

BRB Nos. 09-0522
and 09-0522A

C.D.)
)
 Claimant-Petitioner)
 Cross-Respondent)
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 v.)
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 SPRAGUE ENERGY CORPORATION) DATE ISSUED: 10/29/2009
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 and)
)
 ZURICH AMERICAN INSURANCE)
 COMPANY)
)
 Employer-Respondent)
 Cross-Petitioner) DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Order Denying Employer's Motion to Reopen the Record and Granting Motion for Reconsideration of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

David J. Berg (Latti & Andersen LLP), Boston, Massachusetts, for claimant.

Stephen Hessert (Norman, Hanson & Detroy, LLC), Portland, Maine, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Awarding Benefits and the Order Denying Employer's Motion to Reopen the Record and Granting Motion for Reconsideration (2007-LHC-1608) of Administrative Law Judge Colleen A. Geraghty 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).

Claimant, a Terminal Operator/Equipment Operator, suffered injuries to his left leg and back when he fell while working on a ship on February 24, 2007.¹ Claimant returned to light-duty work as a sweeper on March 12, 2008. Employer did not pay any benefits voluntarily. Claimant filed a claim for benefits under the Act.

In her Decision and Order, the administrative law judge invoked the Section 20(a) presumption that claimant’s current back condition is due to the work injury. 33 U.S.C. §920(a). The administrative law judge found that employer did not rebut the Section 20(a) presumption and thus found that claimant’s back condition is work-related. The administrative law judge found that claimant established his *prima facie* case of total disability and that employer established the availability of suitable alternate employment. The administrative law judge awarded claimant compensation for temporary total disability from February 25 to October 5, 2007, for temporary partial disability based on a residual earning capacity of \$400 per week from October 6, 2007 to March 11, 2008, and for temporary partial disability based on a residual earning capacity of \$640 per week commencing March 12, 2008, 33 U.S.C. §908(e), as well as reasonable and necessary medical care.

The administrative law judge found that claimant’s average weekly wage is \$1,227.27, calculated pursuant to Section 10(c), 33 U.S.C. §910(c). The administrative law judge noted that employer offered the wages of comparable employees for the year prior to claimant’s injury pursuant to Section 10(b), 33 U.S.C. §910(b), but did not provide information from which an average daily wage could be calculated.² Employer filed a timely motion for reconsideration and to reopen the record on the issue of claimant’s average weekly wage. Employer offered as evidence further wage records of the comparable employees. Employer also argued that, pursuant to Section 10(c), the administrative law judge erred in calculating claimant’s average weekly wage. In her Order, the administrative law judge denied employer’s motion to reopen the record for the submission of evidence regarding the comparable employees’ average daily wages.

¹ Claimant’s injury to his left knee fully resolved within a month and is not the subject of this claim. HT at 44-45.

² The administrative law judge held the record open for employer to submit such evidence, but it did not do so.

The administrative law judge did reconsider the calculation of claimant's average weekly wage pursuant to Section 10(c) and modified it to reflect an average weekly wage of \$1,059.46.

Claimant appeals, contending the administrative law judge erred on reconsideration in calculating his average weekly wage. Employer cross-appeals, arguing that the administrative law judge erred in finding that it did not rebut the Section 20(a) presumption and that claimant's current back condition is related to the work injury. Each party has responded to the other's appeal. Employer has filed a reply brief.

We address first employer's cross-appeal contending that the administrative law judge erred in finding that it did not rebut the Section 20(a) presumption. When, as here, claimant establishes his *prima facie* case, Section 20(a) applies to presume that his condition is causally related to his employment. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The burden then shifts to employer to rebut the presumption with substantial evidence that claimant's condition is not caused or contributed to by his employment injury. *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). Pursuant to the aggravation rule, if the work injury aggravates, accelerates, contributes to or combines with an underlying condition, the entire resultant disability is compensable. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT). Employer contends that the administrative law judge erred in finding that it did not establish rebuttal of the Section 20(a) presumption based on the opinion of Dr. Ball.

Dr. Ball examined claimant on August 7, 2007, on behalf of employer. She reviewed claimant's prior medical records as well as videotape surveillance of claimant. Dr. Ball opined that claimant suffers from segmental degenerative lumbar disk disease at three levels which pre-existed the work injury. EX 20 at 3. She stated that the degenerative changes seen on claimant's MRI "are absolutely not related to a single incident of falling and are more related to a combination of genetic and prior use of the lumbar spine." *Id.* Dr. Ball stated that there was "perhaps a brief work-related aggravation of this condition," but noted the absence of any current objective findings. She stated claimant had no restrictions or limitations at that time. *Id.*

The administrative law judge accurately set forth Dr. Ball's opinion, *see* Decision and Order at 14, noting that she opined that the work injury may have briefly aggravated claimant's underlying condition and that any additional symptoms claimant may suffer are due to the underlying condition. The administrative law judge stated that the issue is whether Dr. Ball's opinion is sufficient to rebut the presumed causal connection between

claimant's *ongoing* back condition and the work accident.³ *Id.* The administrative law judge found that employer did not "present evidence which a reasonable mind might find adequate to support the conclusion that the work injury played no role in the Claimant's continuing lumbar spine symptoms/condition." *Id.* at 14-15. The administrative law judge based this finding on claimant's continuing complaints of lumbar pain,⁴ and on her conclusion that if the work injury aggravated claimant's underlying degenerative disk disease, "it is difficult to completely sever the ongoing pain complaint from the aggravating or triggering event." *Id.* at 14. Thus, the administrative law judge concluded that Dr. Ball's opinion does not rebut the Section 20(a) presumption with regard to claimant's ongoing condition.

We cannot affirm the finding that employer did not rebut the Section 20(a) presumption, and we must remand the case for further consideration. Employer's burden on rebuttal is one of production only, and not persuasion. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). While employer must indeed produce substantial evidence that the work injury did not cause or aggravate claimant's condition, *i.e.*, evidence which a reasonable mind might find adequate to support the conclusion, *see Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998), the administrative law judge in this case discounted Dr. Ball's opinion because of the administrative law judge's belief that it is not possible to separate the pain arising from the work accident from that caused by the underlying condition. The administrative law judge did not cite any evidence of record from which such an inference could be drawn. *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965). Moreover, Dr. Ball's opinion does not conflict with any other of the administrative law judge's findings of fact and is not based on any medical theories discredited by the administrative law judge such that it cannot, legally, constitute substantial evidence to rebut the Section 20(a) presumption. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2^d Cir. 2008). Therefore, as the administrative law judge's reasoning in finding Dr. Ball's opinion insufficient to rebut the Section 20(a) presumption is not supported by substantial evidence, we vacate the administrative law judge's finding that employer did not rebut the Section 20(a) presumption as it relates to claimant's ongoing back condition, and we

³ Thus, the record supports the finding that claimant had, at a minimum, some initial period of disability related to the work-related aggravation of his underlying condition.

⁴ The administrative law judge did not credit claimant's claim of debilitating pain, concluding that he suffers only from "some ongoing lumbar pain or discomfort." Decision and Order at 14.

remand the case for further consideration of this issue.⁵ See generally *Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986).

In his appeal, claimant contends the administrative law judge erred in determining his average weekly wage on reconsideration. In her original decision, the administrative law judge determined that claimant's average weekly wage should be calculated pursuant to Section 10(c), 33 U.S.C. §910(c). She found that claimant's actual earnings in his two months of employment as a Terminal II Operator, the job in which he was injured, represented claimant's earning capacity at the time of injury. The administrative law judge took claimant's total earnings during this period, \$9,818.17, and divided the sum by 8 weeks to arrive at an average weekly wage of \$1,227.27.

In its motion for reconsideration, employer contended, *inter alia*, that the administrative law judge should have utilized the wages of comparable employees in calculating claimant's average weekly wage pursuant to Section 10(c). Employer provided the annual earnings of two employees who worked in the same position as claimant, that of a Terminal II Operator. The administrative law judge agreed with this contention. The administrative law judge found that the average weekly earnings of the two comparable employees for the year prior to claimant's injury was \$891.65. She averaged this sum with the average of claimant's actual earnings, \$1,227.27, to arrive at an average weekly wage of \$1,059.46. The administrative law judge found that this figure is a better estimate of what claimant could have been expected to earn absent injury and that use of the comparable employees' wages best comports with the language of Section 10(c). On appeal, claimant contends the administrative law judge erred in using the wages of two other employees, as they were not shown by employer to be "comparable" to claimant.

Section 10(c) states:

If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee,

⁵ If, on remand, the administrative law judge finds the Section 20(a) presumption rebutted, the administrative law judge must address whether claimant established the work-relatedness of his present condition based on the record as a whole. *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982).

including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c). The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT). It is well established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979).

In granting employer's motion for reconsideration, the administrative law judge rejected claimant's contention that the other employees were not comparable to claimant because claimant failed to raise this objection when employer introduced this wage evidence at the initial hearing or during the period that the record was held open. The administrative law judge thus viewed the employees as comparable to claimant because it was established that they had the same job title as claimant. Order on Recon. at 4-5. Claimant contends that he did raise an objection during the initial proceedings and that, moreover, it is employer's burden to establish the comparability of the employees whose wages it sought to use.

Any error in the administrative law judge's statement that claimant did not raise an objection to the comparability of the other employees is harmless.⁶ Section 10(c) states that in computing an average weekly wage, the administrative law judge should "have regard" for the wages of "other employees of the same or most similar class working in the same or most similar employment" if such evidence is introduced. *See, e.g., Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Bonner*, 600 F.2d 1288. In this case, the administrative law judge rationally found that the other two employees worked in the same job classification as that in which claimant was working at the time of injury. This finding is sufficient for consideration of

⁶ After the formal hearing employer introduced the wages of two co-workers for purposes of average weekly wage. In his post-hearing brief, claimant contended it was impossible to determine if the employees were in fact comparable because employer had not introduced evidence concerning these employees' absences from work. This contention concerned the ability to calculate an average daily wage which is necessary for an average weekly wage computation under Section 10(b). *See* 33 U.S.C. §910(b). Claimant contended that, pursuant to Section 10(c), his average weekly wage should be based only on his own earnings. The administrative law judge accepted both contentions in her initial decision. Thus, it cannot be said that claimant failed to object to the comparability of the other employees.

their wages pursuant to Section 10(c). *See generally McKee v. D. E. Foster Co.*, 14 BRBS 513 (1981); *Holmes v. Tampa Ship Repair & Dry Dock Co.*, 8 BRBS 455 (1978). Moreover, the administrative law judge's decision to average the co-workers' annual wages with claimant's earnings in the same position results in a fair and reasonable estimation of claimant's earning capacity at the time of injury. *See, e.g., Hayes v. P & M Crane Co.*, 23 BRBS 389 (1990), *rev'd on other grounds*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). As the administrative law judge's finding that claimant's average weekly wage is \$1,059.46 is rational and supported by substantial evidence, it is affirmed. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT).

Accordingly, the administrative law judge's finding that employer did not rebut the Section 20(a) presumption is vacated, and the case is remanded for further consideration consistent with this decision. The administrative law judge's calculation on reconsideration of claimant's average weekly wage is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge