BRB No. 13-0156

NEIL J. LaGRANGE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DIAMOND S. SERVICES, L.L.C.	)	DATE ISSUED: 12/23/2013
	)	
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.

Gregory S. Unger, Metairie, Louisiana, for claimant.

David K. Johnson (Johnson, Rahman & Thomas), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2012-LHC-00308) of Administrative Law Judge C. Richard Avery 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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 employed as a preventative maintenance supervisor to perform air conditioning maintenance on an offshore fixed platform. On May 16, 2009, he sustained injuries to his back, neck, and head in a work accident when he fell down stairs on the platform. He was airlifted to a hospital for treatment and was diagnosed with degenerative disc disease and other disc abnormalities, as well as a concussion, contusions, and lumbar and cervical strains. On July 31, 2009, Dr. Juneau, claimant's treating neurosurgeon, stated that surgery was not warranted for claimant's lumbar pain. Dr. Juneau subsequently opined that claimant sustained a cervical strain in the accident. The doctor stated on August 24, 2009, that claimant could return to his usual work or perform office/clerical work but could not work offshore. Employer offered claimant a modified job at his pre-injury rate of pay commencing September 14, 2009. Claimant did not take the job,[1] and employer terminated benefits as of September 14, 2009.[2] Claimant has not worked since his May 2009 accident.

On September 22, 2009, Dr. Juneau recommended that claimant remain off work in October and November 2009 due to his cervical myofascial/muscular strain injury.[3] He opined, however, that "by December of 2009 he should be ready to return to work in full capacity without restriction." CX 19 at 23. Claimant continued to experience pain and, in November 2009, he began treatment with Dr. Cupic. Dr. Cupic diagnosed cervical and lumbosacral strains. CX 21 at 4. He sent claimant for a lumbar discogram and CT scan, which showed abnormalities at L3-4, L4-5 and L5-S1. Due to the location of claimant's pain, Dr. Cupic determined that claimant required surgery at L5-S1, which he performed on July 23, 2010. *Id.* at 21. Dr. Cupic gave claimant permanent physical restrictions on June 15, 2011.[4] *Id.* at 39. Claimant filed a claim for disability benefits,

[1]Claimant alleges he had no knowledge of employer's job offer because his previous attorney never informed him of it.

[2]Employer voluntarily paid claimant temporary total disability benefits from May 17 to September 13, 2009, at a compensation rate of $675.07 per week, as well as $54,284.45 in medical benefits.

[3]Dr. Juneau stated that claimant's cervical discogram was essentially negative for disc problems at C3-4, C4-5, and C5-6. CX 29 at 23.

[4]In June 2011, Dr.Cupic prohibited claimant from: lifting more than 20 pounds; prolonged standing, stooping, squatting or sitting; repetitive climbing; staying in one position too long; and, repetitive looking up or reaching up above his head. Dr. Cupic, stated claimant will have restrictions into the future. CX 21; *see also* CX 25.

alleging he suffers disabling physical and psychological injuries.[5] Claimant also sought past and future medical benefits under Section 7 of the Act, 33 U.S.C. §907.

Prior to the formal hearing, the parties stipulated that claimant sustained back, neck, and head injuries in the May 2009 work accident. JX 1. The parties disputed the cause and extent of claimant's present condition, the amount of claimant's average weekly wage, and claimant's entitlement to past and future medical benefits. *Id.* The administrative law judge found there is sufficient evidence to support the parties' stipulations stating that claimant's current neck, back, and head injuries, including any cognitive and psychological symptoms, were caused by the May 2009 work injury. Alternatively, in the event claimant's psychological symptoms were perceived to be a separate injury, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption, relating those symptoms to claimant's work injury. He found that employer did not rebut the presumption and that, in any event, the weight of the evidence establishes that claimant suffers a compensable psychological injury. Decision and Order at 14-15.[6] The administrative law judge also found that neither claimant's physical nor psychological condition has reached maximum medical improvement and that he is totally disabled by his physical condition, as employer failed to establish the availability of suitable alternate employment after September 22, 2009.[7] The administrative law judge found, however, that claimant is not disabled by his psychological and cognitive symptoms and would benefit from returning to work within his assigned physical restrictions. *Id.* at 16-19.

Using Section 10(c) of the Act, 33 U.S.C. §910(c), the administrative law judge calculated claimant's average weekly wage as $989.05, based on the 26.3 weeks claimant actually performed work for employer as opposed to the 29 weeks he was on employer's payroll. Finally, regarding claimant's claim for medical benefits, the administrative law judge found that he is not entitled to be reimbursed for the treatment he procured on his own because he did not seek authorization to change physicians and because employer

[5]In November 2009, claimant consulted with a psychiatrist as he was experiencing problems with his memory, concentration, and information processing. CX 20. He was diagnosed at that time with a mild traumatic brain injury due to the concussion. *Id.*

[6]The administrative law judge found that several doctors diagnosed claimant with psychological symptoms and cognitive deficiencies related to both the concussion he sustained in the workplace accident and to the chronic pain he suffers from his physical injuries. Decision and Order at 15. None found claimant to be malingering.

[7]The administrative law judge found that employer's job offer constituted suitable alternate employment only from September 14 until September 22, 2009, as Dr. Juneau prohibited claimant from working in October and November 2009.

was unaware claimant was treating with new physicians. Therefore, the administrative law judge awarded past medical benefits for treatment received only from Drs. Schutte, Franklin, Juneau, and Strother, and from Lake Charles Memorial Hospital.[8] Nonetheless, the administrative law judge found that employer remains responsible for future necessary treatment of claimant's workplace neck, back, and head injuries, and the resulting psychological and cognitive symptoms. *Id.* at 20-21. Accordingly, the administrative law judge awarded claimant temporary total disability benefits for his physical injuries from May 16 to September 13, 2009, and continuing from September 22, 2009, based on an average weekly wage of $989.05, and certain medical benefits. 33 U.S.C. §§907, 908(b). Employer appeals the administrative law judge's decision. Claimant responds, urging affirmance.

Employer first contends the administrative law judge erred in finding that claimant's continuing physical symptoms, 2010 back surgery, and psychological symptoms are related to his work injuries. While employer stipulated that the May 2009 work accident caused physical injury to claimant's head, neck and back, employer contended below, as it does on appeal, that any problems claimant has had after September 2009 are not related to that work accident because claimant sustained only strains which healed, per Dr. Juneau. Thus, employer asserts claimant failed to establish a prima facie case relating his continuing medical conditions to his employment accident, and, alternatively, if the Section 20(a) presumption was properly invoked, it has been rebutted. We reject employer's contentions.

In order to be entitled to the benefit of the Section 20(a) presumption, a claimant must establish a harm and that an accident occurred or working conditions existed that could have caused the harm. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). The administrative law judge did not specifically address the cause of claimant's current physical injuries but we hold that any error in this regard is harmless. *See generally Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). There is no dispute that claimant fell down stairs at work and suffered head, neck, and back injuries. Medical reports and testimony of record provide substantial evidence to support application of the Section 20(a) presumption, as the doctors diagnosed back, neck, and head pain, disc abnormalities, depression, and post-concussive cognitive issues including those involving his memory, processing speed and anxiety. *See* CX 16-26. Contrary to employer's assertion that claimant suffered only "soft tissue" injuries to his back and neck, the medical records establish that claimant also was diagnosed with

[8]The administrative law judge denied claimant reimbursement for treatment by Drs. Pollock, Lilly, Blackburn, Roman, Cupic and Warner because claimant did not seek authorization from employer to treat with these doctors. Decision and Order at 21; *see* 33 U.S.C. §907(d).

degenerative disc disease that was aggravated by the fall,[9] disc protrusions and bulges, and marked narrowing and spurs, in addition to the lumbar and cervical strains. *See* CX 17-19. Thus, the administrative law judge properly invoked the Section 20(a) presumption relating claimant's continuing physical and psychological problems to his work accident, as they could have been caused or aggravated by his fall at work.[10] *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT). Employer did not present any evidence that claimant's continuing physical conditions are unrelated to the May 2009 work accident and, therefore, has not rebutted the Section 20(a) presumption in this regard. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). The administrative law judge properly concluded that claimant's continuing back and neck complaints are work-related. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002).

With regard to claimant's psychological and cognitive conditions, employer presented the opinion of Dr. Strother in rebuttal. Dr. Strother examined claimant in July 2012. After also reviewing the medical records, he concluded that claimant's initial injury resulted in a "mild uncomplicated TBI or concussion" that is not associated with "permanent brain damage or persistent neuropsychological deficits." EX 5. He stated that any neurocognitive symptoms claimant may have suffered from the work accident would have resolved within three months, and any symptoms thereafter are not related to brain damage from the work injury. However, Dr. Strother also found that claimant was not malingering and that he has some mood or emotional symptoms related to changes in his physical capacity due to the work accident, as well as some psychosocial symptoms due to non-work factors. *Id.* The administrative law judge found that this opinion is insufficient to rebut the Section 20(a) presumption. As Dr. Strother opined that claimant has some symptoms related to the work accident and some symptoms that could have been aggravated by the work accident, the administrative law judge properly found that Dr. Strother's opinion does not rebut the Section 20(a) presumption relating claimant's psychological and cognitive symptoms to his work injury. *Bunol*, 211 F.3d 294, 34 BRBS 29(CRT). In any event, the administrative law judge weighed the evidence as a whole, rendering harmless any error he may have made regarding rebuttal. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). Weighing the evidence as a whole, the administrative law judge rationally credited the opinions of the

[9]Prior to his work accident, claimant underwent successful lumbar surgery in 1995 caused by injury sustained in a motor vehicle accident. Dr. Juneau stated that claimant's work injury aggravated this pre-existing condition. CX 19; EX 1.

[10]Claimant need not establish that his harm actually was caused by the fall at work in order to be entitled to the Section 20(a) presumption. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

doctors who diagnosed claimant with psychological and cognitive deficits due to the concussion and chronic pain.[11] Decision and Order at 15; CX 20, 22; *see, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Therefore, we reject employer's assertion that claimant's psychological and cognitive problems are not related to his employment, and we affirm the administrative law judge's findings that claimant's continuing physical and psychological conditions are work-related. Accordingly, claimant is entitled to reasonable and necessary future medical benefits for these injuries.[12]

Employer next asserts that claimant is not disabled due to his work injuries and that the administrative law judge erred finding otherwise. In order to establish a prima facie case of total disability, a claimant must establish he cannot return to his usual work due to his work injury. If he does, the burden shifts to his employer to demonstrate the availability of suitable alternate employment. *P&M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Although Dr. Juneau released claimant to work in August 2009, he did not release claimant to return to his usual work offshore. After a re-evaluation of claimant on September 22, 2009, Dr. Juneau stated that claimant should remain off all work through November 2009, after which claimant could return to work without any restrictions. CX 19 at 23. The administrative law judge declined to credit this opinion because Dr. Juneau did not examine claimant after September 2009. Decision and Order at 18. Rather, claimant began treating with Dr. Cupic in November 2009, and no doctor who treated claimant thereafter for his physical conditions has released him to return to his usual work. The administrative law judge found that Dr. Cupic, who performed the back surgery in 2010, released claimant to return to work in June 2011 with physical restrictions which are incompatible with claimant's usual work. *See* n.4, *supra*. The administrative law judge found that employer did not offer any evidence of the availability of suitable alternate employment after claimant was released to work in 2011. As this finding is supported by substantial evidence and in accordance

[11]On November 4, 2009, and March 16, 2010, Dr. Blackburn, a psychiatrist, stated that claimant was depressed due to his physical pain. CX 20. Dr. Warner, a clinical psychologist, saw claimant monthly between January 2010 and May 2012. He diagnosed claimant with post-concussion injury, depression due to pain, and anxiety. CX 22.

[12]The administrative law judge correctly found, and claimant does not challenge, that claimant is not entitled to reimbursement for the expenses of past medical treatment provided by unauthorized physicians. Because the administrative law judge has found claimant entitled to future medical benefits, claimant must comply with Section 7 of the Act should he wish to be treated by doctors other than those authorized. 33 U.S.C. §907; *see Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57(CRT) (D.C. Cir. 1989).

with law, we affirm the administrative law judge's finding that claimant is totally disabled by his work-related physical ailments.[13] *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988). As employer does not dispute that claimant's conditions have not reached maximum medical improvement, we affirm the administrative law judge's finding that claimant is entitled to ongoing temporary total disability benefits.

Employer also challenges the administrative law judge's finding that claimant's average weekly wage is $989.05. Employer argues that the administrative law judge erred in using Section 10(c) of the Act, 33 U.S.C. §910(c), and should have applied Section 10(a), 33 U.S.C. §910(a), as 29 weeks constitutes substantially the whole of the year.[14] Employer contends that claimant worked for it for 29 weeks and that his earnings, $26,011.92, divided by 29 weeks equals an average weekly wage of $896.96 that sufficiently represents what claimant would have earned during 52 weeks. This is not a Section 10(a) calculation. *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989). Moreover, contrary to employer's assertion that Section 10(a) is the appropriate section to apply, there is no evidence in the record of the number of days claimant actually worked. Section 10(a) cannot be applied where there is insufficient evidence in the record from which an average daily wage can be calculated. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

[13]The administrative law judge found, based on the opinions of Drs. Warner, Pollack and Strother that claimant's psychological and cognitive symptoms do not prevent him from returning to some type of work and that claimant would benefit from a return to work. Decision and Order at 19; CX 22; CX 24; EX 5.

[14]Section 10(a) provides:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a).

Consequently, Section 10(c) applies.[15] The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's earning capacity at the time of the injury, and the administrative law judge is given broad discretion in making the calculation under this section. *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). In this case, the administrative law judge found that claimant, while on employer's payroll for 29 weeks, only worked and earned wages for 26.3 weeks. Therefore, he divided claimant's 26.3 weeks of earnings by 26.3 to arrive at an average weekly wage of $989.05. This calculation is reasonable and is affirmed. *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT).

[15]No party contends Section 10(b) is applicable. Section 10(c) states:

> If either of the foregoing methods [subsections (a) and (b)] of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c).

Accordingly, we affirm the administrative law judge's Decision and Order.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge