**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 17-0366
and 17-0366A

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| CARLOS M. CAJEIRA | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| KINDER MORGAN LIQUID TERMINAL | ) | DATE ISSUED: Jan. 29, 2018 |
| | ) | |
| and | ) | |
| | ) | |
| ACE AMERICAN INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| Cross-Petitioners | ) | DECISION and ORDER |

Appeals of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Jason T. Ellis (Rudolph, Israel & Ellis, P.A.), Jacksonville, Florida, for claimant.

John J. Rabalais and Gabriel E. F. Thompson (Rabalais Unland), Covington, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (2015-LHC-01848) of Administrative Law Judge Daniel F. Solomon 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 rational, supported by

substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On July 17, 2014, claimant struck his head on a metal bar while working at employer's Carteret, New Jersey, facility. Claimant was diagnosed with a cervical strain and was restricted from "heavy exertion" until August 11, 2014, on which date he was released to return to full duty without restrictions. EX 22 at 12-14; *see* Tr. at 65. Claimant returned to work in his pre-injury position as an "alcohol lead man" but was soon re-assigned to the position of a "pumphouse operator." Tr. at 35-36, 66. Claimant subsequently complained of episodes of dizziness and headaches, sought medical treatment and, on September 15, 2014, was given work restrictions which were to remain in effect until he had been evaluated by a neurosurgeon. EX 22 at 15, 16.

On September 17, 2014, claimant allegedly experienced an exacerbation of his symptoms at work. He did not return to his position at employer's New Jersey facility following this incident, testifying that while he was awaiting an evaluation by a neurosurgeon he was concerned about his ability to continue working. Tr. at 67-69. In October 2014, claimant moved from New Jersey to Florida,[1] where he continued to seek medical care. On February 9, 2015, claimant underwent a cervical epidural steroid, or facet, injection. On February 19, 2015, claimant was diagnosed with shingles; this condition resolved by March 26, 2015. On April 8, 2016, claimant was released for full-duty work, but he did not return to work at employer's New Jersey facility until May 9, 2016.

Claimant filed a claim for benefits under the Act seeking an award of temporary total disability benefits for the period from September 18, 2014 through April 8, 2016. In his Decision and Order, the administrative law judge found that as claimant had a work accident on July 17, 2014 and medical records developed immediately following this incident document a physical harm, claimant established his prima facie case. Stating that the Section 20(a) presumption had not been rebutted by employer/carrier, the administrative law judge found that claimant established his entitlement to medical benefits. Decision and Order at 15-21. The administrative law judge found that employer established that, but for the period that claimant suffered from shingles, it could have accommodated claimant's work restrictions with the position of a pumphouse

[1] Claimant contends he initially informed employer in July 2014 of his intent to move to Florida and to pursue employment with employer in that state by contacting a superior to seek his assistance in transferring to employer's facility in Florida. Claimant further testified that, after relocating to Florida, it was his intention to continue working for employer in New Jersey and to commute back-and-forth until he could secure employment in Florida. *See* EX 1 at 30.

operator at its New Jersey facility. Consequently, the administrative law judge awarded claimant temporary partial disability benefits from August 1 through 10, 2014. 33 U.S.C. §908(e). During the period that he found that claimant was unable to work due to shingles, February 19 through March 26, 2015, the administrative law judge awarded claimant temporary total disability benefits. 33 U.S.C. §908(b). The administrative law judge also awarded claimant medical benefits. 33 U.S.C. §907.

Claimant appeals the administrative law judge's denial of compensation benefits for the period from September 18, 2014 to April 8, 2016. Employer responds, urging affirmance. Claimant has filed a reply brief. BRB No. 17-0366. In its cross-appeal, employer challenges the administrative law judge's finding that claimant's shingles were work-related and the award of disability benefits during the period claimant suffered from that condition. BRB No. 17-0366A. Claimant did not file a response brief.

We first address employer's contention that the administrative law judge erred in finding a causal connection between claimant's February 9, 2015 spinal facet injection and shingles, which was diagnosed on February 19, 2015.[2] Employer contends that claimant "failed to introduce any clear evidence that his shingles was related to his work injury" and that, consequently, claimant is not entitled to the benefit of the Section 20(a), 33 U.S.C. §920(a), presumption. *See* Emp. Br. at 15. In his Decision and Order, the administrative law judge found that claimant required a C4-5 cervical facet injection to relieve pain associated with his work-related injury, and that claimant subsequently was diagnosed with shingles. *See* Decision and Order at 17. The administrative law judge summarily concluded that claimant was entitled to the Section 20(a) presumption and that employer did not rebut the presumption. *Id.* at 18, 19-21.

In order to be entitled to the Section 20(a) presumption, claimant must establish the two elements of his prima facie case: an injury or harm and a work-related accident or working conditions that could have caused or aggravated the harm. *See Ramsey Scarlett & Co. v. Director, OWCP* [*Fabre*], 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The term "injury," as defined in Section 2(2) of the Act, 33 U.S.C. §902(2), includes the "natural or unavoidable results" of an employee's work injury; thus, an injury sustained during the course of medical treatment for a work-related injury is covered under the Act. *See White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 3 (1988); *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986).

[2] Employer agrees that claimant's February 9, 2015 facet injection constituted reasonable and necessary treatment for his work-related injury. *See* Emp. Br. at 16.

Once claimant establishes his prima facie case, Section 20(a) links his harm to the employment accident or working conditions. *See C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008). Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumed causal connection with substantial evidence that claimant's injury was not caused or aggravated by the exposures at work. *Id.* If the administrative law judge finds that the Section 20(a) presumption is rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *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).

Although the administrative law judge did not apply the Section 20(a) presumption explicitly to claimant's shingles, we affirm the administrative law judge's finding that this condition constituted a compensable harm under the Act. Claimant had a facet injection on February 9, 2015 and was diagnosed with shingles on February 19, 2015. While Dr. Hurford declined to definitely opine that a causal relationship existed between these two events, he ultimately stated it was "suspicious that [claimant] developed shingles after having that facet injection," and that it was "likely the two are related." EX 3 at 34. Moreover, employer did not present any evidence to counter the presumed causal relationship between claimant's shingles and his work-related medical treatment. Therefore, the administrative law judge's failure to apply a Section 20(a) analysis with regard to claimant's shingles is harmless error, as there is no evidence to rebut the Section 20(a) presumption. *See Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988). Thus, claimant's shingles constituted a compensable harm which resulted from the work injury. *See Metro Machine Corp. v. Director, OWCP* [*Stephenson*], 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017).

Claimant challenges the administrative law judge's findings that employer established the availability of suitable alternate employment after September 17, 2014. Employer, on cross-appeal, contends the administrative law judge erred in awarding claimant temporary total disability benefits during the period claimant suffered from shingles, February 19 through March 26, 2015.[3]

Claimant bears the burden of establishing that he is disabled by his work-related injury. *See Anderson v. Todd Shipyards, Inc.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). Where claimant has established that he

[3] As no party challenges the administrative law judge's award of temporary partial disability benefits for the period of August 1 through August 10, 2014, that award is affirmed. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

is unable to return to his usual work due to the work injury, the burden of proof shifts to employer to demonstrate the availability of suitable alternate employment. *See New Orleans* (*Gulfwide*) *Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Employer can meet its burden by offering a claimant a job in its facility, including a light duty job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Buckland v. Dept. of the Army/NAF/CPO*, 32 BRBS 99 (1997). An employer may tailor a job to the claimant's specific restrictions so long as the work is necessary. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Larson v. Golten Marine Co.*, 19 BRBS 54 (1986). Moreover, in order to meet its burden by offering claimant a job in its facility, the job must be actually available to claimant. *See Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

The administrative law judge set forth the testimony of claimant and three of employer's managers regarding claimant's ability to return to work, as well as the medical evidence regarding claimant's post-July 17, 2014 medical care. *See* Decision and Order at 2-15. The administrative law judge also cited the Dictionary of Occupational Titles (DOT) description of the employment duties of a pumphouse operator which indicated the work is "light." *Id.* at 27. He then summarily found that employer "would have, according to competent testimony," accommodated claimant's physical restrictions with a job in its facility.[4] *Id.* at 27-28. Next, without discussion, the administrative law judge accepted that "during the period of time that Claimant had acute symptoms from shingles, he was totally disabled." *Id.* at 28. Thus, the administrative law judge awarded claimant temporary total disability compensation from February 19 through March 26, 2015. *Id.*

We cannot affirm the administrative law judge's decision regarding the extent of claimant's work-related disability because it does not satisfy the requirements of the Administrative Procedure Act (APA) and is thus unreviewable. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 356 (3d Cir. 1997). Hearings of claims arising under the Act are subject to the APA, *see* 33 U.S.C. §919(d), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). An administrative law judge thus must adequately detail the rationale behind his decision and specify the evidence upon which he relies. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *see also Gremillion v. Gulf*

[4] The administrative law judge found that claimant's post-injury physical restrictions are: no lifting from floor to waist of over twenty pounds, no lifting waist to overhead over ten pounds, and no pushing/pulling greater than twenty pounds. Decision and Order at 28.

*Coast Catering Co.*, 31 BRBS 163 (1997) (Brown, J., concurring); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

As the parties correctly contend on appeal, the administrative law judge did not address all of the relevant lay and medical evidence regarding the availability and suitability of work at employer's facility for claimant post-injury, nor did the administrative law judge specifically detail the "credible competent testimony" on which he based his decision. *See Ballesteros*, 20 BRBS at 187. The administrative law judge did not address the specific job description and physical responsibilities of a pumphouse operator offered into evidence by employer in addressing whether claimant could perform the work allegedly offered by employer post-injury. *See* EX 7, ex. B. Rather, the administrative law judge set forth the DOT's job description, which was not formally admitted into the record.[5] *See* Decision and Order at 27; *Williams v. Hunt Shipyards, Geosource Inc.*, 17 BRBS 32 (1985) (APA requires that a Decision and Order may not be issued except on the basis of the evidence of record). In finding that claimant did not inform employer of his intent to relocate to Florida, the administrative law judge did not address e-mail exchanges between claimant and employer which are contrary to this finding.[6] *See* CX 5; EX 8 at 9-10. Moreover, the administrative law judge did not address the conflicting evidence regarding employer's alleged offer of modified employment to claimant at the New Jersey facility. *Compare* Tr. at 58 *with* EX 7 at 14, 16, 21. Lastly, with regard to the administrative law judge's award of disability benefits while claimant suffered from shingles, the administrative law judge did not address Dr. Hurford's February 26, 2015 report that claimant was restricted to light-duty while he had shingles. *See* EX 3 at 14-15.

As the administrative law judge did not resolve the differences in the relevant evidence regarding the extent of claimant's post-injury disability, we vacate the administrative law judge's findings on this issue. We remand the case for him to determine claimant's post-injury disability status, addressing the specific physical responsibilities of the position allegedly offered by employer as establishing the

[5] The regulation at 29 C.F.R. §18.84 states, "On motion of a party or on the judge's own, official notice may be taken of any adjudicative fact or other matter subject to judicial notice. The parties must be given an adequate opportunity to show the contrary of the matter noticed." Thus, should the administrative law judge on remand take administrative notice of the DOT, the parties must be provided with an opportunity to respond to that text.

[6] Similarly, the administrative law judge did not discuss evidence contrary to his finding that claimant did not advise employer of his physical restrictions. *See* EX 7 at 7, 14, 16, 19, 21.

availability of suitable alternate employment, whether those responsibilities are within the physical restrictions placed on claimant, including any increased restrictions while claimant had shingles, and if and when that position was actually made available to claimant. The administrative law judge must provide an evidentiary basis for his findings of fact.

Accordingly, the administrative law judge's denial of disability benefits from September 18, 2014 through April 8, 2016, and award of temporary total disability benefits from February 19 through March 26, 2015, are vacated, and the case remanded for further proceedings consistent with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge