRI administered on March 13, 2000, showed a bulging disk at L5-S1. Employer voluntarily paid claimant temporary total disability benefits from February 28 through April 30, 2000. Claimant worked on May 1 and 2, 2000, and from May 22 until June 1, 2000. Dr. Allen performed surgery on claimant's back on August 29, 2000, after an MRI administered on August 3, 2000 showed a ruptured disk and a cyst at L5-S1. Claimant returned to work in December 2000 and currently works in his usual job with employer.

The administrative law judge awarded claimant temporary total disability benefits from May 4 through May 21, 2000, and from June 2 through December 13, 2000, and medical benefits for Dr. Allen's treatment and back surgery necessitated by the work injury. The administrative law judge found employer liable for Dr. Allen's treatment based on his finding that Dr. Byrd referred claimant to his primary care doctor and he in turn referred claimant to Dr. Allen, and as Dr. Byrd had effectively discharged claimant from his care.

On appeal, employer challenges the administrative law judge's award of temporary total disability and medical benefits. Claimant responds in support of the administrative law judge's award.

We first address employer's challenge to the administrative law judge's award of medical benefits. Employer contends that the administrative law judge erred in finding employer liable for Dr. Allen's treatment and back surgery because the herniated disk and cyst necessitating the surgery are not work-related. The Section 20(a) presumption, 33 U.S.C. §920(a), links claimant's injury to his employment. The Section 20(a) presumption is invoked if claimant establishes his *prima facie* case–the existence of a harm and that working conditions existed which could have caused the harm. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption by presenting substantial evidence severing the causal connection between the injury and the employment. *Id.*

We affirm the administrative law judge's finding that claimant is entitled to invocation of the presumption that his ruptured disk and cyst arose out of his work accident as it is supported by substantial evidence. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.2d 54, 35 BRBS 41(CRT) (2d Cir. 2001). Both Drs. Stiles and Allen opined that claimant suffered two harms (a ruptured disk and cyst) which could have been caused by the work accident.[1] Cl. Exs. 12j, l, m, p, 13n. However, we must vacate the

[1]Dr. Stiles stated that the herniated disk present on the August 2000 MRI was

administrative law judge's finding that employer did not establish rebuttal of the Section 20(a) presumption, based on the opinions of Drs. Byrd and Williamson, and remand this case for consideration of these medical opinions under the proper standard. Employer correctly contends that the administrative law judge erred by requiring that employer "rule out" any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. *See* Decision and Order at 10. Rather, the courts have held that the statute requires only that employer produce "substantial evidence" that the condition was not caused or aggravated by the employment. *See* 33 U.S.C. §920(a); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT)(1st Cir. 1998); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997). An opinion that claimant's injury is not work-related given to a reasonable degree of medical certainty is sufficient to rebut the Section 20(a) presumption. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). In discussing whether the changes on the August 2000 MRI consisting of both a herniation and a cyst are related to the work injury, Dr. Byrd stated, "I don't believe they were, no, sir." Emp. Ex. 11.10. Dr. Williamson testified by deposition that the ruptured disk shown on the August 2000 MRI was not caused by or related to the work injury. Emp. Ex. 12.20-12.21. Dr. Williamson stated, however, that he has no opinion as to the cause of the cyst. Emp. Ex. 12.15.

As these opinions may be sufficient to establish rebuttal of the Section 20(a) presumption, we vacate the administrative law judge's finding that employer did not rebut the Section 20(a) presumption and we remand this case to the administrative law judge to determine if the opinions of Drs. Byrd and Williamson constitute substantial evidence that claimant's back problems were not caused by his employment. If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must then weigh the evidence as a whole to determine if claimant's back condition, for which he underwent surgery, is

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related to claimant's work injury. Cl. Ex. 13n. Dr. Allen testified that claimant's herniated disk and subsequent need for surgery were related to his work accident, and that he thought claimant's cyst was work-related. Cl. Exs. 12l, m, p. Dr. Allen also testified that the changes between the March and August 2000 MRIs represented a progression of claimant's initial injury. Cl. Ex. 12j.

work-related. *See, e.g., Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Meehan v. Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT)(8th Cir. 1997), *cert. denied*, 118 S.Ct. 1301 (1998); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994).

Employer next contends that the administrative law judge erred in addressing the issue of whether claimant was required to seek authorization to change physicians, as this issue is only for the district director, and not the administrative law judge, to decide, citing *Jackson v. Universal Maritime Serv. Corp.*, 31 BRBS 103 (1997)(Brown, J., concurring). Generally, the district director oversees a claimant's medical care and has the authority to issue an order changing claimant's treating physician. 33 U.S.C. §907(b); *Jackson*, 31 BRBS 103. The administrative law judge, however, has the sole authority to make findings of fact and to weigh competing evidence. *See* 33 U.S.C. §919(d). Thus, when an issue involving a claimant's medical care requires findings of fact, the issue is properly before the administrative law judge. *See generally Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997)(Brown, J. concurring). Moreover, pursuant to Section 7(d) of the Act, 33 U.S.C. §907(d), the administrative law judge has full authority to determine whether medical care already rendered was authorized in order to determine whether employer must reimburse claimant. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

We hold that the administrative law judge had the authority to decide whether claimant was required to obtain authorization for his change of physician, as that determination in this case required factual findings, and was not a purely discretionary act of granting or denying a request for a change. Dr. Byrd last saw claimant on May 17, 2000, and on that day stated, "I will not see him again." Cl. Ex. 4(d). Claimant testified that, on that same day, he was told by Dr. Byrd to see his primary care physician. Tr. at 18. Dr. Byrd acknowledged that he told claimant he need not see claimant again, but Dr. Byrd's understanding was that claimant could come back if he had problems. Emp. Ex. 11.15. Dr. Byrd also stated that he did not usually refer an injured worker to his primary care physician but could not recall whether he did so in this case. Emp. Ex. 11.15-11.16. The administrative law judge credited claimant's testimony that Dr. Byrd returned him to the care of his primary physician. Decision and Order at 11-12. As the administrative law judge was required to determine the weight to be accorded to the accounts of claimant and Dr. Byrd, we reject employer's reliance on *Jackson*. *See Sanders*, 31 BRBS 19. In *Jackson*, the issue involved only who had the authority to grant or deny a change of physicians at employer's request; the case did not involve the need to resolve issues of fact. Thus, the Board held that the plain language of Section 7(b) of the Act, and the regulations at 20 C.F.R. §§702.406(b), 702.407(b), (c), grant to the district director the discretionary authority to change the claimant's physician. In this case, however, claimant's need to obtain authorization was properly before the administrative law judge as factual issues were in dispute.

Employer also contends that, assuming the administrative law judge had such authority, he erred in finding that claimant's treatment by Dr. Allen was authorized by way of a referral. Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. 33 U.S.C. §907(d). Section 7(d)(1) of the Act, 33 U.S.C. §907(d)(1), requires that a claimant request his employer's authorization for medical services performed by any physician, including claimant's initial choice. An employer must consent to a change of physician where claimant has been referred by his treating physician to a specialist skilled in treating his injury. *See Slattery Assocs. Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT)(D.C. Cir. 1984); *Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000); 20 C.F.R. §702.406.

In the instant case, the administrative law judge found that Dr. Byrd, an orthopedic surgeon, referred claimant to his primary care physician, Dr. Sutton, and he in turn referred claimant to Dr. Allen, a neurosurgeon. As this finding is based on the administrative law judge's rational determination that claimant credibility testified that Dr. Byrd returned claimant to his primary care physician, the administrative law judge properly concluded that Dr. Allen's treatment and surgery are employer's responsibility. *See Armfield v. Shell Offshore Inc.*, 25 BRBS 303 (1992) (Smith, J., dissenting on other grounds); 20 C.F.R. §702.406. Moreover, the administrative law judge rationally determined that claimant was not required to seek authorization for Dr. Allen's treatment, as Dr. Byrd effectively discharged claimant from his care, despite claimant's continuing pain. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Thus, the administrative law judge's finding that employer is liable for Dr. Allen's treatment, including surgery, is affirmed.

We next address employer's challenge to the administrative law judge's award of temporary total disability benefits. Employer contends that the administrative law judge erred in awarding claimant temporary total disability benefits as Dr. Byrd returned claimant to his usual work and as such work was available for the whole period of time for which claimant sought disability benefits. An award of temporary total disability benefits is appropriate where claimant is restricted from performing his usual work, employer does not establish the availability of suitable alternate employment, and claimant has not yet reached maximum medical improvement. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT)*; Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT)(D.C. Cir. 1990); *Pimpinella v. Universal Maritime Serv. Inc.*, 27 BRBS 154 (1993).

In the instant case, the administrative law judge summarily awarded claimant temporary total disability benefits. Decision and Order at 10. Remand is not required, however, as the administrative law judge's award of temporary total disability benefits is supported by substantial evidence. *See James F. Flanagan Stevedores, Inc. v. Gallagher*,

219 F.3d 426, 34 BRBS 35(CRT)(5th Cir. 2000); *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); Cl. Ex. 5a-o, 6a-i, 12n; Emp. Exs. 4.3, 4.5-4.9, 13.1; Tr. at 16, 22, 40. Dr. Byrd returned claimant to work with restrictions in May 2000 and employer did not offer claimant a job at its facility within those restrictions or otherwise establish the availability of suitable alternate employment on the open market from May 4 through 21, 2000. Thus, employer is liable for temporary total disability benefits for this time period.[2]

Moreover, assuming claimant's disk herniation and cyst are work-related, employer is liable for temporary total disability benefits for the period from June 2 through December 13, 2000. Claimant was restricted from all work from June 6 through November 13, 2000, and was cleared to perform restricted work on November 14, 2000, by Dr. Allen. Employer did not offer claimant a job at its facility within his restrictions or otherwise establish the availability of suitable alternate employment.[3] Consequently, we affirm the

[2]Dr. Byrd returned claimant to light duty work with limited bending on May 1 and again on May 17, 2000, and approved claimant's job in regular duty job analyses which erroneously indicated that less than one hour of bending was required per day. Emp. Ex. 4.3, 4.5, 4.9. Claimant returned to employer's facility in his usual job of hustler driver on May 1 and 2, 2000, but this job requires a fair amount of bending as conceded by claimant's supervisor, Mr. Jackson. Tr. at 16, 40.

[3]Drs. Chinnery, Sutton, and Allen took claimant off all work from June 6 through November 13, 2000. Cl. Ex. 5a-o, 6a-i, 12n; Emp. Ex. 13.1. On November 14, 2000, following the August 2000 operation, Dr. Allen returned claimant to work with restrictions. Cl. Exs. 6h, i. When Dr. Allen released claimant to his usual work on December 14, 2000, claimant returned to work and was working in his usual job at the time of the formal hearing. Tr. at 22.

administrative law judge's award of temporary total disability benefits from May 4 through 21, 2000, and June 2 through December 13, 2000, as it is supported by substantial evidence.

Accordingly, the administrative law judge's finding that employer did not establish rebuttal of the Section 20(a) presumption is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge