BRB No. 96-1111

ROBERT E. JENKINS	)	
	)	
Claimant-Respondent	)	
v.	)	
	)	
PRIDE OFFSHORE, INCORPORATED	)	DATE ISSUED:
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

J. Paul Demarest and Angela C. Imbornone (Favret, Demarest, Russo & Lutkewitte), New Orleans, Louisiana, for claimant.

Jefferson R. Tillery (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (95-LHC-724) of Administrative Law Judge Richard D. Mills 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 applicable law. *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.,* 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On September 6, 1994, claimant, a roustabout for employer on an oil platform, was lifting Gas Lift Mandrils weighing over 100 lbs without assistance, when he was injured.

The next day, claimant was taken off the platform by helicopter and was examined by Dr. St. Martin, a family physician, who diagnosed an old, external hemorrhoid and possibly an internal hemorrhoid, along with a lumbar muscular strain, and released claimant for light duty work. EX 9, pp. 15-16. About a week thereafter, claimant began treatment with Dr. Murphy, an orthopedic surgeon, who referred him for an MRI in October 1994, which revealed a bulging disc at L5-S1. Thereafter, Dr. Murphy treated claimant conservatively until April 1995, at which time he recommended surgery after another MRI showed a bulging disc at L3-4. Claimant, who has not worked since the September 6, 1994, accident, sought continuing temporary total disability compensation under the Act. Employer did not voluntarily pay any benefits.

After determining that claimant sustained a work-related back injury and at least an aggravation of a pre-existing hemorrhoidal condition as a result of the September 6, 1994, incident, the administrative law judge awarded claimant temporary total disability benefits from September 7, 1994 until July 24, 1995, and temporary partial disability benefits thereafter. The administrative law judge also held employer liable for reasonable and necessary medical expenses as well as interest on any accrued unpaid compensation benefits.

Employer appeals the administrative law judge's award of benefits, arguing that in finding that the second bulging disk at L3-4 evidenced on the April 1995 MRI was work-related, the administrative law judge improperly applied the Section 20(a), 33 U.S.C. §920(a), presumption as an attribute of evidence in claimant's favor in direct violation of *Del Vecchio v. Bowers*, 296 U.S. 290 (1935). Employer avers that because it introduced the testimony of Dr. Steiner and surveillance evidence establishing that claimant's injury is not work-related, the presumption should have fallen out of the case and the administrative law judge should have determined whether claimant established that this back injury and the purported need for surgery resulting therefrom was work-related based on his evaluation of the evidence as a whole. Employer further avers that in determining the extent of claimant's disability, the administrative law judge violated the principle set forth by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries,* 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994), that the proponent of a particular rule or order bears the burden of proof by awarding temporary total disability without requiring claimant to prove he was totally disabled. Finally, employer avers that, assuming *arguendo,* that claimant did prove he was disabled, the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment based on the light duty job available at its facility from the time of claimant's injury through the testimony of Ronnie Haydel, employer's Human Resources/Safety Manager. Claimant responds, urging affirmance, and employer replies.

We initially affirm the administrative law judge's finding that the second bulging disc at L3-4 evident on the April 1995 MRI is causally related to claimant's September 6, 1994, work injury because this finding is rational, supported by substantial evidence, and in accordance with applicable law. *O'Keeffe,* 380 U.S. at 359. Section 20(a) of the Act

provides claimant with a presumption that his condition is causally related to his employment if he shows that he 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 of proof shifts to employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio*, 296 U.S. at 280 . In a case, such as the present one, where employer alleges a subsequent non-work-related event is the cause of claimant's condition, employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that claimant's condition was not caused by the work-related event. Employer, however, is liable for the entire resultant disability if the second injury is the natural or unavoidable result of the first injury. *See Merrill*, 25 BRBS 140 at 144.

In the present case, as it undisputed that claimant sustained a harm, the bulging disc at L3-4, and that the September 6, 1994, work accident occurred, the administrative law judge properly found that claimant is entitled to the Section 20(a) presumption. Employer asserts that the medical opinion of Dr. Steiner establishes that the activities depicted on its surveillance tape of claimant following the work accident caused the bulging disk at L3-4 and accordingly provides substantial evidence to rebut the Section 20(a) presumption. We reject this contention. Although the administrative law judge invoked Section 20(a) in this case, he did not analyze the evidence in terms of whether it was rebutted. Any error is harmless, however, as he weighed the relevant evidence and rendered a decision based on the record as a whole. Thus, the failure to find rebuttal is not reversible error.

The administrative law judge rationally concluded based on the medical opinion of Dr. Murphy, claimant's treating orthopedic surgeon, CX 11, p. 8-9, and claimant's testimony that he limited his activities post-injury, Tr. at 117-118, that the bulging disc at L3-4 evident on the April 1995 MRI is the natural and unavoidable result of the September 6, 1994, work accident. In making this determination, the administrative law judge specifically found that the surveillance evidence introduced by employer did not contradict claimant's testimony because it failed to show him performing any activity that would be traumatic enough to injure a healthy disc. Inasmuch as the administrative law judge considered all of the relevant evidence in making his causation determination, employer's assertion that his analysis violates *Del Vecchio*, 296 U.S. at 290, is without merit. The administrative law judge's decision to credit Dr. Murphy's testimony, rather than Dr. Steiner's opinion that the bulge shown at L3-4 on the April 1995 MRI is new and unrelated to the work injury, Tr. at 153-154, and to reject employer's interpretation of the surveillance evidence, is a credibility determination within his discretionary authority. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995).

Dr. Murphy's testimony that claimant injured his disc at the time of the work accident and that it subsequently progressed to the point that it became evident as a definite bulge,

CX-11, p. 8-9, in conjunction with the administrative law judge's crediting of claimant's testimony, provides substantial evidence to support his finding that the bulge at L3-4 is causally related to claimant's September 1994 work injury. *See Merrill*, 25 BRBS at 145. As employer has failed to demonstrate any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, we affirm this determination. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

We also reject employer's argument that the administrative law judge violated principles enunciated in *Greenwich Collieries* by providing claimant with a "presumption" of disability, contending that he only required claimant to establish a *prima facie* case of total disability before shifting the burden to employer to establish the availability of suitable alternate employment. In support of this assertion, employer cites a statement contained in the administrative law judge's decision to the effect that once claimant meets his burden of establishing that he is unable to perform his usual work, he is "presumed to be totally disabled." Decision and Order at 7. Employer, however, has taken this statement out of context. Reviewing the discussion of disability, it is apparent that the administrative law judge was not providing claimant with a presumption of total disability, but was merely indicating that under the Act, once claimant meets his burden of establishing that he cannot perform his usual work he is deemed to be totally disabled absent the introduction of evidence by employer to the contrary. Although the administrative law judge did state that claimant is only required to make a *prima facie* case, in finding that claimant established that he is unable to perform his usual employment, the administrative law judge nonetheless considered all of the relevant evidence, crediting Dr. Murphy's assessment that claimant had been on "no-work" status since the time of his injury and noting that there was no contrary probative evidence, *i.e.*, that none of the physicians claimant had seen advocated that he return to his regular duties. The administrative law judge thus did not provide claimant with a presumption of total disability but rather required him to prove that he was unable to perform his usual work before shifting the burden of proof to employer to establish the availability of suitable alternate employment. Accordingly, his analysis does not run afoul of the principle enunciated in *Greenwich Collieries* that it is incumbent on the "proponent of a rule or order *to carry its burden of persuasion*." 114 S.Ct. at 2258, 28 BRBS at 47 (CRT)(quoting *Steadman v. SEC*, 450 U.S. 91, 95 (1981)(emphasis in original). As the administrative law judge properly required that claimant prove he was actually disabled in this case and found after weighing the evidence that claimant had met his burden, we reject employer's argument.

As the administrative law judge found that claimant established an inability to perform his usual work, he properly determined that the burden shifted to employer to produce evidence demonstrating the availability of suitable alternate employment. *See generally P & M Crane Co. v. Hayes,* 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991)*; New Orleans (Gulfwide) Stevedore v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer attempted to meet its burden of establishing the availability of suitable alternate work by offering claimant a light duty job at its facility. The

administrative law judge found that because employer failed to offer evidence of the precise nature of the tasks involved, this job was insufficient to meet employer's burden. The administrative law judge further determined, however, that even assuming that the light duty job at employer's facility did constitute suitable alternate employment, claimant nonetheless was totally disabled through at least January 1995 as claimant's treating physician, Dr. Murphy, opined that claimant was not capable of performing any work prior to that time. Based on Dr. Murphy's opinion that, although claimant was officially on off-work status through May 1995, he could perform sedentary or very light work as of January 1995, and testimony provided by employer's vocational expert, Judith Lide, the administrative law judge ultimately determined that employer established that suitable alternate work was available to claimant as a gasoline cashier as of July 25, 1995, paying $170 per week. Accordingly he awarded claimant temporary total disability benefits from September 7, 1994 though July 24, 1995, and temporary partial disability benefits thereafter.

We agree with employer that the administrative law judge erred in finding that the light duty job available at employer's facility was insufficient to meet its burden of establishing suitable alternate employment because of employer's failure to establish the precise nature of the job duties. Ronnie Haydel, employer's Human Resources/Safety Manager, testified that employer was willing to tailor the job to claimant's restrictions. Tr. at 209-215. An employer can establish the availability of suitable alternate employment by offering claimant a light duty job at its facility which is tailored to his restrictions so long as the work is necessary. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986). Any error the administrative law judge may have made in this regard is harmless for the period through January 1995, because the administrative law judge credited Dr. Murphy's opinion that claimant was not capable of performing even sedentary work prior to January 1995. Inasmuch, however, as Mr. Haydel provided testimony sufficient to establish the nature of the job duties at employer's facility, we vacate the administrative law judge's determination that employer failed to establish the availability of suitable alternate employment prior to Ms. Lide's identification of the cashier job on July 25, 1995, and remand the case for him to reconsider the job at employer's facility. On remand, if the administrative law judge finds this light duty job sufficient, the administrative law judge must then determine whether claimant's potential earnings in that job reasonably represent his wage-earning capacity. *See generally Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (5th Cir. 1990); *Mangaliman v. Lockheed Shipbuilding Co*., 30 BRBS 39 (1996). If not, the administrative law judge must calculate claimant's wage-earning capacity based on the factors in Section 8(h), 33 U.S.C. §908(h).

Accordingly, the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment prior to July 25, 1995 is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge