BRB No. 03-0814

MARCUS J. SANSONE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ATLANTIC TECHNICAL SERVICES	)	DATE ISSUED: Aug. 25, 2004
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Bernard J. Sevel (Sevel & Sevel, P.A.), Baltimore, Maryland, for claimant.

Christopher J. Wiemken (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2001-LHC-1267) of Administrative Law Judge Alice M. Craft 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a foreman and mechanic. On December 18, 2000, claimant felt stiffness and then a sharp pain in his back when coming up from under a chassis he was repairing. He tried to work it off and walk it off, but as he was walking from this particular chassis to the next, he stopped because of severe pain in his back and leg. Tr. at 33-35. Claimant called for help on his walkie-talkie. Help arrived, and he was taken to the clinic. Tr. at 36-37. He has not returned to any work since then. Tr. at 29, 38. Claimant was eventually diagnosed with herniated discs at L1-2, L3-4, L4-

5, spondylolisthesis at L5-S1, and degenerative changes, and he underwent surgery in July 2001. Cl. Exs. 2, 4, 7; Emp. Exs. 4-6, 8.[1] Employer has not paid disability or medical benefits for this injury. Claimant filed a claim for temporary total disability and medical benefits. After 39 years on the waterfront, claimant retired on October 1, 2001. Tr. at 49.

The administrative law judge found that claimant is a maritime employee and that he suffered a work-related injury. Decision and Order at 10-11. Because there is no evidence of claimant's condition having reached maximum medical improvement, the administrative law judge concluded that claimant's condition is temporary. Further, she found that claimant established a *prima facie* case of total disability and that, even if light duty work at employer's facility was available, claimant could not perform it. Therefore, the administrative law judge awarded claimant temporary total disability benefits from December 18, 2000, and continuing, as well as medical benefits. Decision and Order at 12-14. Employer appeals the award, and claimant responds, urging affirmance.

Status

Employer first contends the administrative law judge erred in finding that claimant is a maritime employee. Employer asserts that claimant's job as a roadability foreman dealt only with assuring that chassis and containers leaving the port were roadworthy. As his duties related to land and not sea transportation, employer argues that claimant is not covered by the Act. It further argues that the administrative law judge erred in relying on *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990), to hold that claimant's work is covered. Claimant asserts that *Coleman* is applicable but that he is also covered because of his work as a mechanic on the repair lane.

For a claim to be covered by the Act, a claimant must establish that the injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a) and that the work is maritime in nature and is not specifically excluded by the Act. 33 U.S.C. §§902(3), 3(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996). Thus, to demonstrate that coverage under the Act exists, a claimant must satisfy the "situs" and

[1]Claimant underwent a hemilaminectomy at L3, a foraminotomy at L3 and L4, and a discectomy at L3-4. Emp. Ex. 8.

the "status" requirements of the Act.[2] *Id.*; *see also Crapanzano v. Rice Mohawk, U.S. Construction Co., Ltd.*, 30 BRBS 81 (1996). Generally, a claimant satisfies the "status" requirement if he is an employee engaged in work integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96(CRT) (1989). To satisfy this requirement, he need only "spend at least some of [his] time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165; *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). Although an employee is covered if some portion of his activities constitutes covered employment, those activities must be more than episodic, momentary or incidental to non-maritime work. *Boudloche*, 632 F.2d 1346, 12 BRBS 732; *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990).

The administrative law judge found that the facts of *Coleman* are "very similar" to those in the instant case and, based on *Coleman*, she concluded that claimant's "work as a foreman repairing containers and chassis was 'integrally related to the loading and unloading procedures, connected with and vital to the movement of maritime cargo on navigable waters,' and he was therefore covered by the LHWCA." Decision and Order at 10 (quoting *Coleman*, 904 F.2d at 613, 23 BRBS 103(CRT)). In *Coleman*, the claimant worked primarily to ensure that outbound containers and chassis were roadworthy. However, he also spent some time working to ensure that hustlers and inbound chassis and containers were in good repair. The Board affirmed the administrative law judge's findings that the claimant was a covered employee, and it held that the claimant's overall employment facilitated cargo movement. *Coleman*, 22 BRBS at 312; *see also Coleman*, 904 F.2d at 613, 23 BRBS at 103(CRT). The United States Court of Appeals for the Eleventh Circuit affirmed the Board's conclusion and held:

> Maintenance of the chassis in good working order is essential to prevent the loading and unloading process from breaking down. They must be kept in good condition to support the containers attached to them at dockside. They must be maintained in order to be hauled by hustlers as well as tractor trucks. Similarly, hustlers and containers, both of which Coleman worked on periodically, are essential to the loading and unloading process.
>
> The fact Coleman worked primarily on making loaded chassis/container rigs road worthy does not diminish his involvement in the loading and unloading process. Without the essential maintenance necessary to make

[2]There is no dispute that the Seagirt Marine Terminal in Baltimore, Maryland, is a covered situs pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a). Decision and Order at 3; Tr. at 13.

> the outbound rigs road worthy, the unloading process would stop indefinitely at the Port Authority.

Coleman, 904 F.2d at 618, 23 BRBS at 108(CRT).

Although employer makes the argument that *Coleman* is incorrect because it gives maritime status to work performed in furtherance of the land transport of cargo, the claimant also was required to perform maintenance on hustlers, containers and chassis that remained within the confines of the port area, and those duties played a factor in deciding whether his "overall employment" was covered. Moreover, in *Coleman*, the court considered the Supreme Court's decisions in *Caputo*, *Ford*, and *Schwalb* to arrive at the conclusion that repair of chassis and containers is covered work. In *Schwalb*, the Supreme Court stated:

> Although we have not previously so held, we are quite sure that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Such employees are engaged in activity that is an integral part of and essential to those overall processes. That is all that §902(3) requires.

Schwalb, 493 U.S. at 47, 23 BRBS at 99(CRT); *see Coleman*, 904 F.2d at 616, 23 BRBS at 105-106(CRT). The Supreme Court further stated that the determinative consideration is whether the ship loading/unloading process could continue without the claimant's function. An employee need not be injured while actively engaged in tasks integral to the loading and unloading process; rather, the proper analysis looks to the claimant's regular duties and the tasks to which he may be assigned. *See Ford*, 444 U.S. at 82, 11 BRBS at 328; *Caputo*, 432 U.S. at 272-274, 6 BRBS at 165; *Maher Terminals, Inc. v. Director, OWCP [Riggio]*, 330 F.3d 162, 37 BRBS 42(CRT) (3d Cir.), *cert. denied*, 124 S.Ct. 957 (2003). Thus, employer's contention that *Coleman* was wrongly decided is without merit.

In this case, claimant worked as the roadability foreman where he was in charge of ensuring that trucks and containers were suitable for traveling on the roads outside the port. He also worked as a mechanic in the repair lane. In this regard, claimant made repairs on chassis and containers traveling within the port, including those chassis carrying containers from the ships. Tr. at 24, 30-32, 60, 71, 77, 85. Claimant switched between the roadability and repair lanes depending on the traffic in each. On the morning his back became symptomatic, claimant was completing repairs on a chassis in the repair lane. Tr. at 32-33, 72, 77. Although claimant's primary designation was as roadability foreman, there is no dispute from employer that claimant's job entailed both types of repairs and there is no dispute that he was repairing a chassis in the repair lane just prior to becoming symptomatic. Tr. at 32-33, 77. Because of claimant's dual responsibilities,

see Riggio, 330 F.3d 162, 37 BRBS 42(CRT), and because it is clear from *Coleman* that the repair of chassis and containers constitutes the repair of equipment involved in the unloading of ships, we affirm the administrative law judge's finding that claimant is a covered employee as at least some of his employment involved repairing equipment involved in the unloading process.[3] *Schwalb*, 493 U.S. at 49, 23 BRBS at 100(CRT); *Riggio*, 330 F.3d 162, 37 BRBS 42(CRT); *Coleman*, 904 F.2d at 618, 23 BRBS at 108(CRT).[4]

Causation

Employer next argues that claimant's injury did not arise out of or occur within the course of his employment. Specifically, employer asserts that claimant was merely walking around the worksite when he was injured. The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption, found that employer failed to rebut the presumption, and concluded that claimant's injury is work-related. Additionally, she rejected employer's assertions that the injury occurred while claimant was merely walking and that walking could not be "in the course of employment." Decision and Order at 11-12.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain *and* that conditions existed or an accident occurred at his place of employment

[3]Employer's reliance on cases such as *Stowers v. Consolidated Rail Corp.*, 985 F.2d 292 (6th Cir. 1992), *cert. denied*, 510 U.S. 813 (1993), *Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82(CRT) (9th Cir. 1987), and *Zube v. Sun Refining & Marketing Co.*, 31 BRBS 50 (1997), *aff'd mem. sub nom. Zube v. Director, OWCP*, No. 97-3382 (3d Cir. 1998), is misplaced. Those cases did not involve the status of employees who repaired the equipment used in the unloading process. Rather, they involved the status of employees who transported cargo over land after the unloading process had been completed. Further, employer's assertion that *Coleman* is not applicable because it is a decision issued by the Eleventh Circuit, and this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, is unpersuasive. The Fourth Circuit has not decided this precise issue, and the decision of the Eleventh Circuit is on point.

[4]We need not reach the specific question of whether claimant's duties in the roadability lane are integral to land or sea transportation because, as in *Coleman*, claimant spent time on a regular basis in the repair lane, and it is claimant's overall duties that designate his status.

which could have caused the harm or pain. *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The administrative law judge found that claimant established a *prima facie* case by showing that his back was injured and that repairing the chassis was heavy work and could have caused the injury. Decision and Order at 11. This finding is rational. The medical evidence establishes that claimant suffered multiple herniated discs in his back, and based on claimant's testimony and the corroborating testimony from employer's witnesses, claimant established that his duties as a mechanic could have caused the injury to his back.

Once the claimant establishes a *prima facie* case, as here, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not caused or aggravated by the employment. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *see also American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In this case, the administrative law judge found that employer failed to offer any evidence to rebut the presumption; thus, she found claimant's injury to be work-related. Decision and Order at 11-12. Claimant's injury, therefore, arose out of his employment. *Kelaita*, 13 BRBS 326.

Under the Act, an injury occurs within the course of employment if it occurs within the time and space boundaries of employment and in the course of an activity whose purpose is related to the employment. *Durrah v. Washington Metropolitan Area Transit Authority*, 760 F.2d 322, 17 BRBS 95(CRT) (D.C. Cir. 1985); *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997). The Section 20(a) presumption applies to this question, as well as to whether a claimant's injury arose out of his employment. *Id.; Wilson v. Washington Metropolitan Area Transit Authority*, 16 BRBS 73 (1984). If an employee deviates from his work for personal reasons or becomes so thoroughly disconnected from the service to the employer that it would be unreasonable to say that the injury occurred in the course of employment, the activity may not have occurred in the course of employment and his employer would not be held liable for any resulting injuries. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951); *Compton v. Avondale Industries,*

Inc., 33 BRBS 174 (1999); *Bobier v. The Macke Co.*, 18 BRBS 135 (1986), *aff'd mem.*, 808 F.2d 834, 19 BRBS 58(CRT) (4th Cir. 1986).

There is no question that claimant's injury occurred during the time and space boundaries of his employment: claimant testified he arrived at work at approximately 7 a.m. on December 18, 2000, Tr. at 32, and the injury occurred less than an hour later, Tr. at 77, and both parties agree the injury occurred at employer's facility at the Seagirt Marine Terminal, Decision and Order at 3. *See Compton*, 33 BRBS 174. The only question remaining is whether claimant's injury occurred during the course of activity whose purpose is related to the employment. Specifically, employer argues that because the injury occurred while claimant was "walking" it did not occur within the course of his employment. The administrative law judge rejected this argument, as do we.

First, the administrative law judge stated that employer's argument assumes that the injury itself did not occur prior to the onset of symptoms claimant experienced while walking. She rejected this assumption as unreasonable in light of the medical evidence. Dr. Fiandaca reported that the types of work activity claimant described were consistent with the development of his herniated discs and that claimant's back condition was related to those activities. Cl. Ex. 1. No doctor disputed the connection.

The administrative law judge also rejected employer's assertion that walking cannot be within the course of employment, calling employer's interpretation a "strained and unnatural interpretation" of the witnesses' testimony. The administrative law judge's finding in this regard is rational. Claimant was working on a chassis. He felt some pain while under the chassis, felt more upon rising and still more while walking to find another chassis to work on. To say that claimant's walking was not in the course of his employment simply lacks any merit. *Boyd*, 30 BRBS 218 (assisting co-worker with minor car problem on way to forklift is in the "course of employment"); *Willis v. Titan Contractors, Inc.*, 20 BRBS 11 (1987) (unauthorized use of a crew boat to deliver grease to a barge is in the "course of employment"); *compare with Compton*, 33 BRBS 174 (hiding to smoke marijuana not in the "course of employment"); *Oliver v. Murry's Steaks*, 21 BRBS 348 (1988) (detour to a bar without returning to work not in the "course of employment"); *Bobier*, 18 BRBS at 135 (5-hour detour to a restaurant not in the "course of employment"); *Oliver v. Murry's Steaks*, 17 BRBS 105 (1985). Even insignificant deviations during the time and space limits of employment to attend to personal comforts are not sufficient to take the employee out of the course of his employment. *Durrah*, 760 F.2d at 322, 17 BRBS at 95(CRT); 82 Am. Jur. 2d Workers' Compensation §281 (1992). In this case claimant did not embark on a personal mission, abandon his employment or even make an insignificant deviation from his work. To the contrary, he was walking to find more work to do for employer. Therefore, we reject employer's argument, and we affirm the administrative law judge's determination that

there has been no rebuttal of the Section 20(a) presumption, and claimant's injury occurred within the course of his employment.

Wage-earning Capacity

Employer also contends the administrative law judge erred in finding that claimant's loss of wage-earning capacity is related to his injury. It argues that it established the availability of suitable alternate work at its facility and that claimant's decision to retire instead of to perform that work is the reason for the loss in his wage-earning capacity. Thus, employer asserts that claimant's voluntary retirement disqualifies him for disability benefits. Claimant responds, urging affirmance of the award of temporary total disability benefits.

The administrative law judge first found that, as there is no evidence of claimant's condition having reached maximum medical improvement, his condition remains temporary. Decision and Order at 12. She then found that claimant established an inability to return to his usual work and, therefore, established a *prima facie* case of total disability. Decision and Order at 13. The administrative law judge found that the evidence regarding whether light-duty work was available at employer's facility is contradictory, but she concluded that she need not reach a conclusion on the availability issue because, even if it was available, she found that claimant could not perform it. Thus, she concluded that employer did not satisfy its burden of establishing the availability of suitable alternate employment and that claimant is entitled to temporary total disability benefits. Decision and Order at 13-14.

Employer argues that it established that light-duty work, in the form of inspection jobs on the TIR lane, was available between December 19, 2000, when claimant was injured, and September 30, 2001, when claimant opted to retire.[5] The administrative law

[5]Before the administrative law judge, employer argued that light-duty work was available between December 2000 and July 2001. Decision and Order at 13; Tr. at 87-88; Emp. Post-Hearing Brief at 13. In the brief before the Board, employer argues that suitable alternate employment was available until September 2001. Emp. Brief at 13. We decline to address this aspect of employer's argument because it was not raised before the administrative law judge. Moreover, Mr. Windsor testified that the work in the TIR lanes was available until one or two months before the date of the hearing when employer "lost the TIR inspection job[,]" Tr. at 90-91, so the work may not have been available after August 2001. When an internal position becomes unavailable, it does not satisfy employer's burden establishing the availability of suitable alternate employment. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

judge found that claimant could not perform the TIR lane inspection job. She credited the job descriptions given by both Mr. Vencill, claimant's supervisor, and Mr. Windsor, the regional manager, which included sitting/standing during slow periods, but also requiring prolonged walking. She noted that both men stated that if claimant could not perform prolonged walking, then he could not perform the job.[6] Emp. Ex. 12 at 18-19; Tr. at 88, 95. Crediting claimant's testimony that he could not walk for long periods of time and the medical evidence that he did not find relief from pain until after the surgery in July 2001, Cl. Ex. 11 at 9-10; Emp. Ex. 8, the administrative law judge found that claimant could not perform the job in the TIR lane. Decision and Order at 13-14. She also found that employer failed to establish any other evidence of suitable alternate employment. *Id.*

Employer cites medical opinions from doctors stating that claimant is restricted from lifting and bending, and that after the December 20, 2000, report from Dr. Sorongon, claimant had no restrictions on walking. Emp. Exs. 3-6. Thus, it argues, claimant could have performed the inspector's job. A review of the record reveals that the evidence to which employer refers pre-dated claimant's surgery in July 2001. However, the administrative law judge credited the evidence that claimant was not free from pain until after the July 2001 surgery. Only claimant's doctor, Dr. Fiandaca, reported on claimant's condition after surgery, and it is not clear whether he released claimant to return to work. Cl. Ex. 1.[7] We need not address claimant's post-surgery condition, however, as employer argued only that suitable alternate employment was available until July 2001. *See* n.5, *supra*.

It is within the administrative law judge's discretionary powers to determine how to credit and weigh the evidence of record, including the opinions of medical experts. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961);

[6]Mr. Windsor also testified that the job would have been available to claimant only if he had been released by his doctors. Tr. at 87-88.

[7]Dr. Fiandaca stated that claimant's condition improved as a result of the surgery and, as of September 10, 2001, claimant had full range of motion, could ambulate without difficulty, was well-healed and improving in strength, and was approaching maximum medical improvement. He also stated that claimant would always have some weakness and could not lift as much as he used to, and he advised claimant to gradually begin increasing his activities. Cl. Ex. 1.

Perini Corp. v. Heyde, 306 F.Supp. 1321 (D.R.I. 1969). Because the administrative law judge found that claimant was not relieved of pain until after the July 2001 surgery, it was rational for her to find that employer did not establish that claimant could perform the inspector's job between December 2000 and July 2001 when it was purportedly available. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Therefore, we affirm the administrative law judge's conclusion that the TIR inspector positions are unsuitable for claimant because the position requires prolonged walking with few chances to sit.[8] Decision and Order at 13. Consequently, we affirm the administrative law judge's conclusion that the TIR inspector position was not suitable for claimant, and we affirm the award of temporary total disability benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[8]Accordingly, it is unnecessary to address the availability of the inspector's job on the TIR lane. *See Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*). Further, the administrative law judge committed no error in not addressing claimant's retirement, as it is irrelevant in this traumatic injury case. *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997); *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994); 20 C.F.R. §702.601(c).