BRB Nos. 04-0247
and 04-0247A

TERRY FREEMAN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
v.	)	
	)	
FRIEDE GOLDMAN OFFSHORE, INCORPORATED	)	
	)	
and	)	
	)	
GRANITE STATE INSURANCE COMPANY	)	DATE ISSUED: 11/23/2004
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Karl R. Steinberger (Colingo, Williams, Heidelberg, Steinberger & McElhaney, P.A.), Pascagoula, Mississippi, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order (2003-LHC-551) of Administrative Law Judge C. Richard Avery 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 findings of fact and conclusions of law of the administrative law judge if they 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, a first class pipefitter, allegedly struck his head on scaffolding during the course of his employment with employer on January 10, 2002. Claimant, who continued to work following this alleged incident, thereafter sought treatment for neck pain and headaches in February 2002. An MRI taken in April 2002 revealed a disc herniation at C5-6. Claimant last worked for employer on June 3, 2002. On June 11, 2002, claimant underwent an anterior discectomy at the C5-6 level. Claimant has not returned to gainful employment, and he has reported ongoing cervical symptoms and headaches since undergoing surgery.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, that employer established rebuttal of that presumption, and that, based on the record as a whole, claimant established a causal relationship between his employment with employer and his cervical problems and surgery. Further, the administrative law judge determined that claimant's condition is temporary in nature, that claimant was unable to return to his usual job with employer, but that employer had established the availability of suitable alternate employment as of July 24, 2003. Accordingly, after determining claimant's post-injury wage-earning capacity, the administrative law judge awarded claimant temporary total disability compensation from June 3, 2002 through July 23, 2003, and temporary partial disability compensation from July 24, 2003 and continuing. 33 U.S.C. §908(b), (e).

On appeal, employer challenges the administrative law judge's findings regarding the causal relationship between claimant's disabling condition and his employment with employer, the nature and extent of claimant's disability, and the date on which its liability for claimant's medical expenses commences. Additionally, claimant has filed a cross-appeal of the administrative law judge's decision.

Employer initially challenges the administrative law judge's finding that claimant's cervical symptoms and related surgery are causally related to his January 10, 2002, work-accident; alternatively, employer avers that claimant's January 10, 2002, work-accident resulted, at most, in a temporary aggravation of a pre-existing herniated disc which it alleges claimant sustained in October 2001.[1]

[1] On October 22, 2001, claimant treated with Dr. Fineburg for, *inter alia*, arm pain which he experienced after moving a washing machine. Tr. at 31-35. During this office visit Dr. Fineburg found no neurologic compromise, and he prescribed muscle relaxers for claimant's arm symptoms. EX D at 4.

Where, as in the case at bar, claimant has established entitlement to invocation of the Section 20(a) presumption, *see Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989), the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); S*winton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence in the record and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion *See Port Cooper*, 227 F.3d 285, 34 BRBS 96(CRT); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1984).

In the instant case, the administrative law judge found that claimant invoked the Section 20(a) presumption based on his cervical condition and the January 10, 2002 work-incident, but that employer established rebuttal based on the opinion of Dr. Smith that the chronology of claimant's symptoms indicated that claimant did not injure himself in January 2002. The administrative law judge then weighed all of the evidence and, giving greater weight to the opinion of Dr. McCloskey and claimant's description of his increased pain and new symptoms following the January 10, 2002 work-incident, found that claimant's cervical condition and resultant surgery are related to that work incident. In finding Dr. McCloskey's testimony to be more persuasive that that of Dr. Smith, the administrative law judge noted that Dr. McCloskey's treatment, as claimant's treating physician, was more extensive and continuous than that of Dr. Smith, who examined claimant on one occasion, and that Dr. McCloskey's explanation regarding a causal relationship between claimant's cervical disc herniation and his employment with employer was more definitive in his records than during his deposition.[2] Moreover, the administrative law judge noted Dr. McCloskey's testimony that claimant's type of cervical injury is consistent with his hitting his head on scaffolding, since that type of incident is often seen as the mechanism for a cervical disc injury. Lastly, the administrative law judge found that the record establishes that claimant did not complain

[2] While Dr. McCloskey's records set forth his opinion that a causal relationship exists between claimant's cervical condition and his employment with employer, *see* CX 9, he testified during his deposition that such a relationship is not a "clear cut" case. *See* EX M at 35.

of neck pain or headaches during his October 2001 visit to Dr. Fineburg, and he credited claimant's description of his increased pain and new symptoms of headaches which appeared following the January 10, 2002 work-incident.

We reject employer's assertion that the administrative law judge erred in weighing the evidence of record regarding the issue of causation. It is well-established that the administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom and is not bound to accept the opinion or theory of any particular medical examiner. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *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). Moreover, it is impermissible for the Board to substitute its views for those of the administrative law judge; thus, the administrative law judge's findings may not be disregarded merely on the basis that other inferences might appear to be more reasonable. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003). The administrative law judge addressed each of employer's contentions regarding the causal relationship between claimant's cervical condition and his employment in weighing the evidence of record, and his ultimate findings are supported by substantial evidence. We therefore affirm the administrative law judge's conclusion that claimant's cervical symptoms and subsequent surgery are related to claimant's employment with employer.

Employer additionally contends that the administrative law judge erred in failing to find that claimant reached maximum medical improvement. We disagree. Claimant is entitled to temporary disability benefits until he reaches maximum medical improvement, the date of which is determined by medical evidence. *See generally Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant has reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). In concluding that claimant has not yet reached maximum medical improvement, the administrative law judge relied upon the opinion of Dr. McCloskey, claimant's treating physician who also performed claimant's cervical surgery. Specifically, the administrative law judge found that although Dr. McCloskey initially stated that claimant reached maximum medical improvement on September 23, 2002, the day on which he assigned claimant a 10 percent whole body impairment, Dr. McCloskey subsequently continued to treat claimant for his ongoing complaints. *See* CX 9. The administrative law judge determined that based upon claimant's post-operative changes and complaints, Dr. McCloskey's continued treatment and referrals were not hypothetical or speculative but, rather, were compelled by claimant's complaints with the anticipation of an improvement in claimant's condition. Decision and Order at 15-16.

Dr. McCloskey stated on September 23, 2002, that claimant had reached maximum medical improvement; also on that date, he found claimant "ready to go back to work," and he assigned claimant an impairment rating and permanent restrictions.[3] CX 9 at 27. The administrative law judge found, however, that claimant continued to experience pain and to undergo necessary treatment after this date, and these findings are supported by the record. *See* Decision and Order at 9-11, 15-16. As early as September 30, 2002, and continuing, claimant advised Dr. McCloskey that he was experiencing neck and arm pain, as well as severe headaches. EX G at 65, 70, 71. At the doctor's recommendation, claimant underwent a lateral cervical spine x-ray on October 8, 2002, which was interpreted as unremarkable, *id.* at 66-67, and a cervical myelogram on October 28, 2002, which revealed post-operative changes and a possible residual minimal left disc herniation at C5-6. *Id.* at 75. The administrative law judge noted that claimant repeatedly e-mailed Dr. McCloskey in October and November regarding his problems and continued to see him. Decision and Order at 10. On December 9, 2002, Dr. McCloskey explained that claimant had post-operative cervical syndrome, recommended claimant see a physical therapist for reevaluation and discussed the possibility of treatment with Botox injections. CX 9 at 8. On April 12, 2003, Dr. McCloskey stated that "claimant remains temporarily totally disabled," and that he would clearly have permanent restrictions. *Id.* at 5-6. On June 30, 2003, Dr. McCloskey responded to a questionnaire from claimant's counsel by writing that claimant's permanent impairment was "undetermined" and that claimant was restricted to sedentary/light work. *Id.* at 2. On July 11, 2003, Dr. McCloskey stated that the results of claimant's June 2002 surgery had been disappointing, a fusion has not occurred, and he recommended that claimant be evaluated by Dr. April, a spinal diagnostician. *Id.* at 1.

Based upon this evidence, we hold that the administrative law judge could rationally conclude that after September 2002, Dr. McCloskey revised his opinion on permanency and continued to treat claimant with an eye toward improving his condition. Since claimant continued to undergo treatment with a view to improving his condition, the administrative law judge properly found claimant did not reach maximum medical improvement in September 2002. *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT). Moreover, Dr. McCloskey's most recent statements support a conclusion that his condition remains temporary in nature. We therefore affirm the administrative law judge's finding on this issue. *See generally Leone v. Sealand Terminals Corp.*, 19 BRBS 100 (1986).

Employer next challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment as of September 22, 2002. Where, as in the instant case, it is uncontroverted that claimant is unable to return to his

[3] Claimant was restricted from performing heavy, strenuous or overhead work, and he was advised to perform very limited vertical climbing. CX 9 at 27.

usual employment duties with employer as a result of his work-related injury, the burden shifts to employer to establish the availability of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *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 show that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing. *Wilson v. Dravo Corp.*, 22 BRBS 459 (1989)(Lawrence, J., dissenting).

In the instant case, employer submitted into evidence vocational testimony which it alleges establishes the availability of suitable alternate employment that claimant could perform as of September 22, 2002, and July 24, 2003. *See* EX O. In addressing this issue, the administrative law judge found that in spite of claimant's need for ongoing medical treatment and his failure to reach maximum medical improvement, Dr. McCloskey acknowledged claimant's ability to perform light or sedentary work. Decision and Order at 16. He further found that while claimant's condition was not stable enough to warrant a finding that he could perform suitable alternate employment in September 2002, he was capable of performing light or sedentary employment by July 24, 2003.[4] Employer argues that, based on Dr. McCloskey's September 2002 release of claimant to work with restrictions, he was able to perform suitable alternate employment at that time. As previously discussed, although Dr. McCloskey noted on September 22, 2002, that claimant felt ready to return to work and restricted him from performing heavy, strenuous or overhead work, CX 9 at 27, the record supports the conclusion that his release was premature. Within eight days claimant was reporting neck and arm pain as well as severe headaches, EX G at 65, 70-71; within approximately five weeks claimant thereafter underwent both a lateral cervical spine x-ray and a cervical myelogram. EX G at 66-67, 75. Ultimately, on April 12, 2003, Dr. McCloskey reported that claimant "remains temporarily totally disabled." CX 9 at 5. Consistent with his weighing of the evidence on maximum medical improvement, the administrative law judge could rationally conclude based on the medical records that claimant's condition on September 22, 2002, was not stable enough to warrant a finding that he could perform suitable alternate employment at that time. Decision and Order at 17. As it is well-established that the administrative law judge is entitled to draw his own inferences from

[4] As no party challenges the administrative law judge's determination that employer established the availability of suitable alternate employment as of July 24, 2003, that finding is affirmed.

the evidence and his decision must be affirmed if supported by substantial evidence, *O'Keeffe*, 380 U.S. 359, we affirm the administrative law judge's determination as it is supported by claimant's testimony and the medical evidence of record. *See generally Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1982), *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). Accordingly, we affirm the administrative law judge's conclusion that claimant is entitled to temporary total disability compensation from June 3, 2002, to July 24, 2003.

Lastly, employer avers that the administrative law judge, after initially finding that its liability for claimant's medical treatment commenced on June 5, 2002, erred in stating in his Order that employer was liable for *all* medical expenses resulting from claimant's January 10, 2002, work-injury. We agree. Under Section 7(d) of the Act, 33 U.S.C. §907(d), there can be no reimbursement for medical expenses unless authorization for such treatment is first requested or treatment has been refused. *See Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F. 3d 440, 35 BRBS 17(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001); *Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in part and rev'd in part on other grounds sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989); *McQuillen v. Horne Brothers, Inc.*, 16 BRBS 10 (1983). In this case, the parties stipulated that claimant notified employer of the January 10, 2002, work-incident on June 5, 2002, *see* Decision and Order at 2; JX 1, and the administrative law judge properly commenced employer's liability for claimant's medical treatment as of that date. *Id.* Accordingly, we modify the administrative law judge's order to clarify that the medical expenses accrued by claimant prior to June 5, 2002, are not reimbursable, while the charges accrued thereafter are compensable, as found by the administrative law judge. Decision and Order at 18-19; *Anderson v. Todd Shipyards Corp.*, 22 BRBS 70 (1989).

We next address claimant's cross-appeal of the administrative law judge's award of benefits. It is well-established that the circumscribed scope of the Board's review authority necessarily requires a party challenging the decision below to address the decision and demonstrate why substantial evidence does not support the result reached; adequate briefing must therefore include a discussion of the relevant law and evidence. *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). The Board's Rules of Practice and Procedure state, in this regard, that:

> Each petition for review shall be accompanied by a supporting brief . . . which: Specifically states the issues to be considered by the Board; presents . . . an argument with respect to each issue presented with references [to the record]; a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result.

20 C.F.R. §802.211(b). Therefore, where a party is represented by counsel, "mere assignment of error is not sufficient to invoke Board review." *Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986).

In the instant case, claimant has failed to meet these threshold requirements. Specifically, claimant's brief in support of his cross-appeal is essentially an identical copy of the post-hearing brief that he submitted to the administrative law judge. As such, claimant has failed to either address the administrative law judge's decision, demonstrate why substantial evidence does not support the administrative law judge's post-injury wage-earning capacity calculation, or explain his single sentence contention that he has a post-injury wage-earning capacity of $280 per week. Accordingly, as claimant has failed to raise a substantial issue in his brief for the Board to review, we affirm the administrative law judge's calculation of claimant's post-injury wage-earning capacity. *See Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); *Shoemaker*, 20 BRBS 214.

Accordingly, the administrative law judge's decision is modified to reflect employer's liability for all reasonable and necessary medical expenses incurred by claimant subsequent to June 4, 2002. 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