BRB No. 99-0975

OREY L. ROWELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ZAPATA PROTEIN, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
RELIANCE NATIONAL INSURANCE	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Henry B. Zuber, III (Parlin & Murphy, P.A.), Ocean Springs, Mississippi, for claimant.

Stephen A. Anderson (Bryant, Clark, Dukes, Blakeslee, Ramsay & Hammond, P.L.L.C.), Gulfport, Mississippi, for employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-2370) of Administrative Law Judge Lee J. Romero, Jr., 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 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).

On December 7, 1995, as claimant, a welder, was standing on a ladder to reach an overhead pipe, something hit the ladder causing it to fall. Claimant received a gash on his left shin that was about three inches long and required stitches. Claimant sought immediate medical attention for the leg wound and subsequently sought treatment for pain in his neck and back. Claimant also subsequently complained of pain in his wrist, which was diagnosed as carpal tunnel syndrome. Claimant returned to work with employer but was subsequently laid off. Since the accident, claimant has attempted to perform some odd jobs and some welding jobs which would last no more than a few hours per job. Claimant sought benefits under the Act.

In his Decision and Order, the administrative law judge found, after weighing the evidence as whole, that claimant's carpal tunnel syndrome is not causally related to the work injury of December 7, 1995. However, the administrative law judge found that employer did not produce sufficient evidence to rebut the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's neck and back condition is causally related to the work injury, and thus these injuries are compensable under the Act. The administrative law judge also found that claimant reached maximum medical improvement and that he cannot return to his former duties as a welder. The administrative law judge found that employer established the availability of suitable alternate employment, and thus that claimant is entitled to permanent partial disability benefits from December 31, 1997 and continuing. The administrative law judge calculated claimant's average weekly wage as $367.71 under Section 10(c) of the Act, 33 U.S.C. §910(c). In addition, the administrative law judge rejected employer's contention that claimant's lack of cooperation with employer's vocational expert should bar his entitlement to benefits, and he awarded claimant a penalty pursuant to Section 14(e), 33 U.S.C. §914(e), and interest.

On appeal, employer contends that the administrative law judge erred in finding claimant's neck and back injuries are related to the work accident and that suitable alternate employment was not established until December 31, 1998, rather than March 7, 1997, the date suitable alternate employment was first located by Mr. Tingle, employer's vocational rehabilitation counselor. In addition, employer contends that the administrative law judge erred in finding claimant's average weekly wage was $367.71, and that claimant's refusal to cooperate with employer's vocational expert was "shielded" by his attorney's actions. Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

Initially, employer contends that the administrative law judge erred in finding the evidence insufficient to rebut the Section 20(a) presumption that claimant's neck and back condition is causally related to the work injury on December 7, 1995, inasmuch as claimant did not complain of pain in these areas until a month after the work accident. Section 20(a) provides claimant with a presumption that his injury is causally related to his employment, if claimant establishes that he has a physical harm, and that an accident occurred or working

conditions existed that could have caused the harm. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). Once the presumption is invoked, the burden shifts to employer to rebut it with substantial countervailing evidence that claimant's disabling condition was not caused or aggravated by his employment. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The Section 20(a) presumption may be rebutted by negative evidence if the evidence is sufficiently specific to sever the potential connection between a particular injury and a job-related accident. *Swinton*, 554 F.2d at 1083, 4 BRBS at 477; *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995). Moreover, the Board has held that negative evidence, which supplements "positive" medical evidence and a credibility determination, is sufficient to rebut the Section 20(a) presumption. *Holmes*, 29 BRBS at 22; *Craig v. Maher Terminal, Inc.*, 11 BRBS 400 (1979)(Miller, J., dissenting).

In the instant case, the administrative law judge found that claimant's credible testimony, that he suffered from pain as a result of falling from the ladder, was supported by the physicians' opinions of record. He found that "merely because claimant did not immediately report symptoms and pain does not establish that the pain was non-existent." Decision and Order at 38. He rejected employer's contention that the length of time it took for claimant to report his symptomatology requires a finding of rebuttal. Dr. Manolakas testified that the fall "probably likely" aggravated claimant's pre-existing back condition. Cl. Ex. 12 at 25. On cross-examination in a deposition, Dr. Longnecker testified that the length of time before claimant's first complaints of neck and back pain may be indicative that the injuries were not related to the incident on December 7, 1995. Cl. Ex. 14 at 36. However, Dr. Longnecker also testified that his opinion that claimant's neck and back condition was causally related to the work incident on December 7, 1995 was not changed. He noted that it was also possible that claimant initially addressed his primary problem, *i.e.*, the leg laceration, and thought the other pain would go away. Cl. Ex. 14 at 33. Dr. Wyatt testified in a deposition that he would think that a person falling from the top of a ladder and landing on his back would have significant complaints at the time of the injury. Emp. Ex. 26. Claimant testified that immediately after the accident, the major sources of pain were in his back and neck, but mostly concentrated in his legs. H.Tr. at 90-91.

We affirm the administrative law judge's finding that employer did not produce substantial evidence to rebut the Section 20(a) presumption. *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). The administrative law judge found the evidence insufficient to support the negative inference that claimant's back and neck pain is not work-related given claimant's credible testimony that he suffered pain in his back and neck immediately following the accident, but did not report the pain until after the leg wound had been addressed. Unlike in *Holmes*, 29 BRBS at 22, there is no other "positive evidence" that severs the causal relationship between

claimant's neck and back condition and the work-related accident. Inasmuch as the administrative law judge acted within his discretion in evaluating the evidence, *see Perini v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969), and employer has failed to establish that the credibility determinations of the administrative law judge are irrational, we affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption and that claimant's back and neck injuries are work-related.[1] *See Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994).

