BRB Nos. 12-0047
and 12-0047A

ALBERTO CALVILLO	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
PROFAB CONSTRUCTION	)	DATE ISSUED: 10/31/2012
	)	
and	)	
	)	
TEXAS MUTUAL INSURANCE, COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Van Huseman and Eric Stewart (Huseman, Dodson & Hummell), Corpus Christi, Texas, for claimant.

Peter Thompson and Elizabeth Thomas Doyle (Thompson & Reilley), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order of (2010-LHC-1447) of Administrative Law Judge Lee J. Romero, Jr., 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).

Claimant sustained a work-related head injury on May 29, 2005. Employer voluntarily paid claimant temporary total disability benefits from June 6, 2005, through January 24, 2010, at a weekly compensation rate of $731.69, permanent partial disability benefits from January 25, 2010, through April 3, 2011, at a weekly compensation rate of $503.81, and medical benefits. Subsequently, claimant filed a claim for ongoing permanent total disability and medical benefits for cognitive and psychological problems. Employer controverted the claim.

The parties stipulated that claimant suffered a compensable head injury on May 29, 2006. The administrative law judge found that claimant established a prima facie case and invoked the Section 20(a), 33 U.S.C. §920(a), presumption relating his psychological and cognitive injuries to his work injury. The administrative law judge also found that employer rebutted the presumption and that, on weighing the evidence as a whole, claimant established a causal relationship between the work accident and his psychological and cognitive injuries. Decision and Order at 32-38. The administrative law judge next found that claimant established a prima facie case of total disability as he found that claimant cannot return to any work. *Id.* at 41. He also found that employer's vocational evidence, consisting of two labor market surveys dated November 10, 2009, and March 16, 2010, did not establish the availability of suitable alternate employment because they failed to specify the physical demands of the jobs. Therefore, the administrative law judge found claimant to be totally disabled. *Id.* at 46. He calculated claimant's average weekly wage under Section 10(c) of the Act, 33 U.S.C. §910(c), and determined it was $897.26. Decision and Order at 48. Finally, the administrative law judge awarded claimant all reasonable and necessary medical expenses arising out of his work injury on May 29, 2005, including the recommended treatment for claimant's cognitive deficiencies and depression. *Id.* at 50.

On appeal, claimant contends the administrative law judge erred in calculating his average weekly wage, arguing that it should be $1,097.54. Employer responds urging affirmance of the administrative law judge's calculation. BRB No. 12-0047. Employer cross-appeals the administrative law judge's findings that claimant's cognitive defects and psychological problems are caused by his work accident on May 29, 2005, and that claimant is permanently totally disabled. Claimant has not responded to employer's cross-appeal. BRB No. 12-0047A.

We shall address employer's cross-appeal first. Employer contends the administrative law judge erred in relying on claimant's pre-hearing statement to find that claimant "claimed" a psychological injury and in applying the Section 20(a) presumption to find the injury work-related. Employer asserts the administrative law judge instead should have applied the "natural and unavoidable" standard set forth in *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008), and required

claimant to prove the work-relatedness of his psychological condition without the benefit of the Section 20(a) presumption. This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. In *Amerada Hess*, the Fifth Circuit relied on the Supreme Court's decision in *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), and held that, as the claimant's claim for benefits did not assert a work-related heart condition, the administrative law judge erred in applying the Section 20(a) presumption to determine that the claimant was entitled to medical expenses for his heart condition, which he alleged arose because of the steroid treatment for his work-related back injury. Because the heart condition developed subsequent to the work injury and was not "claimed" as a work-related condition, the court held that a causal relationship existed only if claimant established without benefit of the Section 20(a) presumption that his heart condition "naturally or unavoidably" resulted from the work-related injury or the treatment as established by medical or scientific evidence. As the administrative law judge made no finding on the work-relatedness of the heart condition under this standard, the Fifth Circuit remanded the case to the administrative law judge. *Amerada Hess*, 543 F.3d at 763, 42 BRBS at 44-45(CRT); *see* 33 U.S.C. §902(2).

It is axiomatic that the Section 20(a) presumption attaches only to claims made. *U.S. Industries*, 455 U.S. 608, 14 BRBS 631; *Amerada Hess*, 543 F.3d 755, 42 BRBS 41(CRT). However, a claimant is permitted to amend his claim, and the Supreme Court noted the informal nature of workers' compensation proceedings under the Act, stating that "considerable liberality" is allowed in amending claims. *U.S. Industries*, 455 U.S. at 613 n.7, 14 BRBS at 633 n.7. Thus, the courts and the Board have held that a claimant is not limited to the issues raised in his initial filing, and an administrative law judge may consider allegations raised in the pre-hearing statement, at the formal hearing, in briefs to the administrative law judge, or in other filings sufficient to put the employer on notice of additional injury or disability claimed. *See Pool Co. v. Cooper,* 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Meehan Seaway Service, Inc. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997); *Dangerfield v. Todd Pacific Shipyards Corp.,* 22 BRBS 104 (1989).

In this case, it is clear that the entirety of the claim concerned whether claimant's psychological and cognitive difficulties were caused or aggravated by the work-related head injury. The administrative law judge noted that neither party submitted claimant's claim form into evidence, and that if any defect existed in claimant's original pleading, it was cured by virtue of claimant's pre-hearing statement. Decision and Order at 28; *see Pool Co.,* 274 F.3d 173, 35 BRBS 109(CRT); *Dangerfield,* 22 BRBS 104. The administrative law judge also found that the issue neither surprised nor prejudiced employer, as it had sent claimant to psychologists for evaluations, noting there is no dispute that claimant has some sort of psychological and/or cognitive problems. Decision

and Order at 28. Moreover, unlike *Amerada Hess*, there is no "subsequent" condition here. Claimant contends his psychological and cognitive injuries were directly caused by the injury to his head, and he provided medical evidence to support this allegation. Therefore, as claimant claimed his condition is a direct result of the work injury, the administrative law judge properly applied Section 20(a) to ascertain whether claimant's psychological injuries are work-related. *Id.*

Employer also contends the administrative law judge improperly relied on Dr. Weiner's opinions in finding that claimant established a prima facie case and, ultimately, in finding that he established the work-relatedness of his condition. Specifically, employer alleges that Dr. Weiner's opinion lacks credibility because, by being claimant's treating physician as well as by performing a forensic neuropsychological exam, he entered into an improper dual relationship under Texas law.

In order to invoke the Section 20(a) presumption, a claimant must show that he sustained a harm and that either an accident occurred or working conditions existed which could have caused the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see also U.S. Industries*, 455 U.S. 608, 14 BRBS 631. Once the claimant establishes a prima facie case, Section 20(a) applies to relate the injury to the employment, and the burden is on the employer to rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the employer rebuts the presumption, it no longer controls and the issue of whether there is a causal relationship must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Ceres Gulf, Inc. v. Director, OWCP,* 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012).

The administrative law judge addressed and rationally rejected the contention that Dr. Weiner's opinion is not creditable. He found that any violation of the professional code is not before him and, in any event, does not detract from Dr. Weiner's reported opinions and conclusions. Decision and Order at 30. The administrative law judge found that Dr. Weiner's opinion is entitled to the greatest weight because he consistently treated claimant for over four years. The administrative law judge is entitled to evaluate the credibility of all witnesses and has considerable discretion in evaluating and weighing the evidence of record. *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); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The administrative law judge found that Dr. Weiner's credible opinion established that claimant suffered a harm that could have been caused by his work injury. Decision and Order at 32. Dr. Weiner stated that claimant's work-related head injury could have caused his cognitive and psychological injuries and

his depression. Cl. Exs. 1, 7. Dr. Weiner's opinion constitutes substantial evidence supporting the administrative law judge's invocation of the Section 20(a) presumption and we affirm this finding. *S.K. [Kamal] v. ITT Industries, Inc.*, 43 BRBS 78 (2009), *aff'd in pert. part,* No. 4:09-MC-348, 2011 WL 798464 (S.D. Tex. Mar. 1, 2011).

The administrative law judge determined that employer rebutted the Section 20(a) presumption with the opinions of its experts, Drs. Perez and Holden, who concluded that claimant's psychological condition is not the result of his work injury. On the record as a whole, the administrative law judge rationally gave the opinion of claimant's doctor dispositive weight, finding he was more familiar with claimant's situation because he had treated him over a period of years. *See Young v. Newport News Shipbuilding & Dry Dock Co.,* 45 BRBS 35 (2011). Accordingly, based on the opinions of Dr. Weiner, the administrative law judge concluded that claimant's cognitive and psychological injuries and depression are related to his 2005 work injury. Decision and Order at 37-38. The administrative law judge thoroughly and accurately summarized the medical evidence of record. His decision to credit the opinion of Dr. Weiner is within his discretion. Dr. Weiner opined that claimant is not malingering and that the work injury to claimant's head caused his cognitive deficiencies and depression. Thus, as the administrative law judge's conclusion is supported by substantial evidence, we affirm the finding that claimant's psychological injuries are related to his 2005 head injury. *See Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002).

Employer also contends the administrative law judge erred in finding that claimant cannot return to his usual work. In order to establish a prima facie case of total disability, a claimant must demonstrate he is unable to perform his usual work due to his work injury. *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Once the claimant establishes he is unable to perform his usual work, the burden shifts to his employer to demonstrate the availability of realistic job opportunities within the geographic area where the claimant resides, which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing and could secure if he diligently tried. *Id.*

In this case, the administrative law judge found that claimant established, via the opinions of Drs. Chodosh and Weiner, that he cannot return to his usual employment as a supervisor for employer. Decision and Order at 40-41. Claimant's usual employment required him to perform various tasks such as overseeing crews, completing paperwork, holding safety meetings, and designing piping. In ascertaining that claimant cannot return to this position, the administrative law judge credited Dr. Chodosh's most recent report dated October 6, 2010, in which Dr. Chodosh stated that claimant was unable to return to any type of work. EX 2 at 1. The administrative law judge also relied on Dr. Weiner's opinion that claimant is unable to work, as evidenced by claimant's inability to

manage his own finances and to complete tasks around his home. CX 7 at 32. Dr. Weiner explained that claimant's significant depression, poor concentration, and fatigue would prevent him from maintaining even a part-time job, and he stated that this was a permanent condition. Cl. Exs. 1, 7. As the administrative law judge is the fact-finder given the authority to credit and weigh evidence, and as his findings are rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant established his prima facie case of total disability. *See generally Louisiana Ins. Guar. Ass'n v. Director, OWCP*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010).

Employer further contends that the administrative law judge erred in finding it did not establish the availability of suitable alternate employment. We reject employer's contention. Drs. Chodosh and Weiner both stated that claimant's work-related cognitive and psychological conditions prevent him from returning to any work. Cl. Exs. 1-2; Cl. Ex. 7 at 9-10, 32-33, 48. Dr. Weiner emphasized that claimant's unemployability is permanent because of his conditions. Cl. Exs. 1 at 11; 7 at 10. The administrative law judge credited these opinions over those of employer's experts and found that claimant is incapable of performing any work. Decision and Order at 41. Such a finding renders an employer's vocational evidence moot. *J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP,* 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010). Therefore, it was unnecessary for the administrative law judge to address employer's vocational evidence, and any error in addressing that evidence in terms of claimant's physical abilities instead of his cognitive ones is harmless. *Id.*; *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005). Consequently, we affirm the administrative law judge's finding that claimant is totally disabled as it is rational, supported by substantial evidence, and in accordance with law.

In his appeal, claimant argues that the administrative law judge erred in calculating his pre-injury average weekly wage. Claimant does not challenge the administrative law judge's use of Section 10(c) in making his calculation. Rather, he alleges error with the result, arguing that the evidence establishes his pre-injury average weekly wage should be $1,097.54, rather than $897.26.

The purpose 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. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). An administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). *See Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000). Here, the administrative law judge found that claimant earned $46,657.51 during the 52-week period from June 2, 2004, to June 2, 2005. Decision and Order at 48; Cl. Ex. 5 at 11-12; Emp. Ex. 13. The administrative law judge then divided that amount by 52

pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), resulting in an average weekly wage of $897.26. Claimant asserts that employer made its voluntary payments based on an average weekly wage of $1,097.54, Emp. Exs. 2, 5, and that this establishes his average weekly wage at this rate. This contention is without merit. The calculation of claimant's average weekly wage was a disputed issue before the administrative law judge; therefore, employer's voluntary payments cannot be used as "conclusive" evidence of that wage. The administrative law judge rationally computed an annual wage based on claimant's actual earnings and divided that figure by 52 pursuant to the Act, resulting in an average weekly wage of $897.26. Claimant has not established error in this method of calculating his average weekly wage. Therefore, we affirm the administrative law judge's finding as it is based on substantial evidence of record and is in accordance with law. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

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

SO ORDERED.

____
ROY P. SMITH
Administrative Appeals Judge

____
BETTY JEAN HALL
Administrative Appeals Judge

____
JUDITH S. BOGGS
Administrative Appeals Judge