BRB No. 98-1605

JEANNE L. HUSTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: 9/15/99
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Henry B. Zuber, III (Parlin & Murphy), Ocean Springs, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for the self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Awarding Benefits (97-LHC-2015, 98-LHC-2362) of Administrative Law Judge David W. DiNardi 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 was employed by employer in its electrical department commencing on October 15, 1992. Claimant had been involved in an automobile accident on October 14, 1992, the day before she began working for employer, but she was nonetheless able to begin her employment. Tr. at 38-41. An x-ray taken following the car accident revealed C5-6 disc disease with degenerative changes. RX 2 at 7. On October 26, 1992, while working, claimant fell backward head first into an open manhole, hitting her neck, back and shoulder. Claimant went to employer's infirmary, but was not hospitalized. Following the accident claimant was moved to the materials department as a material runner. She was involved in another accident at work on February 8, 1993, when some metal boxes fell on her, pinning her down. This time she was hospitalized for four days. She did not return to work after the second accident. A series of myelograms identified disc herniations throughout claimant's cervical and lumbar spine. RX 28 at 10-13. Dr. Danielson performed one low back and two cervical surgeries. *Id.* at 15-18, 29-33, 50-55.

In his Decision and Order, the administrative law judge found that claimant established that she had a work-related back condition. With regard to her neck injury, he found that claimant established a *prima facie* case pursuant to Section 20(a), 33 U.S.C. §920(a), linking this condition to her work accident, but he concluded employer established rebuttal of the presumption. Upon weighing all of the evidence, he determined that claimant did not sustain a work-related neck injury. The administrative law judge then found that employer established suitable alternate employment and that claimant did not establish that she diligently sought employment. Accordingly, he awarded claimant permanent partial disability compensation based on a $142.65 loss in wage-earning capacity, beginning on February 16, 1998. The administrative law judge affirmed his findings on reconsideration. Claimant appeals, challenging the administrative law judge's findings that she did not establish that her neck condition is work-related and the administrative law judge's determination that employer established the availability of suitable alternate employment. Employer responds, urging affirmance. Claimant replies, reiterating her prior arguments relating to causation and suitable alternate employment.

After consideration of the Decision and Order in light of the record evidence, we vacate the administrative law judge's causation finding relating to claimant's neck condition. It is undisputed that claimant is entitled to invocation of the Section 20(a) presumption in this case. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that her condition is causally related to her employment if she shows that she suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See*

Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd,* 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. *Gooden v. Director, OWCP,* 135 F. 3d 1066 , 32 BRBS 59 (CRT)(5th Cir. 1998); *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); *Merrill,* 25 BRBS at 144. Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury in order to rebut Section 20(a). *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

In analyzing rebuttal, after summarizing the medical as well as other evidence, the administrative law judge, without pointing to any specific evidence, found that employer established rebuttal as to the neck injury. Decision and Order at 23. In summarizing the evidence, the administrative law judge relied on the following: that employer's internal accident reports make no reference to the neck; that the LS-202 Forms, First Reports of Injury, following both accidents, do not mention a neck injury, and neither does the Physical Therapy evaluation; that Dr. Wiggins stated that the "fall involved primarily lumbar region" and that the car accident "was a neck injury primarily," RX 3; that according to Dr. McCloskey "there was no indication that her neck problems were related to any problems that occurred at [employer]," RX 4 at 32; and that while Dr. Danielson initially felt that claimant's neck condition was aggravated at work, RX 28, he ultimately opined that it was probably related to the car accident, RX 38. Decision and Order at 21-24.

Initially, we vacate the administrative law judge's finding that employer established rebuttal, as the administrative law judge provided no analysis in support of this conclusion. In so doing, we note that while Dr. McCloskey's October 16, 1994, report states that there was no indication that claimant's neck problems were related to her employment, it is employer's burden on rebuttal to produce specific evidence that there was in fact no relationship. Moreover, the opinions of both Dr. Wiggins and Dr. Danielson must be considered in terms of the aggravation rule; an opinion that a condition is "primarily" due to other causes may not answer the question of whether the condition is in part due to work. On remand, the administrative law judge must consider whether the evidence is sufficient to sever the causal nexus and establish that the work injuries did not cause or aggravate claimant's cervical condition. *See Quinones*, 32 BRBS at 6.

If, on remand, the administrative law judge again concludes that employer established rebuttal, he must again weigh all of the evidence to determine whether there is substantial evidence from which he could conclude that claimant's pre-existing cervical condition was not aggravated by her October 26, 1992, and February 8, 1993, employment injuries. In concluding that claimant did not establish the requisite nexus in the present case, the administrative law judge stated that he accorded determinative weight to Dr. Danielson's opinion, over that of Dr. Germann, because he found Dr. Danielson's opinions extremely credible and persuasive, as he was claimant's primary treating physician for almost four years and was the physician who performed claimant's lumbar and cervical surgeries. Decision and Order at 25. The administrative law judge relied on Dr. Danielson's agreement with the statement that claimant's low back problems arose out of incidents at [employer], but the neck problem arose out of an incident in a moving vehicle accident. RX 38 at 31. Dr. Danielson also deposed, however, that it was likely that the injury claimant sustained at work in October 1992 is consistent with an injury where one would hurt or aggravate an injury to one's cervical area, RX 38 at 51-52, and he agreed that some portion of claimant's cervical injury is attributable to the aggravations at work. RX 38 at 54. Dr. Danielson's opinion does not, therefore, constitute substantial evidence that claimant's neck condition was not work-related, as he, even after "refining" his opinion as to what caused claimant's back and neck problems, continued to assert that the work injuries aggravated claimant's cervical condition. RX 38 at 31, 51-52, 54. On remand, the administrative law judge must reconsider his causation determination in accordance with applicable law. *See generally Director, OWCP v. Vessel Repair, Inc.,* 168 F.3d 190, 193 (5th Cir. 1999)(work injury need not be sole cause of disability; only legally relevant question is whether the work injury is a cause of the disability). *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

Claimant next appeals the administrative law judge's finding that employer established suitable alternate employment. Where, as in the instant case, claimant has established that she is unable to perform her usual employment duties due to a work-related injury, the burden shifts to employer to establish the availability of suitable alternate employment by demonstrating the availability of jobs within the geographic area where claimant resides which claimant, considering her age, education, work experience, and physical restrictions, is capable of performing and for which she can compete and can reasonably be expected to secure. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Claimant's subjective complaints of pain do not preclude an administrative law judge from finding that employer has established the availability of suitable alternate employment where substantial evidence establishes

that claimant is nonetheless able to perform the job. *See generally Adam v. Nicholson Terminal & Dry Dock Corp.*, 14 BRBS 735 (1981); *Peterson v. Washington Metropolitan Area Transit Authority,* 13 BRBS 891 (1981).

Addressing claimant's argument that she is totally disabled, the administrative law judge noted that claimant has a tendency to exaggerate and acting within his discretion as fact finder, rationally rejected claimant's contention that her pain is disabling, rendering her unable to perform any of the jobs on which employer relied to establish suitable alternate employment. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 372 U.S. 954 (1963). Further, it was within the administrative law judge's discretion to interpret Dr. Danielson's opinions as releasing claimant to perform sedentary work and credit it over the contrary opinion of Dr. Buckley. While Dr. Danielson in places deposed that claimant is totally disabled, RX 38 at 17-18, 21, his overall testimony provides substantial evidence for the administrative law judge's finding that claimant is capable of performing some sort of sedentary employment. RX 38 at 22, 36, 39-42, 53. Both the administrative law judge and the vocational expert acknowledged that Dr. Danielson "vacillated" on this issue, but nevertheless concluded that claimant is capable of performing some sedentary work. Further support for this conclusion is found in a February 10, 1997 form, in which Dr. Danielson stated: "feel client will have to work at her own pace sedentary type activity such as proof reading at her home." RX 28 at 63. We therefore affirm the administrative law judge's finding that sedentary work is within claimant's physical capabilities.

We next reject claimant's argument that the identification of four positions is insufficient to constitute a range of jobs under the law of the United States Court of Appeals for the Fifth Circuit, as this assertion is in fact contrary to the law of that circuit. *See Avondale Shipyard, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992)*; P & M Crane,* 930 F.2d at 424, 24 BRBS at 116(CRT). Addressing claimant's next argument regarding the suitability of the identified positions, the administrative law judge found that four positions listed in the February 16, 1998, report prepared by employer's vocational expert, Mr. Sanders, namely, cashier/collector, desk clerk at Hampton Inn and King's Inn and telemarketer for Olan Mills Studio, were suitable for claimant. RX 35 at 4-5. Claimant argues that the cashier/collector job and the two desk clerk jobs were sedentary to light and therefore outside her capabilities. Claimant's assertion is without merit. The mere fact that the desk clerk and cash collector jobs were not technically sedentary jobs does not automatically preclude them from being suitable, as Dr. Danielson approved the desk clerk and cashier collector jobs. RX 38 at 40, 42. Further, the administrative law judge took all of Dr. Danielson's restrictions into consideration and rejected several positions identified by employer as sedentary, because even

within that classification they did not comply with Dr. Danielson's restrictions. Inasmuch as Dr. Danielson's restrictions provided that claimant was limited to intermittent sitting, and the description of the physical requirements for these jobs specifically included intermittent sitting and negligible lifting, the administrative law judge acted within his discretionary authority in concluding that employer met its burden of showing that these jobs were suitable.[1]

Claimant also asserts that the administrative law judge erred in finding that she did not establish that she diligently sought employment. A claimant may rebut employer's showing of suitable alternate employment and thus retain entitlement to temporary total disability benefits by demonstrating that she diligently tried but was unable to secure alternate employment. *See Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP,* 781 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 107 S.Ct. 101 (1986). We reject claimant's assertion that she had no obligation to seek employment because Dr. Danielson had not released her to return to work. Claimant testified that she was not aware that on February 10, 1997, Dr. Danielson stated that he thought she may be able to perform some sedentary work. Tr. at 85. Claimant acknowledged, however, that she read Dr. Danielson's February 1998 deposition, in which he agreed that claimant may try to perform some sedentary work, prior to the April 24, 1998, hearing. Claimant conceded that she nevertheless did not apply for any of the jobs identified by Mr. Sanders, Tr. at 86, because she was in too much pain to try to return to work. Tr. at 94. Because the administrative law judge's finding that claimant did not demonstrate due diligence in seeking employment is supported by substantial evidence in the record, we affirm this determination.

Accordingly, the administrative law judge's findings with regard to the cause of claimant's neck condition are vacated, and the case is remanded for further

[1]The cashier/collector job description indicated that the job is primarily sedentary where claimant would sit approximately 90 percent of the work day with latitude to stand and move about as needed. RX 35 at 4. The desk clerk at Hampton Inn description noted that job entails occasional standing with frequent sitting/handling. RX 35 at 4.

consideration of this issue consistent with this opinion. In all other respects, the administrative law judge's Decision and Order - Awarding Benefits and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL
Chief Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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MALCOLM D. NELSON
Acting Administrative Appeals Judge