BRB No. 04-0190

LESLIE L. LEWIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	DATE ISSUED: Nov. 4, 2004
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Clifford R. Mermell (Gillis & Mermell, P.A.), Miami, Florida, for claimant.

Lawrance B. Craig, III and Frank J. Sioli (Valle, Craig, Soili & Lynott, P.A.), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (02-LHC-0230) of Administrative Law Judge Daniel F. Solomon awarding benefits 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 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 testified that he was working for employer, driving a mule, that is, a small

tractor or electric engine used to tow boats along a canal, when, on March 26, 2001, he sustained injuries to his head, neck, left wrist, back and knees, after the mule he was driving "stopped short," and thrust his body into the dashboard. In addition, claimant alleges that this work accident aggravated his pre-existing visual impairment and paranoid schizophrenia and further resulted in post-traumatic stress disorder, and that, as a result of the entirety of his injuries, he is unable to perform any kind of work. Claimant filed a claim seeking permanent total disability benefits. Employer challenged claimant's entitlement to benefits and alternatively filed a request for Section 8(f) relief, 33 U.S.C. §908(f).

In his decision, the administrative law judge determined that claimant established a *prima facie* case invoking the Section 20(a) presumption, 33 U.S.C. §920, with regard to his alleged work injuries. The administrative law judge concluded that claimant's neck, back, and knee injuries, as well as his post-traumatic stress disorder, are work-related. Additionally, he concluded that claimant sustained work-related aggravations of his pre-existing vision deficiency and pre-existing paranoid schizophrenia. He then determined that claimant is unable to return to his usual employment as a longshoreman and that employer did not establish the availability of suitable alternate employment within claimant's extensive restrictions. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from March 27, 2001, to July 23, 2001, permanent total disability benefits from July 24, 2001, and continuing, as well as all reasonable and necessary medical benefits.[1] 33 U.S.C. §907. Lastly, in accordance with the parties' stipulation, the administrative law judge remanded the case to the district director for consideration of employer's request for Section 8(f) relief.

On appeal, employer challenges the administrative law judge's award of total disability benefits. Claimant responds, urging affirmance.

Employer first contends that the administrative law judge erroneously relied on claimant's "implausible" testimony to find that he established a *prima facie* case of causation under Section 20(a) with regard to his numerous alleged injuries. Employer also argues that the administrative law judge erred in finding that it did not establish rebuttal of the Section 20(a) presumption with regard to claimant's psychiatric and ophthalmologic conditions. Employer further contends that it has established that claimant's extensive psychiatric, ophthalmologic and orthopedic injuries are due entirely to supervening/independent causes.

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated

[1] The administrative law judge also awarded claimant an assessment pursuant to Section 14(e), 33 U.S.C. §914(e). He subsequently reversed this award, on employer's motion, in his Amended Decision and Order.

the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In his decision, the administrative law judge determined that claimant established that a work accident did, in fact, occur, and that said accident caused harm, such that claimant is entitled to the Section 20(a) presumption. In finding that an accident occurred, the administrative law judge relied on claimant's testimony regarding his accident, including statements that he reported the accident to his boss, notified the Port, and that an accident report was filed by the local police. Employer's Exhibit (EX) 4 at 55-56. The administrative law judge directly addressed and rejected employer's challenges to claimant's credibility. He specifically found that while claimant made some inconsistent statements and provided some inappropriate responses to several of his physicians in an effort to try to take advantage of the compensation system, these shortcomings are, for the most part, attributable to claimant's ongoing psychiatric condition,[2] and are insufficient to mandate that all of claimant's testimony be discredited. The administrative law judge thus credited, following "a review of the complete record," claimant's testimony as to the details of the accident. Decision and Order at 42. The administrative law judge then found that claimant likewise established that he has a harm, as Drs. Pritchard, Gordon, Boza, Millheiser, Kay, and Hamburger all indicated that claimant sustained injuries to his back, knees, psyche and vision as a result of his March 26, 2001, accident. Claimant's Exhibit (CX) 2 at 18-20, 30-34; CX 1 at 19; EX 2 at 57; CX 5; EX 7 at 9-12, 18.

[2] The administrative law judge observed from two days of testimony that claimant has a mental impairment that makes him hostile, suspicious and guarded, and that his observations are consistent with Dr. Castiello's testimony regarding the predominant symptoms of schizophrenia, *i.e.*, disturbance of thinking, accompanied usually by distorted ideation, distorted perceptions and conclusions that do not correspond to reality. EX 33 at 11, 39; Decision and Order at 41-42. Moreover, the administrative law judge found that Dr. Castiello testified that claimant's conduct, *i.e.* his inappropriate responses, are consistent with the diagnosis of paranoid schizophrenia. In particular, Dr. Castiello stated that claimant's mental condition led him to exaggerate the extent of his physical impairments. EX 33 at 38-39.

It is well established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence, *see Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963), and the Board may not reweigh the evidence, but may assess only 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). As the administrative law judge has thoroughly reviewed claimant's testimony, both at the hearing and at deposition, as well as the medical opinion evidence, and his findings relevant to that evidence, that claimant has established a *prima facie* case and thus is entitled to the Section 20(a) presumption, are supported by substantial evidence, they are affirmed. *Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994).

Once claimant is entitled to invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT).

Although the administrative law judge stated the relevant legal standard for rebuttal, his evaluation of the evidence on causation, particularly as it relates to claimant's psychological and ophthalmologic conditions, is intertwined with his consideration of whether claimant established a *prima facie* case as well as the weighing of the evidence on causation in the record as a whole. Any error in the administrative law judge's analysis of Section 20(a) rebuttal with regard to claimant's psychiatric and ophthalmologic conditions is harmless, as he fully considered the evidence in the record and his finding that claimant's psychiatric and ophthalmologic conditions are work-related is supported by substantial evidence.[3] *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988).

[3] After an extensive discussion of the evidence relevant to causation, Decision and Order at 33-44, the administrative law judge concluded that based on the totality of the evidence, claimant proved his claim "without necessity of needing the Section 20(a) presumption." *Id.* at 44. In view of the administrative law judge's weighing of the evidence, Section 20(a) rebuttal is moot.

With regard to claimant's alleged psychological condition and causation, the administrative law judge considered the conflicting opinions proffered by Drs. Boza and Castiello. Specifically, he found that Dr. Boza opined that the March 26, 2001, work incident caused post-traumatic stress disorder and aggravated and worsened claimant's paranoid schizophrenia and dysthymia, while Dr. Castiello opined that the work accident did not occur and that claimant's post-injury psychological condition is otherwise completely unrelated to his alleged work accidents. In weighing this evidence, the administrative law judge provided six distinct reasons for crediting Dr. Boza's opinions regarding causation over those of Dr. Castiello, Decision and Order at 36-39, including that Dr. Boza's diagnosis is more rational since, as claimant's treating psychiatrist, he had a more extensive record to review. *Calbeck*, 306 F.2d 693. Moreover, the administrative law judge rejected Dr. Castiello's opinion that the accident did not occur,[4] and furthermore found, based on statements made at his deposition, that Dr. Castiello actually admitted that the work accident on March 26, 2001, could have aggravated claimant's pre-existing paranoid schizophrenia and be causing his current level of dysfunction.[5] EX 33 at 29-30, 33-34. Consequently, the administrative law judge concluded from his consideration of the relevant evidence as a whole, that claimant's post-injury psychological condition is work-related.

As for claimant's ophthalmologic injury, the administrative law judge observed that Drs. Kay and Hamburger each opined that as a result of the March 26, 2001, accident, claimant aggravated a pre-existing eye injury, and that, in contrast, Dr. Trattler opined that all of the degeneration in the eye was unrelated to the March 26, 2001, work accident. The administrative law judge credited the opinions of Drs. Kay and Hamburger over the opinion of Dr. Trattler since they are consistent, they outnumber the contrary opinion of Dr. Trattler, their logic is more reasonable as it is premised on claimant's predisposition to eye injury, and because Dr. Hamburger has superior qualifications as a neuro-ophthalmologist and has special expertise in eye trauma. *See Calbeck*, 306 F.2d 693. The administrative law judge therefore determined that claimant received a blow to the head while at work on March 26, 2001, which aggravated his pre-existing vision deficit, and thus concluded that his post-injury vision impairment is work-related.

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[4] In this regard, the administrative law judge observed that Dr. Castiello's opinion is premised, in large part, on his erroneous belief that claimant was incapable of performing any work due to his pre-existing psychological condition prior and up to the date of injury, a position which directly conflicts with the objective evidence of record. Hearing Transcript (HT) at 228, 254-255, 258; EX 4 at 55-56.

[5] As employer contends, the administrative law judge did not discuss the opinion of psychologist Dr. Burda. However, as Dr. Burda did not render any opinion on causation with regard to claimant's psychological condition, his opinion is not relevant to this issue. *See e.g., Brown*, 893 F.2d 294, 23 BRBS 22(CRT).

Inasmuch as the administrative law judge fully weighed all of the relevant evidence of record on causation, Decision and Order at 33-45, 50-60, and as his conclusion that the injuries to claimant's back, knees, psyche and vision are work-related is supported by substantial evidence, it is affirmed. *Brown*, 893 F.2d at 297, 23 BRBS at 24(CRT); *Casey v. Georgetown Univ. Medical Center*, 31 BRBS 147 (1997); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). Moreover, employer's contention that claimant is not entitled to permanent total disability benefits because his injuries are due solely to intervening causes is without merit, as employer has not put forth evidence that claimant's condition is due to any subsequent injury which might serve as an intervening cause,[6] and because, in any event, the administrative law judge's explicit rejection of employer's allegations that claimant's condition is due entirely to non-work-related entities is supported by substantial evidence, Decision and Order at 33-45, 50-61. *See generally Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd*, 32 Fed.Appx 126 (5th Cir. 2002) (table); *Plappert v. Marine Corps Exch.*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997).

Employer further contends that the administrative law judge erred in rejecting the testimony of its vocational expert, Mr. Bilski, and his labor market survey, and thus in finding that it did not meet its burden to establish the availability of suitable alternate employment. Where, as in the instant case, claimant is unable to perform his usual employment duties, he has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986). In order to meet this burden, employer must demonstrate that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing given his age, education, work experience and physical restrictions and which he could realistically secure if he diligently tried. *Id*.

The administrative law judge extensively considered but rejected the labor market survey and accompanying testimony put forth by Mr. Bilski, which indicated that claimant was capable of work in a light to sedentary capacity and identified several positions within those restrictions, as its underlying medical profile did not accurately reflect claimant's psychological condition. Specifically, the administrative law judge found that Mr. Bilski did not submit the suitable jobs in the labor market survey to any of the psychiatrists or the psychologist, nor did Mr. Bilski make any reference to claimant's mental status, or put forth

[6]As the administrative law judge found, "all of employer's evidence [regarding intervening causes] relates to pre-existing conditions and earlier accidents." Decision and Order at 44.

the mental requirements of the jobs he identified as suitable.[7] As Mr. Bilski did not take into account claimant's mental condition in identifying potential suitable jobs, the administrative law judge's rejection of the labor market survey in its entirety is affirmed.[8] *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Pietrunti v. Director OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Consequently, the administrative law judge's award of permanent total disability benefits is affirmed.

Accordingly, 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

REGINA C. McGRANERY
Administrative Appeals Judge

[7] Mr. Bilski readily admitted that his return to work opinions were "confined to the neurological, ophthalmological and orthopedic records and testimony reviewed," HT at 117, since "at the point in time I didn't have any documentation on psychiatric issues that would be out there for [claimant]." HT at 208-209. The labor market survey, dated February 6, 2002, however, post-dates the opinions of Drs. Boza, Storper and Castiello that claimant was totally disabled due to his mental condition.

[8] Furthermore, the administrative law judge rationally rejected each of the jobs identified in the labor market survey as they involved dealing with the public or extensive interaction with co-workers, or, as in the case of a position as a commercial driver, required vision beyond claimant's post-injury restrictions.