BRB No. 92-562

ANITA C. RAINEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVY EXCHANGE/NAVRESSO	)	DATE ISSUED:
	)	
and	)	
	)	
GATES, McDONALD & COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits and Order on Reconsideration of Edward C. Burch, Adminis-trative Law Judge, United States Department of Labor.

Douglas Smurr (Law Offices of Preston Easley), National City, California, for claimant.

Eugene L. Chrzanowski (Littler, Mendelson, Fastiff & Tichy), Long Beach, California, for employer/carrier.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order-Awarding Benefits and Order on Reconsideration (90-LHC-1000, 90-LHC-1001) of Adminis-trative Law Judge Edward C. Burch 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant was employed by employer for 23 years, the last seven in a supervisory capacity. On August 11, 1988, claimant suffered a work-related back injury while assisting a customer in lifting a keg of beer. Claimant left work on August 14, 1988 due to back pain and began treatment with Drs. Small, Menninger and Adler. Claimant returned to light duty work on November 28, 1988. On December 18, 1988, claimant stopped working due to her on-going back pain. Thereafter, on March 20, 1989, Dr. Small released claimant to return to work without restrictions; however, claimant again left her employment on April 2, 1989 because of back discomfort. She has not worked since that date. Employer voluntarily paid claimant temporary total disability benefits from August 16, 1988 to November 27, 1988, and December 18, 1988 to March 21, 1989.

On June 10, 1989, claimant sought treatment for pain and numbness in her right hand and wrist from Dr. Small who, while subsequently diagnosing carpal tunnel syndrome, did not offer an opinion as to the cause of that condition.[1] Cl. Ex. 5. On November 29, 1989, claimant was examined by Dr. Silverman, who diagnosed non-industrially related carpal tunnel syndrome. See Emp. Ex. 24. Claimant was thereafter examined on May 11, 1990 by Dr. Latteri, who opined that claimant's right hand symptoms are the direct consequence of stress and strain associated with the nature of her work activities.[2] See Cl. Ex. 3.

Claimant sought disability compensation under the Act, alleging that she was disabled as a result of both her back condition and her carpal tunnel syndrome. In his Decision and Order, the administrative law judge, relying on the opinion of Dr. Silverman, found that claimant's carpal tunnel syndrome was not work-related. In addressing claimant's back condition, which the parties stipulated was work-related, the administrative law judge found that claimant reached maximum medical improvement on March 20, 1989, and that claimant could not return to her usual employment duties with employer. However, the administrative law judge also found that employer had established the availability of suitable alternate employment and thus awarded claimant total

[1]Claimant initially testified that her job required repetitive writing, lifting and grasping, as well as the use of a cash register, Telxon machine and a price gun. See Tr. at 13-21. However, on cross-examination, claimant testified that these activities were intermittent and that her duties were primarily supervisory. Id. at 40-43.

[2]Claimant informed Dr. Silverman that she first noticed her right hand symptoms on April 2, 1989. Emp. Ex. 24; Cl. Ex. 4. However, claimant subsequently related to Dr. Latteri that she first noticed these symptoms in January 1989. Cl. Ex. 3. Claimant's claim form lists the dates of injury as April 3, 1988 to April 2, 1989. Cl. Ex. 2.

disability benefits for the periods August 16, 1988 to November 27, 1988 and December 18, 1988 to March 20, 1989, and permanent partial disability benefits, pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), thereafter. In his Order on Reconsideration, the administrative law judge determined that claimant did not establish invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), to link her carpal tunnel syndrome to her employment; however, assuming that the Section 20(a) presumption was applicable, the administrative law judge found that the credited opinion of Dr. Silverman was sufficient to rebut the presumption of a causal connection between claimant's carpal tunnel syndrome and her employment.

On appeal, claimant challenges the administrative law judge's decision to commence claimant's permanent partial disability award as of the date she reached maximum medical improvement; specifically, claimant contends that, pursuant to the decision of the United States Court of Appeals for the Ninth Circuit in Stevens v. Director, OWCP, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), cert. denied, 111 S.Ct. 798 (1991), an award of permanent partial disability compensation should commence upon the date when employer establishes the availability of suitable alternate employment. Claimant additionally appeals the administrative law judge's determination that her carpal tunnel syndrome is not related to her employment with employer. Employer responds, conceding that Stevens controls the date upon which claimant's disability became partial, and urging affirmance of the administrative law judge's finding of no causation regarding claimant's carpal tunnel syndrome.

Claimant initially contends that the administrative law judge erred in commencing her award of permanent partial disability compensation on the date maximum medical improvement was established. We agree. Once claimant, as in the instant case, establishes that she is unable to perform her usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. See Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order for employment opportunities to be considered realistic, an employer must establish their precise nature, terms, and availability. See Reiche v. Tracor Marine, Inc., 16 BRBS 272 (1984). In Stevens, supra, the United States Court of Appeals for the Ninth Circuit, in those jurisdiction this case arises, concluded that total disability does not become partial retroactive to the date of maximum medical improvement, upon a later showing of suitable alternate employment by employer, since such a holding ignores the economic aspect of an employee's disability and assumes that the job market was the same at the time of maximum medical improvement as it was when the job showing was made. See Stevens, 909 F.2d at 1259-1260, 23 BRBS at 94 (CRT). Thus, the court concluded that, as the incapacity to earn

wages is not a result of the permanent or temporary nature of the disability but rather is dependent upon a showing of suitable alternate employment, an employee's disability becomes partial when employer establishes the existence of suitable alternate employment. Id.; see also Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991), vacating on recon. BRB No. 88-1721 (January 29, 1991)(unpublished).

In the instant case, the administrative law judge determined that employer established the availability of suitable alternate employment, that claimant could have obtained suitable alternate employment in March 1989 and, therefore, claimant was entitled to permanent partial disability compensation as of March 21, 1989. In making this award, however, the administrative law judge did not make an affirmative finding regarding the date upon which employer established the availability of suitable alternate employment, nor did the administrative law judge set forth the specific positions which he found constituted suitable alternate employment; rather, the administrative law judge ordered the award of permanent partial disability benefits to commence as of the date of maximum medical improvement, March 20, 1989. We, therefore, vacate the administrative law judge's finding that claimant's award of permanent partial disability compensation commences on March 21, 1989, the date of maximum medical improvement, and we remand the case to the administrative law judge for a determination of the date upon which employer established the availability of suitable alternate employment, and thus the commencement date of claimant's permanent partial disability benefits. See Rinaldi, 25 BRBS at 131.

Next, claimant contends that the administrative law judge erred by failing to invoke the Section 20(a) presumption and in determining that employer had produced specific and comprehensive evidence to rebut the presumption. In establishing that an injury arises out of the employee's employment, a claimant is aided by the Section 20(a) presumption, which applies to the issue of whether an injury is causally related to her employment activities. Perry v. Carolina Shipping Co., 20 BRBS 90 (1987). An employment injury need not be the sole cause of a disability; rather, if the employment aggravates, accelerates, or combines with an underlying condition, the entire resultant condition is compensable. See Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966). Upon invocation of the presumption, the burden shifts to employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. See Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), cert. denied, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. See Devine v. Atlantic Container Lines,

G.I.E., 23 BRBS 279 (1990). In this regard, the United States Court of Appeals for the Ninth Circuit has stated that even after substantial evidence is produced to rebut the Section 20(a) presumption, the employer still bears the ultimate burden of persuasion. See Parsons Corp. of California v. Director, OWCP, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980); see also Wright v. Connolly-Pacific Co., 25 BRBS 161 (1991).

Initially, we note that, as claimant contends, the administrative law judge in his Decision and Order did not invoke the Section 20(a) presumption when addressing the relationship between claimant's carpal tunnel syndrome and her employment. In his Order on Reconsideration, however, the administrative law judge, "assuming arguendo that it was error not to apply the Section 20(a) presumption," considered the issue of whether employer established the lack of a casual relationship between claimant's condition and her employment with employer. See Order on Reconsideration at 2. Since on reconsideration the administrative law judge considered whether Section 20(a) was rebutted, any error in failing to invoke specifically the Section 20(a) presumption in his initial decision is harmless.

Next, claimant alleges that the administrative law judge erred in finding the Section 20(a) presumption rebutted. Claimant contends that the evidence credited by the administrative law judge was neither specific nor comprehensive enough to rebut the Section 20(a) presumption. We disagree. In his Decision and Order, the administrative law judge, after setting forth and discussing the medical evidence of record and acknowledging Dr. Silverman's expertise as a Board-certified orthopaedic surgeon specializing in hand disorders, credited and relied upon the testimony of Dr. Silverman over the testimony of Dr. Latteri in concluding that claimant's carpal tunnel syndrome was not work-related; thereafter, in his Order on Reconsideration, the administrative law judge expressly found that Dr. Silverman's credited testimony was sufficient to establish rebuttal of the Section 20(a) presumption. Dr. Silverman diagnosed carpal tunnel syndrome which, he concluded, was not caused by claimant's employment. Emp. Ex. 24; Cl. Ex. 4. In reaching his opinion as to causation, Dr. Silverman noted that carpal tunnel syndrome is a cumulative trauma disorder which may occur by the continued repetitive use of the hands for long periods of time on a daily basis; claimant's symptoms, however, appeared after she stopped working on a regular basis.[3] See Emp. Ex. 32; Silverman Dep. at

[3]Claimant informed Dr. Silverman that she first noticed her right hand and wrist symptoms in April 1989; claimant had worked only 3-4 weeks in the prior 8 months. Dr. Silverman testified that his opinion would not change assuming claimant had noticed her symptoms in January 1989. Emp. Ex. 32; Silverman Dep. at 32.

32. Lastly, Dr. Silverman opined that claimant's ongoing crocheting activities were the probable cause of her condition.[4] See Silverman dep. at 35.

We conclude that the administrative law judge properly determined that Dr. Silverman's testimony constitutes substantial evidence sufficient to rebut the Section 20(a) presumption that claimant's carpal tunnel syndrome was causally related to her employment with employer. See Swinton, 554 F.2d at 1075, 4 BRBS at 466; Neeley v. Newport News Shipbuilding and Dry Dock Co., 19 BRBS 138 (1986). Moreover, because Dr. Silverman specifically testified that claimant's carpal tunnel syndrome was not causally related to her employment with employer, his opinion constitutes substantial evidence sufficient to carry employer's ultimate burden of persuasion. See Parsons Corp., 619 F.2d at 38, 12 BRBS at 234 (CRT). Accordingly, inasmuch as the administrative law judge weighed the conflicting evidence and, acting within his discretionary authority, rationally credited and relied upon the testimony of Dr. Silverman in resolving the issue of causation in favor of employer, we affirm his determination that claimant's carpal tunnel syndrome was not caused by her employment with employer. See Wright, 25 BRBS at 161.

Accordingly, the administrative law judge's award of permanent partial disability benefits is vacated, and the case is remanded for the administrative law judge to determine the commencement date of those benefits, consistent with this opinion. In all other respects, the administrative law judge's Decision and Order-Awarding Benefits and Order on Reconsideration are affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[4]Claimant testified that she had been crocheting on a regular basis for the prior eleven years and that this activity aggravated the pain in her right hand and wrist. See Emp. Ex. 29; Clt.'s dep. at 26; Tr. at 46.

LEONARD N. LAWRENCE
Administrative Law Judge