BRB No. 05-0339

CARL DOMINGUE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
QUALITY SNUBBING CONTROL, INCORPORATED	)	DATE ISSUED: 12/20/2005
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

David C. Whitmore (Scheuermann & Jones), New Orleans, Louisiana, for claimant.

David K. Johnson, Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2001-LHC-1655) of Administrative Law Judge C. Richard Avery awarding benefits 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.* (1982) (the Act), as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *et seq.* (OCSLA). 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 sustained a puncture wound to his right ankle on June 4, 1994, while working offshore for employer, when a needle valve punctured the rubber boots he was wearing. Claimant was flown from employer's rig to the emergency room at the Medical Center of Southwest Louisiana, where his chief complaint was noted as laceration, injury, infection to right lower leg. CX 4 at 2. The emergency room record reported that claimant had an avulsion laceration on his right medial ankle and that the ankle was swollen.[1] Claimant attempted to return to work for employer, but employer had no light duty work available. Employer paid claimant compensation benefits until June 13, 2000, when it discovered that claimant previously had a similar injury.[2]

In his Decision and Order, the administrative law judge found that claimant's ankle condition is causally related to his employment with employer. The administrative law judge then found that claimant reached maximum medical improvement on January 26, 1998, that he could not return to his usual work and that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant compensation for temporary total disability from June 4, 1994, until January 26, 1998, and for continuing permanent total disability beginning on January 26, 1998.

[1] The administrative law judge, citing Stedman's Concise Medical Dictionary, 4th ed. (2001), took notice that an avulsion is defined as "a tearing away or forcible separation." Decision and Order at 4 n.4.

[2] The University Medical Center records show that prior to the June 4, 1994, accident at issue here, claimant was at the Center's emergency room on September 17, 1993, with an infected right ankle that he had cut three weeks before. EX 3 at 1. Claimant returned to the Center on September 21 and 28, 1993, for wound checks. EX 3. On November 14, 1993, claimant was referred to surgery, because antibiotics and cleaning did not heal the wound, which was now diagnosed as a persistent ankle ulcer. EX 3 at 6. The emergency room physician who saw claimant on December 22, 1993, diagnosed claimant with a stasis ulcer, and an outpatient physician confirmed the diagnosis on January 7, 1994. Claimant was diagnosed with venous insufficiency. EX 3 at 22. Claimant visited the Center's emergency room and clinic several additional times prior to the current injury. EX 3.

Employer appeals, arguing that the administrative law judge erred in awarding claimant permanent total disability compensation. Claimant responds, urging affirmance of the administrative law judge's decision.

CAUSATION

Employer challenges the administrative law judge's finding that claimant's current ankle condition is causally related to his June 4, 1994, work-accident. With regard to causation, claimant must initially establish a *prima facie* case by showing that he suffered a harm and that either an accident occurred at work 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).

In the instant case, employer argues that claimant sustained a prior injury to his ankle in either July 1993 or September 1993, that by April 1994 claimant was diagnosed with a recurrent ankle ulcer/statis ulcer, and that in May 1994 he was diagnosed with venous insufficiency. CX 3 at 16, 24. Additionally, employer asserts that the post-June 1994 records from the Medical Center do not reference claimant's June 1994 work-accident as a contributing cause to claimant's right ankle ulcer, and that claimant's complaints at that time were similar to his pre-injury complaints. In order to establish his *prima facie* case, however, claimant is not required to prove that the accident or working conditions in fact caused the harm; rather, claimant must show only the existence of an accident or working conditions which could potentially cause the harm alleged. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *see generally O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Here, the parties stipulated that claimant sustained a puncture-injury to his ankle while working for employer on June 4, 2004. Dr. Blanda, an orthopedic surgeon and claimant's treating physician at the time of the hearing, opined that claimant's work injury was the most likely cause of his present medical problems. Dr. Blanda explained that an accident such as the one sustained by claimant can aggravate a pre-existing condition such as venous statis with stretching of the skin and poor circulation, which combined with some type of trauma to the area, makes the particular wound or trauma more difficult to heal; this difficulty with healing can then cause wound infections to become chronic.[3] EX 6 at 21-22. Thus, claimant has established the existence of a harm, specifically ongoing medical problems with his right ankle, and the occurrence of a work-related accident which could have caused or

[3] Dr. Blanda deposed that venous insufficiency indicates an insufficient valve system which prevents the blood from being pumped up to the heart and causes it to pool, causing stasis, or swelling and discoloration resulting from improper circulation. EX 6 at 9.

aggravated the harm. Accordingly, as claimant has established the two elements of his *prima facie* case, we affirm the administrative law judge's determination that the Section 20(a) presumption applies to link claimant's medical conditions to his employment. *See Sinclair,* 23 BRBS 148; *Kelaita v. Triple A Machine Shop,* 13 BRBS 326 (1981).

Where claimant has established entitlement to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment.[4] *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT)(5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); S*winton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Thus, where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *O'Kelley*, 34 BRBS 39. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence in the record and resolve the causation issue based on the record as a whole. *See Port Cooper,* 227 F.3d 285, 34 BRBS 96(CRT); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1984).

The administrative law judge in this case did not make a specific finding as to whether employer established rebuttal of the invoked presumption. Any error the administrative law judge may have committed in not discussing rebuttal in this case is harmless, however, as employer does not cite any evidence which could establish that claimant's condition was not caused or aggravated by his work injury. In this regard, employer's allegations that claimant's condition pre-existed his June 1994 work-accident are insufficient to satisfy its burden, as mere hypothetical probabilities and suggestions of alternate ways that claimant's injury might have occurred are insufficient to rebut the presumption. S*ee Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Sinclair,* 23 BRBS 148. Moreover, in light of the aggravation rule, *see Strachan Shipping,* 782 F.2d 513, 18 BRBS 45(CRT), evidence of a pre-existing condition alone cannot rebut the invoked presumption. Accordingly, as employer did not introduce

[4] The aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

medical evidence severing the presumed causal nexus between claimant's ankle conditions and his employment, we affirm the administrative law judge's finding that these conditions are causally related to claimant's employment with employer. *See Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 178 (1996); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991); *see also I.T.O. Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989).

NATURE AND EXTENT OF DISABILITY

The administrative law judge found that claimant reached maximum medical improvement on January 26, 1998, based on the opinion of Dr. LaBorde, claimant's treating physiatrist. EX 5; Decision and Order at 19. As employer's mere assignment of error regarding this finding is not sufficient to invoke Board review, we affirm the administrative law judge's finding that claimant's condition reached maximum medical improvement on January 26, 1998. *See Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986).

Employer next challenges the administrative law judge's award of total disability benefits to claimant; employer argues that it established the availability of suitable alternate employment. Where, as in this case, claimant is incapable of resuming his usual employment duties with his employer as a result of his work-injury, the burden shifts to employer to establish the availability of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRS 294 (1992).

Employer submitted into evidence a vocational report prepared by Mr. Sy Arceneaux which it alleges establishes the availability of vocational opportunities for claimant at wages equal to or exceeding his earnings at the time of his June 1994 work-accident. In determining whether identified employment positions constitute suitable alternate employment, the administrative law judge must compare claimant's physical restrictions and vocational factors with the requirements of the positions identified by employer in order to determine where employer has met its burden. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.2d 901, 32 BRBS 212(CRT) (5th Cir. 1999); *see generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Mr. Arceneaux, a rehabilitation consultant, completed a labor market survey on April 15,

1997, in which he identified six available full time positions in the Lafayette area.[5] EX 2. The administrative law judge found that none of the positions identified in this labor market survey established the availability of suitable alternate employment because employer did not establish the precise nature and terms of the positions.[6] Specifically, in reaching this conclusion, the administrative law judge found that the letter accompanying the list of positions did not address claimant's physical restrictions or appropriate physical capacity level, and that the listed positions themselves did not contain any job descriptions or duties against which claimant's physical restrictions could be compared.[7] After thus considering the employment opportunities identified by employer's vocational expert, the administrative law judge determined that employer's evidence was insufficient to satisfy its burden of establishing the availability of suitable alternate employment. Decision and Order at 21. As the administrative law judge considered the relevant evidence in his decision, and his findings are rational, supported by substantial evidence, and are in accordance with law, his conclusion that employer failed to meet its burden of demonstrating the availability of suitable alternate

[5] These positions included maintenance route driver, jewelry manufacturer, inside sales, aircraft service helper, dispatcher and service advisor.

[6] Employer's labor market survey sets forth the lifting requirements and job duties of each identified position; the survey does not address the additional physical requirements associated with each position. *See* EX 2 at 2-4.

[7] Although Mr. Arceneaux subsequently performed a vocational evaluation of claimant on May 12, 1999, and stated that he would locate potential employment for claimant based on Dr. LaBorde's November 4, 1998, report, Mr. Arceneaux was later told to place claimant's file on hold by employer and the record contains no evidence that a second labor market survey was in fact prepared. *See* EX 2 at 16-18. On June 14, 1999, Dr. LaBorde opined that claimant would not be able to return to productive employment due to his significant restrictions on sitting, standing and walking. *See* EX 5 at 23.

employment and consequent award of total disability benefits is affirmed.[8] *See Wilson v. Crowley Maritime*, 30 BRBS 199 (1996); *Uglesich*, 24 BRBS 180.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[8] Employer also generally challenges claimant's credibility and maintains that surveillance videotapes taken of claimant in 2000-2001 are inconsistent with claimant's alleged physical limitations. Employer has failed to identify specific error in this regard in the administrative law judge's decision. In any event, any error is harmless due to employer's failure to present sufficient evidence of suitable alternate employment.