BRB No. 02-0394

| | | |
|---|---|---|
| AUJEST CHERAMIE | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| 5. | ) | |
| | ) | |
| FOURCHON WELDING CONTRACTORS | ) | DATE ISSUED: Oct. 23, 2002 |
| | ) | |
| | ) | |
| and | ) | |
| | ) | |
| LOUISIANA WORKERS= COMPENSATION CORPORATION | ) | |
| | ) | |
| | ) | |
| Employer/Carrier- | ) | |
| Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Ted Williams (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (98-LHC-1663) of Administrative Law Judge Clement J. Kennington 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 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).

This case is before the Board for the second time. On August 22, 1997, claimant suffered a back injury while moving angle irons during the course of his employment with employer. Employer voluntarily paid claimant temporary total disability benefits from October 14, 1997, through November 17, 1997, but contested claimant=s claim for permanent total disability benefits thereafter.

In his initial Decision and Order, the administrative law judge accepted the parties= stipulations that claimant suffered a work-related injury on August 22, 1997 and that claimant

reached maximum medical improvement on November 17, 1997. The administrative law judge then found that claimant established a *prima facie* case of total disability because employer had not made claimant=s former position available to claimant upon his release to work, without restrictions, by Dr. Landry on November 17, 1997, and employer had offered no evidence of suitable alternate employment. Consequently, the administrative law judge awarded claimant continuing permanent total disability benefits commencing on November 18, 1997.

On employer=s appeal, the Board vacated the administrative law judge=s award of continuing permanent total disability benefits, and remanded the case to the administrative law judge for further consideration. Specifically, the Board held that the administrative law judge erred in finding that, as of November 18, 1997, claimant established a *prima facie* case of total disability based on the unavailability of his former job, without the administrative law judge=s first having found that claimant had a residual work-related medical impairment. *Cheramie v. Fourchon Welding Contractors, Inc.*, BRB No. 99-0532 (April 20, 2001)(unpub.). In this regard, the Board held that based on the undisputed evidence that claimant sustained a work-related back injury on August 22, 1997, claimant is entitled to invocation of the Section 20(a), 33 U.S.C. '920(a), presumption that his continuing back condition is causally related to his employment. The Board, therefore, remanded the case for the administrative law judge to determine whether employer presented sufficient evidence to rebut the Section 20(a) presumption, and if so, to resolve the issue of causation on the basis of the record as a whole. *Id.*, slip op. at 3-4. If the administrative law judge determined that claimant=s back condition is work-related, he was to determine the extent of any permanent physical impairment claimant sustained from his work accident. The Board stated that as claimant=s former job was unavailable to him, claimant would establish a *prima facie* case of total disability if his work injury resulted in permanent restrictions. *Id.* at 5-6.

In his decision on remand, the administrative law judge found that employer established rebuttal of the Section 20(a) presumption because Dr. Landry reported on November 17, 1997, that claimant was able to return to work without restrictions.[1] Nonetheless, on weighing the evidence as whole, the administrative law judge credited claimant=s credible testimony of continuing back pain as preventing him from obtaining meaningful work, as evidenced by his limited post-injury

[1]Evidence regarding claimant=s ability to work goes to the extent of disability, an issue to which Section 20(a) does not apply. In remanding the case, the Board held that Section 20(a) would apply to the question of whether claimant=s back condition is causally related to his employment. The issue before the administrative law judge, however, as well as in the current appeal to the Board, concerns the degree of claimant=s disability due to his back complaints. Any error by the administrative law judge in initially applying Section 20(a) in analyzing evidence relevant to disability is harmless, as the administrative law judge found the presumption rebutted and fully weighed the relevant evidence in the record as a whole.

employment as a hot-shot driver.[2] In this regard, the administrative law judge found that Dr. Landry erred in releasing claimant to return to work without any restrictions, as claimant experiences ongoing back pain. The administrative law judge also determined that claimant=s current physical impairments are worse than the incapacity claimant had prior to August 22, 1997, as claimant was able to work prior to the injury but was unable to engage in any meaningful employment thereafter.[3] Therefore, the administrative law judge credited claimant=s credible complaints of ongoing incapacitating back pain, as corroborated by various documentary evidence concerning claimant=s post-injury condition. Accordingly, the administrative law judge awarded claimant continuing permanent total disability benefits.

On appeal, employer argues that the administrative law judge erred in finding, based solely on claimant=s testimony, that claimant has a residual impairment due to the work injury which renders him totally disabled. Specifically, employer points to inconsistencies between claimant=s testimony and other evidence of record, and therefore contends that Dr. Landry=s opinion should be given determinative weight. Claimant has not responded to this appeal.

Employer=s assertion of error rests on three primary areas in which employer contends claimant=s testimony is contradicted by other evidence of record. Employer first contends that claimant=s testimony, that he had no history of back trouble prior to his August 22, 1997, work accident, is in conflict with claimant=s pre-accident, medical and vocational rehabilitation records. Employer thus contends that claimant=s current restrictions are no more severe than they were before the accident. Contrary to employer=s contention, the administrative law judge discussed claimant=s prior back complaints, *see* Decision and Order on Remand at 4-5, and rationally determined that these complaints were not too serious. At a pre-employment physical for another employer in February 1995, Dr. Logan remarked that claimant had a narrow disc at T12/L1 with fusion, an abnormal condition that placed claimant at risk with lifting over 50 pounds. EX 6.

---

[2]A Ahot shot@ driver transports workers to and from their offshore jobs. Claimant testified that he obtains limited employment as a Ahot shot@ driver, approximately three days per week, but that he cannot drive over 80 miles round trip, because of his inability to sit for a prolonged time due to his back pain.

[3]Claimant suffered a heart attack in 1992, and underwent angioplasty four months later. Dr. Smith opined in July 1995 that claimant was permanently and totally disabled from multiple causes, including coronary artery disease, ischemic cardiomyopathy, hyperlipidemia, diabetes mellitus, chronic hypertension, chronic bronchitis, hypothyroidism, reflux esophagitis, and morbid obesity. EX 3. In March 1996, claimant was referred by Louisiana Rehabilitation Services to Dr. Logan who diagnosed claimant as having a back impairment, cardiovascular disease and diabetes mellitus. EX 7. After a functional capacity evaluation was performed on claimant, Mr. Matherne, a rehabilitation counselor, classified claimant as Selection Group II, severely disabled. EX 8.

Claimant testified that at one time he was given a prescription medication for back pain, but that he had not been taking this medication at the time he began working for employer. Tr. at 61,74-75. Although claimant did not inform Dr. Landry of his prior back pain, *Id.* at 53, the administrative law judge was not required to find claimant=s testimony regarding the severity of his current back pain undermined by virtue of this omission. As the Board discussed in its prior decision, employer is liable for claimant=s entire disability if the work accident aggravated a prior condition. *Cheramie*, slip op. at 4, citing *Independent Stevedore Co. v. O=Leary*, 357 F.2d 812 (9th Cir. 1966). Claimant testified that his current pain is different and more severe than that he previously experienced, Tr. at 34-35, 45, 60, and the administrative law judge rationally credited claimant=s testimony in this regard. *See Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

Employer next contends that the administrative law judge erred in finding that claimant was able to work prior to his sustaining the back injury with employer, as other evidence of record establishes that claimant had difficulty obtaining employment prior to the injury. Claimant testified that prior to working for employer, he worked for G&A Barge Company for about a year and a half beginning in April or May 1996 as a captain of a jack-up barge.[4] Tr. at 18-19, 63. Although Allen Crane, a rehabilitation counselor with whom claimant was working in August 1996, reported that claimant was not working at the time, EX 8; Tr. at 85, whether or not claimant had difficulty obtaining employment prior to working for employer is not relevant to the issue before the administrative law judge. As the administrative law judge correctly discussed, the relevant issue is claimant=s ability to perform his usual work for employer. *See generally SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). In this regard, the administrative law judge=s finding that claimant was able to perform his work for employer before the back injury occurred on August 22, 1997, and that afterwards, he could not, is rational and supported by substantial evidence. *See Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT)*; Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT).

Finally, employer contends that the administrative law judge mischaracterized the physical therapy notes and Dr. Landry=s report in finding they corroborate claimant=s testimony concerning his back pain. Employer further maintains that the fact that claimant had not seen a doctor for a year at the time of the formal hearing belies his complaints. On November 7, 1997, the physical therapist=s notes state that claimant had completed seven

[4]As employer notes, claimant=s testimony, that he worked for a year and a half for G&A beginning in April or May 1996, is not consistent with his having commenced his employment with employer in May 1997.

therapy sessions, but continued to experience Asignificant pain and guarding lumbar musculature,@ as well as numbness in some of his toes. EX 4 at 21. In the last note, dated November 14, 1997, the therapist stated that claimant Anotices a slight improvement,@ but continues to experience radiating pain into his left lower extremity. *Id.* at 23. On November 17, 1997, Dr. Landry released claimant to return to work, noting only that claimant has tightness in his back, but does not have any spasm. *Id.* at 12. The record does not contain any medical evidence of more recency. Claimant testified in November 1998 that he sees a doctor for his cardiac condition, but takes only ibuprofen for his back pain as he has neither a doctor to treat his back nor medical insurance. Tr. at 74-75.

We cannot say that the administrative law judge=s interpretation of the medical evidence as supportive of claimant=s testimony is in error. The administrative law judge is entitled to draw his own inferences from the evidence, *see Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), and the administrative law judge rationally found that Dr. Landry=s release of claimant from his care was premature in light of the therapist=s notes and claimant=s testimony regarding his condition. Employer has not demonstrated that the administrative law judge=s decision to credit claimant=s testimony is Ainherently incredible or patently unreasonable@ in light of the other evidence of record. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see also Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994), *aff=g Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993). As claimant is unable to perform his usual work from a physical standpoint, he has made a *prima facie* case of total disability, and employer has not demonstrated the availability of suitable alternate employment,[5] we affirm the administrative law judge=s award of total disability benefits. *See SGS Control Serv.*, 86 F.3d 438, 30 BRBS 57(CRT); *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT).

Accordingly, the administrative law judge=s Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

---

[5]The administrative law judge rationally found that claimant=s limited work as a Ahot-shot@ driver, in which claimant earns up to $30 a week, demonstrates the Atruthfulness@ of claimant=s testimony that he cannot work at any sustained activity. Employer does not contend that this work constitutes suitable alternate employment.

ROY P. SMITH
Administrative Appeals Judge

---

REGINA C. McGRANERY
Administrative Appeals Judge

---

BETTY JEAN HALL
Administrative Appeals Judge