BRB No. 07-0582

J.B. Claimant-Respondent v. SERVICE EMPLOYERS INTERNATIONAL, INCORPORATED and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Employer/Carrier-Petitioners	)	DATE ISSUED: 12/19/2007 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Amending Decision and Order Awarding Benefits of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Dale W. Pedersen, Colorado Springs, Colorado, for claimant.

Jerry R. McKenney and James L. Azzarello, Jr. (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Order Amending Decision and Order Awarding Benefits (2006-LDA-00083) of Administrative Law Judge Russell D. Pulver 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.*,

as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act).[1] 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 began working for employer in Iraq as a tank truck driver on October 24, 2004. Claimant delivered jet fuel, diesel fuel, and gasoline throughout Iraq. He worked an average of 13 hours a day, 7 days per week in hot, dry, dusty and windy conditions. Claimant sought medical care for dry and itchy eyes at employer's health clinic on November 28, 2005. Claimant was diagnosed with bilateral pterygia and he was referred to Dr. Abdullah, an ophthalmologist. Pterygia denotes a fibrovascular growth that extends from the conjunctiva of the eye onto the cornea. EX 5 at 1. Dr. Abdullah diagnosed mild dry eyes and bilateral pterygia with the right side pterygium exhibiting degenerative changes. Dr. Abdullah prescribed eye drops, protective sunglasses, and excision of the right eye pterygium. Claimant filed a claim for benefits under the Act and he returned home on December 19, 2005, to receive treatment for pterygia. Employer controverted the claim on the basis that claimant's eye condition is not related to his employment in Iraq. Claimant subsequently obtained work in Colorado in May 2006 as a gas tanker driver.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his pterygia to his employment, and that employer produced substantial evidence to rebut the presumption. Weighing the evidence as a whole, the administrative law judge credited the opinions of Drs. Abdullah and McMahon to find that claimant's pterygia is related to his employment in Iraq. The administrative law judge found that claimant is entitled to compensation for temporary total disability, 33 U.S.C. §908(b), from December 19, 2005, to May 22, 2006, and for temporary partial disability, 33 U.S.C. §908(e), from May 22, 2006, when claimant began working in Colorado. The administrative law judge found that claimant's average weekly wage is $1,717.61. *See* 33 U.S.C. §910(a). The administrative law judge found claimant entitled to medical benefits for his pterygia, including reimbursement for past medical expenses and for repatriation expenses to obtain treatment in the United States. *See* 33 U.S.C. §907. In a subsequent Order, the administrative law judge found that claimant's compensation for temporary total disability is subject to the maximum compensation rate in effect for fiscal year 2006 of $1,073.64. *See* 33 U.S.C. §906(b).

[1] Employer stated "Oral Argument Requested" on the cover of its brief to the Board. Employer's request is denied inasmuch as employer did not submit its request in the form of a motion specifying the issues to be argued and justifying the need for oral argument. *See* 20 C.F.R. §802.305.

On appeal, employer challenges the administrative law judge's finding that claimant's condition is work-related, the award of disability and medical benefits, and the applicable compensation rate. Claimant responds, urging affirmance.

Employer contends that the administrative law judge's finding, based on the record as a whole, that claimant's pterygia was caused or aggravated by his working conditions in Iraq is not supported by substantial evidence. If the administrative law judge finds that the Section 20(a) presumption is invoked and rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established, with claimant bearing the burden of persuasion. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

In weighing the evidence as a whole, the administrative law judge credited the opinions of Drs. Abdullah and McMahon over the opinion of Dr. Garcia. Decision and Order at 6-7. Dr. McMahon examined claimant on January 5, 2006, after claimant returned to Colorado. EX 3. Specifically, the administrative law judge credited the statement in Dr. Abdullah's report that pterygia is more common in people exposed to dry weather and sunlight, and Dr. McMahon's opinion that environmental conditions in Iraq caused claimant's pterygia and that a genetic predisposition may have been a factor as well. EXs 1 at 4; 3 at 5. The administrative law judge also noted the opinion of Dr. Garcia that there is "some possibility" that claimant's pterygia was "made worse" by the chronic dryness and irritation encountered in Iraq. EX 5 at 1.[2] The administrative law judge found that claimant's working 13 hours a day and 7 days per week is equivalent to an environmental exposure accumulating over several years of normal work. Moreover, the administrative law judge rejected employer's contention that claimant's dry eye complaints are unrelated to his pterygia based on Dr. McMahon's opinion that dry eye syndrome is commonly associated with pterygia. EX 3 at 5. The administrative law judge concluded that the opinions of Drs. Abdullah and McMahon establish that claimant's pterygia was, at the least, aggravated or exacerbated by the environmental conditions associated with claimant's employment in Iraq. Decision and Order at 7.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *see also Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). In this case, there is no evidence that claimant was diagnosed with pterygia prior to commencing work in Iraq but in his pre-employment physical for employer on October 5, 2005, claimant checked a box that he had experienced blurring, tearing and redness, which he noted was caused by stress. EX 2 at 2. Claimant's eye examination at that time

[2] Dr. Garcia reviewed claimant's medical file at employer's request and opined that claimant's pterygia was not caused by his working conditions in Iraq.

was normal. *Id*. at 6. Employer produced no evidence contrary to claimant's testimony concerning his working conditions, and the reports of Drs. Abdullah and McMahon are substantial evidence linking claimant's pterygia, at least in part, to his working conditions in Iraq. *See Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999). As the administrative law judge's weighing of the evidence is rational, we affirm his conclusion claimant established that his pterygia is related to his employment in Iraq as it is supported by substantial evidence.[3] *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999).

Employer next challenges the administrative law judge's finding that claimant's eye condition is disabling inasmuch as there is no medical evidence that pterygia renders claimant unable to work, claimant experienced significant reduction of his dry eye symptomatology while on leave in Colorado, and he was able to obtain similar employment there as a gas tanker driver in May 2006. In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. *See, e.g., Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

In this case, the administrative law judge stated the relevant legal standard for establishing entitlement to total disability benefits, and he summarily found claimant entitled to compensation for temporary total disability until he obtained alternate employment in May 2006, at which time the administrative law judge found claimant entitled to compensation for temporary partial disability based on a loss of wage-earning capacity. Claimant's hearing testimony is uncontradicted that employer did not allow him to resume driving after his examination by Dr. Abdullah on December 7, 2005, on the basis that his eye condition jeopardized the safety of his co-workers. Tr. at 45-47, 66, 71, 80. Claimant testified that his eye condition was painful and affected his vision by causing swelling, redness, irritation, spots, and blurriness. *Id*. at 30-31. Claimant also testified that employer denied his request to have eye surgery in Kuwait, or to work light-duty until his next scheduled leave in February 2006. *Id*. at 70-71, 90-91. Instead, employer characterized claimant's eye condition as non work-related, sent claimant home on December 19, 2005, to receive treatment for his pterygia on leave-without-pay status, and he was ultimately discharged by employer because he did not timely receive treatment for his eye condition at his own expense. *See* Tr. at 53, 92-95; CX 7 at 3; EX 1 at 8-9. The record also establishes that claimant started working in Colorado as a gas tanker driver on May 22, 2006. CPX 1 at 3.

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[3] Accordingly, as claimant established that his bilateral pterygia is work-related, we reject employer's contention that claimant is not entitled to medical benefits to treat his eye condition. *See generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

Disability under the Act is an economic concept; the extent of disability cannot be measured by the medical condition alone. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Even a minor physical impairment can establish total disability if it prevents the employee from performing his usual employment. *Equitable Equip. Co. v. Hardy*, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977). Moreover, a claimant establishes an inability to perform his usual employment if claimant's job is no longer available to him after his injury. *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988). In this case, claimant's uncontradicted testimony establishes that employer refused to allow claimant to continue working in Iraq after December 19, 2005, due to his eye condition on the basis that it jeopardized the safety of his co-workers. Accordingly, claimant established his inability to return to his usual employment due to his injury notwithstanding the absence of medical evidence that this work was precluded.[4] *Id.*; *see also Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT); *Nguyen v. Ebbtide Fabricators, Inc.*, 19 BRBS 142 (1986). In the absence of any evidence of suitable alternate employment until claimant obtained work on May 22, 2006, we affirm the administrative law judge's finding that claimant was temporarily totally disabled from December 20, 2005, through May 21, 2006. As claimant's usual work was unavailable to him due to his work injury, employer is liable for the loss of wage-earning capacity claimant sustained due to his lower paying employment in Colorado. *See Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996). Therefore, we affirm the ongoing award of temporary partial disability benefits.

Finally, we reject employer's contention that claimant's compensation rate for his award of temporary total disability is $1,047.16, rather that $1,073.64. The former figure is the maximum compensation rate in effect under Section 6(b) for fiscal year 2005, when employer asserts claimant's injury arose.[5] Fiscal year 2005 was from October 1, 2004, to

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[4] That claimant did not undergo the recommended eye surgery is not, on the facts of this case, indicative of the absence of disability. Employer refused to pay for the surgery on the ground that claimant's condition was not work-related, and claimant did not want to pay the deductible and co-payment while he sought benefits under the Act. Decision and Order at 3.

[5] Section 6(b) provides in pertinent part:

> (b)(1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).
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> * * *
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> (3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine

September 30, 2005. Irrespective of the merit of employer's contention that claimant's eye injury arose prior to October 1, 2005, the applicable maximum rate is the one in effect when the disability commences, *i.e.*, the date benefits begin. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006). In this case, claimant's compensation for temporary total disability began on December 22, 2005. Thus, the administrative law judge properly found claimant's compensation subject to the maximum compensation rate in effect for fiscal year 2006 of $1,073.64.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Amending Decision and Order Awarding Benefits are 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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BETTY JEAN HALL
Administrative Appeals Judge

> the national average weekly wage of the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending September 30 of the next year….

33 U.S.C. §906(b).