BRB No. 08-0821

R.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 02/24/2009
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

R.B., Gautier, Mississippi, *pro se*.

Paul B. Howell (Franke & Salloum, P.L.L.C.), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant, without legal representation, appeals the Decision and Order (2007-LHC-0806) 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.* (the Act). In an appeal by a claimant, without the assistance of counsel, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law 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). If they are, they must be affirmed.

Claimant was injured while working for employer on March 9, 2006. She was running cable and fell backwards from the second step of a ladder, landing on her back. She was diagnosed with a contusion and given pain medication. She returned to work in

a light-duty capacity on August 27, 2006. After one month, employer's light-duty work ceased to be available. Claimant has not returned to work. Employer voluntarily paid temporary total disability benefits from the date of injury until August 27, 2006, and it has paid all medical bills except for medications prescribed within four months of the date of the hearing. Claimant filed a claim for continuing benefits, alleging she injured her shoulder in the work accident and remains disabled by all her injuries.

The administrative law judge determined that claimant established a *prima facie* case with regard to her shoulder injury. However, he also found that employer rebutted the Section 20(a), 33 U.S.C. §920(a), presumption that the shoulder injury is work-related, and, on the record as a whole, he found that claimant's shoulder was not injured as a result of the work accident on March 9, 2006. Decision and Order at 13. Additionally, the administrative law judge found that claimant was able to return to her usual work as of the date her back and neck condition reached maximum medical improvement, August 27, 2006. *Id.* at 16. He also found that claimant's average weekly wage was $523.81 and that employer is not liable for the prescriptions for which it had declined to pay. *Id.* at 19. Claimant appeals this decision without representation by counsel, and employer responds, urging the Board to affirm the administrative law judge's decision.

We affirm the administrative law judge's finding that claimant's shoulder injury is not work-related as substantial evidence of record supports this finding. In determining whether an injury is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after she establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that she sustained a harm or pain and that conditions existed or an accident occurred at her place of employment which could have caused the harm or pain. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the disabling injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge found that claimant invoked the Section 20(a) presumption linking her shoulder injury to her March 2006 fall; however, he also found that employer rebutted the presumption and that the record as a whole supported the conclusion that the shoulder injury is not work-related. Dr. Zarzour, claimant's treating orthopedist, testified that claimant first mentioned shoulder pain to him in August 2007, nearly one and one-half years after the accident, and he concluded it is not related to the work incident. Emp. Ex. 23 at 28-29. This unequivocal opinion of Dr. Zarzour is sufficient to rebut the Section 20(a) presumption, and we affirm the finding that employer established rebuttal. *See Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995) (Decision on Recon.); *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). In addition to Dr. Zarzour's testimony, the administrative law judge noted that claimant denied shoulder pain when she was rushed to the hospital following the fall. Emp. Ex. 15.[1] Although he acknowledged that claimant mentioned shoulder pain to Dr. McCloskey, employer's expert, and Ms. Bosarge, the physical therapist, in January 2007, the administrative law judge found that neither of them was treating claimant's condition. Decision and Order at 13. As the record as a whole supports the administrative law judge's finding that claimant's shoulder condition is not work-related, we affirm it. *See generally Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Next, claimant contends she is entitled to permanent total disability benefits following the termination of her light-duty work until October 30, 2006, when employer submitted evidence of suitable alternate employment, and that she is entitled to permanent partial disability benefits thereafter. We reject this contention. In order to establish a *prima facie* case of total disability, a claimant must establish that she cannot return to her usual work. *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984). If she does so, the burden shifts to the employer to demonstrate the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In this case, the administrative law judge found that claimant could return to her usual work as of the date her condition reached maximum medical improvement. In August 2006, claimant was examined by Dr. Dempsey, whom she asked to see for a second opinion. Dr. Dempsey concluded that claimant's complaints of back and neck pain were not supported by the physical examination and that she could return to work without restrictions. Cl. Ex. 7. In February 2007, claimant was examined by Dr.

[1]The October 2006 claim for compensation and the January 2007 pre-hearing form also do not mention a shoulder condition. Emp. Exs. 8, 11.

Petersen at employer's request. Dr. Petersen determined that claimant demonstrated inappropriate reactions during the physical exam and that she was not suffering from any anatomical impairment. He stated that she could return to her usual work without restrictions, and that she should discontinue narcotic medications. Emp. Ex. 20. Significantly, the administrative law judge found that Dr. Zarzour, who had relied upon claimant's representations to him to direct her course of treatment and impose work restrictions had altered his opinion after reviewing her records prior to his deposition and concluding that there were numerous inconsistencies which led him to doubt her veracity. Emp. Ex. 23 at 36. Dr. Zarzour stated that there were no objective findings to substantiate claimant's complaints and that she should have shown some improvement over time. In conjunction with the opinions of Drs. Dempsey and Petersen, and the unusable functional capacity evaluation, Dr. Zarzour concluded that claimant was magnifying her symptoms, and he rescinded his restrictions, stating that claimant could return to work without limitations. Emp. Ex. 23 at 35-36, 42, 45, 48. Substantial evidence supports the administrative law judge's finding that claimant was capable of returning to her usual work and that she could do so as of the date of maximum medical improvement. Although Dr. Zarzour released claimant to return only to light-duty work on August 23, 2006, the administrative law judge found that Dr. Zarzour rescinded those restrictions upon further reflection on claimant's case and that this rescission is supported by Dr. Dempsey's finding of no disability as of August 16, 2006. Decision and Order at 16 n.11. Thus, as substantial evidence supports the conclusion that claimant could return to her usual work, we affirm the administrative law judge's finding that claimant was not disabled after August 27, 2006, when she returned to light-duty work. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998); *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1448 (9th Cir. 1990).

Claimant also contends the administrative law judge erred in calculating her average weekly wage in that her annual wages should have been divided by 44 to account for weeks she did not work following Hurricane Katrina. When an employee works substantially the whole of the year, the Act requires application of Section 10(a) in calculating average weekly wage unless such application would be unreasonable or unfair or if the facts necessary for application of Section 10(a) are not available. 33 U.S.C. §910(a),[2] (c);[3] *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT)

[2]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

(5th Cir. 1996); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981). The parties here agreed that claimant worked substantially the whole of the year and that the administrative law judge should use Section 10(a) to calculate average weekly wage. *See SGS Control Serv.*, 86 F.3d 438, 30 BRBS 57(CRT). However, in order to use Section 10(a), the claimant must be a five- or six-day per week worker, and the administrative law judge must determine the claimant's average daily wage, multiply that number by 260 or 300, and then divide the result by 52.[4] *See Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd in pert. part and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), and *aff'd and rev'd on other grounds*, No. 02-81207, 2004 WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), *cert. denied*, 544 U.S. 960 (2005); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006). In order to properly utilize Section 10(a), the record must contain evidence concerning the number of days the claimant worked during the year preceding her injury.

In this case, claimant testified that she worked four 10-hour days per week, and employer presented evidence reporting claimant's wages on a weekly basis. The administrative law judge, however, made no findings regarding the number of days claimant worked and did not use a true Section 10(a) calculation. Decision and Order at 18; Emp. Exs. 5, 22 at 19; n.2, *supra*. Because Section 10(a) applies to five- and six-day workers, it cannot be applied here. 33 U.S.C. §910(a); *see generally Proffitt*, 40 BRBS 41. The administrative law judge's average weekly wage finding may, nevertheless, be affirmed by applying Section 10(c) instead.

Section 10(c) gives the administrative law judge broad discretion to determine a claimant's average weekly wage when Section 10(a) or 10(b), 33 U.S.C. §910(a), (b), cannot be used. *See Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). The evidence establishes that claimant earned $25,143.05 between

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> 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.

[3]Section 10(c) provides:

> If either of the foregoing methods 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 . . . shall reasonably represent the annual earning capacity of the injured employee.

[4]Section 10(d)(1), 33 U.S.C. §910(d)(1), provides: "The average weekly wages of an employee shall be one fifty second part of his average annual earnings."

March 13, 2005, and March 5, 2006, and that she was off work for six weeks following the hurricane. Emp. Ex. 5. Although employer's facility was closed following the storm and its employees could not work, claimant testified that she remained off work additional time for personal reasons even after having been called to duty. Tr. at 40. Accordingly, the administrative law judge rejected claimant's suggestion that her average weekly wage be computed by dividing her annual earnings by 44. Rather, because work was available but claimant declined to return for personal reasons, he included those weeks in the calculation and divided her earnings by 48 to arrive at an average weekly wage of $523.81. This computation is rational and is affirmed. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Browder*, 24 BRBS 216.

Finally, claimant asserts that she is entitled to be reimbursed for prescription costs denied by employer prior to the hearing. Section 7 of the Act, 33 U.S.C. §907, authorizes coverage of medical expenses for the reasonable and necessary treatment of a claimant's work-related injury.[5] The claimant has the burden of establishing the elements of a claim for medical benefits. *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996). In this case, the administrative law judge reasonably concluded that the prescriptions at issue were neither necessary nor reasonable, as Dr. Petersen stated that claimant no longer needed medication, Dr. Zarzour rescinded his prior opinion regarding claimant's condition and Dr. Dempsey stated that there was nothing objectively wrong with claimant. *See, e.g., Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995). As claimant did not establish either the reasonableness or the necessity of the prescriptions, we affirm the administrative law judge's denial of reimbursement therefor.

[5]Section 7(a) of the Act, 33 U.S.C. §907(a), states:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

Accordingly, the administrative law judge's Decision and Order is 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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REGINA C. McGRANERY
Administrative Appeals Judge