Employer also contends on appeal that the administrative law judge erred in finding that suitable alternate employment was not established until December 31, 1998, rather than March 7, 1997, the date alternate employment was first located by employer's vocational expert, Mr. Tingle. As claimant established that he is unable to perform his usual work, the burden shifted to employer to demonstrate the availability of realistic job opportunities which claimant could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The testimony of a vocational rehabilitation specialist may establish the availability of suitable alternate employment. *Jones v. Genco, Inc.*, 21 BRBS 12 (1988). The administrative law judge should determine the employee's physical restrictions based on the medical opinions of record and apply them to the available jobs identified by the vocational expert. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985)(Ramsey, C.J., concurring in part and dissenting in part), *mot. for recon. denied*, 17 BRBS 160 (1985)(Ramsey, C.J., concurring in part and dissenting in part).

In the instant case, the administrative law judge found that the labor market survey dated December 31, 1998, did not contain enough information regarding the physical requirements of the positions identified in order for him to evaluate the suitability of the positions. Thus, the administrative law judge requested and received further information about the positions from a deposition of Mr. Tingle dated February 11, 1999. Emp. Ex. 30. Once the administrative law judge reviewed the additional information regarding the positions identified in the December 1998 survey, he found that a number of them were not suitable given claimant's physical restrictions, but that four of the gate guard positions were suitable. Employer does not contest this finding on appeal. As the administrative law judge rationally found that the earlier surveys did not contain enough information regarding the

[1]As we affirm the administrative law judge's finding that rebuttal of the Section 20(a) presumption was not established, we need not address employer's contentions regarding the weighing of the evidence as a whole.

positions identified for him to ascertain whether the positions identified were suitable given claimant's physical restrictions, *Turner*, 661 F.2d at 1042-1043, 14 BRBS at 164-165; *Fox v. West State, Inc.*, 31 BRBS 118 (1997), we affirm the administrative law judge's finding that suitable alternate employment was not established until December 31, 1998, the date of the labor market survey which contains the positions relied upon by the administrative law judge as available given claimant's physical restrictions. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991)*; Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration).

Employer also contends that the administrative law judge erred in finding that claimant did not fail to cooperate with employer's vocational expert. In *Villasenor*, the Board held that an employee must reasonably cooperate with an employer's rehabilitation specialist and that failure to do so should be considered in evaluating the extent of disability. *Villasenor*, 17 BRBS at 102; *see also Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999); *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989); *Vogle v. Sealand Terminal, Inc.*, 17 BRBS 126 (1985). The Board, however, cautioned that it did not intend to interfere with an administrative law judge's discretion in weighing the evidence, and thus, remanded the case for the administrative law judge to consider the relevance, if any, of claimant's lack of cooperation in evaluating the rehabilitation expert's testimony. *Villasenor*, 17 BRBS at 102.

In the present case, the administrative law judge considered employer's contention that claimant failed to cooperate with employer's vocational expert and found claimant did not purposefully fail to cooperate, but rather that claimant's counsel refused to let the vocational expert interview claimant. Moreover, the administrative law judge found that employer was able to establish suitable alternate employment even though the vocational expert did not meet with claimant.[2] Therefore, as the administrative law judge explicitly considered and found immaterial claimant's failure to meet with employer's vocational rehabilitation specialist, we reject employer's contention of error. *See Jensen*, 33 BRBS at 99.

[2]We also note that claimant's refusal did not prevent employer from conducting a job search and the deficiency in employer's evidence, *i.e.*, the lack of specificity regarding the physical requirements of the identified employment, was not due to claimant's failure to cooperate. *Jensen*, 33 BRBS at 99.

Employer lastly contends that the administrative law judge erred in his determination of claimant's average weekly wage. Employer contends that the income characterized as "business income" on claimant's tax return is too vague and speculative and thus should not have been included in the calculation of claimant's pre-injury wages. Under Section 10, 33 U.S.C. §910, computation of average annual earnings must be made pursuant to subsection (c) if subsection (a) or (b) cannot be reasonably and fairly applied. The administrative law judge is accorded broad discretion in determining claimant's annual earning capacity under Section 10(c). *See generally Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979). All sources of income are to be included in determining claimant's average weekly wage. *See* 33 U.S.C. §910(c); *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990).

In the present case, the administrative law judge found that claimant's earnings in 1995 yield the fairest determination of his average weekly wage. He found that claimant's earnings in 1995 include $3,978.97 from Gautier Utility District, $540 from employer, and $6,880 from business income, as reflected on claimant's tax return, and that claimant worked a total of 31 weeks in 1995.[3] Thus, he found that claimant had an average weekly wage of $367.71 ($11,398.97/31= $367.71). Claimant testified that he received some wages for jobs he did while he was self-employed in 1995, from the date he stopped receiving unemployment compensation to the date he began work with employer. Although claimant did not provide a detailed accounting of the specific jobs he performed during this period, he testified that these jobs included carpentry work, roofing, hanging sheetrock, welding, fitting steel, and working with steel, and that he was paid by the job rather than then the hour. H. Tr. at 68. He also testified that he did not receive any wages from his self-employment during the period he was receiving unemployment compensation. H. Tr. at 128. From the record it can be determined that claimant's self-employment wages were received for the work performed during the relevant period. We, therefore, affirm the administrative law judge's determination of claimant's average weekly wage as it is reasonable and supported by substantial evidence. *See Wayland,* 25 BRBS at 59; *Lobus*, 24 BRBS at 140.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED

ROY P. SMITH
Administrative Appeals Judge

[3]Claimant received unemployment compensation from May 17, 1995 to October 11, 1995, for a period of 21 weeks.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge