BRB No. 02-0207

LANSKA TAKORI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Nov. 7, 2002
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

Chanda W. Stepney (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2000-LHC-0587, 2000-LHC-0588, 2000-LHC-0589, 2000-LHC-0590) 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.* (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).

During the course of his employment as a shipfitter, pipefitter and crane operator with employer, claimant suffered several injuries. He injured his right shoulder, wrist and knee on July 8, 1994, his right ring finger on January 17, 1995, his left shoulder on August 12, 1997, and his left wrist on October 5, 1998. Emp. Ex.

16; Tr. at 7-8. Although claimant was given temporary restrictions, he lost no time from work due to his shoulder injuries; however, he underwent surgery on his right finger and lost time because of the injury to his left wrist. For his finger injury, claimant was permanently restricted from lifting greater than 50 pounds and from climbing ladders. Cl. Exs. 3-4; Tr. at 25. Despite the restrictions related to his finger impairment, claimant performed his usual work, and he was laid off from his regular duty job on September 9, 1999. On September 14, 1999, claimant filed claims for benefits for the injuries to his shoulders, finger and right wrist. In early 2000, both Drs. Lannik and Phillips imposed lifting and overhead working restrictions after having evaluated claimant's shoulder conditions. Cl. Exs. 11b, 15 at 10.

The administrative law judge found that the current disabilities of claimant's right and left shoulders are related to his employment injuries. He based his conclusion on the reports and testimony of claimant's treating physicians, Drs. Lannik and Phillips. The administrative law judge then found that the September 14, 1999, claim for compensation for the right shoulder was filed in a timely manner, as claimant was not aware that his condition would affect his wage-earning capacity until after he was laid off from work, rejecting employer's assertion that claimant should have been aware of the potential effect on his earning capacity in 1996 when the state awarded claimant benefits for his right wrist injury. Decision and Order at 13-14. The administrative law judge found that employer satisfied its burden of establishing the availability of suitable alternate employment, and he awarded claimant permanent partial disability benefits for his shoulder impairment based on a compensation rate of $222.18 per week. The administrative law judge also awarded claimant permanent partial disability benefits for the seven percent impairment to his right ring finger, as employer previously paid only temporary total and temporary partial disability benefits for that injury, and medical benefits. *Id.* at 16-19. Employer appeals, and claimant responds, urging affirmance.

Employer first contends the administrative law judge erred in concluding that claimant's current shoulder disabilities are related to his work injuries. Employer asserts that the injuries occurred in 1994 and 1997, too long ago to be the cause of claimant's current shoulder symptoms, that the work injuries to claimant's shoulders had healed with no residual impairments pursuant to Dr. Reid's report, and that Dr. Cohn's opinion is entitled to greater weight than that accorded by the administrative law judge. We reject employer's arguments.

The record evidence in this case reveals that claimant treated with Dr. Phillips for the 1994 injury to his right shoulder and with Dr. Lannik for the 1997 injury to his left shoulder. The record also reveals there were no intervening injuries to either shoulder and that both shoulders, when evaluated in 2000, had symptoms similar to those present at the times of the initial injuries. The doctors also stated that claimant's activities between the date of the injuries and the most recent evaluation, as well as the activities captured on videotape, were not incompatible with claimant's

[1]Employer paid benefits for the injury to claimant's left wrist and that is not at issue.

diagnosis. Cl. Exs. 3-4, 6, 11, 14 at 9, 15 at 8-10, 17 at 6-10. Accordingly, both Drs. Lannik and Phillips opined that claimant's current shoulder conditions were caused by his work injuries. Cl. Exs. 14 at 10, 15 at 9, 17 at 10-11. Dr. Cohn, who evaluated claimant one time at employer's request, disagreed with their conclusions and, based on claimant's lack of treatment over a period of years, the performance of his usual work, and the remoteness of the original injuries to the current symptoms, believed the current condition is the result of some other factor. Emp. Exs. 20, 25.

It is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including medical experts, and may draw his own 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); *see also, e.g., Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053 (1978). Additionally, the Board may not reweigh the evidence, but may only assess whether there is substantial evidence to support the administrative law judge's decision. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). The administrative law judge rationally credited the opinions of Drs. Lannik and Phillips in finding that claimant's shoulder conditions were caused by his 1994 and 1997 work injuries, and these opinions constitute substantial evidence supporting the administrative law judge's decision. Therefore, we affirm the determination that claimant's shoulder impairments are work-related. *Meehan Seaway Service, Inc. v. Director, OWCP*, 4 F.3d 633, 27 BRBS 108(CRT) (8th Cir. 1993); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

---

[2] In determining whether a disabling condition is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption. The administrative law judge thus erred in stating that the Section 20(a) presumption is irrelevant in determining whether claimant's current impairments are related to his employment, as the fact that employer conceded that the alleged accidents occurred begs the question as to whether those injuries caused claimant's impairment. Moreover, there is no basis for his statement that the presumption "does not apply to claimed later manifestations of those injuries," Decision and Order at 13, as the presumption applies once claimant has established a *prima facie* case by proving that an accident occurred which could have caused the harm alleged. *See Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd,* 892 F.2d 173, 23 BRBS 13(CRT)(2d Cir. 1989). This error is harmless, however, as his finding that causation was established on the record as a whole is supported by substantial evidence. *See Price v. Stevedoring Services of America*, 36 BRBS 56 (2002); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

Next, employer contends the administrative law judge erred in finding the 1999 claim for compensation for his right shoulder injury timely filed. Section 13(a) of the Act, 33 U.S.C. §913(a), provides a claimant with one year after he is aware, or should have been aware, of the relationship between his injury and his employment within which to file a claim for compensation for a traumatic injury. This period does not commence until claimant is aware, or should have been aware, of the likely impairment of his earning capacity. *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33 (CRT) (6th Cir. 1996); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991).

Claimant initially injured his right shoulder, wrist and knee in 1994. He was under temporary work restrictions following this injury, after which he continued to perform his former job. In 1996, claimant was awarded state disability benefits for his right wrist injury. Emp. Ex. 2. Claimant received no treatment for his right shoulder after the 1994 incident until he saw Dr. Phillips in 2000, although he testified that his shoulder bothered him on occasion. On September 9, 1999, employer laid off numerous employees, including claimant, for economic reasons, and claimant filed his claims for benefits on September 14, 1999.

The record before us supports the administrative law judge's determination that claimant's claim was filed in a timely manner. Specifically, the administrative law judge found that claimant was not aware that his earning capacity would be affected by his shoulder disability until he was laid off. Decision and Order at 14. The fact that claimant continued to work contradicts employer's assertion that claimant knew the full impact of his disability, *i.e.,* the effect it would have on his earning capacity, immediately following the accident. Rather, that fact supports the administrative law judge's conclusion that claimant was unaware of the impact of his injury upon his earning power until he actually lost the capacity to earn wages. Therefore, the administrative law judge reasonably found that claimant became aware of the relationship between his injury, his disability and his employment as of September 9, 1999, making the claim filed on September 14, 1999, timely. *Parker*, 935 F.2d 20, 24 BRBS 98 (CRT); *see also Paducah Marine*, 82 F.3d 130, 30 BRBS 33 (CRT); *Duluth, Missabe & Iron Range Ry. Co. v. Heskin*, 43 F.3d 1206 (8th Cir. 1994); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984).

Finally, employer challenges the award of permanent partial disability benefits, asserting that any loss of wage-earning capacity claimant suffered was a result of

---

[3]The administrative law judge noted that although the right wrist injury was mentioned on claimant's claim form, claimant received state benefits for this injury and did not contend there was a current impairment to his right wrist entitling him to benefits under the Act. Thus, the administrative law judge did not address any impairment to the right wrist or award benefits for it. Further, because the 1996 state award pertained only to the wrist injury, we agree with the administrative law judge that it did not indicate to claimant that his right shoulder injury would impair his wage-earning capacity.

the layoff and was not due to any disability because claimant was able to perform his usual work and would have continued to do so but for the economic layoff. Once a claimant has established a *prima facie* case of disability by showing that he cannot return to his usual work, the burden shifts to the employer to establish the availability of suitable alternate employment. *Lentz v. 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). The non-discriminatory nature of a layoff does not relieve an employer of its burden of establishing the availability of suitable alternate employment where claimant has established a *prima facie* case. *Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001); *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

In this case, the administrative law judge found that claimant's restrictions as a result of his work injuries prevent him from returning to his usual work. Specifically, he stated that claimant is restricted from lifting greater than 30 pounds and from pushing, pulling, climbing and working overhead. Decision and Order at 18; Cl. Exs. 10-11; Emp. Ex. 20. These restrictions, set by Drs. Lannik, Phillips and Cohn, support the administrative law judge's finding that claimant cannot return to his usual heavy work at the shipyard. *Green v. I.T.O. Corp. of Baltimore*, 32 BRBS 67, 70 n.5 (1998), *modified on other grounds*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). As claimant has established a *prima facie* case of total disability, employer must establish the availability of suitable alternate employment to show that claimant's disability is, at most, partial. *See, e.g., Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). Reliance on the argument that claimant lost his job for reasons unrelated to his disability is not responsive to its burden. *Hord*, 193 F.3d at 801 n.3, 33 BRBS at 172 n.3(CRT); *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997). Therefore, we reject employer's argument.

In order to satisfy its burden, an employer must demonstrate the availability of realistic job opportunities the claimant is capable of performing, considering his age, background, education, work experience, and physical restrictions. *Lentz*, 852

---

[4]As the administrative law judge noted, although claimant was performing his usual work at the time he was laid off, he was working outside his restrictions.

[5]The administrative law judge credited claimant's doctors in making this determination. Both Drs. Lannik and Phillips watched the surveillance videotape and stated that claimant's activities recorded therein do not establish that claimant can perform his usual work on a long-term basis. Rather, a review of the videotape shows claimant working with his hands over his head for approximately seven minutes during which time he alternated the working hand. Contrary to employer's description, this does not constitute an "extended" period of time, and it does not mandate the conclusion that claimant can perform his usual work. Therefore, we reject employer's assertion that the administrative law judge erred in failing to discuss the videotape for this purpose.

F.2d 129, 21 BRBS 109(CRT). Here, the administrative law judge determined that the jobs identified by employer's vocational rehabilitation counselor were within claimant's physical restrictions, and he credited claimant's opinion that he could perform some of those jobs. Decision and Order at 18. Based on these findings, the administrative law judge concluded that employer established the availability of suitable alternate employment and, in light of claimant's vague responses to the questions about his job search, the administrative law judge found that claimant failed to demonstrate due diligence in seeking post-injury employment. *Tann*, 841 F.2d 540, 21 BRBS 10(CRT). No party disputes these findings. Therefore, we affirm the administrative law judge's conclusion that claimant is partially disabled and is entitled to permanent partial disability benefits. 33 U.S.C. §908(c)(21). *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge