BRB Nos. 04-0809
and 04-0809A

NICOLA TERRAFINO	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
A.G. SHIP MAINTENANCE	)	DATE ISSUED: 07/18/2005
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Robert N. Dengler (Flicker, Garelick & Associates, LLP), New York, New York, for self-insured employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (03-LHC-0491) of Administrative Law Judge Ralph A. Romano 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 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 was injured on November 8, 1997, during the course of his employment as a lasher. He slipped and fell, and immediately felt sharp pain in his left knee. Employer voluntarily paid temporary total disability benefits from November 9, 1997, to

August 23, 2002. Claimant sought continuing permanent total disability benefits for a psychological injury, as well as for neck and back injuries and the injury to his left leg as a result of the work-related accident.

In his Decision and Order, the administrative law judge found that claimant did not establish that he suffers from work-related psychological, neck or back injuries. However, the administrative law judge found that claimant has a 15 percent impairment to his left leg. Consequently, the administrative law judge awarded claimant permanent partial disability benefits pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2).

On appeal, claimant contends that the administrative law judge erred in finding that the evidence is not sufficient to establish a work-related neck or back injury or psychological condition. In addition, claimant contends that the administrative law judge erred in finding that suitable alternate employment was established, as Dr. Urs opined that claimant is unable to perform any work. Finally, claimant contends that the scheduled award of permanent partial disability should not commence until October 7, 2003, and therefore, claimant is entitled to temporary partial disability benefits until that date. Employer responds, urging rejection of these contentions. However, on cross-appeal, employer contends that the administrative law judge erred in finding that claimant has a 15 percent disability of his left leg. Claimant responds to employer's cross-appeal, contending that should the Board affirm the administrative law judge's finding that suitable alternate employment is established, the administrative law judge's finding that claimant suffered a 15 percent impairment of his left leg should be affirmed. In addition, claimant has requested an attorney's fee for work performed before the Board in the amount of $800, representing 4 hours of legal services at the hourly rate of $200.

Psychiatric Injury

Claimant contends that the administrative law judge erred in finding that he does not suffer from a work-related psychological condition. The administrative law judge found that claimant did not report psychological complaints until well after the work accident, and therefore the claim of such injury is too remote to be creditable. However, as claimant correctly contends, a psychiatric injury does not necessarily develop contemporaneously with a physical injury, and the Act recognizes latent injuries. *Director, OWCP v. Potomac Electric Power Co.*, 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979). Therefore, the administrative law judge's finding that claimant did not establish the existence of a work-related psychiatric injury is not based on valid reasoning.[1] *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965).

[1] Dr. Mannucci stated that claimant suffers from Major Affective Disorder Depression, which is causally related to the work accident. This opinion arguably is

Nonetheless, the administrative law judge made alternative findings on this issue, and we affirm on the basis of these findings. The administrative law judge found that Dr. Head's opinion that claimant does not suffer from any psychiatric condition or disability related to the work accident is sufficient to rebut the Section 20(a) presumption. EX J. As it is supported by substantial evidence, we affirm the administrative law judge's finding that this opinion is sufficient to establish rebuttal of the Section 20(a) presumption that claimant suffers from a work-related psychiatric condition. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 124 S.Ct. 825 (2003); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), *aff'g* 31 BRBS 98 (1997).

Therefore, the presumption falls from the case, and the administrative law judge must weigh all of the evidence, with claimant bearing the burden of persuasion, on the issue of the work-relatedness of his condition. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge found that Dr. Head's conclusion that claimant does not suffer from a psychiatric injury related to the work accident is thoroughly well-reasoned and documented.[2] Decision and Order at 6. In addition, the administrative law judge found that Dr. Mannucci's testimony regarding his treatment of claimant by telephone does not correspond with the records of treatment and billing records, and therefore, his opinion cannot be credited due to these inconsistencies. As the administrative law judge's weighing of the evidence is rational and his conclusion is supported by substantial evidence, we affirm the administrative law judge's finding that claimant does not suffer from a work-related psychiatric condition. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

Neck and Back Injuries

Claimant contends that the administrative law judge erred in finding that he does not suffer from work-related neck and back injuries. In order to be entitled to the Section 20(a) presumption in this case, claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred which could have caused or aggravated the harm. *See U.S. Industries/Federal Sheet*

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sufficient to invoke the Section 20(a) presumption. *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996).

[2] Although claimant correctly asserts that Dr. Head opined that claimant could have suffered from depression immediately following the work accident, employer voluntarily paid temporary total disability benefits until August 23, 2002, which would have covered this period. Dr. Head clearly states that any psychiatric condition has resolved.

Metal, Inc. v. Director, OWCP, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In the present case, the administrative law judge found that the evidence is insufficient to establish invocation of the Section 20(a) presumption that claimant suffered a work-related neck or back injury solely on the ground that claimant did not initially complain of a neck or back injury and the physicians' opinions that diagnose a work-related neck injury are too remote to the work injury to be creditable. Decision and Order at 5. The administrative law judge offered no other basis for rejecting the medical reports which link claimant's alleged neck condition with the work-related accident.

We cannot affirm this finding. Initially, the record contains the opinions of Drs. Perel, Nepola and Urs, who state that claimant's neck and back pain is causally related to the work accident. Cl. Exs. 1, 3, 7. Contrary to the administrative law judge's finding that the first medical report of neck pain occurred over a year and a half following the November 1997 accident, Dr. Nepola reported that he had been treating claimant for neck and back pain since 1998.[3] Cl. Ex. 7.

In order to invoke the Section 20(a) presumption, moreover, claimant is not required to prove that the his work accident in fact caused the harm. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990). Although claimant's theory must go beyond "mere fancy," he need only show the existence of an accident which could have caused the harm alleged. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). The mere fact that claimant's complaints of neck and back pain do not have a temporal nexus to the accident cannot be the basis for the finding that the pain is not work-related, as latent injuries are compensable under the Act. Rather, the administrative law judge must assess the creditability of the evidence diagnosing neck and back pain in order to determine whether claimant established the "harm" element of his *prima facie* case. If claimant did so, then the Section 20(a) presumption is invoked if claimant introduced evidence that these complaints could have been caused by his 1997 work injury. *Id.*

[3] The administrative law judge found that Dr. Nepola's report of November 2003, stating that he had treated claimant for neck pain since 1998, contradicts his report immediately following the accident. Cl. Ex. 7. However, Dr. Nepola's earlier report is dated November 1997, and thus does not address any treatment provided in 1998. Emp. Ex. F.

Moreover, the administrative law judge's "alternative finding" that employer established rebuttal of the Section 20(a) presumption based on the "absence of complaints" of neck and back pain also cannot be affirmed. The mere absence of immediate complaints is not substantial evidence that claimant's neck and back pain is not work-related, and the administrative law judge did not discuss any evidence supportive of his rebuttal finding. *See generally Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13(CRT) (2nd Cir. 1989). Therefore, we vacate the administrative law judge's finding that claimant's alleged back and neck complaints are not work-related. The case is remanded to the administrative law judge for further findings consistent with Section 20(a), and for a discussion of all relevant evidence of record pursuant to applicable law. *See generally Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997)(Brown, J., concurring); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

Extent of Disability

Claimant contends that the administrative law judge erred in finding that he is able to perform alternate employment. Specifically, claimant contends that the opinion of Dr. Urs that claimant is unable to perform any work should have been credited over the contrary opinion of Dr. Zaretsky. Once a claimant has established the inability to return to his former work, the burden shifts to employer to demonstrate the availability of jobs within the geographic area where claimant resides which claimant, by virtue of his age, education, work experience and physical restrictions is capable of performing and can reasonably secure. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *see also New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In the instant case, the administrative law judge gave greater weight to Dr. Zaretsky's opinion limiting claimant to jobs that do not involve squatting and climbing. The administrative law judge found that Dr. Urs's opinion that claimant is totally disabled is not rational as that conclusion is not supported by the specific restrictions he placed on claimant, namely, the inability to walk long distances, the inability to walk up and down stairs, and the requirement that claimant ambulate using a cane.[4] The administrative law judge found that three of the positions identified in the labor market survey satisfied the restrictions of both Dr. Urs and Dr. Zaretsky.[5] However, claimant

[4] The medical reports of record do not indicate that claimant has additional physical restrictions due to his alleged neck or back injury.

[5] The administrative law judge found that the positions as an assembler for Comfort Fit Labs, a packer/floor person for Emilani Enterprise, and a toll collector for

correctly contends that the administrative law judge addressed only part of Dr. Urs's opinion. Dr. Urs also opined that claimant's inability to work is affected by his post-surgery development of Sudeck's atrophy syndrome, which causes swelling in the joints, hypersensitivity and pain, and the inability to sit in one position. Cl. Ex. 10 at 16, 25. If credited, this opinion supports Dr. Urs's assessment that claimant is totally disabled. Therefore, we vacate the administrative law judge's finding that employer established the availability of suitable alternate employment, and we remand the case for the administrative law judge to address the entirety of Dr. Urs's opinion, to re-weigh the evidence relative to claimant's ability to work, and to reconsider his finding that employer established suitable alternate employment in light thereof.[6] *See Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Cairns*, 21 BRBS at 257.

Additional Temporary Disability

Finally, claimant contends that the administrative law judge erred in failing to award temporary partial disability benefits from August 2002 until October 7, 2003. Specifically, claimant contends that October 7, 2003, is the first date that claimant was medically reported to have suffered a rateable loss of use of his left leg.[7] Assuming suitable alternate employment was established in August 2002, claimant asserts he is entitled to additional benefits under Section 8(e), 33 U.S.C. §908(e), for the period between August 1, 2002, and the date of the rating. We reject this contention.

The parties stipulated that claimant reached maximum medical improvement on August 1, 2002. Since this date establishes the date of permanency, claimant cannot receive temporary total or temporary partial benefits thereafter. Moreover, the administrative law judge properly terminated claimant's total disability benefits on the date he found that suitable alternate employment was established, August 23, 2002. At that time claimant became entitled to permanent partial disability benefits, and as his disability results from a leg injury, he is limited to an award under the schedule. 33

Five Star Parking Systems were within the functional restrictions noted by both Drs. Urs and Zaretsky. Decision and Order at 7; Emp. Ex. K.

[6] We reject claimant's contention that the administrative law judge erred in finding suitable alternate employment established because claimant's daughter testified that the positions were not available when she called to inquire about them. The administrative law judge specifically relied on three positions in employer's labor market survey about which claimant's daughter did not inquire. Decision and Order at 7.

[7] Although Dr. Zaretsky did not assign an impairment rating until 2003, he found that claimant had reached maximum medical improvement in 2000. Emp. Ex. H.

U.S.C. §908(c)(2). *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). Without a rating, claimant could not establish the degree of his impairment, which is necessary for a schedule award. However, it is claimant's burden to establish the extent of his disability, and the absence of a rating does not establish entitlement to any benefits. Once claimant produced the necessary evidence, the onset date of his partial disability was the date suitable alternate employment was established, as the administrative law judge found. Claimant's argument that he was entitled to additional benefits through the date of the rating is thus rejected.

Extent of Scheduled Impairment

Employer contends on cross-appeal that the administrative law judge erred in finding that claimant suffers a 15 percent impairment of his left leg based on Dr. Urs's opinion. An administrative law judge is not bound by any particular formula, but may rely on a variety of medical opinions and observations in addition to claimant's description of symptoms and physical effects of his injury in assessing the extent of claimant's disability under the schedule. *See Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Maritime Serv., Inc.*, 27 BRBS 154, 159 (1993). Moreover, the Act does not require that impairment ratings in medical opinions use the criteria of the American Medical Association *Guides to the Evaluation of Permanent Impairment*, except in cases involving hearing loss and voluntary retirees. *See* 33 U.S.C. §§908(c)(13), 902(10). However, the administrative law judge's finding must be rational and supported by substantial evidence. *See O'Keeffe*, 380 U.S. 359; *Cotton*, 34 BRBS at 89.

We hold that the administrative law judge's decision in this regard abides by these principles. Dr. Urs testified that he arrived at the 15 percent impairment rating based on the swelling in claimant's knee, the weakness of the muscle, the warmth of the knee, and the limited range of motion. Cl. Ex. 10 at 33. The administrative law judge found that as Dr. Urs is claimant's treating physician, and thus is in the better position to determine claimant's overall degree of impairment, his opinion is entitled to greater weight than the opinion of Dr. Zaretsky that claimant has a five percent impairment. *Pietrunti*, 119 F.3d 1043, 31 BRBS 90(CRT). Since employer has raised no reversible error in this finding, we affirm the administrative law judge's conclusion that claimant suffered a 15 percent impairment to his left knee as it is supported by substantial evidence. *See generally Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

Accordingly, the administrative law judge's finding that claimant does not suffer from a work-related neck or back injury is vacated, and the case is remanded for further findings consistent with this opinion. In addition, the administrative law judge's finding that employer established suitable alternate employment is vacated, and the case is

remanded for further findings.[8] In all other respects, 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

_____
BETTY JEAN HALL
Administrative Appeals Judge

[8] Because the case must be remanded, we decline to address claimant's attorney's fee request at this time. *See generally* 20 C.F.R. §802.203(c).