

BRB Nos. 08-0812
and 08-0812A

J.F.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
UNITED STATES MARINE	)	DATE ISSUED: 05/06/2009
CORPS/MWR	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

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

Andrew J. Hanley (Crossley McIntosh Collier Hanley & Edes, PLLC),
Wilmington, North Carolina, for claimant.

James M. Mesnard (Seyfarth Shaw LLP), Washington, D.C., for self-
insured employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (2007-LHC-01404) 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 commenced employment with employer at Camp Lejeune in September 1997. On December 26, 2003, claimant injured her left hand while lifting

boxes in employer's package store. On February 12, 2004, Dr. Armistead opined that claimant appeared to be suffering from carpal tunnel syndrome. On May 7, 2004, claimant underwent a left carpal tunnel release; thereafter, claimant returned to work for one day. Claimant subsequently experienced swelling and pain in her left hand. On July 14, 2004, Dr. Nicks opined that claimant was suffering from reflex sympathetic dystrophy, and he recommended that claimant undergo a nerve block procedure in order to treat this condition. On November 18, 2004, Dr. Getz similarly diagnosed claimant's left hand condition as complex regional pain syndrome with no motion in claimant's index or longer left fingers, and he recommended that claimant undergo ganglion blocks in her left upper extremity. On May 3, 2005, Dr. Nicks examined claimant a second time and, after opining that claimant's left hand had become one hundred percent disabled, stated that the possibility of nerve blocks and intensive physical therapy may render claimant's hand slightly more useful. On January 25, 2006, Dr. Getz noted that claimant had refused to undergo the recommended ganglion blocks, that claimant had a fifty-nine percent permanent partial disability of her left hand, and that she had a somatoform conversion disorder affecting her right hand, which exhibited no grip strength. On June 6, 2007, claimant was found to have some dry gangrene on the first and second digits of her left hand. On November 2, 2007, claimant was evaluated by Dr. Rollins, a psychiatrist, who opined that claimant's right hand and arm weakness is due to a conversion disorder.

In a letter dated May 8, 2006, employer informed claimant that it had a sales associate position available for her which was within her restrictions. Claimant, however, did not report to employer for post-injury employment. At the time of the formal hearing, employer, who had previously voluntarily paid claimant temporary total disability benefits between March 22, 2004 and May 27, 2006, was paying claimant permanent partial disability benefits for a fifty-nine percent impairment rating to her left hand.

In his Decision and Order, the administrative law judge found that employer was not prejudiced by claimant's untimely notice of injury, that claimant's right arm conversion disorder was not related to her December 26, 2003, work-injury, that employer established the availability of suitable alternate employment within the restrictions imposed by claimant's December 26, 2003, work-injury, and that claimant did not unreasonably refuse to undergo medical treatment for her left hand condition. Accordingly, the administrative law judge denied claimant's claim for additional unscheduled compensation benefits under the Act, but found claimant entitled to future medical treatment for her work-related arm impairments payable by employer.

On appeal, claimant challenges the administrative law judge's finding that her right arm condition is not causally related to her December 26, 2003, work-injury, and the administrative law judge's denial of her claim for ongoing permanent total disability benefits. In its cross-appeal, employer argues that the administrative law judge erred in finding that claimant reasonably refused medical treatment for her left hand condition.

Claimant first contends that the administrative law judge erred in finding no relationship between claimant's right arm and hand conditions and her December 26, 2003, work-injury.¹ Section 20(a), 33 U.S.C. §920(a), provides claimant with a presumption that her disabling condition is causally related to her employment if claimant establishes her *prima facie* case by proving that she suffered a harm and that working conditions existed or an accident occurred which could have caused the harm. *See Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd sub nom.* 245 Fed.Appx. 249 (4th Cir. 2007); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1998). In the instant case, it is undisputed that claimant sustained a work-injury on December 26, 2003, which claimant alleges resulted in, *inter alia*, stress and the conversion disorder which affects her right arm and hand. Claimant therefore is entitled to invocation of the Section 20(a) presumption.² *See Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989).

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 her employment. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 199) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Swinton*, 554 F.2d 1075, 4 BRBS 466.

¹ In response to claimant's contention, employer avers that the sole claim for benefits raised by claimant below was based upon an injury sustained to claimant's left hand on December 26, 2003. Er's br. at 19. Claimant, however, clearly raised injuries to both limbs before the administrative law judge, asserting in her post-hearing brief that the work-related injury to her left hand is related to the conversion reaction and right hand condition subsequently diagnosed. The administrative law judge thus properly found injuries to both extremities were at issue. Decision and Order at 2-3; 19. *See U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n.7 (1982) (noting informal nature of workers' compensation proceedings, court stated that "considerable liberality is afforded in amending claims"). Employer also defended such a claim, as the record establishes that 1) employer employed the services of Dr. Rollins to interview and evaluate claimant regarding the etiology of her conversion disorder and right hand and arm conditions, EX 44; 2) employer, at the formal hearing, questioned Dr. Rollins at length regarding whether claimant's conversion disorder was caused or aggravated by her December 26, 2003, work-injury, H.Tr. at 106 – 131; and 3) employer's post-hearing brief to the administrative law judge addresses this causation issue. Er's post-hearing br. at 20 – 26.

² Employer acknowledges that claimant's December 26, 2003, work-injury caused a fifty-nine percent permanent partial disability to her left hand, and that as a result of that incident claimant is presently unable to use her left arm. *See Er's resp. br.* at 34 - 35.

Employer's burden is one of production; once employer produces substantial evidence of the absence of a causal relationship between the claimant's disabling condition and her employment, the presumption no longer controls and the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994); *Richardson*, 39 BRBS 74. Employer is liable for the sequelae of a work injury; thus, any conditions which naturally or unavoidably result from the work injury are also compensable. *See Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *Manship v. Norfolk & W. Ry. Co.*, 30 BRBS 175 (1996); *Bass v. Broadway Maint.*, 28 BRBS 11 (1994).

Although in this case the administrative law judge did not apply the presumption, he considered the issue of whether claimant's right arm and hand condition was related to her December 26, 2003, work-injury, and he found that this condition was not attributable to claimant's work-related injury. Accordingly, if the evidence relied upon by the administrative law judge to find that causation was not established is sufficient to rebut the presumption, his failure to apply the presumption is harmless; however, if that evidence is insufficient to rebut the presumption, and there is no other evidence in the record to support rebuttal, then causation is established as a matter of law. *Burson*, 22 BRBS 124.

After briefly describing the opinions of Drs. Getz and Rollins, the administrative law judge concluded that the conversion disorder affecting claimant's right hand and arm is not attributable to her December 26, 2003, work-injury. Decision and Order at 19. Specifically, the administrative law judge stated that Dr. Getz, a Board-certified orthopedic surgeon, diagnosed claimant's right hand condition as resulting from a somatoform conversion disorder and recommended a psychiatric evaluation for confirmation and treatment.³ Next, the administrative law judge found that Dr. Rollins, a psychiatrist who interviewed and evaluated claimant at employer's request on November 2, 2007, concluded that claimant had a conversion reaction of the right arm which was unrelated to her work-injury; rather, Dr. Rollins opined that the main stressors resulting in claimant's conversion disorder and resulting right arm symptoms

³ On January 25, 2006, Dr. Getz examined claimant at the request of employer. During this examination, claimant complained of weakness in both hands and, upon examination, Dr. Getz noted that claimant's left hand revealed changes associated with reflex sympathetic dystrophy while the right hand revealed inconsistent findings and generalized weakness. Dr. Getz diagnosed claimant with sympathetic reflex dystrophy of the left hand. Regarding claimant's right hand, Dr. Getz found that claimant exhibited findings of a somatoform conversion disorder which he stated would require a psychiatric evaluation for confirmation and treatment. EX 26.

appear to be the overall stress and psychological conflict that claimant has experienced during the last several years of claimant's personal life.⁴ H.Tr. at 117.

We cannot affirm the administrative law judge's decision, as neither physician's opinion provides substantial evidence that claimant's conversion disorder, which resulted in her present right hand and arm conditions, did not occur, at least in part, as a result of her work-related left hand injury. Dr. Getz diagnosed claimant with a somatoform conversion disorder, but did not render an opinion regarding the cause of that condition. See EX 26. Thus, his opinion cannot rebut Section 20(a). With regard to Dr. Rollins, while the administrative law judge's decision accurately reflects Dr. Rollins initial statement that claimant's conversion disorder was not "work-related," H.Tr. at 117 - 118, the administrative law judge did not mention Dr. Rollins's subsequent testimony that claimant experienced stress as a result of her left hand injury and resulting pain and that this stressful event in claimant's life was a factor, although not a major one, in the overall stress which contributed to her conversion disorder. *Id.* at 120. After testifying that claimant's work-related left hand injury was a stressful event in claimant's life, that claimant's overall level of stress was aggravated by her left arm problems, and that the totality of claimant's stress produces her conversion disorder, *id.* at 126, Dr. Rollins was asked the following questions:

Q: So when [employer's counsel] asked you that you believe that the left arm injury didn't aggravate the right arm injury, that's incorrect, correct?

A: I don't think the left arm injury caused the conversion disorder and of course the left arm injury happened first. I think the stress resulting from the left arm injury is part of the totality of the stress that has produced the conversion disorder.

Q: So it did contribute to the conversion disorder.

A: To some extent yes.

Id. Lastly, Dr. Rollins was asked the following question:

Q: So is it still your opinion that the conversion disorder was not caused or aggravated by the December 26, 2003 injury?

⁴ Dr. Rollins defined a conversion disorder as a physical symptom that does not have a physical basis and is thought to have to do with psychological conflicts and stress. See H.Tr. at 114, 124 – 125. Dr. Rollins testified that, assuming that Dr. Getz's evaluation of claimant's condition is correct, claimant experiences weakness and limitations in her right arm which are caused by psychological rather than orthopedic factors. H.Tr. at 122.

A: Of course that happened before the major manifestation of the conversion disorder. My opinion it wasn't caused by that, the stress associated with that is part of the totality of her stress and whether that's an aggravation is a legal question.

Id. at 129.

Given this testimony, Dr. Rollins's opinion is insufficient as a matter of law to rebut the Section 20(a) presumption, since he unequivocally stated that claimant's work-related left hand injury resulted in stress, which in part was a cause of claimant's conversion disorder and right arm and hand conditions. See *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). Dr. Rollins's opinion in fact supports a finding that claimant's conversion reaction and resulting condition is work-related. See *Manship*, 30 BRBS 175. As the record contains no other evidence refuting a causal relationship between claimant's work-injury and her subsequent conversion disorder and right arm and hand conditions, employer has failed to produce substantial evidence to rebut the Section 20(a) presumption. See *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). Accordingly claimant's right arm and hand conditions are work-related, as the only relevant evidence establishes they are due, at least in part, to the consequences of her December 26, 2003, work-injury.⁵ See *Manship*, 30 BRBS 175; *Burson*, 22 BRBS 124. The administrative law judge's finding to the contrary is therefore reversed, and the case is remanded to the administrative law judge for consideration of the remaining issues.

Claimant next challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Specifically, claimant contends that the sales associate position offered to her by employer does not conform to her work restrictions; alternatively, claimant avers that that employer's job offer to her was sheltered employment. Where, as in the instant case, claimant establishes that she is unable to perform her 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); *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 1999, 16 BRBS 74(CRT) (4th Cir. 1984). Employer can meet its burden by offering claimant a job in its facility, including a light duty job. See *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *Stratton v.*

⁵ Thus, the same result would be reached even if Section 20(a) were not applied. See *Amerada Heas. Corp. v. Director, OWCP*, 543 F.2d 755, 42 BRBS 41 (5th Cir. 2008) (since only formal claim was for a back and groin injuries, Section 20(a) does not apply to link subsequent heart attack and claimant must prove it arose from the work injuries without reference to the Section 20(a) presumption).

Weedon Eng'g Co., 35 BRBS 1 (2001); *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); see also *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). The Board has affirmed a finding of suitable alternate employment where employer offers claimant a job tailored to her specific restrictions so long as the work is necessary. *Buckland v. Dept. of the Army/NAF/CPO*, 32 BRBS 99 (1997); *Shiver v. United States Marine Corps, Marine Base Exch.*, 23 BRBS 246 (1990); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Sheltered employment, on the other hand, is a job for which claimant is paid even if she cannot do the work and which is unnecessary; such employment is insufficient to constitute suitable alternate employment. *Buckland*, 32 BRBS 99; *Everett*, 23 BRBS 316; *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

Initially, the administrative law judge rationally determined that the employment position offered to claimant by employer did not constitute sheltered employment as it was necessary and profitable to employer. Decision and Order at 21. In offering claimant employment as a sales associate, employer stated that it would be able to accommodate claimant within the physical limitations placed on her by her physician.⁶ EX 8. Ms. Chapman, employer's workers' compensation program manager, testified that employer's return to work program involves a one hundred percent accommodation for any restriction placed on an injured worker. With regard to the offer of employment made to claimant, Ms. Chapman stated that claimant, as a sales associate, could have been assigned to a number of duties and tasks including dusting shelves, stocking light-weight items, serving as a customer greeter, and counting money. H.Tr. 64 – 70. As Ms. Chapman's testimony supports the administrative law judge's finding that the sales associate position offered to claimant involved actual job duties and thus necessary work for employer, the conclusion that it was not sheltered employment is affirmed.

We cannot affirm, however, the administrative law judge's summary conclusion that the sales associate position offered to claimant established the availability of employment suitable for claimant given her restrictions. In ascertaining the suitability of a job, the administrative law judge must compare the duties of the position with the claimant's physical restrictions. *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). In his decision, the administrative law judge did not make this comparison but simply relied on the statement by Ms. Chapman that "virtually" all restrictions can be accommodated, Decision and Order at 20, and concluded that

⁶ Claimant, on May 16, 2006, returned employer's May 6, 2006, offer letter to employer with the following endorsement: I, [J.F.], understand that I am being offered a position which accommodates my current medical restrictions but I choose not to accept. EX 8.

. . . the job of sales associate is suitable alternate employment which can be performed within the restrictions imposed by the work-related injuries.

Id. at 21.⁷ Pursuant to our holding that claimant's right arm and hand conditions are also work-related, the administrative law judge must on remand address the extent of impairments to both limbs and state the applicable medical restrictions, and these restrictions must then be compared to the employment duties of the sales associate and any other positions. In this regard, a review of the record reveals that both Drs. Armistead and Getz imposed lifting restrictions on claimant's right arm,⁸ see EXs 19, 27, 40, and that while Ms. Chapman's testimony indicates employer's willingness to place any employee with any type of restriction, it also indicates that employer may not be able to place an employee who is unable to work.⁹ See H.Tr. at 65. Accordingly, we vacate the administrative law judge's finding that employer established the availability of suitable alternate employment, and remand this case for further findings consistent with this opinion.

In its cross-appeal, employer contends that claimant's refusal to undergo nerve block injections in September 2005 serves as a sufficient ground to suspend the payment of additional benefits to claimant. Section 7(d)(4) provides that an administrative law judge may, by order, suspend the payment of compensation to an employee during any period in which she unreasonably refuses to submit to medical or

⁷ While the administrative law judge used the plural "injuries" in this sentence, his prior determination that claimant sustained only an injury to her left hand as a result of her December 26, 2003, work-incident leads to the conclusion that he considered only the restrictions imposed on that hand when addressing this issue.

⁸ In its response brief, employer concedes that claimant has a right hand impairment. See Er's resp. br. at 28 – 29.

⁹ Claimant correctly states on appeal that, while Ms. Chapman additionally testified that as a sales associate claimant could have been assigned the duties and tasks of a greeter, that position was no longer staffed by employer as of the time of the formal hearing. H.Tr. at 67, 75. Although employment as a greeter was not specifically offered to claimant, this position was in existence at the time employer made its offer of employment as a sales associate to claimant; thus that position may be considered by the administrative law judge in determining whether a suitable position with employer was offered to claimant on May 6, 2006. See *McCullough v. Marathon Letourneau Co.*, 22 BRBS 359 (1989). See EXs 13, 14. If the administrative law judge relies on this position, he must determine the date on which employer made such jobs unavailable as such a finding is necessary in determining the extent of claimant's disability. See *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

surgical treatment, unless the circumstances justified the refusal. 33 U.S.C. §907(d)(4). Section 7(d)(4) requires a dual inquiry. Initially, employer must establish that claimant's refusal to undergo medical treatment is unreasonable; if employer does so, the burden shifts to claimant to establish that circumstances justified the refusal. For purposes of this test, the reasonableness of claimant's refusal has been defined by the Board as an objective inquiry, while justification has been defined as a subjective inquiry focusing on the individual claimant. *See Dodd v. Crown Cent. Petroleum Corp.*, 36 BRBS 85 (2002); *Malone v. Int'l Terminal Operating Co., Inc.*, 29 BRBS 1995); *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979)(Smith, S., dissenting).

In the instant case, the administrative law judge initially found that Dr. Nicks recommended that claimant undergo nerve blocks in July 2004, *see* EX 22 at 1, and that Dr. Getz confirmed this recommendation in November 2004. *See* EX 23 at 6. Employer, however, did not authorize this procedure until 2005. Decision and Order at 18. Claimant subsequently consulted with Dr. Johnston on September 19, 2005; in his report following his examination of claimant, Dr. Johnston wrote that claimant expressed a great deal of reluctance with proceeding with any kind of injection "particularly if the injection has any kind of risk." EX 25 at 45. Claimant, at the formal hearing, testified that she declined to undergo a nerve block procedure after being told that the risks involved with that procedure included paralysis and death. *See* H.Tr. at 33. Based upon these findings, the administrative law judge determined that, after a course of unsuccessful surgeries,¹⁰ it was not unreasonable for claimant to refuse treatment that carried significant risks, and he thus declined to conclude that claimant refused necessary treatment. Decision and Order at 18. As the administrative law judge's finding that employer did not establish that claimant's refusal to undergo a nerve block procedure was unreasonable is rational and supported by substantial evidence, we affirm the denial of employer's request for the suspension of claimant's benefits.

¹⁰ In addition to her May 2004 left carpal tunnel release, claimant has undergone surgery on her right elbow.

Accordingly, the administrative law judge's finding that claimant's right arm and hand conditions are not related to claimant's work-injury is reversed. The administrative law judge's determination that employer established the availability of suitable alternate employment is vacated, and the case is remanded for further consideration regarding the extent of claimant's disability consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge