BRB No. 97-0497

JOHNNY J. RIGGINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FAIRWAY TERMINAL CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Stephen M. Vaughn (Mandel & Wright, P.C.), Houston, Texas, for claimant.

Steven L. Roberts (Fulbright & Jaworski), Houston, Texas, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (95-LHC-2676) of Administrative Law Judge Ellin M. O'Shea 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 injured during the course of his employment with employer on March 23, 1993, when he was hit from behind by a piece of plywood. Claimant underwent a surgical intervention on his right knee in 1994 and treatment for his cervical and lumbar spine. He has not worked since April 8, 1993. Claimant filed a claim for permanent total disability compensation based on impairments to his right knee, neck, and spine, as well as headaches and diabetes. Employer paid temporary total disability compensation to claimant from April 8, 1993, to March 9, 1994, and from November 10, 1994, to November 15, 1995. 33 U.S.C. §908(b).

In her Decision and Order, the administrative law judge found, *inter alia*, that

claimant's right knee and spine conditions, as well as his diabetes, were caused and/or aggravated by his work injury and that employer failed to establish either that claimant could return to his usual job or that suitable alternate employment was available to claimant. Accordingly, the administrative law judge awarded claimant permanent total disability compensation.

Employer now appeals, contending that the administrative law judge erred in finding that claimant's diabetes arose out of, or was aggravated by, his work accident and his subsequent treatment. Employer additionally asserts that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer initially contends that the administrative law judge erred in invoking the Section 20(a), 33 U.S.C. §920(a), presumption when addressing the issue of whether claimant's work accident and subsequent treatment could have caused or aggravated his diabetes. We disagree. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that an accident occurred or working conditions existed which could have caused the injury or harm. *See Konno v. Young Bros., Ltd.,* 28 BRBS 57 (1994). In establishing his *prima facie* case, claimant is not required to introduce affirmative medical evidence proving that the working conditions in fact caused the harm. *See Hampton v. Bethlehem Steel Corp.,* 24 BRBS 141 (1990). Rather, claimant must only show the existence of working conditions which could have caused the harm alleged.[1] *See Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989). Upon invocation of the presumption, the burden shifts to the employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, she must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

In the instant case, it is uncontroverted that claimant was injured while working for employer in March 1993, that claimant underwent treatment, including surgery, as a result of that incident, and that claimant was thereafter diagnosed with diabetes. In addition, claimant's treating physician, Dr. Orlander, opined that the stress of claimant's injuries and

[1]An employment injury need not be the sole cause of a disability; rather, if the employment aggravates, accelerates, or combines with an underlying condition, the entire resultant condition is compensable. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

surgeries have had an important impact on his glucose tolerance. *See* Cl. Ex. 6. Thus, as it is undisputed that claimant sustained a harm, and claimant presented evidence that his work injury could have aggravated that harm, we hold that the administrative law judge did not err in finding that claimant established his *prima facie* case. Accordingly, we affirm the administrative law judge's invocation of the Section 20(a) presumption as it applies to claimant's diabetes. *See Sinclair,* 23 BRBS at 148. As employer has not challenged the administrative law judge's finding that it failed to rebut the presumption, the administrative law judge's finding of a causal relationship between claimant's March 1993 work injury and his diabetes must be affirmed.

Employer next argues that the administrative law judge erred in concluding that it failed to establish the availability of suitable alternate employment. Where, as in the instant case, claimant establishes that he is unable to perform his usual employment due to his work-related injury, the burden shifts to employer to demonstrate the availability of jobs within the geographic area where the claimant resides which claimant by virtue of his age, education, work experience, and physical restrictions is capable of performing, and for which he can compete and realistically secure. *See 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); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In support of its contention of error, employer asserts that the testimony and report of Mr. Quintanilla, a vocational expert, is sufficient to meet its burden of establishing the availability of suitable alternate employment. Mr. Quintanilla found claimant able to perform the duties of his former job as a longshore walking boss. He also opined that, based on the opinions of Drs. Mouton, Barrish, and Pennington, claimant would be employable in various light to sedentary jobs. He identified five actual job openings with employers in the Houston area as a courtesy van driver, small parts assembler, museum guard, parts driver, and entry/exit guard. In addition, he stated that approximately 3,000 jobs were generally available in this region of the state during the most recent year as cashiers, security guards, and couriers/messengers.

The administrative law judge found Mr. Quintanilla's testimony insufficient to meet employer's burden of establishing suitable alternate employment. Initially, she found that while Dr. Mouton believed claimant could perform some limited work, and the reports of the other physicians do not establish that he is precluded from all work, none of these specialists delineated claimant's residual capabilities resulting from his right knee and low back injuries and his pre-existing left knee problems. She stated that this information was required in order to compare claimant's restrictions with the exertional demands of the jobs identified in Mr. Quintanilla's survey. Further, she found that neither Mr. Quintanilla's report nor his testimony stated the exertional demands of the specific jobs, and the Dictionary of Occupational Titles (DOT) provides "but part of an incomplete picture." Decision and Order at 16. She therefore concluded that there is an insufficient foundation for a judgment regarding claimant's ability to perform the specific jobs. Finally, she found employer's evidence lacking insofar as claimant's work and educational capabilities were concerned, in that neither specific facts regarding claimant nor the requirements of the identified

employers were in the record.

Employer asserts that its evidence is sufficient to prove that the specific jobs identified were realistically available to claimant and that the administrative law judge erred in disregarding the evidence that some 3,000 jobs were generally available in the community. Employer relies on the holdings of *Turner* and *P & M Crane* in support of its contention. Moreover, employer asserts that the record contains ample medical evidence of claimant's physical capabilities and that some of the jobs at least required no specific education or skills and thus should not have been discounted on that basis.

Initially, we agree with employer that the administrative law judge erred in finding that the evidence as to claimant's physical limitations is insufficient. As the administrative law judge stated, Dr. Mouton opined that claimant could perform basically sedentary work, Cl. Ex. 10, while Dr. Wilde found claimant had limitations on stooping, squatting, bending, and lifting. Moreover, Dr. Kant, claimant's treating physician whom the administrative law judge credited in finding claimant could not perform his former work as a longshoreman, discussed claimant's limitations due to his back and knees at length in his deposition. Cl. Ex. 14. Dr. Kant generally agreed with Dr. Wilde's limitations, but stated there were other things claimant could not do, such as kneeling. *Id.* at 32. He also provided specific testimony regarding the interaction between claimant's knees and his back. *Id.* at 43-45. He stated that claimant's back results in limitations on stooping, bending, and lifting more than 5-10 pounds. While claimant can lift 5-10 pounds frequently based on his back injury, he cannot lift substantially more and lifting 20 pounds on a repeated basis would be too much. *Id.* at 32. Claimant cannot sit for long periods of time and should alternate sitting and standing. *Id.* at 34. He explained that if claimant's knees were normal, he could lift more because he could use his legs, but due to his knee and back impairments, claimant cannot bend and use his legs to lift. *Id.* at 44-45.

The administrative law judge credited the opinions of Drs. Kant, Mouton, and Barrish in finding claimant established that he could not return to his former employment. This evidence, as well as the consistent report of Dr. Wilde, which the administrative law judge noted in her discussion of suitable alternate employment, is sufficient to establish claimant's physical restrictions resulting from the knee and back impairments due to the work injury and claimant's pre-existing knee conditions. *See Fox v. West State Inc.,* BRBS , BRB Nos. 96-1781/A (Sept. 29. 1997). Thus, the administrative law judge's conclusion that insufficient information to determine claimant's functional capacity due to his impairments existed in the record is not supported. In addition, her finding that Mr. Quintanilla's report was deficient due to his failure to explain his conclusion that the jobs were suitable given claimant's education and work background also does not support discounting his opinion in its entirety, as at least some of the jobs required no specific skills or experience.

Contrary to employer's contention, however, the administrative law judge's finding that Mr. Quintanilla failed to identify the exertional requirements of the specific jobs he identified is supported by the record and requires affirmance of her decision that employer did not meet its burden of proof. Information as to the physical requirements of available

jobs is necessary for the fact finder to weigh the evidence to determine whether the jobs were suitable. Mr. Quintanilla did not describe the exertional requirements of the jobs he found available. In fact, it is not clear from his report or his testimony exactly what physical restrictions his conclusions were based upon; he stated only that claimant was employable in a variety of light to sedentary occupations, in addition to working as a longshore walking foreman, based on the opinions of Drs. Mouton, Barrish, and Pennington. Mr. Quintanilla did not state what physical limitations he gleaned from their reports. His report is conclusory in nature, as he did not explain the basis for his finding that the identified jobs are suitable.[2]

[2]Mr. Quintanilla's testimony at the hearing does not supplement the conclusory nature of his report but addressed his conclusion that claimant could perform his former work as longshore foreman, consistent with Dr. Pennington's opinion. The administrative law judge, however, did not credit this conclusion. Mr. Quintanilla stated in his report that he relied upon the opinions of Drs. Mouton, Barrish, and Pennington, and at the hearing he testified that he also reviewed the reports of Drs. Wilde and Kant. The doctors' opinions he relied upon varied in their views of claimant's work-related ailments and physical limitations. In addition, in relying on Dr. Mouton, Mr. Quintanilla stated that Dr. Mouton found claimant could perform work which did not require "excessive walking or standing," but he admitted in his testimony that he drew this conclusion from Dr. Mouton's statement that claimant "would be able to function in jobs that did not require being up and about and

no more strenuous than simple clerical duties." Tr. at 20, quoting Cl.'s Ex. 10. Moreover, he testified regarding Dr. Kant's limitations as if only claimant's back injury were considered, disregarding claimant's pre-existing and aggravated knee injuries. In response to the question as to whether, if claimant's knees were normal, he could do jobs requiring light duty according to Dr. Kant, he answered "yes" and stated that was on what his opinion was based. Tr. at 216. Mr. Quintanilla stated he understood employer's position to be that claimant's knees should not be considered in addressing his wage-earning capacity. *Id.* The administrative law judge credited Dr. Kant's opinion in finding claimant's work injury aggravated his prior right knee problems, and she properly considered the combination of claimant's work-related back and right knee problems and his pre-existing left knee condition in assessing the extent of disability. These findings and conclusions are not challenged by employer on appeal. On this record, there are ample grounds for finding Mr. Quintanilla's conclusions lacked the necessary foundation.

His description of the duties of the jobs he found available suffers from similar limitations. Employer contends that it demonstrated the availability of sedentary and light jobs. However, while Mr. Quintanilla stated that claimant could perform jobs of a sedentary or light nature, and listed 12 DOT classifications in those categories, none of the jobs he found available, *i.e.*, neither the specific nor the general jobs, were sedentary in nature; all of the available jobs were light duty jobs. Mr. Quintanilla did not describe the exertional requirements of any of the jobs he discussed, with the exception of a job as a courtesy van driver which his report indicated required no lifting. His report described only the general duties of the specific jobs and provided the titles of jobs generally available as cashiers, security guards, and couriers/messengers. Without a description of the exertional requirements, the administrative law judge was unable to find that any of the jobs met claimant's restrictions.[3] In the absence of any testimony from employer's expert as to the

[3]While the DOT provides the exertional requirement for jobs it classifies as "light," Mr. Quintanilla did not discuss the DOT requirements or how they relate to the jobs he identified. Moreover, employer did not submit the DOT description into the record nor did it ask either the administrative law judge or the Board on appeal to take official notice of it. Under these circumstances the administrative law judge did not err in not addressing it. In any event, claimant's lifting restriction alone fails to meet the DOT definition for light duty jobs, since an employee must be able to lift up to 10 pounds frequently, *i.e.*, up to 2/3 of the time, and 20 pounds occasionally, which it defines as up to 1/3 of the time. Dr. Kant, the treating physician credited by the administrative law judge on other issues, specifically stated that lifting 20 pounds on a repeated basis would be too much, Cl. Ex. 14 at 32, and none of the credited physicians offered a contrary opinion. Thus, the DOT definition cannot meet employer's burden here. Accordingly, though some of the identified jobs may require less exertion than these general requirements, as the administrative law judge noted, the DOT categories are general and cannot give a complete picture. As we have discussed, only one position, as a courtesy van driver, described any exertional requirements. While

physical requirements of the jobs identified, the administrative law judge did not err in finding Mr. Quintanilla's opinion lacking.

Mr. Quintanilla's report stated that position required no lifting, it did not relate claimant's other restrictions to the job duties.

On the facts of this case, particularly considering claimant's numerous restrictions due to his back and knees, the absence of information relating claimant's restrictions to the exertional requirements of the jobs results in our affirmance of the administrative law judge's conclusion that employer did not meet its burden of proof. On appeal, employer appears to assert that because its expert concluded that light work was suitable, the administrative law judge was required to find the jobs were in fact suitable. However, determining whether jobs identified by a vocational expert are within the claimant's physical capabilities is the function of the administrative law judge's role as the fact finder, and she is not required to defer to the conclusions of a vocational expert. In addition, employer's reliance on the holdings of *Turner* and *P & M Crane* regarding the degree of proof necessary to show jobs are realistically available is misplaced in this case. The administrative law judge did not discount employer's evidence because employer did not demonstrate that jobs were realistically available. Mr. Quintanilla clearly identified available job opportunities. However, employer must demonstrate that the available jobs were suitable given claimant's restrictions, and it is on this point that the administrative law judge found Mr. Quintanilla's opinion was deficient.[4] As employer failed to meet its burden of proving that suitable jobs which claimant was capable of performing existed within the ambit of those realistically available, the administrative law judge's decision awarding permanent total disability benefits is affirmed.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN

[4]Employer also discusses the Fifth Circuit's unpublished opinion in *Diosdado v. John Bludworth Marine, Inc.,* No. 93-5422, 29 BRBS 125 (CRT)(5th Cir. Sept. 19, 1994), in its discussion of its burden of showing job availability. As we have explained, job availability is not dispositive here. However, *Diosdado* is relevant to the issue of suitable jobs in this case, in that the court affirmed the administrative law judge's findings that numerous jobs identified by an expert were not suitable employment opportunities given claimant's physical limitations. Moreover, opinions of the Fifth Circuit issued prior to January 1, 1996, are of precedential value in that circuit, *see* United States Courts of Appeals of the Fifth Circuit Rule 47.5.3, and this case arises within the jurisdiction of that court.

Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge