BRB No. 98-1408

DARRYL M. WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: July 27, 1999
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Periods of Permanent Total Disability and Permanent Partial Disability and the Decision Denying Employer's Motions for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein, & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Periods of Permanent Total Disability and Permanent Partial Disability and the Decision Denying Employer's Motions for Reconsideration (97-LHC-1208) of Administrative Law Judge Richard K. Malamphy 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 the 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).

Claimant, who worked for employer as a welder, suffered a work-related back injury

on April 12, 1993. Claimant was off work briefly, but returned to work for employer on June 25, 1993, in a light duty position as a welder that accommodated the physical restrictions imposed by his treating physician, Dr. Persons. Claimant was assigned permanent restrictions by Dr. Persons on December 20, 1993, and continued working in his light duty welding position.[1] Claimant suffered other minor back injuries on April 13, 1994 and September 20, 1994.

Due to a reduction-in-force as a consequence of economic factors, claimant was temporarily laid off from his job with employer on December 7, 1996. Claimant secured a position with Franklin Equipment on March 17, 1997; he left this job on May 17, 1997 due to poor attendance and/or carpal tunnel syndrome. Claimant returned to his position with employer on September 29, 1997, after being recalled.

Claimant sought disability compensation for the period of the layoff. The administrative law judge found that claimant's current back impairment is due to his work-related back injury, and awarded claimant permanent total disability compensation from the date of the layoff, December 7, 1996, to March 17, 1997, the date he secured alternate employment with Franklin. The administrative law judge awarded claimant permanent partial disability compensation thereafter until claimant returned to his welding job with employer. Employer filed a motion for reconsideration with the administrative law judge, which was denied. In this appeal, employer contends that the administrative law judge erred in finding a causal nexus between claimant's disability and his work-related back injury pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a), and in awarding claimant total disability compensation for the period immediately following the layoff until claimant obtained alternate employment with Franklin. Claimant responds, requesting affirmance of the decision below.

Initially, we address employer's allegations regarding causation. Section 20(a) of the Act provides claimant with a presumption that his impairment is causally related to his employment. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). Once, as here, claimant establishes that he suffered a harm, *i.e.,* a back impairment resulting in physical restrictions, and that employment conditions existed or an accident occurred which could have caused, aggravated or accelerated the condition, i.e., the work-related back injury with employer in

[1]Dr. Persons placed the following permanent restrictions on claimant: lifting to 40 pounds, and intermittent bending, pushing and pulling no more than 40 pounds. CX-1 at 34.

1993, claimant has established a *prima facie* case of causation, and the burden shifts to employer to rebut the presumption with specific and comprehensive evidence sufficient to sever the casual 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 on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

In this case, we agree with employer that the administrative law judge erred in weighing all the medical opinions of record in determining that employer failed to rebut claimant's *prima facie* case. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). The administrative law judge relied upon the opinion of Dr. Persons in finding claimant's condition to be work-related, as he found Dr. Persons' opinion that claimant's continuing symptoms were contemporaneous with his 1993 injury to be more reliable than the opinion of Dr. Neal that there is no connection between the 1993 injury and the ongoing disability. EXS 7, 8; Decision and Order at 13 - 14. Although an administrative law judge's failure to analyze separately the inquiries concerning rebuttal of the Section 20(a) presumption and the weighing of the evidence as a whole may be harmless error under certain circumstances, *see, e.g., Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998), in this case, the administrative law judge's failure to do so requires that we remand this case for further consideration. Specifically, the administrative law judge's finding that Dr. Persons' opinion supports an affirmative finding that claimant's current back condition is related to the work injury cannot be affirmed, as the administrative law judge selectively analyzed the opinion of Dr. Persons. *See generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43 (CRT)(1994); *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

Dr. Neal affirmatively stated that claimant's ongoing symptoms are unrelated to the work injury and that claimant does not have any permanent residual effects from the injury, nor was claimant's underlying degenerative disc disease aggravated by the work incidents.[2] EX-7. This opinion, unless discredited for valid reasons, *see Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990), is sufficient to meet employer's burden of rebutting the Section 20(a) presumption. *See Moore*, 126 F.3d at 262-263, 31 BRBS at 123 (CRT). In crediting Dr. Persons's opinion over that of Dr. Neal on the basis that he provided the more extensive and recent treatment, the administrative law judge determined that Dr. Persons was of the opinion that there was a causal nexus between claimant's 1996 disability and his 1993 work-related back injury based upon his statement that claimant's symptoms were

[2]Although, as the administrative law judge notes, Dr. Neal last saw claimant on 1994, his 1998 opinion was given after he reviewed later records from Dr. Persons. EX-7.

contemporaneous with the 1993 incident. EX-8. The administrative law judge concluded from this statement that Dr. Persons' opinion supports the finding that there is indeed a causal nexus between claimant's current disability symptoms and the work injury. The administrative law judge, however, failed to consider the statement of Dr. Persons that he could not state with any reasonable degree of medical probability that claimant's condition in 1996 was related to the 1993 injury. EX-8. Thus, contrary to the administrative law judge's characterization, since Dr. Persons stated that he could not determine whether claimant's 1996 disability was attributable to his 1993 work-related back injury, his opinion is not necessarily contrary to the opinion of Dr. Neal. Therefore, we vacate the administrative law judge's finding that rebuttal of the Section 20(a) presumption was not established, and remand for the administrative law judge to reconsider whether employer established rebuttal.[3] If the administrative law judge concludes that rebuttal is established on remand, he must then weigh all of the evidence and resolve the causation issue on the record as a whole with claimant bearing the burden of proof. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

We next address employer's contention that the administrative law judge erred in awarding claimant total disability compensation for the period of the layoff prior to his securing a job with Franklin on March 17, 1997. In order to establish a *prima facie* case of total disability, claimant must establish that he cannot perform his usual employment. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989). Where claimant has established that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of suitable alternate

[3]We note that, aside from the opinions of Drs. Persons and Neal, the record also contains two opinions by Dr. Kyles relevant to the causation issue. Dr. Kyles testified on deposition that the physical restrictions claimant was under in 1997 were a result of his 1993 back injury. CX-7 at 27. In a written medical opinion, Dr. Kyles found that claimant has degenerative disc disease which was not caused by work-related injuries, and that he would not place any limitations on claimant due to the 1993 injury. EX-13 at 7. The administrative law judge should consider these two opinions with the other evidence relevant to the causation issue on remand.

employment. *See Moore,* 126 F.3d at 256, 31 BRBS at 119 (CRT); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). Employer may meet this burden by offering claimant a light-duty position in its facility so long as the position is tailored to claimant's physical restrictions, and the job is necessary and profitable to employer's business. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Where claimant is laid off from a suitable post-injury light duty job within employer's control, for reasons unrelated to any actions on his part, and demonstrates that he remains physically unable to perform his pre-injury job, the burden remains with employer to show the availability of new suitable alternate employment, if employer wishes to avoid liability for total disability. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989); *Mendez v. National Steel & Shipbuilding Co.,* 21 BRBS 22 (1988).

In this case, the parties agree that after suffering his work-related injury, claimant returned to light duty work with employer, working in his job as a welder within the restrictions placed on him. Decision and Order at 4. Thus, inasmuch as claimant has established that he cannot perform his pre-injury employment as a consequence of his work-related injury, claimant has established a *prima facie* case of total disability, and the burden shifts to employer to establish suitable alternate employment. The parties also agree that employer has met this burden for the period prior to the layoff, and subsequent to claimant's obtaining a job with Franklin in March 1997.

In light of the Board's holding in *Mendez*, and the unpublished decision of the United States Court of Appeals for the Fourth Circuit in *Newport News Shipbuilding & Dry Dock Co. v. Cole,* 120 F.3d 262 (Table), No. 96-2535, 1997 WL 457665 (4th Cir. Aug. 12, 1997), we affirm the administrative law judge's determination that employer failed to establish suitable alternate employment for the period from December 6, 1996 through March 16, 1997. Employer contends that it is not liable for disability compensation because the layoff was for economic reasons rather than for reasons due to claimant's injury, and that it is not a guarantor of employment for claimant. The economic basis for employer's layoff is not determinative of the inquiry. In *Mendez*, the employer withdrew the opportunity for claimant to do light duty work in its facility by laying off the claimant with the result that suitable alternate employment in the employer's facility was no longer available. The Board affirmed the administrative law judge's finding that Mendez was totally disabled since the claimant's light duty job with employer was no longer available and as employer did not establish the

availability of other suitable alternate employment.[4] *Mendez*, 21 BRBS at 25.

In *Cole*, the administrative law judge, citing *Mendez*, awarded the claimant benefits during a period when her light duty position with the employer was unavailable due to an economic layoff. *See Cole v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 621(ALJ)(1994). In affirming the award of benefits to claimant, the Fourth Circuit specifically discussed the Board's decision in *Mendez* and held, in accordance with that decision, that in order for employer to carry its burden of establishing the availability of suitable alternate employment, employer must demonstrate that a suitable job exists. Thus, in a situation where a light duty job is no longer available due to an economic layoff, employer has made that job unavailable and may not rely on that position to demonstrate that a suitable alternate job exists. *See Cole*, 1997 WL 457665 at ** 6-8.

[4]In *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), where claimant was laid off from alternate work on the open market, rather than from light duty work with the employer, the Board held that the fact that claimant was laid off due to a reduction in the work force did not impose upon employer the responsibility of identifying new suitable alternate employment, as an employer is not a long term guarantor of claimant's employment. The Board's decision was reversed by the United States Court of Appeals for the Ninth Circuit in *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994), which held that short-lived employment did not establish that alternate work was "realistically and regularly" available to the claimant.

In this case, as in *Mendez* and *Cole*, light duty suitable alternate employment at employer's facility became unavailable to claimant due to a layoff, albeit temporarily. Employer did not attempt to demonstrate the availability of additional suitable alternate employment opportunities to claimant during December 6, 1996 to March 16, 1997,[5] until, without notice to claimant or to the administrative law judge, it attempted to call a previously unnamed vocational counselor, Mr. Karmolinski, to testify at the hearing about the contents of a labor market survey which was not served on the parties or placed in the record. Tr. at 68. The administrative law judge, who has broad discretion in procedural matters, acted within that discretion in refusing to allow employer's untimely evidence into the record. *See generally Durham v. Embassy Dairy*, 19 BRBS 105 (1986). The only other evidence relevant to suitable alternate employment available to claimant for the period in question is claimant's testimony that he was offered another job with an unnamed employer, but turned the position down because he wanted to secure a wage of at least $6.50 per hour. Tr. at 58 - 61. The administrative law judge rationally concluded that this testimony was insufficient to meet employer's affirmative burden of demonstrating the availability of suitable alternate employment. Thus, since employer failed to establish suitable alternate employment during the period of the layoff prior to claimant's obtaining a job with Franklin, we affirm the administrative law judge's determination that claimant is entitled to total disability benefits from December 6, 1996 to March 16, 1997, if a causal nexus between claimant's work-related injury and his disability is established on remand.

Accordingly, the administrative law judge's finding that claimant's disability is work-related is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

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[5]Contrary to employer's contention, the Fourth Circuit's unpublished decision in *Forgich v. Norfolk Shipbuilding & Dry Dock Corp.*, 153 F.3d 719 (Table), No. 96-2574 1998 WL 468834 (4th Cir. Aug. 4, 1998), does not compel a different result. In *Forgich*, the claimant worked at employer after his injury as well as at two other employers for periods of time, although not during the time of claimant's economic layoff from employer. The court held, therefore, that as claimant held a series of four jobs for three employers, demonstrating the capability of working and of finding and changing jobs freely, the administrative law judge's finding that claimant is not entitled to total disability benefits during the layoff is supported by the evidence. 1998 WL 468834 at **2. In the instant case, however, there is no credible evidence of the availability of any other type of work prior to claimant's obtaining the position with Franklin on March 16, 1997. *See* discussion, *infra.*

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge