BRB No. 09-0587

SUSAN CHIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 12/22/2009
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Lance G. Proctor, Westerly, Rhode Island, for claimant.

Conrad M. Cutcliffe (Cutcliffe Glavin & Archetto), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (06-LHC-1961, 1962, 1963) of Administrative Law Judge Thomas F. Phalen, Jr., 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 was an electrical worker who assembled electrical panels and boxes for installation on ships and submarines. She testified that she began experiencing numbness in her left arm from her shoulder to her fingers and that she had difficulty lifting the larger boxes. On September 22, 2005, claimant had difficulty with her vision and went to the dispensary. While at the dispensary, she reported the numbness in her left arm and stated that it had begun approximately one and a half months prior to this visit. The dispensary nurse advised claimant to go to the hospital to rule out the possibility of heart

problems. Claimant attempted to return to work the following Monday, but employer required her to pass an eye examination, which she failed. Claimant testified that employer stated that it would call her if a job became available which did not require acute eyesight, but claimant was not notified of any jobs and has not returned to work. She has subsequently been diagnosed with macular degeneration and cataracts. Claimant began treatment with Dr. Meyer for her left arm numbness in January 2006. He stated that the MRI performed in October 2005 showed mild central stenosis at C4-C5 with moderate to severe foraminal narrowing. Cl. Ex. 5; 7. He diagnosed cervical radiculitis with symptoms in the left arm. Claimant filed a notice of injury for her cervical complaints in May 2006, and sought temporary total disability benefits under the Act.

In his decision, the administrative law judge found that claimant suffers from a work-related aggravation of her degenerative disc disease at C4-5 and that claimant established a *prima facie* case of total disability. As employer did not present evidence of suitable alternate employment, the administrative law judge found that claimant is entitled to temporary total disability benefits under the Act.

On appeal, employer contends that the administrative law judge erred in failing to give determinative weight to the opinion of Dr. Nieto, and thus erred in finding that claimant suffers from continuing disability due to a work-related condition. Claimant responds, urging affirmance of the administrative law judge's decision. In addition, claimant's counsel requests an attorney's fee for work performed before the Board in the amount of $3,412.50, in defense of the administrative law judge's award of benefits.

Employer contends that the administrative law judge erred in finding that claimant suffers from a work-related disability. The administrative law judge applied Section 20(a) of the Act, 33 U.S.C. §920(a), to determine that claimant suffers a work-related aggravation of her degenerative disc disease. Specifically, the administrative law judge found that claimant's cervical stenosis with foraminal narrowing was asymptomatic until it was aggravated by repeated heavy lifting at work, resulting in left arm radiculpathy that restricts claimant's ability to lift. Decision and Order at 18.

The administrative law judge found that claimant established invocation of the Section 20(a) presumption that she has a work-related condition, based on her subjective complaints of numbness in her left arm and the medical records of Dr. Meyer and Dr. Olin, who opined that claimant's work exacerbated claimant's degenerative disc condition in her cervical spine causing it to become symptomatic. Cl. Exs. 5, 14; *see American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). The administrative law judge found that employer established rebuttal of the Section 20(a) presumption based on Dr. McLennan's opinion that claimant's foraminal stenosis and osteoarthritis was not aggravated, accelerated or exacerbated by her work. Emp. Ex.

24; *see generally Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). After weighing the evidence as a whole, the administrative law judge rationally credited the opinions of Drs. Meyer and Olin, as they are supported by claimant's testimony and the objective evidence of record. As these opinions constitute substantial evidence supporting the administrative law judge's finding that claimant sustained a work-related aggravation of her degenerative cervical disc condition which caused numbness in her left arm, it is affirmed. *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT).

Employer also contends that the administrative law judge erred in finding that claimant is disabled due to this work-related condition; rather, it contends, she cannot return to work due to her non work-related macular degeneration alone. Employer bases its contention on the opinion of Dr. Nieto, who treated claimant following her visit to the hospital in September 2005. Dr. Nieto stated that claimant reported episodes of paresthesis in her left arm which lasted a few seconds and would go away. Emp. Ex. 8-1. He released claimant to return to work with no restrictions. In October 2005, Dr. Nieto diagnosed claimant as possibly suffering from a seizure disorder and prescribed an anti-seizure medication. The anti-seizure medication was discontinued after an examination in December 2005, and Dr. Nieto reported that claimant was asymptomatic from a neurological standpoint. Emp. Ex. 8-2.

Claimant bears the burden of establishing that she is disabled due to her work-related injury. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In order to establish a *prima facie* case of total disability, claimant must establish that she is unable to perform her usual work due to the injury. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). In order to determine whether a claimant can return to her usual work, the administrative law judge must compare the claimant's medical restrictions due to the work injury with the physical requirements of the usual employment. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985).

The administrative law judge found that claimant cannot return to her usual work due to her left arm radiculpathy. The administrative law judge credited claimant's testimony that she had experienced numbness due to lifting for about a month and a half before September 22, 2005, and that the numbness had improved since she stopped working. Tr. at 41, 62. He also found claimant's testimony regarding her job requirements to be credible and uncontradicted by employer. Specifically, claimant stated that she was required to occasionally lift and move large electrical boxes weighing 30 to 40 pounds, and to move boxes weighing up to 20 pounds frequently. *Id.* at 31. The administrative law judge rejected Dr. McLennan's opinion that claimant is not disabled,

as the doctor admitted that "heavy wear and tear" would cause exacerbation of forminal stenosis over time and mistakenly believed that claimant worked with small wires most of the time. Emp. Ex. 24. In determining claimant's restrictions due to her work-related condition, the administrative law judge credited the opinions of Dr. Meyer and Olin. Dr. Meyer imposed a lifting restriction of no more than 20 pounds and recommended that claimant discontinue her former work. Cl. Ex. 5. Dr. Olin recommended restrictions on lifting or carrying over ten pounds and on repetitive bending, lifting or twisting. Cl. Ex. 13.

We reject employer's contention that the administrative law judge should have credited Dr. Nieto's 2005 opinion that claimant could return to work without restrictions. The administrative law judge noted that Dr. Nieto stated claimant's arm pain was due to "possible" sensory seizures, and the administrative law judge gave his opinion little weight on this basis, as he found her condition to be due to the aggravation of a degenerative cervical condition. Decision and Order at 21. 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, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *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). The administrative law judge found that three of the four physicians of record diagnosed claimant as suffering from degenerative changes in the neck with foraminal narrowing. Of these three, the administrative law judge credited the opinions of Dr. Meyer and Olin that claimant is unable to perform her former duties due to the work-related exacerbation of her degenerative disc disease.[1] As the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, they are affirmed. *Id.* Thus, we affirm the administrative law judge's finding that claimant established a *prima facie* case of total disability. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597 38 BRBS 60(CRT)(1st Cir. 2004). Moreover, as employer did not submit any evidence of suitable alternate employment, we affirm the administrative law judge's award of temporary total disability benefits.[2] *Care v. Washington Metro. Area Transit Authority*, 21 BRBS 248 (1988).

[1] That claimant is also disabled by non work-related macular degeneration is of no legal consequence. *See generally Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997).

[2] The administrative law judge found that none of the physicians opined that claimant has reached maximum medical improvement and that her impairment has not continued for a lengthy period of time. Thus, the administrative law judge concluded that

Counsel for claimant has submitted a petition for an attorney's fee seeking $3,412.50 for services performed before the Board in connection with the defense of employer's appeal to the Board. Employer has not filed objections to this fee request. As counsel successfully defended claimant's award against employer's appeal, and as the overall fee is reasonable and commensurate with the necessary work performed, we grant counsel a fee in the amount of $3,412.50. *See Lewis v. Todd Shipyards Corp*., 30 BRBS 154, 159 (1996); *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87, 89 (1996); 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed. Claimant's counsel is awarded an attorney's fee of $3,412.50 for work performed before the Board, to be paid directly to counsel by employer.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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claimant's disability is temporary. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).