

BRB No. 98-856

GARY ROBINSON)
)
 Claimant-Petitioner)
)
 v.)
)
 RAYTHEON SERVICES NEVADA) DATE ISSUED:
 COMPANY)
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 and)
)
 EMPLOYER ' S INSURANCE OF)
 WAUSAU)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits, Decision on Motion for Reconsideration, and Order Denying Posthearing Admission of Evidence of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Charles L. Stott, San Diego, California, for claimant.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela & Sorkow), San Pedro, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits, Decision on Motion for Reconsideration, and Order Denying Posthearing Admission of Evidence (96-LHC-1216) of Administrative Law Judge Daniel L. Stewart 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

Defense Base Act, 42 U.S.C. §1651 *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).

Claimant, a carpenter on the Johnston Atoll, injured his left shoulder while moving a heavy window panel weighing over 200 pounds in mid August 1993, but continued to work through October 1993. Employer voluntarily paid claimant temporary total disability benefits from November 1, 1993, through July 4, 1994. Claimant was terminated on July 5, 1994, after he was released to return to work but refused to do so. He sought permanent total disability benefits from July 5, 1994, for his left shoulder injury, as well as for a cervical injury, a thoracic injury, thoracic outlet syndrome, carpal tunnel syndrome, tarsal tunnel syndrome, and a pain disorder referred to as reflex sympathetic disorder. The administrative law judge found that only the shoulder injury was compensable and that maximum medical improvement with respect to this injury was reached on May 9, 1994. The administrative law judge found claimant capable of returning to his pre-injury employment on June 14, 1994, and that claimant’s average weekly wage was \$999.33, exclusive of a seven percent completion bonus on claimant’s second six month contract. The administrative law judge denied claimant an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), and medical benefits after May 9, 1994. The administrative law judge held that employer’s request for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), was moot. The administrative law judge denied claimant’s motion for reconsideration and his request to admit posthearing medical evidence.

On appeal, claimant challenges the administrative law judge's exclusion of posthearing medical evidence and the administrative law judge’s findings with respect to causation, nature and extent of disability, average weekly wage, and denial of a Section 14(e) assessment.¹ Employer responds in support of the

¹Claimant further requests that the Board take judicial notice of certain medical facts. We accept employer’s response to claimant’s request for judicial notice, claimant’s table of authorities, and claimant’s reply in support of his request for

administrative law judge' s exclusion of posthearing medical evidence and denial of additional benefits.

judicial notice as part of the record. 20 C.F.R. §802.215. We deny claimant' s request that we take judicial notice of certain medical facts for the first time on appeal, as the Board' s scope of review is limited to the record developed before the administrative law judge. See *Palma v. California Cartage Co.*, 18 BRBS 119 (1986).

We first address claimant's argument that the administrative law judge abused his discretion in excluding claimant's posthearing medical evidence. The administrative law judge has broad discretion concerning the exclusion of evidence and any decision regarding the exclusion of evidence is reversible only if arbitrary, capricious, or an abuse of discretion. See *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). We hold that the administrative law judge acted within his discretion in refusing to admit into the record posthearing medical documents, which claimant submitted to him on September 23, 1997. The administrative law judge rationally determined that admission of these documents would place an unfair burden on employer, as its proposed Decision and Order was due on September 30, 1997.² Moreover, the administrative law judge found that claimant's submission would necessitate the generation of additional medical reports. See *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon.*, 20 BRBS 26 (1987), *aff'd and rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989); Order Denying Posthearing Admission of Evidence at 3. Likewise, we hold that the administrative law judge acted within his discretion in excluding the 20 new exhibits which claimant submitted with his motion for reconsideration. See *Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989); *Brown*, 19 BRBS at 200; Decision on Motion for Reconsideration at 3-4; see generally 20 C.F.R. §702.336(b). The administrative law judge properly noted that if claimant wishes consideration of this new evidence, he may request modification pursuant to Section 22 of the Act, 33 U.S.C. §922. *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT)(1995); *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985).

We next address claimant's challenges to the administrative law judge's causation findings with respect to claimant's cervical injury, thoracic injury, thoracic outlet syndrome, carpal tunnel syndrome, tarsal tunnel syndrome, and pain disorder. The Section 20(a), 33 U.S.C. §920(a), presumption is invoked if claimant establishes his *prima facie* case, *i.e.*, that he sustained a harm and that an accident occurred or working conditions existed which could have caused the harm. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption by presenting 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, he

²The administrative law judge noted that the record was held open after the hearing on July 1, 1997, for submission of the parties' proposed Decision and Orders, which were due on September 30, 1997.

must weigh all of the evidence and resolve the causation issue based on the record as a whole. See *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997).

With regard to the cervical injury, we hold that the administrative law judge erred in finding rebuttal established as the evidence upon which he relied is insufficient to sever the connection between claimant's condition and his employment. Decision and Order at 38-42. The objective tests that the administrative law judge discussed are relevant to the issue of the specific nature of claimant's cervical condition, but they do not address the cause of the conditions noted on the tests.³ Decision and Order at 40; Cl. Exs. 39, 57, 66, 69, 86, 112. Thus, the tests cannot rebut Section 20(a). Moreover, the opinions of Drs. Marcisz and Garfin do not establish rebuttal as Dr. Marcisz related claimant's cervical injury to his work, and as Dr. Garfin testified that he had no reason to disbelieve claimant that his pain onset started in 1993 at work. Cl. Exs. 151 at 41, 154 at 16, 35. Although Dr. Stern treated claimant for his cervical injury, he did not give an opinion on causation. Cl. Ex. 152 at 15. Therefore, we vacate the administrative law judge's finding of rebuttal with regard to the cervical injury. See *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989). On remand, the administrative law judge must reconsider his rebuttal finding in light of the remaining relevant evidence of record. See, e.g., Emp. Ex. 6.

We affirm the administrative law judge's findings that claimant either does not have the remaining injuries as claimed or that they are not work-related. See Decision and Order at 44, 47, 49-50, 51-52, 54. Claimant has raised no error committed by the administrative law judge in weighing the relevant evidence of record, and the administrative law judge's findings are supported by substantial evidence. See generally *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7 (CRT)(2d Cir. 1993); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT)(9th Cir. 1988).

Next, we address claimant's challenge to the administrative law judge's nature and extent of disability findings. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement based on the

³The objective tests upon which the administrative law judge relied to find rebuttal established include MRIs dated February 15, 1997, May 24, 1996, and October 12, 1994, a cervical CT scan of May 2, 1994, an x-ray of the cervical spine dated May 18, 1994, and an electrodiagnostic examination performed on June 6, 1994. Cl. Exs. 39, 57, 66, 69, 86, 112.

medical evidence. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Diosdado v. Newport Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *see also Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). To establish a *prima facie* case of total disability, claimant must show that he is unable to return to his usual employment due to his work-related injury. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). In the instant case, the administrative law judge acted within his discretion in determining that claimant reached maximum medical improvement on May 9, 1994, and that claimant could return to work on June 14, 1994, with respect to his left shoulder injury based on Dr. Bohart's opinion. *See Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989); *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990); Decision and Order at 54-56; Cl. Ex. 61; Emp. Ex. 20. Thus, we affirm these findings. If, on remand, however, the administrative law judge finds that claimant's cervical injury is compensable, he must reconsider these findings.

Claimant next argues that the administrative law judge erred in excluding from his average weekly wage calculation the potential seven percent completion bonus on his second six month contract. The administrative law judge's exclusion of this potential completion bonus is in accordance with law, as it was contingent upon an event which had not occurred at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); Decision and Order at 56-59; Cl. Ex. 173. Consequently, we affirm the administrative law judge's determination that claimant's average weekly wage is \$999.33.

The administrative law judge's denial of an assessment pursuant to Section 14(e) also is in accordance with law, as employer timely filed its notice of controversion, which contained all necessary information.⁴ *See White v. Rock Creek*

⁴Contrary to claimant's arguments, employer's notice of controversion dated June 22, 1994, did not contain material misrepresentations or omissions as the administrative law judge found the opinions of Drs. Aalbers, Ostrup, and Marcisz supported employer's controversion. Emp. Exs. 21, 23, 24, 31; Cl. Exs. 67, 69, 72,

Ginger Ale Co., 17 BRBS 75 (1985); 33 U.S.C. §914(d); Decision and Order at 60-62; Decision on Motion for Reconsideration at 6-8. We, therefore, affirm the administrative law judge's denial of a Section 14(e) assessment.

187. Moreover, employer was not required to controvert each of claimant's specific injuries as claimant alleged that these injuries arose out of his employment and as employer's controversion was with respect to the "work injury," claimant's claim did not specifically list these diagnoses, and as tarsal tunnel syndrome was not diagnosed until after employer filed this controversion.

Accordingly, the administrative law judge's finding that claimant's cervical injury is not 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 and Order Denying Benefits, Decision on Motion for Reconsideration, and Order Denying Posthearing Admission of Evidence are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge