BRB No. 92-2397

NATHAN E. HUFFMAN, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED:
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

J. Bradford Doyle, Seattle, Washington, for claimant.

Richard M. Slagle (Williams, Kastner & Gibbs), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-1502) of Administrative Law Judge Henry B. Lasky 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 findings of fact and conclusions of law of the administrative law judge 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).

On April 26, 1990, claimant, a casual longshoreman, injured his right shoulder and cervical spine while working for employer. Claimant was initially treated on April 30, 1990, by Dr. Strange, a Board-certified family practitioner, who had previously treated claimant for a chronic plantar fascitis condition of the right heel and a right knee injury resulting from a February 26, 1990, accident with another employer. Dr. Strange diagnosed a right shoulder strain, and referred claimant

on May 3, 1990 to Dr. Mysfliwiec, an orthopedic specialist, for further evaluation. Dr. Mysfliwiec, in turn referred claimant to Dr. Georgia, a neurologist, who performed an EMG on May 21, 1990, which proved negative and a June 28, 1990, MRI which was read twice, once as normal and once as showing a broad central to left paracentral millimeter disc herniation at the C5-C6 level. Inasmuch as claimant continued to be symptomatic, Dr. Georgia recommended surgical decompression. Claimant was then referred to Dr. Blue, who provided a contrary second opinion regarding the need for surgical intervention. Claimant ultimately declined to undergo surgery. Although Dr. Mysfliwiec opined that claimant could not return to longshoring work, on January 31, 1991, he released claimant to light duty work, with a lifting restriction of 25 pounds on a repetitive basis and 30 pounds on an occasional basis, and advised claimant to avoid twisting and turning his neck from side to side. In his deposition of July 25, 1991, Dr. Mysfliwiec testified that claimant's cervical condition was fixed and stable as of July 22, 1991, and that his physical restrictions had not changed since January 31, 1991. Paul Tomita, a vocational rehabilitation counselor, identified job opportunities within these restrictions as a motel desk clerk, customer service representative, and bank teller, which were available to claimant on January 31, 1991, and Dr. Mysfliwiec approved these positions. On November 18, 1991, claimant returned to Dr. Strange for treatment of depression, which the physician attributed to multiple stresses, including claimant's cervical injury.

Employer voluntarily paid claimant temporary total disability compensation from May 4, 1990 through March 2, 1992 at the rate of $177.76 per week. Claimant, who has not worked except for a few days immediately following the April 26, 1990, work injury, sought additional disability compensation and medical benefits under the Act for his cervical injury and alleged resultant depression.

Rejecting claimant's testimony that his depression is related to his cervical injury, the administrative law judge found that claimant's depression was due to his legal tax problems with the Internal Revenue Service and the State of Washington, a pending paternity suit, and his multiple unrelated medical problems. The administrative law judge further determined that while claimant was unable to resume casual longshore work when he reached maximum medical improvement from his cervical injury on July 22, 1991, he was not totally disabled because employer established the availability of suitable alternate employment as of January 31, 1991, which paid an average of $240 per week at the time of claimant's injury. Accordingly, he awarded claimant temporary total disability compensation from May 5, 1990, until he was released to light duty work on January 31, 1991, but denied claimant additional compensation thereafter on the rationale that as of January 31, 1991, employer had demonstrated that claimant had a post-injury wage-earning capacity of $240 per week which exceeded his average weekly wage at the time of injury of $166.89.

On appeal, claimant maintains that he is entitled to ongoing temporary total disability compensation from November 18, 1991, for depression caused in part by his work-related cervical injury. Claimant also challenges the administrative law judge's calculation of his average weekly wage, and asserts that based on a post-injury wage-earning capacity of $240 per week if the correct average weekly wage is applied, he has nonetheless sustained a permanent loss in his wage-earning capacity and is therefore entitled to permanent partial disability compensation for his cervical injury. Employer responds, urging affirmance.

Initially, we agree with claimant that the administrative law judge's finding that his depression was neither disabling nor related to his work injury cannot be affirmed.[1] In the present case, as it is undisputed that claimant suffers from depression and that a work accident occurred, claimant is entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, that his depression is causally-related to his work. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989); *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). Once claimant has invoked the presumption, the burden of proof shifts to employer to rebut it with substantial countervailing evidence establishing that claimant's employment did not cause, aggravate, or contribute to his injury. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935).

In denying compensation for claimant's depression, however, the administrative law judge did not apply the Section 20(a) presumption. Rather, he determined that claimant's testimony relating his depression to his April 1990 work injury was unreliable, and without additional explanation found that while claimant may, in fact, suffer from depression, it was attributable to his other multiple socioeconomic and legal problems. Claimant correctly asserts that in making this finding the administrative law judge failed to consider the relevant opinion of Dr. Strange that from at least November 18, 1991, claimant has been unable to pursue gainful employment because of depression related, at least in part, to the effects of his cervical injury. Moreover, he did not consider the opinion of the psychological counselor Carol Baros, who diagnosed claimant as suffering from major depression due to his feeling of being victimized by the insurance company in his Longshore claim, and the testimony of Penny Ann Burnett, a classmate, and Rose Courcy, claimant's girlfriend, which described claimant as suffering from depression resulting in an inability to concentrate related to frustration with the problems he was having with the insurance company regarding his Longshore claim.

The administrative law judge also found that there was no credible evidence that claimant's depression would preclude his performing the suitable alternate work established by employer and

[1]We reject claimant's argument that because the administrative law judge discredited his testimony and minimized the objective evidence of his cervical injury, he was not afforded a fair hearing as unsubstantiated by the record.

cited Dr. Mysfliwiec's deposition testimony, which indicates that claimant is capable of performing reasonably continuous gainful employment in light, sedentary occupations, Cx. 29 at 59-60, in support of this determination. While the administrative law judge's denial of disability compensation for claimant's depression could be affirmed, if Dr. Mysliwiec had, in fact, considered claimant's depression in rendering his opinion, when viewed in context it is apparent that Dr. Mysliwiec was referring only to claimant's physical capacity. In addition, we note that at the hearing employer's vocational expert, Mr. Tomita, testified that while he was unaware of whether claimant's depression was chronic or acute and whether he had been prescribed medication for it, it would affect his employability. Tr. at 244. In finding that claimant's depression was not disabling, the administrative law judge failed to consider Mr. Tomita's testimony.

Inasmuch as the administrative law judge did not apply the Section 20(a) presumption or discuss the evidentiary basis for his causation finding and address all relevant evidence of record in determining that claimant's depression was not employment-related and was not disabling, we vacate these findings. On remand, the administrative law judge must reconsider claimant's entitlement to disability compensation for depression in light of the Section 20(a) presumption and all relevant evidence of record and provide an explanation of the evidentiary basis for his conclusions consistent with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). *See McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

Claimant next asserts that although he has a post-injury wage-earning capacity of $240 per week,[2] he is nonetheless entitled to permanent partial disability compensation based on a loss in wage-earning capacity for his cervical injury alone because the average weekly wage of $166.89 computed by the administrative law judge fails to accurately reflect his earning capacity at the time of his injury as required by Section 10(c), 33 U.S.C. §910(c).[3] Claimant maintains that pursuant to Section 10(c), the administrative law judge should have calculated his average weekly wage as $1,113.24, based on both his longshore earnings and his accountant's post-audit calculation of net profit of $55,843.65 from claimant's mill business in the 52-week period prior to injury. Claimant also asserts that the administrative law judge's calculation of his average weekly wage fails to account for the fact that he was a successful businessman in the process of developing a new mill for profitable, legitimate operation at the time of his injury. In the alternative, claimant argues that as he was self-employed, his average weekly wage should have been based on testimony of claimant and his accountant, Mr. Mee, indicating that the reasonable value of hiring the services of a mill manager was $50,000. Lastly, claimant argues that inasmuch as his cervical injury prevents him from returning to block cutting work, for which his 1987 tax return shows legitimate earnings of $28,714.15,[4] these earnings should have been included in determining his earning capacity at the

[2]Claimant does not argue that the alternate work identified by employer's vocational expert was either unavailable or unsuitable, based on his physical restrictions.

[3]In arriving at his figure, the administrative law judge projected claimant's actual longshore earnings of $2,956.40, for the period from January 1, 1990 through May 5, 1990, to approximate annual earnings of $8,678.28, and then divided that amount by 52.

time of his injury.

After review of the administrative law judge's decision in light of the evidence of record, we affirm his average weekly wage determination. The administrative law judge's decision not to include claimant's 1988 and 1989 earnings in self-employment in a cedar shake and shingle business which claimant operated on a cash basis, without paying local, state or federal taxes for himself or his business or withholding taxes for his employees, was a proper exercise of his discretionary authority.[5] After considering the relevant evidence, the administrative law judge concluded that claimant's average weekly wage should not be based on earnings from his businesses because the mills had been closed prior to and for reasons unrelated to his cervical injury, because of claimant's demonstrated inability to conduct his self-employment legally on a profitable basis, and because claimant's track record of lying to federal and local authorities in conducting his businesses rendered the evidence of these earnings unreliable.[6]

The administrative law judge also rejected claimant's contention that the cervical injury prevented him from starting up a new and lucrative mill business based on claimant's testimony that he had abandoned refurbishing the new mill he located in January 1990 in July or August 1990 because he could no longer make the lease payments, was faced with a $100,712.90 state workers' compensation lien, and was attending college on a full-time basis. Moreover, he deemed it entirely unlikely that claimant would have been able to generate any lawful income in a declining industry from any new mill had he operated it lawfully based on his past business dealings. In addition, he deemed it beyond reason to base claimant's average weekly wage on the reasonable cost of hiring a mill manager given that claimant had never been hired in that capacity or for that wage at the time of his injury and his demonstrated inability to legally operate and manage such a facility on a profitable basis for two years.

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[4]Claimant alleged up to $150,000 per year in unreported earnings from block cutting or contracting. Tr. at 45.

[5]The administrative law judge noted that claimant had been audited by a number of interested governmental agencies in connection with his business dealings and that it was estimated that claimant is responsible for more than a quarter of a million dollars in tax liens. Decision and Order at 8.

[6]In so concluding, the administrative law judge credited the testimony of Randall Martin, a certified public accountant, who indicated that, notwithstanding Mr. Mee's post-audit computations of profit, claimant would have sustained significant losses in 1988 and 1989 if he had operated his businesses legitimately. Decision and Order at 9-11; Tr. at 202-204; Emp. Ex. 18 at 278-280.

In light of this evidence, the administrative law judge found that claimant's actual longshore earnings in 1990 are the only measure of claimant's earning capacity and that claimant's average weekly wage was $166.89 pursuant to Section 10(c). The administrative law judge is afforded broad discretion in arriving at a fair and reasonable approximation of claimant's earning capacity at the time of injury pursuant to Section 10(c). *See Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). Inasmuch as the administrative law judge provided valid reasons for declining to calculate claimant's earning capacity at the time of injury in the manner urged by claimant,[7] and his determination of claimant's average weekly wage is reasonable and supported by substantial evidence, we affirm his average weekly wage calculation. *See generally Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). Inasmuch as we affirm the administrative law judge's determination that claimant's average weekly wage is $166.89, which is less than claimant's unchallenged $240 post-injury wage-earning capacity with regard to his cervical injuries, his determination that claimant failed to establish a loss in wage-earning capacity based on his physical injuries is also affirmed. *See generally Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[7]Although the administrative law judge did not specifically address claimant's argument that his earning capacity should be based on his 1987 earnings as a blockcutter, this error is harmless on the facts presented. Inasmuch as claimant was physically precluded from performing this work due to his pre-existing heel condition and his February 26, 1990, knee injury prior to the subject injury, Tr. at 45, 65-66, 89-91, claimant's earnings in such employment were irrelevant to claimant's earning capacity at the time of injury. *See Klubnikin v. Crescent Wharf and Warehouse Co.*, 16 BRBS 189 (1984); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981).