BRB No. 02-0297

MICHAEL C. WILLIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TERMINAL MAINTENANCE COMPANY	)	
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	DATE ISSUED: Dec. 4, 2002
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

David Utley (Devirian, Utley & Detrick), Wilmington, California, for claimant.

Robert E. Babcock, Sherwood, Oregon, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2000-LHC-2308, 2000-LHC-2309, 2000-LHC-2310) of Administrative Law Judge Paul A. Mapes 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 maintenance manager at its Trans-Pacific Container Service Corporation facility. On February 23, 1999, claimant experienced pain in his left shoulder, heaviness in his left foot and numbness in his left big toe, and a CT scan revealed evidence of an ischemic infarction, a stroke, in the right frontal cortical area of his brain. A carotid duplex scan conducted on March 1, 1999, revealed a total or subtotal occlusion of claimant's left internal carotid artery. Following the stroke, claimant continued to be treated but he returned to work, performing his usual employment except, he testified, he could no longer climb ladders or lift certain objects due to weakness in his left arm and leg. In August 1999, claimant and his assistant were moving tools between two trucks when claimant injured his back. On August 31, 1999, claimant's treating physician, Dr. Sliskovich, took claimant out of work due to a downturn in his recovery from the stroke and the back injury. During this same time period, claimant's supervisor filed a memo terminating claimant from employment as of the week of August 30, 1999. Claimant has not worked since August 31, 1999, and he filed a claim for both his stroke-related disability and his back injury.

The administrative law judge invoked, and found rebutted, the Section 20(a), 33 U.S.C. §920(a), presumption linking claimant's stroke-related condition to his employment. On the record as a whole, the administrative law judge credited claimant's testimony and the opinions of his medical experts, Drs. Sliskovich, Kalafut and Jay, over the opinions of employer's experts, Drs. Grodan and Rosove, to find that the mental stress claimant experienced at work caused, aggravated, accelerated or otherwise permanently worsened claimant's cardiovascular condition. Decision and Order at 10-12. Additionally, the administrative law judge determined that claimant's testimony and the medical evidence sufficed to warrant invocation of the Section 20(a) presumption with regard to claimant's back injury and that inconsistencies in the testimony and records served to rebut the presumption. Considering the record on the whole, the administrative law judge found a "bare preponderance" to support the conclusion that claimant suffered a temporary exacerbation of his stroke-related leg and arm weaknesses due to the back injury caused by moving heavy tools in August 1999. Further, he found that Dr. Sliskovich removed claimant from work due to his medical condition before claimant learned his employment was being terminated and that claimant's return to his usual work after suffering the effects of the stroke in February 1999 was accomplished with extraordinary effort and was medically inadvisable. *Id.* at 12-15. Thus, the

administrative law judge found that claimant established he could not return to his usual work. Because employer did not establish the availability of suitable alternate employment, the administrative law judge concluded that claimant is entitled to permanent total disability benefits from August 31, 1999, and continuing. In light of the evidence showing that claimant had pre-existing hypertension, manifest to employer, that contributed to claimant's disability, the administrative law judge awarded employer Section 8(f), 33 U.S.C. §908(f), relief. *Id.* at 16-17. Employer appeals the award of disability benefits, and claimant responds, urging affirmance.

Employer contends the administrative law judge erred in assessing liability for the stroke-related disabilities without first determining whether the diseases that caused the stroke, *i.e.,* hypertension and arteriosclerosis, are "occupational" diseases. It also argues that the administrative law judge failed to impose upon claimant the burden of establishing a post-injury wage-earning capacity, as he asserted that his actual earnings were not a fair representation of his post-injury earning capacity. After reviewing the record, we reject employer's contentions, and we affirm the administrative law judge's decision.

Initially, in arguing that claimant's diseases are not compensable because they are not "occupational" in nature, employer misconstrues the Act and its application to the facts in this case. Section 2(2) of the Act provides that the term "injury" "means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. . . ." 33 U.S.C. §902(2). An occupational disease arises "out of exposure to harmful conditions of the employment when those conditions are present in a peculiar or increased degree by comparison with employment generally." *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989). Although employer is correct in asserting that the Act distinguishes between a traumatic injury and an occupational disease, *see* 33 U.S.C. §§902(2), 912-913; *Port of Portland v. Director, OWCP [Ronne II]*, 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000), it incorrectly contends that any disease a claimant suffers must be designated as "occupational" in order to be compensable. Rather, while the special provisions for occupational diseases in the Act are in contemplation of latent conditions that are caused by the claimant's employment, *Ronne II*, 192 F.2d at 940, 33 BRBS at 148(CRT), there are cases, like the present one, where a claimant's underlying non-occupational disease is affected by conditions at his employment. Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kubin v. Pro-Football, Inc.* 29 BRBS 117 (1995). Moreover, if a claimant's employment played a role in the manifestation of a condition, the non-work-relatedness of the underlying disease is irrelevant. *See Obert v. John T. Clark & Sons of Maryland*, 23 BRBS 157 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS

252 (1988).

In this case, the administrative law judge determined that claimant's cardiovascular condition is compensable. First, he properly invoked, and found rebutted, the Section 20(a) presumption. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *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); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th 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). Next, he considered the evidence of record as a whole to resolve the issue of causation with the claimant bearing the burden of persuasion. *See Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *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). The record contains conflicting evidence as to the relationship between claimant's condition and his employment. Drs. Sliskovich, Kalafut, and Jay, claimant's doctors, opined that claimant's stressful work environment affected his hypertension and this, in part, caused the stroke. Despite other factors, such as claimant's history of smoking which employer's experts identified as the cause of claimant's condition, Tr. at 227-230, 241, 350, 354-356, claimant's doctors stated that work-related stress contributed to claimant's current cardiovascular condition. Cl. Exs. 5-7, 12; Emp. Ex. M. In addition, the administrative law judge found that claimant credibly testified that he was under undue stress in the fall of 1998, and the medical records establish that his blood pressure during this time was regularly elevated to unhealthy levels. Cl. Ex. 6; Emp. Ex. M at 222. The administrative law judge thus found that claimant's February 1999 stroke was related to his pre-existing hypertension and arteriosclerosis, and he credited the opinions of claimant's physicians that claimant's stressful employment circumstances contributed to and accelerated his hypertension, which in turn, contributed to the occurrence of the stroke. Decision and Order at 10-11; Cl. Exs. 5-7, 12; Emp. Ex. M.

It is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and may draw his own conclusions from the evidence. *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); *see also, e.g., Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053 (1978). The opinions of claimant's doctors constitute substantial evidence supporting the administrative law judge's conclusion that claimant's hypertension was aggravated by his employment, and this aggravation contributed to the occurrence of a disabling stroke. Thus, although claimant's underlying diseases were not directly caused by his work environment, the record supports the administrative law judge's finding that they were aggravated by that environment, making the resulting disability compensable. Therefore, we affirm his conclusion. *See Bazor v. Boomtown Belle Casino*, 35

BRBS 121 (2001); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Obert*, 23 BRBS 157.

Next, employer argues that the administrative law judge erred in failing to place the burden on claimant of establishing his post-injury wage-earning capacity, as claimant argued that his actual post-injury wages were not representative of his post-injury wage-earning capacity. It is a claimant's burden to establish a *prima facie* case of total disability by establishing an inability to perform his usual work due to the injury. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). If the claimant meets his burden, then the employer has the burden of coming forth with evidence of the availability of suitable alternate employment, thereby establishing that the claimant's disability is, at most, partial. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). An employer may meet its burden by establishing the availability of a job at its facility that is suitable for and available to the claimant. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997).

Claimant's doctors stated that he should not have returned to his usual employment following his stroke, as the physical difficulty of the work was beyond the limitations of his weakened state, and the stress was inconsistent with his prophylactic medical restrictions to avoid such situations. Cl. Ex. 5; Emp. Ex. M at 239. In conjunction with these medical prohibitions, the administrative law judge credited claimant's testimony that, in order to perform his job after his stroke, he had to exert extraordinary effort just to keep up with his work. *See Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978); Decision and Order at 14-15; Emp. Ex. E at 66; Tr. at 75-76, 146, 154. Accordingly, the administrative law judge found that claimant should not have returned to his usual work following his stroke, and this conclusion is supported by facts demonstrating that the job was not within claimant's restrictions. Moreover, claimant was terminated six months later due to his failing work performance, a criticism that had not arisen prior to the February 1999 stroke. Decision and Order at 15; *see Nguyen v. Ebbtide Fabricators, Inc.*, 19 BRBS 142 (1986). In finding that claimant's decision to return to his job was not medically advisable, the administrative law judge, in essence, concluded that claimant's usual work was not suitable. *Bumble Bee Seafoods*, 629 F.2d 1327, 12 BRBS 660. As it was not suitable employment, the wages earned therein cannot establish claimant's post-injury earning capacity. *See Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Jennings v. Sea-Land Serv., Inc.*, 23 BRBS 312 (1990). Moreover, as claimant has therefore met his burden of proving he is unable to return to his usual employment, employer, bore the burden of establishing suitable alternate employment and thus that claimant retained a wage-earning capacity. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989). As claimant cannot return to his usual work, and as there is no evidence of alternate employment suitable for claimant, employer did not satisfy its burden, and claimant

has established entitlement to total disability benefits. *Id.*

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge