BRB No. 99-0885

JACKIE TRUEX	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. NAVY EXCHANGE	)	DATE ISSUED:
	)	
and	)	
	)	
CRAWFORD AND COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

James C. Causey, Jr. (Causey Law Firm), Seattle, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (98-LHC-936) of Administrative Law Judge Alfred Lindeman 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 Nonappropriated Funds Instrumentalities Act, 5 U.S.C. §8171 *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 worked as an auto mechanic for employer for more than 21 years. He began

suffering numerous injuries to his frame in 1993, for which he sought treatment from his family physician, Dr. Lycksell. In late 1995 or early 1996, claimant was referred by Dr. Lycksell to Dr. Madenwald, who told claimant that years of work as a mechanic had worn out his upper back. Claimant stopped working on January 4, 1996 on the advice of Dr. Lycksell, and sought benefits under the Act.

In his Decision and Order, the administrative law judge accorded greater weight to the opinion of Dr. Lycksell, as he was claimant's treating physician for more than ten years, and found that claimant has a disabling medical condition. In addition, the administrative law judge found that claimant's condition was aggravated by and thus causally related to his work as a mechanic. He also found that claimant has not reached maximum medical improvement, that he cannot return to his former duties, and that employer had not established suitable alternate employment. Thus, the administrative law judge found claimant entitled to temporary total disability benefits.

On appeal, employer contends that the administrative law judge's finding that claimant has a disabling medical condition is ambiguous and requires reversal, that the administrative law judge erred by including at the hearing the new issue of injury due to cumulative trauma, and that the administrative law judge failed to address its contention that claimant did not suffer an injury. In addition, employer contends that the administrative law judge erred by failing to analyze whether the Section 20(a), 20 C.F.R. §920(a), presumption applied and by finding that claimant is totally disabled. Claimant responds, urging affirmance of the administrative law judge decision.

Employer's initial contentions relate to whether claimant established the existence of an injury under the Act. An injury occurs "if something unexpectedly goes wrong within the human frame." *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Claimant need not show that he has a specific illness or disease in order to establish an injury, but need only establish some physical harm. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). Moreover, an injury need not be traceable to a definite time, but can occur gradually, over a period of time. *See Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm. *See Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). Once claimant establishes that has sustained harm, and that an accident occurred or working conditions existed which could have caused it, he has established a *prima facia* case for a work-related injury, and the Section 20(a) presumption is invoked. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

In the present case, the administrative law judge found that claimant initially filed his

claim for fibromyalgia. He also found that:

> At the hearing, he maintained that he suffers from fibromyalgia as well as cumulative trauma, which he acquired over a period of 21 years and which has caused him to be totally disabled since January 4, 1996.

Decision and Order at 5. While the administrative law judge does not make any other specific characterization of claimant's "disabling medical condition," it is apparent claimant's claim is for musculoskeletal problems, allegedly due to cumulative trauma over 21 years of employment.[1] The administrative law judge's review of the medical evidence and testimony focuses on claimant's back-related problems and treatment, as well as the frequent treatment for pain in his upper back, neck, shoulders, arms and numbness in his legs. The administrative law judge rationally accorded greatest weight to the opinion of Dr. Lycksell, as claimant's treating physician, as he found it supported by claimant's extensive medical history, claimant's credible testimony, and the opinion of Dr. Hofenbeck that claimant has a good work ethic and is not malingering. Therefore, we affirm the administrative law judge's finding that claimant has something wrong with his human frame as it is supported by the evidence credited with greater weight. *See generally Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

We also reject employer's contention that it did not have time to prepare for a claim for cumulative trauma as claimant included a claim for a musculoskeletal condition in his LS-18 dated December 31, 1997, and his pre-hearing statement dated October 23, 1998. The hearing was held November 19, 1998, almost 11 months after the first mention of muscoskeletal problems. In addition, contrary to employer's contention, the administrative law judge did not err in failing to identify an "accident, incident, exposure, event or episode" at work on December 29, 1995, the date of "injury" in this case. The finding of a compensable claim is not based on a specific injury on this date, but is a claim for cumulative trauma over many years of work. *See generally U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

As employer correctly contends, the administrative law judge found that claimant's condition "was aggravated by, and thus causally related to, his work as a mechanic for the Navy Exchange," without discussing the issue in terms of Section 20(a), 33 U.S.C. §920(a). Decision and Order at 6. If invoked, Section 20(a) provides claimant with a presumption that

[1]While the administrative law judge may have found that claimant also alleged that he suffers from fibromyalgia, he does not mention fibromyalgia again in his analysis.

his condition is causally related to his employment. In this case, any error by the administrative law judge in failing to apply Section 20(a) is harmless. Section 20(a) is invoked based on evidence claimant sustained a physical harm and that his working conditions could have caused it. Specifically, Dr. Lycksell's opinion that claimant's condition was caused or aggravated by his work as an auto mechanic supports invocation of the Section 20(a) presumption. Once the presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's disabling condition was not caused or aggravated by this employment. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th 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 physicians upon whom employer relies, Drs. McCollum and Campbell, examined claimant and reviewed the medical evidence of record. Dr. McCollum noted various "minor" degenerative changes, but opined that there was no evidence of any significant disease process that would justify time off from work. Emp. Ex. 3. Dr. Campbell diagnosed osteoarthritis in the hands, neck and back and chronic musculoskeletal pain syndrome without any underlying physiologic or structural abnormality to explain the symptoms. Emp. Ex. 2. While it is clear that neither physician concluded that claimant has a disabling medical condition, they do not address whether claimant's symptoms and the degenerative changes found are related to claimant's exposure to cumulative trauma, and thus are insufficient to rebut the Section 20(a) presumption. *See generally Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127 (1997)(McGranery, J., dissenting), *aff'd on recon. en banc*, 32 BRBS 134 (1998)(Brown and McGranery, JJ., dissenting). Accordingly, as there is no other evidence of record that rebuts the presumption that claimant's current condition was caused or aggravated by his employment, we affirm the administrative law judge's finding that claimant's condition is due to his work as a mechanic for employer.

Lastly, employer contends that the administrative law judge erred in finding that claimant is totally disabled. In order to establish a *prima facie* case of total disability, claimant must establish that he is unable to return to his usual work due to a work-related condition. *See, e.g., SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). If claimant establishes that he cannot return to his usual employment, the burden shifts to employer to establish the availability of suitable alternate employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

In the present case, the administrative law judge found that claimant cannot return to his former work based on the reports of Drs. Lycksell and Hofenbeck, Dr. Madenwald's opinion that claimant can perform only light or sedentary work, claimant's own testimony and that of his father, and the fact that claimant was terminated from his position with employer. We affirm this finding, as it is based on substantial evidence. *See Anderson v.*

Todd Shipyards Corp., 22 BRBS 20 (1989). In addition, the administrative law judge credited the opinion of Dr. Lycksell that claimant was only capable of performing work for one hour per day and noted that it was not likely that claimant would be able to obtain employment within this restriction. The administrative law judge had previously accorded greatest weight to the opinion of Dr. Lycksell based on his long-term treatment of claimant. It is within the administrative law judge's discretion to credit a doctor's opinion that claimant is disabled from seeking gainful employment. *See Clophus v. Amoco Produc. Co.*, 21 BRBS 261 (1988); *Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather the administrative law judge may draw his own inferences and conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Thus, we affirm the administrative law judge's decision to credit the opinion of Dr. Lycksell over the contrary opinions of record as it is rational and employer has identified no reversible error on appeal. Consequently, we affirm the administrative law judge's finding that employer failed to establish suitable alternate employment, and thus affirm the award of total disability benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge