BRB No. 05-0387

DEBORAH S. WILSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WASHINGTON GROUP INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 01/11/2006
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

E. Paul Gibson (Riesen Law Firm, L.L.P.), Charleston, South Carolina, for claimant.

Kurt A. Gronau (Law Office of Kurt A. Gronau), Honolulu, Hawaii, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2004-LHC-1096, 2004-LHC-1097) of Administrative Law Judge Richard E. Huddleston 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). 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 worked for employer on Johnston Atoll, which is located approximately 800 miles southwest of Hawaii. Claimant was promoted to travel administrator by employer in April 1995. As travel administrator, claimant oversaw the scheduling of chartered flights on and off the island. Prior to starting work on the Atoll, claimant underwent two medical examinations which did not detect any physical or mental problems.

Claimant testified that in 1989, before she started working for employer, she had an intestinal condition, which was successfully treated with antibiotics. In early June 1996, while working on the Atoll, claimant developed a recurrence of her intestinal condition. Tr. at 40, 47; CX 1; CX 13. Claimant's condition deteriorated, and ultimately, she was flown to Honolulu on June 9, 1996, where Dr. Cheung performed surgery. Tr. at 49. After recuperating for several days, claimant returned to her home in South Carolina where she remained for three months. Following her medical release to return to Johnston Atoll in September 1996, claimant returned to the Atoll and resumed her prior employment duties with employer. Tr. at 65-66

Claimant testified that her health problems resumed immediately upon her return to work. Tr. at 51-52. In October 1997, Dr. Cheung again performed surgery, but upon her return to work after recuperating for a week, her condition persisted. Claimant has since undergone five additional surgeries related to her ongoing condition. The administrative law judge credited claimant's testimony that her condition has left her afraid to go out in public and she has been diagnosed with depression. CX 29. As a result of her ongoing physical and psychological conditions, claimant sought continuing permanent total disability benefits under the Act, commencing January 10, 2001. CX 43.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, and that employer failed to rebut that presumption; accordingly, the administrative law judge found a causal relationship established between claimant's employment and her present physical and psychological conditions. The administrative law judge further found that claimant's condition is permanent in nature, and he concluded that claimant is totally disabled. Accordingly, the administrative law judge awarded claimant continuing permanent total disability benefits, at the maximum weekly compensation rate of $933.83, beginning on January 10, 2001, as well as medical benefits under the Act. 33 U.S.C. §§908(a), 907.

On appeal, employer challenges the administrative law judge's findings regarding causation. Specifically, employer contends that the administrative law judge erred in finding that claimant established a harm and the existence of working conditions which could have caused that harm. Alternatively, employer challenges the administrative law judge's findings regarding the nature and extent of any work-related disability sustained

by claimant. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

We first address employer's argument regarding causation. In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that she sustained a harm and that an accident occurred or working conditions existed which could have caused the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). Once claimant has established her *prima facie* case, she is entitled to invocation of the Section 20(a) presumption linking her harm to her employment. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by her employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *O'Kelley*, 34 BRBS at 41; *see Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). If employer establishes rebuttal of the presumption, the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole. *See 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).

Initially, employer contends that claimant did not sustain a harm as defined by the Act. Employer avers that claimant's claim is based on a condition which first appeared in 1989, is therefore not work-related and, pursuant to the decision of the United States Supreme Court in *U.S. Industries*, 455 U.S. 608, 14 BRBS 631, cannot qualify as a harm for the purpose of invocation. Employer's contention is without merit. For purposes of establishing the first element of her *prima facie* case, a harm has been defined as when "something unexpectedly goes wrong within the human frame." *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968)(*en banc*); *see Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). In finding that claimant established the harm element of her *prima facie* case, the administrative law judge relied on not only claimant's pre-existing condition, but also on the worsening of claimant's condition after claimant began working on the Atoll. Decision and Order at 13. In fact, all the medical reports recognized that something had "gone wrong" within claimant's body, and employer does not dispute the existence of claimant's multiple symptoms. EX 22 at 28; EX 23. Thus, claimant has established the existence of multiple harms under the Act for purposes of establishing the first element of her *prima facie* case.

Contrary to employer's contention on appeal, the decision in *U.S. Industries*, 455 U.S. 608, 14 BRBS 631, does not support reversal of the administrative law judge's finding on this issue. In *U.S. Industries*, the Court stated that "A prima facie 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." 455 U.S. at 615, 14 BRBS at 633. Thus, proof that "something has gone wrong within the human frame," which demonstrates the existence of physical impairment, is insufficient alone to invoke Section 20(a), as claimant must also demonstrate the existence of employment conditions sufficient to bring the claim within the course of employment. Accordingly, consistent with *U.S. Industries*, claimant must prove *both* a harm, or physical impairment, and the occurrence of an accident or the existence of working conditions which could have caused it. Since the administrative law judge did not invoke Section 20(a) based solely upon proof of a harm, his decision is not inconsistent with *U.S. Industries.* In this case, moreover, claimant's claim complies with *U.S. Industries,* as employer concedes that her claim for compensation under the Act posits that her present medical conditions arose as a result of her employment with employer on the Atoll. *See* Employer's Pre-Hearing Statement dated February 4, 2004. Claimant thus filed a claim for an injury arising out of and in the course of employment. Employer's emphasis on the fact that claimant's condition existed prior to the commencement of her employment with employer is misplaced. Under the aggravation rule, where an injury at work aggravates, accelerates or combines with a pre-existing condition, the entire resulting condition is compensable. *Strachan Shipping Co.*, 782 F.2d 513, 18 BRBS 45(CRT); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). Thus, proof that a condition pre-existed employment is insufficient alone to defeat a claim. Moreover, claimant has established, and the record supports, the occurrence of multiple symptoms that claimant experienced after she commenced employment with employer on the Atoll. We therefore affirm the administrative law judge's finding that claimant established the "harm" element of her *prima facie* case.

Employer next contends that the administrative law judge's finding that working conditions existed on Johnston Atoll which could have caused claimant's conditions is based on "mere fancy." We disagree. In establishing this element of her *prima facie* case, claimant is not required to prove that her work-related activities did, in fact, cause her harm, but she must show only that working conditions existed which *could have* caused or aggravated the harm. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2001); *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). In finding that claimant established the second element of her *prima facie* case, the administrative law judge credited claimant's testimony that she had little choice of where and what to eat while working for employer on the Atoll, and that her diet was responsible for her gastrointestinal problems. Decision and Order at 12-13. The administrative law judge also found that the opinions of Drs. Lahr and Morrison establish

that the condition which required the surgeries have been caused by the residual effects of the symptoms claimant experienced on the Atoll, EX 22; EX 23, and that the additional physical and psychological problems from which claimant currently suffers is due to the results of the surgeries. Decision and Order at 14. It is well established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 371 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Accordingly, an administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978) *cert. denied*, 440 U.S. 911 (1979). In the instant case, the administrative law judge concluded that claimant established the existence of working conditions, specifically the living and dining conditions present on the Atoll, which could have caused the harms from which she now suffers.[1] On the basis of the record, the administrative law judge's decision to rely upon the testimony of claimant is neither inherently incredible nor patently unreasonable. Accordingly, we affirm the administrative law judge's finding that claimant established the second prong of her *prima facie* case, and his consequent invocation of the Section 20(a) presumption. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). As employer does not challenge the finding that it did

[1]Employer further argues that the administrative law judge erred in applying the "zone of special danger" to this case. The doctrine of the "zone of special danger" applies in Defense Base Act cases, including the present case, expanding the reach of the Act so that it is not necessary that the employee be engaged at the time of injury in an activity that benefits employer. The doctrine developed because employees in locales covered by the Defense Base Act are subjected to unusual risks, working as they often do in the farthest reaches of the globe, and thus "employer can be said to create a zone of special danger by employing the employee in a foreign country." *Ilaszczat v. Kalama Services*, 36 BRBS 78 (2002), *aff'd sub. nom Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir.), *cert. denied*, 125 S.Ct. 36 (2004). All that is required is that the "obligations or conditions of employment create a zone of special danger out of which the injury arose." *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951); *see O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). Employer's argument that the administrative law judge erred in applying the "zone of special danger" to this case is without merit, as the administrative law judge's inclusion of claimant's living and eating conditions in her "working conditions" in this case is rational and accords with law. *See O'Leary*, 340 U.S. at 507.

not rebut the presumption, his conclusion that claimant's physical and psychological conditions are work-related is affirmed.

Employer next challenges the administrative law judge's finding that claimant is permanently disabled. In support of its position, employer avers that the administrative law judge erred in failing to credit the report of Dr. Thrasher, a psychiatrist who evaluated claimant on February 13, 2003, and stated that claimant has not yet reached maximum medical improvement since claimant is still suffering from depression secondary to her physical problems. Tr. at 23; CX 29. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

In concluding that claimant has reached maximum medical improvement, the administrative law judge relied upon the opinion of Dr. Brabham, a counseling psychologist and rehabilitation counselor, that despite various attempts to treat claimant, her physical problems, the cause of her depression, have not improved and he is not optimistic about future improvement.[2] Tr. at 87. The administrative law judge stated that he found Dr. Brabham's rationale convincing, as claimant has undergone treatment for her physical problems since 1996, yet continues to suffer from a chronic condition, and her depression is linked to her physical ailments. Additionally, the administrative law judge found that Dr. Thrasher conceded that Dr. Brabham's evaluation of claimant was more recent than his own, and that events may have transpired which could change his opinion. Tr. at 27. We hold that the administrative law judge rationally found that Dr. Brabham's opinion constitutes substantial evidence that claimant's condition is permanent and, therefore, we affirm the administrative law judge's finding on this issue. *See generally Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989); *Leone v. Sealand Terminals Corp.*, 19 BRBS 100 (1986).

Employer lastly argues that the administrative law judge erred in finding claimant totally disabled. In addressing this issue, employer asserts that claimant is only 51 years old and has no health problems other than the conditions at issue here, and that the

[2] In this regard, Dr. Brabham opined that, because of claimant's particular physical problem, claimant cannot be treated with conventional means such as participating in activities and volunteer efforts. Tr. at 73-91.

administrative law judge did not address the suitability of the jobs identified in the labor market survey prepared by its vocational expert.

Where, as in this case, claimant is incapable of resuming her usual employment duties with her employer as a result of her work-injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment.[3] *See Hairston v. Todd Shipyards Corp.*, 849 F.2d 194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which she is capable of performing, considering her age, education, work experience, and physical restrictions, and which she could secure if he diligently tried. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). In the instant case, in finding that claimant is totally disabled, the administrative law judge credited claimant's statement that her condition precludes her from employment in a regular work environment. Tr. at 63. The administrative law judge also acknowledged Dr. Brabham's opinion that claimant is "unable to work in any gainful employment, and is likely to continue to be unable to return to work." CX 50; Decision and Order at 17-18. Accordingly, the administrative law judge awarded claimant permanent total disability compensation starting January 10, 2001.

We hold that any error committed by the administrative law judge in not addressing employer's labor market survey is harmless. The administrative law judge rationally determined, based upon the testimony of claimant and Dr. Brabham, that claimant is unable to perform any employment. Decision and Order at 17-18. It follows, therefore, that employer has not established suitable alternate employment. *See Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 450 U.S. 1104 (1983). Moreover, the labor market survey submitted into evidence by employer, which it alleges establishes the availability of suitable alternate employment, fails to set forth any description regarding the nature, terms and physical requirements of the positions listed.[4] *See* CX 46. In determining whether identified positions constitute suitable alternate employment, the administrative law judge must compare a claimant's restrictions and vocational factors with the requirements of the positions identified by employer in order to determine whether employer met its

[3] Employer does not dispute that claimant cannot return to her usual work.

[4] This labor market survey sets forth six employment positions, the address of each employer, and the rate of pay for the identified position. CX 46.

burden. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001). As employer's evidence lacks information required for the administrative law judge to properly address this issue, that evidence cannot support employer's allegation of error. Accordingly, as the administrative law judge's conclusion that claimant is totally disabled is rational and supported by substantial evidence, it is affirmed.

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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BETTY JEAN HALL
Administrative Appeals Judge