BRB No. 02-0362

KENNETH MATHIS, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LABOR READY	)	DATE ISSUED: Feb. 11, 2003
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Ben E. Clayton, Metairie, Louisiana, for claimant.

John J. Rabalais and Janice B. Unland (Rabalais, Unland & Lorio), Covington, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-LHC-0364) of Administrative Law Judge Larry W. Price 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 alleged that he sustained a lower back injury on May 3, 1999, during

the course of his employment for employer. Claimant underwent treatment with Dr. Nutik who released claimant to return to work on June 15, 1999. Employer provided claimant with a modified duty position from June 21 to 23, 1999, when claimant stopped working. He has not returned to work due to alleged back and neck pain. Claimant also alleged genitourinary symptoms and psychiatric problems related to his back injury. Claimant began treating with Dr. Phillips on July 15, 1999. Dr. Phillips considers claimant a candidate for back surgery, and he also recommended urological and psychiatric evaluations. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from May 3, 1999, to April 27, 2000. Employer terminated compensation based on a surveillance videotape of claimant.

In his decision, the administrative law judge credited the opinions of Drs. Nutik, Applebaum, and Moss, to find that claimant injured his back on May 3, 1999. With regard to the claim of a psychological injury, the administrative law judge determined that claimant did not establish a *prima facie* case sufficient to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), because he found that claimant failed to show either that he has a psychological disorder or that working conditions existed that could have caused such a harm. Alternatively, the administrative law judge found that employer rebutted the presumption, and that, based on the record as a whole, claimant does not have any psychiatric problems resulting from his May 3, 1999, work injury. Regarding claimant's genitourinary problems, the administrative law judge applied the Section 20(a) presumption and found that claimant's alleged symptoms are not related to his May 3, 1999, work injury. The administrative law judge found that claimant is unable to return to his usual employment due to his back injury, but that employer's modified duty position, which claimant performed from June 21 to 23, 1999, established the availability of suitable alternate employment. The administrative law judge denied claimant's request for back surgery, pain management, a urological evaluation, and psychiatric evaluation and treatment. The administrative law judge denied employer's contention under Section 31(a), 33 U.S.C. §931(a), that claimant committed fraud to obtain compensation, or made material misrepresentations sufficient to warrant referral of the complaint to the local United States district attorney's office. The administrative law judge awarded claimant compensation for temporary total disability from May 3 to June 20, 1999.

On appeal, claimant challenges the administrative law judge's denial of evaluation and treatment for his allegedly work-related psychological and genitourinary conditions and for pain management evaluation and treatment. Claimant also challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Employer responds, urging affirmance.

Claimant argues that he had a pre-existing psychological condition that was aggravated by the May 3, 1999, back injury. Although claimant specifically does not challenge the administrative law judge's finding that claimant magnifies the extent of his back pain, he argues that this symptom magnification is due to the aggravation by the work injury of a pre-existing psychological disability. The administrative law judge found claimant did not establish a *prima facie* case that he has a work-related psychological disorder. The administrative law judge reasoned that none of the doctors in the case specializes in psychology, and that claimant's testimony of depression and psychological difficulties and Dr. Phillips's recommendation that claimant undergo psychiatric evaluation, is insufficient evidence to establish a *prima facie* case of an undefined psychological disorder. Decision and Order at 24. The administrative law judge also summarily found that claimant failed to establish working conditions that could have caused a psychological disorder. Assuming, *arguendo*, invocation of the Section 20(a) presumption, the administrative law judge found that employer established rebuttal of the presumption. The administrative law judge credited the observations of symptom magnification by Drs. Nutik, Applebaum, and Moss. The administrative law judge also credited the deposition testimony of Dr. Applebaum, a neurologist, that claimant does not require a psychological evaluation. Finally, the administrative law judge credited the June 2001 Psycho-Social Assessment by Alicia Sloan of the Veteran's Administration hospital in New Orleans (the VA), which noted claimant's May 1999 work injury but did not address whether it was related to claimant's emotional problems. The administrative law judge concluded by finding, based on the record as a whole, that claimant does not suffer from any psychiatric problems resulting from the May 3, 1999, work accident.

We cannot affirm the administrative law judge's finding that claimant does not have a work-related psychological condition. Specifically, the administrative law judge erred in finding that claimant did not establish a *prima facie* case sufficient to invoke the Section 20(a) presumption, and we cannot affirm the administrative law judge's finding that employer established rebuttal of the presumption. The aggravation rule provides that employer is liable for the totality of the claimant's disability if the work injury aggravates a pre-existing condition. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982). In order to establish his *prima facie* case, claimant is not required to

[1]It is well-settled that a psychological impairment related to employment is compensable under the Act, *Sanders v. Alabama Dry Dock & Shipbuilding Co.,* 22 BRBS 340 (1989), and that the Section 20(a), 33 U.S.C. §920(a), presumption is applicable in psychological injury cases. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 384 n.2 (1990).

affirmatively prove that his work injury in fact caused or aggravated the harm; rather, claimant need only establish that the work injury could have caused or aggravated the harm alleged. *See Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). It is well-established that claimant's theory as to how the injury arose must go beyond "mere fancy." *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982; *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Conoco , Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied*, 528 U.S. 1187 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge then must weigh all the evidence and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Initially, we hold that claimant is entitled to the Section 20(a) presumption linking his alleged psychological disability to the May 3, 1999, work injury. The record contains evidence of a psychological harm. Claimant was admitted to the VA hospital for in-patient drug and alcohol rehabilitation prior to his work injury. Tr. at 23-25; EXS 2 at 56-63; 10 at 22. Claimant also testified and the record indicates that he asked for psychiatric treatment for anger from the VA in June 1998, and that he received psychiatric therapy at the VA in October and December 1998. Tr. at 133; EX 10 at 36-37. In May 2001, Dr. Larry Pardue, a staff psychiatrist with the VA, diagnosed claimant as having major depression with psychotic features. EX 10 at 26-29. This diagnosis is sufficient to establish a psychological harm. *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon.,* 32 BRBS 224 (1998). The administrative law judge also found that claimant sustained a back injury on May 3, 1999, and there is medical evidence of record that claimant needs a psychological evaluation to determine the cause of his continuing complaints of pain. Accordingly,

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[2]Dr. Moss recommended a pain management evaluation to determine whether psychological problems were leading to exaggerated physical complaints. EX 5 at 48, 59-60. Dr. Phillips opined that claimant needs a psychiatric evaluation to determine if claimant is a drug addict, and is experiencing a conversion reaction or is only magnifying his symptoms purposefully. CX 5 at 12. A conversion reaction is a psychological condition whereby emotional difficulties are expressed as physical symptoms. AMERICAN HANDBOOK OF PSYCHIATRY, vol. 4, at 58-59 (2d ed.1974). Thus, contrary to the administrative law judge's finding, Dr. Phillips's recommendation is not necessarily inconsistent with a finding that claimant's condition is work-related. Moreover, the absence of an opinion from a specialist in psychiatry cannot be used to prevent invocation of the Section 20(a) presumption, as claimant need not, in fact, demonstrate the existence of an actual causal relationship

claimant has established the "accident" element of his *prima facie* case. *Welch*, 23 BRBS at 401; *see also Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). Thus, we hold that claimant has established his *prima facie* case entitling him to invocation of the Section 20(a) presumption as he established the existence of a psychological harm that could have been aggravated by the work injury. *See generally Champion,* 690 F.2d at 295.

We also cannot affirm the administrative law judge's finding that, assuming *arguendo*, invocation of the presumption, employer produced substantial evidence to rebut the presumption. Initially, we note that there is no medical opinion of record stating that claimant's alleged psychological injury was not caused or aggravated by the May 3, 1999, work accident. *See Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *see also Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). Moreover, the administrative law judge's finding of rebuttal, based on negative inferences, cannot stand. The fact that the VA psycho-social assessment of June 2001 does not link claimant's psychological condition to his work injury cannot rebut the Section 20(a) presumption as a matter of law. *See Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). Furthermore, the fact that Dr. Moss recommended a pain management evaluation, instead of a psychological evaluation cannot rebut the Section 20(a) presumption as Dr. Moss recommended the evaluation because he opined that any problems claimant is having may be psychological. EX 5 at 2, 39, 48; *see Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). Similarly, that Dr. Applebaum stated that claimant does not need a psychological assessment does not rebut the Section 20(a) presumption because it does not constitute substantial evidence of the absence of a connection between claimant's work injury and his psychological condition. *See generally Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

We therefore vacate the administrative law judge's finding that claimant does not have a work-related psychological condition, as well as the denial of claimant's requests for psychological and pain management evaluations and treatment. On remand, the administrative law judge must reconsider whether claimant's psychological condition is related to his work injury, affording claimant the Section 20(a) presumption and applying the aggravation rule and allocating to employer the burden of producing substantial evidence that claimant's condition was not caused

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at this stage. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

[3]The VA assessment concluded that claimant's reported symptoms of depression, paranoia, and hearing voices are similar to Post-Traumatic Stress Disorder (PTSD), and it concurred with Dr. Pardue's diagnosis, in May 1991, of major depression with psychotic features. EX 10 at 23. The administrative law judge noted claimant's testimony that he was subsequently diagnosed as not having PTSD. Decision and Order at 23; *see* Tr. at 137.

or aggravated by his work injury. *See generally Lennon v. Waterfront Transport,* 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994). Should the administrative law judge find a causal relationship between claimant's psychological condition and his work injury, he must address claimant's claim, pursuant to Section 7 of the Act, 33 U.S.C. §907, for psychological and pain management evaluation and treatment.

We next address claimant's contention the administrative law judge erred in finding that claimant's genitourinary condition is not related to the May 3, 1999, work injury. The administrative law judge found claimant entitled to the Section 20(a) presumption, and that the opinions of Drs. Nutik, Applebaum, and Moss are sufficient to rebut the presumption. These doctors opined that any genitourinary problems claimant may have are not related to claimant's back injury. EXS 3 at 36-37; 4 at 41; 5 at 37. The administrative law judge also credited their testimony to find, based on the record as a whole, that claimant's genitourinary problems are not related to the May 3, 1999, work injury, and that employer is not liable for medical treatment for this condition. As the administrative law judge's finding is supported by substantial evidence, *see*, *e.g.*, *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1998), and as claimant has failed to demonstrate any error made by the administrative law judge in his evaluation of the medical evidence on this issue, the administrative law judge's denial of medical treatment for claimant's genitourinary condition is affirmed. *See Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Rochester v. George Washington University*, 30 BRBS 233 (1997).

Finally, we address claimant's challenge to the administrative law judge's finding that the modified duty job employer provided claimant from June 21-23, 1999, established the availability of suitable alternate employment. Specifically, claimant contends that, pending a psychiatric evaluation, employer failed to establish the availability of suitable alternate employment because claimant may have been unable to continue working after June 23, 1999, due to his psychiatric disability, which causes him to magnify his back symptomatology. Where, as in the instant case, it is uncontested that claimant is unable to perform his usual employment duties as a day laborer, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience and physical or psychological restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can satisfy this burden by providing at its facility a job suitable for claimant. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). In addressing employer's job offer, the administrative law judge must compare claimant's restrictions and vocational factors with the requirements of the position provided by employer in order to determine whether employer has met its burden. *See generally Ledet v. Phillips Petroleum Co.*, 163 F.2d 901, 32 BRBS 212(CRT) (5th Cir. 1999).

In this case, the administrative law judge credited a surveillance videotape of claimant, his observations of claimant at the hearing, and the notes by Drs. Nutik,

Applebaum, and Moss to find that claimant's credibility is "suspect" and that his subjective reports of pain have been "less than honest." Decision and Order at 26. Claimant's job duties for employer from June 21-23, 1999, entailed cleaning boots and goggles, stuffing envelopes and separating papers. Tr. at 64, 107. The administrative law judge credited the medical observations of symptom magnification and the surveillance video to find that claimant was exaggerating his symptoms, and the medical opinions that claimant can perform, at least, sedentary work. EXS 3 at 26-27, 36; 4 at 11, 13-14, 16-20, 41-42; 5 at 12-17, 26, 80; 17. The administrative law judge also credited the objective medical tests of record and the opinion of Dr. Nutik, who examined claimant immediately before and after claimant's three days of modified work for employer, that the position was suitable. EX 4 at 19-24; CX 4. Accordingly, the administrative law judge concluded that the job employer provided claimant from June 21-23, 1999, established the availability of suitable alternate employment.

In adjudicating a claim, it is well-established that the administrative law judge is entitled to weigh the evidence, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In the instant case, we hold that the administrative law judge's decision to rely on the opinions of Drs. Nutik, Applebaum, and Moss, the diagnostic test results, the surveillance videotape of claimant, and his observations of claimant at the hearing is rational and supported by substantial evidence. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir.1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, there is no evidence in the current record of a psychological disability that would have prevented claimant from continuing to perform the modified duty job provided by employer commencing June 21, 1999. Accordingly, we affirm the finding that employer established suitable alternate employment. *Arnold v. Nabors Offshore Drilling, Inc.,* 35 BRBS 9 (2001), *aff'd mem*., 32 Fed. Appx. 126 (5th Cir. 2002) (table).

Accordingly, we vacate the administrative law judge's finding that claimant does not have a work-related psychological disorder, and we remand the case for further consideration of this issue consistent with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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[4]As we affirm the administrative law judge's crediting of the actual job employer provided claimant, we need not address claimant's challenge to employer's additional evidence of suitable alternate employment. If claimant obtains evidence of a work-related psychological condition that renders employer's job unsuitable, claimant may move for modification pursuant to Section 22 of the Act, 33 U.S.C. §922.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge