BRB Nos. 05-0999
and 05-0999A

PIETRO BRUNETTI	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
A.G. SHIP MAINTENANCE CORPORATION	)	DATE ISSUED: 08/30/2006
	)	
and	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Thomas R. Uliase (Uliase & Uliase, P.C.), Haddon Heights, New Jersey, for claimant.

Robert N. Dengler and Richard L. Garelick (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Awarding Benefits (2004-LHC-2960) of Administrative Law Judge Robert D. Kaplan 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 allegedly sustained a neuron-ophthalmic condition as a result of his work for employer as a lasher on December 19, 2000. After lifting 50-60 pounds of material in the course of his work, claimant experienced a nosebleed with accompanying dizziness, light-headedness, and an overall feeling of disorientation. An ambulance was called, and claimant, having a reported blood pressure of 220/140, was taken to Greenville Hospital where he was treated and discharged with the diagnosis of uncontrolled hypertension. Claimant, however, continued to experience dizziness, along with blurry vision, and pressure behind his eyes and at the neck, prompting him to seek treatment from a series of physicians including, most importantly for purposes of this case, ophthalmologists Drs. Warren, Zee, Kapoor, and Frohman.

Dr. Warren diagnosed an eye movement/neurological disorder, *i.e.*, an oculomotor abnormality, which, he opined, occurred as a result of the work injury claimant sustained on December 19, 2000. Dr. Warren ultimately stated that claimant is totally disabled from any gainful employment due to his eye condition. As a result of Dr. Warren's referral, claimant was examined by Dr. Zee who diagnosed a convergence spasm principally of the right eye. Dr. Zee opined that claimant did not appear to have any of the possible organic causes of convergence spasm and recommended additional testing in the form of an EEG and psychiatric counseling to discern the origin of his condition. Claimant then saw Dr. Kapoor who assessed claimant's condition as convergence insufficiency, with deficits of saccades, deficits of pursuits, photosensitivity, myopia, presbyopia, and vertigo/dizziness. Dr. Kapoor stated that claimant's abnormal eye movements are not typical of any specific diagnosis or syndrome such that a precise etiology was unclear. She, however, added that "it is clear that the onset of these symptoms followed his work-related injury (12/00)." CX 14. Furthermore, Dr. Kapoor opined that claimant's ocular condition renders him permanently totally disabled. Lastly, Dr. Frohman diagnosed claimant's ocular condition as a non-organic accommodative spasm or superimposed volitional convergence maneuver. Dr. Frohman opined that claimant's vision problems are not causally related to the work events of December 19, 2000.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), but that employer established rebuttal thereof. Evaluating the evidence as a whole, the administrative law judge found that claimant's eye disorder is causally related to his work for employer. The administrative law judge then concluded that claimant is entitled to temporary total disability benefits from December 19, 2000, to March 19, 2000, and from June 27, 2001, until October 6, 2004,

and to permanent total disability benefits thereafter,[1] finding that claimant could not return to his usual employment as a lasher, and that employer did not establish the availability of suitable alternate employment. Lastly, the administrative law judge concluded that claimant has not established his entitlement to a Section 14(e) assessment, 33 U.S.C. §914(e).

On appeal, employer challenges the administrative law judge's findings regarding causation and entitlement to total disability benefits. Specifically, employer asserts that the medical evidence is insufficient to support the administrative law judge's determination that claimant's eye disorder is work-related. Alternatively, employer argues that it established the availability of suitable alternate employment via the labor market survey and testimony of Laurie Havassy. Claimant responds, urging affirmance. On cross-appeal, claimant challenges, as unsupported by the evidence of record, the administrative law judge's denial of a Section 14(e) assessment for the period between December 19, 2000, through July 21, 2003.

After consideration of the administrative law judge's findings, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge's findings are supported by substantial evidence. Initially, we reject employer's assertion that the administrative law judge erred in finding that claimant's eye condition is work-related. Once, as here, claimant invokes and employer rebuts the Section 20(a) presumption, it no longer controls and the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See 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. 257, 28 BRBS 43(CRT) (1994); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). In addressing this issue, the administrative law judge extensively discussed all of the relevant evidence of record, and accorded greatest weight to Dr. Warren's opinion that claimant's ocular condition is related to his December 19, 2000, work incident. The administrative law judge initially recognized that although Dr. Warren was unable to provide a "definitive diagnosis for claimant's condition," he nevertheless extensively considered claimant's subjective complaints, all of the objective testing, claimant's prior medical history, the events of December 19, 2000, and claimant's symptoms thereafter in opining that claimant's eye condition is a result of a miswiring or misdirection of his brainstem that was caused by an ischemic event occurring as a result of his work for

[1] The administrative law judge determined, based on Dr. Warren's opinion, that claimant attained maximum medical improvement with regard to his eye condition as of October 6, 2004.

employer on December 19, 2000.[2] *Id.* In crediting Dr. Warren's opinion, the administrative law judge further noted the physician's statement that claimant's acute onset of dizziness is a symptom which "might occur with a brainstem stroke." CX 11.

In contrast, the administrative law judge found that Dr. Zee was unclear regarding causation, and that Dr. Frohman's opinion lacks any supporting documentation in the form of a psychiatrist's opinion. The administrative law judge found that Dr. Zee made no specific statements, either way, as to whether claimant's ocular condition is related to the work incident of December 19, 2000. CX 14. Additionally, the administrative law judge acted within his discretion by rejecting Dr. Frohman's opinion that claimant's condition is psychiatric in nature on the ground that as a credentialed neuro-ophthalmologist, he is not qualified to make a diagnosis of a psychiatric condition. Lastly, the administrative law judge found that all of the physicians agreed that the medical evidence demonstrates that claimant did not have a significant ocular history or a history of hypertension prior to the events of December 19, 2000, and that none of them contradicted claimant's contention that his abnormal eye movements directly followed his nosebleed. He therefore concluded, based on this evidence, that there was also a "temporal nexus" between the work events of December 19, 2000, and claimant's eye condition. Decision and Order at 18. This too is supported by substantial evidence, as the administrative law judge's recitation of the record in this regard is accurate.[3]

As the administrative law judge acted within his discretion in according greatest weight to the opinion of Dr. Warren, as supported by claimant's testimony regarding the incident and his symptoms thereafter, and the fact that it is undisputed that claimant's eye problems did not occur until the time of his December 19, 2000, work injury, we affirm his determination that claimant's ocular condition is causally related to his employment. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see*

[2] We therefore reject employer's assertion that Dr. Warren's opinion is too speculative to support a finding of causation. As noted above, the administrative law judge acknowledged Dr. Warren's statements regarding the speculative nature of his opinion, but nevertheless rationally credited his causation conclusion as it was explained in terms of the overall facts in this case.

[3] The administrative law judge did not err in relying, in part, on evidence establishing a "temporal nexus" between the December 19, 2000, work incident and claimant's symptoms, as a consideration of such relevant evidence is contemplated by the standard which requires the administrative law judge to resolve the causation issue "based on the record as a whole." *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

also Marinelli v. American Stevedoring, Ltd., 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

Where, as in the instant case, a claimant has established that he is unable to perform his usual employment duties due to his work-related injury, claimant has established a *prima facie* case of total disability. The burden then shifts to employer to demonstrate within the geographic area where claimant resides the availability of jobs 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. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1041, 31 BRBS 84, 88(CRT) (2d Cir. 1997); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *see also New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In addressing the suitable alternate employment issue, the administrative law judge rationally credited Dr. Rosenberg's testimony, in conjunction with the opinions of Drs. Warren and Kapoor, to find that claimant is incapable of any employment because of his ocular condition. *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005). The administrative law judge, however, also rationally rejected the positions identified by Ms. Havassy because they fall beyond the scope of claimant's overall capabilities.[4] *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). We therefore affirm the administrative law judge's finding that employer has not established the availability of suitable alternate employment, and his consequent conclusion that claimant is entitled to total disability benefits as they are rational, in accordance with law and supported by substantial evidence.

Turning to claimant's cross-appeal, the administrative law judge found that the record is insufficient to determine whether employer is, in fact, liable for a Section 14(e) assessment.[5] The administrative law judge found that employer's July 21, 2003, notice of

[4] Specifically, the administrative law judge found that all of the identified jobs are customer-service based and would require claimant to be attentive to the customers' needs, factors which Dr. Rosenberg believed would be compromised by claimant's unreliability due to his frequently recurring symptoms. Additionally, the administrative law judge found that claimant's limitation of keeping his head in a simple position, his credible testimony that he sometimes becomes confused and disoriented in large spaces, when there is a great deal of activity around him, or when he is talking on the telephone, as well as the fact that he has no prior employment experience in an office setting, nor is familiar with operating computers or doing paperwork, further precludes these positions as evidence of suitable alternate employment.

[5] Employer's argument that claimant abandoned this issue by failing to address it in his brief to the administrative law judge is rejected. The issue was raised before the

controversion states that it "supplements the notice of controversion that was previously filed by the employer." CX 2. However, as the administrative law judge observed, the earlier notice of controversion is not a part of the record. Thus, the only evidence of record establishes a controversion date in July 2003.

On this record, claimant has sufficient evidence to establish his entitlement to a Section 14(e) assessment, as he was injured in December 2000 and filed his claim on November 26, 2001, *see, e.g., Bailey v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 11 (2005)(employer's obligation to file a notice of controversion commences once it has knowledge of the injury), and the sole controversion in the record was not timely filed.[6] Employer's statement that it filed a prior notice is, at best, evidence that a prior notice may exist, but in the absence of specific evidence, it cannot prove a controversion was timely filed.[7] We therefore reverse the administrative law judge's finding that the record is insufficient to determine whether employer is liable for a

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administrative law judge. Moreover, a Section 14(e) assessment is mandatory and thus may be raised at any time. *See, e.g., McKee v. D.C. Foster Co.,* 14 BRBS 513 (1981).

[6] At the hearing, employer's counsel stated, in response to the administrative law judge's question as to whether employer timely controverted the claim, that "[s]imply that it goes, the decree was dated November 26, 2001, and the LS-207 is dated July 21, 2003." HT at 13. This statement also supports claimant's position that employer did not controvert the claim for benefits until July 21, 2003.

[7] As this document was generated by employer, it is incumbent upon employer to produce it. Claimant cannot be required to produce evidence that employer did not file a prior notice, as the absence of the document is support for such a conclusion. Moreover, it is not claimant's burden to produce every document in the administrative file, *see* 20 C.F.R. §702.319, but to produce evidence sufficient to make a *prima facie* case, which he has done.

Section 14(e) assessment. As additional findings are necessary under this section,[8] we vacate his denial of a Section 14(e) assessment, and remand this case for further findings. On remand, employer may be given the opportunity to produce the prior notice of controversion referenced in its July 21, 2003, notice.

Accordingly, the administrative law judge's award of benefits is affirmed, his denial of a Section 14(e) assessment is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[8] Employer is liable for the Section 14(e) assessment if it fails to timely controvert after it has knowledge of the injury. 33 U.S.C. §914(d). It is assessed on all benefits due and unpaid from this time until the date employer files a notice or the Department of Labor has the information a proper notice would reveal, *e.g.*, the date of an informal conference. *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979).