BRB No. 97-425

SANDRA BREESE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
THE DEPARTMENT OF ARMY/NAF/CPO	)	DATE ISSUED:
	)	
and	)	
	)	
ARMY CENTRAL INSURANCE FUND	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Part and Remanding to the District Director of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Anthony Natale, lll (Ira H. Weinstock, P.C.), Harrisburg, Pennsylvania, for claimant.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in Part and Remanding to the District Director (96-LHC-0917) of Administrative Law Judge Ainsworth H. Brown 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*., as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 injured on March 30, 1992, while working at the Youth Activities Center at Letterkenny Army Depot, when a ten-year old boy struck her in the left wrist with a cue ball. Her family physician, Dr. Warrenfeltz, referred her to Dr. Richards, an orthopedic surgeon, who performed a release of the transverse carpal tunnel ligament of the left hand on May 21, 1992. Dr. Richards released claimant to work without restrictions on September 21, 1992. Because of her complaints of continuing pain, claimant was referred by Dr. Warrenfelz to Dr. Wallick, a plastic surgeon, who ultimately performed left wrist and elbow surgery on March 5, 1993. On June 7, 1993, Dr. Wallick released claimant to return to work with a 20-pound lifing restriction and a restriction regarding repetitive use of the arm. On February 1, 1994, the Army informed claimant that she was being terminated because she could not meet the 40-pound lifting requirement necessary to work as a recreational aide at its facility. Emp. Ex. 3. Claimant thereafter secured part-time work at McDonald's from March 1994 until September 1994, and then at K-Mart through December 1994. In January 1995, claimant worked for two weeks at the Cumberland Valley Mental Health Facility, and during the summer of 1995 she worked part-time at Baker & Cool Concessions. Employer voluntarily paid claimant temporary total disability compensation for various periods until July 1994. Claimant has not worked since August 1995 and sought temporary partial and temporary total disability compensation under the Act beginning July 18, 1994, and medical benefits.

The administrative law judge found that claimant suffered from a cervical disc herniation, thoracic outlet syndrome (TOS), and related reflex sympathetic dystrophy (RSD) due to her March 1992 work injury and awarded her continuing temporary total disability commencing May 21, 1992, the date of her initial surgery. The administrative law judge also rejected employer's argument that claimant's right to disability compensation and medical benefits should be suspended between June 1995 and July 1996 pursuant to Section 7(d)(4), 33 U.S.C.§907(d)(4), and remanded the case for the district director to consider whether to excuse claimant's physicians' failure to file attending physician reports under Section 7(d)(2), 33 U.S.C. §907(d)(2)(1994).

On appeal, employer challenges the administrative law judge's finding that claimant's cervical disc herniation, RSD, and TOS are causally related to her March 1992 work injury. In addition, employer contends that the administrative law judge erred in awarding claimant temporary total disability compensation, as it introduced evidence sufficient to establish the availability of suitable alternate employment. Employer also contends that the administrative law judge erred in refusing to suspend claimant's entitlement to medical benefits and disability compensation from June 6, 1995, until July 1996, because during this period claimant had unreasonably refused to undergo an orthopedic examination scheduled by employer with Dr. Eagle in violation of Section 7(d)(4). In the alternative, employer argues that the administrative law judge's Decision and Order should be vacated because his analysis of the relevant issues and evidence does not comply with the requirements of the Administrative Procedure Act, 5 U.S.C.§557(c)(3)(A). Claimant responds, urging affirmance.

On appeal, employer does not challenge the administrative law judge's finding that claimant was entitled to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), to link

her cervical disc herniation, TOS, and RSD to her March 1992 work injury. Rather, employer argues that the administrative law judge erred in failing to find that it rebutted the Section 20(a) presumption and established the absence of a causal nexus based on the credible testimony of its medical expert, Dr. Eagle, Emp. Exs. 28, 31.

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. *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. *See Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

Initially, the administrative law judge's finding that claimant's cervical disc herniation is causally-related to her March 30, 1992, work injury is affirmed. The administrative law judge found the only opinion suggesting that the work incident could not have caused claimant's cervical disc condition is that of Dr. Eagle, who opined that claimant's MRI report was not diagnostic of a classic herniated disc, that claimant's physical examination did not correlate with this report, and that the type of wrist injury claimant sustained is not capable of producing a disc herniation. The administrative law judge found that this opinion was insufficient to rebut the Section 20(a) presumption because it did not address whether claimant had a pre-existing asymptomatic disc condition which was aggravated by the work event. Inasmuch as claimant raised an aggravation theory and Dr. Eagle's opinion does not rule out an aggravation of a pre-existing herniated cervical disc due to her March 30,1992, wrist injury, the administrative law judge properly found Section 20(a) was not rebutted. The finding that this condition is work-related is accordingly affirmed.[1] *See Cairns v. Matson Terminals, Inc.,* 21 BRBS 252, 257 (1988).

[1]Employer suggests that it is more likely that claimant's disc condition was caused after her 1992 work injury when she slipped on the ice in 1994, especially in light of Dr. Cho's testimony that the herniated cervical disc was "very new" and not detected until early 1996. Emp. Ex. 36 at 14. We need not address this argument, however, as employer failed to develop it while the case was before the administrative law judge. Moreover, we note that the reports of Drs. Wallick and Warrenfeltz, who treated claimant after her fall, reflect only that she reinjured her left wrist and elbow.

We also affirm the administrative law judge's finding that claimant's TOS and RSD are work-related. Employer argues that Dr. Eagle's opinion constituted specific and comprehensive evidence sufficient to establish rebuttal of the Section 20(a) presumption with regard to these conditions. We need not resolve this issue as any error the administrative law judge may have made in this regard is harmless on the facts presented because he weighed all of the relevant evidence and the medical opinion of Dr. Cho, as corroborated by Drs. Cifor and Iams, provides substantial evidence to support his finding that claimant's TOS and RSD are work-related. *See Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988).

Employer, however, raises numerous arguments regarding the administrative law judge's decision to credit Dr. Cho's opinion over the opinion of Dr. Eagle premised on the notion that only Dr. Eagle was aware of claimant's complete history. Having considered these arguments, we conclude that employer has failed to establish any reversible error. Although employer argues that Dr. Cho was not aware of claimant's full psychological history, Dr. Cho nonetheless testified that he deduced from speaking with claimant that she had substantial psychological problems, yet found a physical basis for her complaints which he related to her work-injury. Moreover, although Dr. Cho did not review the medical records of Drs. Warrenfeltz and Richards, he did review the medical records of Drs. Wallick and Iams, which referenced much of the some same information.[2] In addition, Dr Cho actually examined the claimant, and employer has failed to identify anything in the reports of Drs. Warrenfeltz and Richards which would negate Dr. Cho's conclusions. On these facts, employer's assertion that Dr. Cho's opinion was not adequately reasoned must fail.

[2]Dr. Wallick referred claimant for a pain clinic evaluation, where Dr. Cifor, an osteopathic surgeon, ruled out reflex sympathetic dystrophy, but thought claimant might have either a cervical spine problem or thoracic outlet syndrome. Dr. Iams, a cardiovascular surgeon, found positive evidence of thoracic outlet syndrome, and after an upper extremity arterial study, found the test consistent with neurovascular compression at the thoracic outlet. Emp. Ex. 23 at 4.

Dr. Cho opined that claimant developed TOS, a pinching of the nerve in the collar-bone, as a result of sustained muscle contractions due to RSD, an abnormality of the sympathetic and parasympathetic nervous systems, triggered by the trauma she sustained in the March 1992 work accident, superimposed on an underlying fibromyositis or fibromyalgia condition. Emp. Ex. 36 at 19-20. Employer argues, however, that claimant did not have RSD because she was not diagnosed with this condition until three years after her injury, and Dr. Cho himself admitted that the condition develops within a few months of an injury. Employer's argument lacks merit as Dr. Cho testified that claimant has exhibited symptoms of RSD since the time of her injury which were mistakenly diagnosed as carpal tunnel syndrome.[3] Emp. Ex. 36 at 23-24. We accordingly hold that Dr. Cho's testimony provides substantial evidence to support the administrative law judge's finding that claimant's TOS and RSD are work-related. *See Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS at 145. Inasmuch as employer has failed to demonstrate that the administrative law judge's decision to credit Dr. Cho's opinion, as corroborated by Drs. Cifor and Iams, over Dr. Eagle's contrary opinion based on his determination that Dr. Cho's opinion was more detailed and better reasoned[4] is either inherently incredible or patently unreasonable, we affirm his finding that claimant's TOS and RSD are work-related. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 372 U.S. 954 (1963).

While we must reject employer's argument regarding causation, we agree with employer that the administrative law judge erred in awarding claimant continuing temporary total disability compensation. Where, as here, it is undisputed that claimant is unable to return to her pre-injury employment, she has established a *prima facie* case of total disability and the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *New Orleans (Gulfwide) Stevedores, Inc. v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Merrill*, 25 BRBS at 145. One way that employer can meet this burden is by showing a suitable job

[3]Employer also alleges that Dr. Cho diagnosed claimant with anxiety depression disorder, sleep disorder, spastic bladder and swallowing dysfunction which was causally related to her work injury without full knowledge of her psychiatric history. The administrative law judge accepted employer's argument in this regard and rejected Dr. Cho's opinion regarding the cause of claimant's psychological problems as speculative. *See* Decision and Order at 14-15.

[4]We note that Dr. Eagle's opinion consists of a one-page letter.

that claimant actually performed after her injury. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986).

In the present case, employer attempted to meet its burden of establishing the availability of suitable alternate employment through the testimony of its vocational expert, Mr. Kane. Emp. Ex. 35. After reviewing claimant's medical records, Mr. Kane conducted a labor market survey based on the restrictions imposed by Drs. Cho and Wallick and identified 41 positions available between 1994 and 1996 which he felt were suitable for claimant. The administrative law judge, however, initially, determined that Mr. Kane's testimony was not sufficient to establish the availability of suitable alternate employment because he admitted that 33 out of the 41 positions he identified were not within Dr. Cho's 10-pound lifting restrictions. The administrative law judge further determined that of the remaining 8 positions, the two positions Mr. Kane identified as available in July and August 1994 for a cashier at the Bonanza Restaurant and a clerk with Mason Dixon Video, also did not meet employer's burden because they were insufficient to establish a range of suitable job opportunities available to claimant. Moreover, he found that while the remaining 6 positions identified in 1996 did establish a range of available job opportunities within claimant's physical restrictions, these jobs also were insufficient to establish the availability of suitable alternate employment because Mr. Kane failed to consider whether public transportation to these job sites was feasible, and claimant had provided credible unrebutted testimony that she has no other means of transportation.

Employer initially argues on appeal that the administrative law judge's finding that employer did not meet its burden of establishing the availability of suitable alternate employment cannot be affirmed because in so concluding he never resolved the issue of whether Dr. Cho's 10-pound lifting restriction or Dr. Wallick's 20-pound lifting restrictions better reflected claimant's physical capabilities. We disagree. Although the administrative law judge noted the 20-pound lifting restrictions imposed by Dr. Wallick in his recitation of the evidence, he nonetheless accorded determinative weight to Dr. Cho's 10-pound restriction, consistent with his crediting of Dr. Cho's opinion throughout his decision. Decision and Order at 4, 17. Employer also argues that Dr. Wallick's restrictions are more reliable because he is the surgeon who last operated on claimant and is more aware of claimant's medical history. Credibility determinations, however, are within the purview of the administrative law judge; as Dr. Cho was the only doctor of record who accounted for all of the conditions found by the administrative law judge to be work-related, employer has failed to establish that the administrative law judge's decision to rely upon Dr. Cho's 10-pound lifting restriction involved an abuse of his authority. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, the administrative law judge's finding that employer did not meet its burden of establishing suitable alternate employment based on the 33 jobs identified by Mr. Kane which exceeded Dr. Cho's 10-pound lifting restriction is affirmed.

We agree with employer, however, that the administrative law judge erred in finding that the remaining 8 jobs which Mr. Kane identified as compatible with Dr. Cho's restrictions were insufficient to meet its burden of establishing the availability of suitable alternate

employment. Initially, the administrative law judge's determination that the two jobs Mr. Keene identified in 1994 were insufficient to establish a range of available jobs opportunities appears irrational on the facts presented, as claimant performed work similar to that identified continuously for 9 months of that year. Moreover, the administrative law judge also erred in finding that the 6 jobs which Mr. Kane identified in 1996 did not establish the availability of suitable alternate employment because of his failure to consider whether the jobs sites were accessible by public transportation. In so concluding, the administrative law judge imposed a burden on employer not required under applicable law. A claimant's inability to drive as a result of a work-related injury is a factor which the administrative law judge should take into consideration in determining the extent of his disability. *See Sampson v. F.M.C. Corp.*, 10 BRBS 929 (1979); *Kilsby v. Diamond M Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub nom. Diamond M Drilling Co. v. Marshall*, 577 F.2d 1033, 8 BRBS 658 (5th Cir. 1978). In the present case, however, claimant is physically able to drive, but her car has simply broken down. Tr. at 82. Inasmuch as employer's burden of establishing the availability of suitable alternate employment does not include providing a claimant who is otherwise able to perform the alternate work identified with a reliable means of transportation, *see generally Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988), we vacate the administrative law judge's finding that employer failed to meet its burden of establishing the availability of suitable alternate employment and remand for him to determine the extent of claimant's disability. Inasmuch as the record reflects that claimant worked at McDonald's from March to September 1994, at K-Mart from September to December 1994, and for periods of time in 1995 at Cumberland Valley Mental Hospital and with Baker & Cool Concessions, the administrative law judge should also consider these jobs on remand in assessing claimant's post-injury wage-earning capacity. *See generally Penrod Drilling Co. v. Johnson,* 905 F.2d 84, 23 BRBS 108 (CRT)(5th Cir. 1990). In addition, he should consider whether claimant exercised due diligence in attempting to secure alternate work; a claimant can nonetheless prevail in establishing that she is totally disabled despite employer's showing of suitable alternate employment, if she demonstrates that she diligently tried and was unable to secure such employment. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258, 260 (1988).

Finally, we reject employer's argument that the administrative law judge erred in refusing to suspend claimant's entitlement to disability compensation and medical benefits from June 6, 1995, until July 24, 1996, pursuant to Section 7(d)(4),[5] based on her refusal

[5]Section 7(d)(4), as amended in 1984, provides in pertinent part:

> If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order suspend the payment of further compensation during such time as such refusal continues..., unless the circumstances justified the refusal.

to submit to an examination which employer scheduled with Dr. Eagle. Section 7(d)(4) contemplates an immediate remedy for an employer when a claimant unreasonably refuses to submit to medical examination or treatment. Section 7(d), however, requires the employer to obtain an order authorizing it to suspend benefits before it takes such action. *Johnson v. C&P Telephone Co.*, 13 BRBS 492, 496 (1981) (Miller, J., dissenting). In the present case, as employer suspended its payment of benefits on its own initiative in 1994, prior to claimant's refusal to undergo the disputed medical examination, the administrative law judge rationally found that Section 7(d)(4), which is intended to be applied prospectively, did not relieve employer of liability during claimant's period of non-compliance. *See Dodd v. Newport News Shipbuilding & Dry Dock Co*., 22 BRBS 245, 249 (1989). Moreover, as employer had terminated the payment of compensation, the administrative law judge's finding that claimant's refusal to undergo employer's scheduled examination was justified is also reasonable and within his discretionary authority. *See* 20 C.F.R. §702.410(b)*; Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 98 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Accordingly, the administrative law judge's findings regarding the inapplicability of Section 7(d)(4) are affirmed.

Accordingly, the administrative law judge's finding that employer failed to establish suitable alternate employment is vacated and the case is remanded for further consideration consistent with this opinion. In all other respects, his Decision and Order Awarding Benefits in Part and Remanding to the District Director is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

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33 U.S.C. §907(d)(4) (1994).