

R.R.)
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 Claimant-Respondent)
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 v.)
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 AMSEC CORPORATION)
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 and)
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 AIG WORLD SOURCE) DATE ISSUED: 05/27/2009
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 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

Michael W. Thomas and Robyn A. Leonard (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Peter B. Silvain (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (2007-LHC-00948) 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 alleged he sustained an injury on November 19, 2004, during the course of his employment for employer when a piece of tri-wall cardboard struck his neck in windy conditions. Claimant had previously undergone neck surgery in 2000 and 2003. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), until it terminated benefits approximately 18 months after the date of injury. Claimant sought continuing compensation for temporary total disability and medical treatment for his neck and for depression. Claimant alleged that his psychological condition arose from chronic neck pain due to the work injury.

In his decision, the administrative law judge found that claimant's neck and psychological conditions are related to the November 19, 2004, work incident and that claimant is unable to work due to totally disabling pain. The administrative law judge found that claimant's neck condition has not reached maximum medical improvement. Accordingly, the administrative law judge found premature employer's application for Section 8(f) relief, 33 U.S.C. §908(f). The administrative law judge awarded claimant ongoing compensation for temporary total disability as of September 13, 2006, the date employer terminated its voluntary compensation payments.

On appeal, employer challenges the administrative law judge's findings that claimant's neck and psychological conditions are related to the work injury, that he is unable to work, and that claimant's neck condition has not reached maximum medical improvement. Employer also challenges the administrative law judge's failure to address whether it established the availability of suitable alternate employment and its entitlement to Section 8(f) relief. Claimant responds, urging affirmance of the award of compensation and medical benefits. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of Section 8(f) relief.

Employer contends that the administrative law judge's findings that claimant's neck and psychological conditions are related to the work injury, that he is unable to work, and that claimant's neck condition has not reached maximum medical

improvement are conclusory in that the administrative law judge failed to discuss the material issues of law, weigh the conflicting evidence of record, make credibility determinations, and provide a reasoned analysis. Decisions rendered under the Act are subject to the Administrative Procedure Act (APA) which requires that every adjudicatory decision be accompanied by a statement of “findings and conclusions and the reasons or basis therefor, on all material issues of fact, law or discretion presented in the record.” 5 U.S.C. §557(c)(3)(A). Thus, the administrative law judge must adequately detail the rationale behind his decision and specify the evidence upon which he relies. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994).

We agree with employer that the challenged findings cannot be affirmed. In his decision, the administrative law judge summarized evidence pertinent to the contested issues, but he did not render adequate findings of fact and conclusions of law with respect to the conflicting evidence of record. Rather, the administrative law judge merely recited very limited portions of doctors’ opinions without providing factual or legal context for them. *See* Decision and Order at 22-23. Therefore, we must vacate his decision and remand the case for more detailed findings of fact and conclusions of law on the disputed issues as discussed below.

With regard to the neck and psychological injury claims, employer does not dispute that claimant is entitled to invocation of the Section 20(a) presumption linking these conditions to the work incident on November 19, 2004. 33 U.S.C. §920(a). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant’s condition was not caused, contributed to or aggravated by his employment.¹ If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case and claimant bears the burden of establishing the work-relatedness of his injury based on the record as a whole. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

The administrative law judge did not address employer’s contention that claimant’s current neck condition is not due to the 2004 work incident. The administrative law judge misstated employer’s contention as conceding that claimant’s neck condition reached maximum medical improvement in November 2005. Rather, in its Post-Hearing Brief, employer asserted that at least claimant sustained a temporary

¹ If the work injury aggravated a pre-existing condition, employer is liable for the entire resulting disability. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001).

exacerbation of his pre-existing neck symptomatology as a result of work injury, and that claimant's neck condition reached maximum medical improvement from the November 19, 2004 incident a week later on November 26, 2004. Employer's Post Hearing Brief at 7, 42. Employer raised this issue in an effort to establish that claimant's current neck condition is not related to the work incident but is due solely to his pre-existing condition. In this regard, employer argued that a temporary exacerbation is established from the conflicting accounts of the work injury provided by claimant and his supervisor, L. M., who was present when claimant was injured, claimant's failure to request that L. M. file an injury report, claimant's not seeking neck treatment before November 26, 2004, and the medical records closest in time to the work incident. *Id.* at 16-20. Moreover, employer argued in detail that claimant's account of the injury and his complaints of increased neck symptomatology after the work incident lack credibility, and it specifically relied on the hearing testimony of Dr. Gold, including his opinion that claimant's neck condition as it relates to the November 19, 2004 work incident reached maximum medical improvement on November 26, 2004. *Id.* at 23-25, 30-42; *see* Tr. at 123, 158. In his decision, the administrative law judge did not address employer's contention or the evidence supporting it.

With regard to claimant's alleged work-related psychological condition, employer contends that the administrative law judge erred by summarily crediting the opinion of Dr. Robert Mitchell because he treated claimant on a frequent basis over the opinion of Dr. Mansheim. Decision and Order at 23. Dr. Mitchell diagnosed depression, secondary to multiple somatic problems. CX 2 at 9. Specifically, he related claimant's pain symptomatology to his two prior neck surgeries and the November 2004 work incident, and Dr. Mitchell opined that claimant's depression is related to his pain symptomatology. CX 20 at 10-11. Dr. Mansheim opined that claimant does not have a work-related psychological condition. Tr. at 169-170, 193, 208-209; CX 8 at 17-18. The administrative law judge found that, "Dr. Mansheim was a credible witness at the hearing but one must defer to Dr. Robert Mitchell who has treated the claimant on a frequent basis." Decision and Order at 23. Dr. Mitchell has treated claimant's psychological condition since May 2, 2005. CX 2. In *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999), the Ninth Circuit held that greater weight may be accorded to a treating physician's opinion regarding treatment options since he is employed to cure and has a greater opportunity to know and observe the patient as an individual. *Amos*, 164 F.3d at 1054, 32 BRBS at 147(CRT) (internal citations omitted). The court further held that, on the facts of that case, the administrative law judge was required to credit the claimant's treating physician's opinion regarding a proposed course of treatment since his opinion was entitled to special deference and since it was not shown by the testimony of other doctors to be unreasonable. The court's holding, therefore, is based on two factors: the doctor was the treating physician and the other medical evidence of record did not show his opinion to be unreasonable. Accordingly, in weighing a treating physician's opinion,

the administrative law judge must also consider its underlying rationale, as well as the other medical evidence of record. See *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); see also *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005); accord *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002). In this case, the administrative law judge's crediting of Dr. Mitchell's opinion that claimant's psychological condition is related to the work injury does not reflect consideration of any factor other than his status as claimant's treating psychiatrist, and the administrative law judge found that "one must defer" to his opinion for this reason alone. Decision and Order at 23. We, therefore, agree with employer that the administrative law judge erred by crediting Dr. Mitchell's opinion without considering its underlying rationale or addressing his opinion in view of the other evidence of record. See *Brown*, 34 BRBS at 200-201. On remand, the administrative law judge must reconsider the weight to be accorded Dr. Mitchell's opinion in view of its rationale and the other medical evidence of record.

While there is evidence in the record which supports the administrative law judge's conclusion, his errors in addressing the cause of claimant's current neck and psychological conditions are not harmless in view of his failure to provide adequate reasoning, as discussed above. In this regard, the administrative law judge's finding that the objective data do not support claimant's assertion of an increase in his pain symptoms after the November 2004 work incident must also be addressed in the context of the record evidence. Decision and Order at 22. Moreover, the administrative law judge did not address the evidence in light of employer's burden to rebut the Section 20(a) presumption, and, should employer establish rebuttal of the presumption, claimant's burden to establish that his neck and psychological conditions are related to the work incident based on the record evidence as a whole. See *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Accordingly, we vacate the administrative law judge's finding that claimant's current neck and psychological conditions are related to the work injury. On remand, the administrative law judge must reconsider all of the relevant evidence in light of the Section 20(a) presumption and employer's contention that the work injury resulted in only a temporary exacerbation of claimant's pre-existing neck condition.

We next address employer's challenge to the administrative law judge's finding that claimant's neck condition has not reached maximum medical improvement. We agree that this finding cannot be affirmed as the administrative law judge did not render adequate findings of fact with respect to the conflicting evidence of record. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Monta*, 39 BRBS at 108; *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period,

Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), or if he has any residual impairment after reaching maximum medical improvement, the date of which is determined by medical evidence. *See generally Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

In this case, the administrative law judge summarily stated that claimant's neck condition has not reached maximum medical improvement "as indicated by Dr. Gajjar in his November 2007 deposition." Decision and Order at 23. In his deposition, Dr. Gajjar did not explicitly opine that claimant's neck is not at maximum medical improvement, and the administrative law judge did not cite to the specific deposition testimony he credited. CX 23. In addition to Dr. Gold's hearing testimony that claimant's neck reached maximum medical improvement from the November 19, 2004 incident on November 26, 2004, Dr. Gold testified that claimant's overall neck condition reached maximum medical improvement by the date of his November 18, 2005 examination. Tr. at 123-124; *see also* EX 28 at 1196, 1208. Employer further contended in its Post-Hearing Brief that reports from Dr. Paul Mitchell support its contention that claimant's neck condition has reached maximum medical improvement. Employer's Post-Hearing Brief at 42; *see* EX 31 at 1243, 1264. Because the administrative law judge must in the first instance resolve these conflicts and explain what evidence he credited and why, consistent with the requirements of the APA, *see McCurley v. Kiewest Co.*, 22 BRBS 115 (1989), and because the Board cannot render more specific findings to supplement the administrative law judge's Decision and Order, *see Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701, 14 BRBS 538, 543 (2^d Cir. 1982), we vacate the administrative law judge's findings with respect to the nature of claimant's disability. On remand, the administrative law judge shall reconsider this issue should he find that claimant's current neck condition is related to his employment. Should the administrative law judge find that claimant's neck condition is at maximum medical improvement and that claimant has a work-related psychological condition, he must also address whether the psychological condition is at maximum medical improvement. *See Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1988); *see also Beumer v. Navy Pers. Command/MWR*, 39 BRBS 98 (2005). Should the administrative law judge find that claimant's work injury has reached maximum medical improvement, he must then address employer's application for Section 8(f) relief.

Employer next challenges the administrative law judge's finding that claimant is totally disabled due to neck pain. Claimant bears the burden of establishing that he is unable to perform his usual work due to his work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). Once claimant establishes that he is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Moore*, 126 F.3d 256, 31 BRBS

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 v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In order to meet this burden, employer must show the availability of a range of job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Lentz*, 852 F.2d at 129, 21 BRBS at 109(CRT); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). If the administrative law judge finds that claimant is unable to perform any work he is totally disabled, and the administrative law judge need not address employer's evidence of suitable alternate employment.² *J.R. v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008); *see also Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

In this case, the administrative law judge acknowledged Dr. Gold's testimony that claimant could perform most of the jobs in employer's labor market survey, but he instead credited the psychological functional capacities examination and deposition testimony of Dr. Robert Mitchell to find that chronic pain renders claimant unable to function psychologically on a daily basis and that claimant is totally disabled. Decision and Order at 22-23; *see Tr.* at 121, 282; CXs 2 at 16-18; 20 at 15-19; EXs 28 at 1202, 1211-1212; 37 at 1410-1416. Dr. Mitchell's opinion is supported by the hearing testimony of employer's vocational consultant, Beverly Brooks, that the psychological limitations noted by Dr. Mitchell would prevent claimant from performing the jobs identified in her labor market survey. *Tr.* at 278-279. The Board is not empowered to reweigh the evidence, *see generally Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994), and this evidence supports the administrative law judge's conclusion. However, Dr. Mitchell testified at his deposition that he relied solely on claimant's veracity as to his medical history and symptoms in forming his opinion as to claimant's psychiatric condition. CX 20 at 26; *see Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2^d Cir. 1997). Although the administrative law judge found that the objective evidence does not support claimant's subjective pain complaints, Decision and Order at 22, he did not address claimant's credibility. In its Post-Hearing Brief, employer disputed claimant's credibility as to his symptomatology both before and after the work incident. As the administrative law judge did not make findings on this issue, we vacate his conclusion that claimant is totally disabled. Employer's Post-Hearing Brief at 8-16, 26-30. Should the administrative law judge find on remand that claimant's neck and psychological conditions are related to the November 19, 2004, work incident, he must discuss all of the

² As the administrative law judge found that claimant is unable to work, he did not err by not addressing employer's evidence of suitable alternate employment, and we reject employer's contention in this regard. *See J.R.*, 42 BRBS at 97.

relevant evidence regarding claimant's ability to work, including the evidence pertaining to claimant's credibility, in order to comply with the APA.³

Accordingly, the award of temporary total disability benefits must be vacated. The administrative law judge's findings that claimant has totally disabling work-related neck and psychological injuries and that these conditions have not reached maximum medical improvement are therefore vacated, and the case is remanded for further proceedings in accordance with this opinion.⁴ The administrative law judge shall address employer's application for Section 8(f) relief should he find on remand that claimant has a permanently disabling work injury.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

³ The administrative law judge inferentially addressed employer's assertions that claimant is not credible due to alleged drug and alcohol dependency. Decision and Order at 22-23; Employer's Post-Hearing Brief at 30-41. If the administrative law judge finds claimant's neck condition related to his employment, he should explicitly address employer's argument.

⁴ Claimant filed a Motion to Remand with the Board, stating that his claim for reimbursement of additional medical expenses could not be resolved before the district director. Claimant requests that the case be remanded to the district director so that he may refer the case to the Office of Administrative Law Judges for a hearing on the matter. There is no need to remand this case to the district director. On remand, claimant may file a motion to consolidate this matter with the current case.