BRB No. 01-0341

ORVILLE M. ECHOLS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: Dec. 18, 2001
	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order-Award of Benefits and the Amended Decision and Order on Employer's Granted Reconsideration Petition of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

James M. McAdams (Pierry & Moorhead), Wilmington, California, for claimant.

Timothy G. Keller (Law Offices of Klein, Testan and Brundo), Long Beach, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Award of Benefits and the Amended Decision and Order on Employer's Granted Reconsideration Petition (98-LHC-2363, 2364) 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 if they 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).

On December 8, 1995, claimant sustained a heart attack during the course of his employment as a supercargo clerk. Claimant was diagnosed with coronary artery disease and hypertension. Claimant returned to work for employer on February 3, 1996. In March 1996, claimant underwent an atherectomy for a totally occluded right coronary artery. In September 1996, claimant's treating physician, Dr. Daniel, recommended that claimant not work as he opined that claimant's continuing chest pain was aggravated by his work environment. Claimant stopped working on October 31, 1996, based on Dr. Daniel's recommendation. On September 12, 1997, claimant was diagnosed with a work-related bilateral neurosensory hearing loss. Claimant sought compensation under the Act for permanent total disability, 33 U.S.C. §908(a), due to his heart condition, and medical benefits for hearing loss, 33 U.S.C. §907. Employer controverted the claims; alternatively, employer requested relief from continuing compensation liability under Section 8(f) of the Act, 33 U.S.C. §908(f).

In her decision, the administrative law judge found that claimant had chest pains, hypertension, and coronary artery disease, which pre-existed his December 8, 1995, heart attack. The administrative law judge found that claimant was entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that work stress exacerbated claimant's pre-existing heart condition. The administrative law judge found that employer failed to establish rebuttal of the presumption and, furthermore, based on the record as a whole, that claimant established that his heart condition was contributed to and aggravated by stress from his employment. The administrative law judge found that claimant is unable to return to his usual employment as a supercargo clerk due to his heart condition and that employer failed to establish the availability of suitable alternate employment. The administrative law judge also found employer entitled to Section 8(f) relief. The administrative law judge denied the claim for medical benefits for claimant's hearing loss as she found no evidence that claimant requires hearing aids or periodic evaluation of his non-ratable hearing loss. On reconsideration, the administrative law judge granted employer's request that she vacate her award of Section 8(f) relief.

On appeal, employer argues it was prejudiced by claimant's submission of medical evidence post-hearing in violation of the administrative law judge's Pre-Trial Order. Employer also challenges the administrative law judge's finding that claimant's heart condition is related to work stress, and the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

Employer argues that it was prejudiced by the administrative law judge's admission post-hearing of the deposition of Dr. Daniels offered by claimant in violation of the

administrative law judge's December 2, 1998, Pre-Trial Order requiring the submission to opposing counsel of all documentary evidence thirty days prior to the calendar call scheduled for April 19, 1999. Specifically, employer asserts prejudice in that Dr. Daniel was able to review all the evidence and testimony presented at the formal hearing before his deposition.[1] An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if shown to be arbitrary, capricious, or an abuse of discretion. *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). In the instant case, the administrative law judge rejected employer's objection to claimant's request to depose Dr. Daniel post-hearing, reasoning there was pertinent medical evidence regarding claimant's heart condition generated the month of the April 1999 formal hearing and that claimant reasonably sought comment from Dr. Daniel, his treating physician. The administrative law judge also found that a continuance to obtain deposition testimony would unduly burden claimant, who traveled from Texas to attend the hearing in Long Beach, California, and she allowed employer the opportunity post-hearing to present rebuttal evidence from Dr. Hyman. Tr. at 34-41. In this regard, employer submitted a report from Dr. Hyman dated January 27, 2000, that extensively commented on Dr. Daniel's July 22, 1999, deposition testimony.[2] EX 20. Under these facts, we hold that employer has not shown prejudice, and we conclude that the administrative law judge did not abuse her discretion in admitting evidence which was not offered in compliance with the pre-hearing order. *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table); *Chavez v. Todd Shipyards Corp.*, 24 BRBS 71

[1]Employer also asserts prejudice in that Dr. Daniels did not testify at the hearing and by the administrative law judge's allowing claimant to also obtain post-hearing the deposition testimony of Dr. Scott. Employer, however, concedes that Dr. Scott did not appear at his scheduled deposition. Moreover, the regulations do not require in-hearing testimony, and they specifically permit submission of testimony taken by deposition. 20 C.F.R. §702.341. Accordingly, we reject employer's contentions.

[2]In addition, employer's counsel was present at Dr. Daniel's deposition, and cross-examined him.

(1990), *aff'd in pert. part and rev'd in part sub nom. Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992); *Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986).

We next address employer's challenge to the administrative law judge's finding that claimant's coronary artery disease and hypertension were aggravated by work-related stress, which contributed to claimant's heart attack on December 8, 1995, and to his leaving longshore employment on October 31, 1996. Employer asserts that the administrative law judge erred by substituting her opinion that claimant worked under stressful conditions for claimant's testimony that he did not perceive his working conditions as stressful. Employer also asserts the administrative law judge erred by discrediting medical records of pre-existing heart problems related to physical activity. Initially, the aggravation rule provides that employer is liable for the totality of claimant's disability if the work injury aggravates a pre-existing condition. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). In order to be entitled to the Section 20(a) presumption linking claimant's condition to his employment, claimant must establish a *prima facie* case by establishing the existence of a harm and that an accident occurred or working conditions existed that could have caused the harm. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1990). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused, contributed to or aggravated by his employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied*, 528 U.S. 1187 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge then must weigh all the evidence and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In her decision, the administrative law judge found ample evidence of work-related stress. Specifically, the administrative law judge credited claimant's testimony of personnel and operational difficulties inherent in the duties of a supercargo clerk with respect to resolving labor-management disputes, training a shifting and inexperienced workforce, and responding to tight time restraints in the loading/unloading process for which he had primary managerial responsibility. The administrative law judge also credited claimant's testimony that he obtained his position as a supercargo clerk as a result of civil rights litigation and therefore endured resentment from other management personnel and racial prejudice on the waterfront. The administrative law judge found that claimant has an ill-defined

understanding of stress; however, the administrative law judge credited claimant's presentation of himself, including his body language, and the supporting opinions of Drs. Daniel and Scott, to conclude that claimant was entitled to the Section 20(a) presumption as he had a pre-existing heart condition and he was required to work under various external pressures to successfully perform a hard-driven, time sensitive and highly responsible position. Decision and Order at 17-18.

We reject employer's contention that the administrative law judge substituted her opinion for claimant's to find that claimant's working conditions were stressful. Initially, we reject employer's assertion that claimant's perception of whether particular working conditions are stressful is determinative, as it is the province of the administrative law judge to evaluate the evidence and resolve whether claimant presented sufficient evidence of working conditions that could have aggravated his heart condition. *See generally Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). Moreover, the administrative law judge acted within her discretion in finding that claimant's testimony revealed stressful working conditions. Specifically, claimant repeatedly testified that he encountered stress at work, and he provided numerous instances of work stress that the administrative law judge rationally credited.[3] Tr. at 55, 57-73, 90; *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 470 U.S. 911 (1979); *Wheatley*, 407 F.2d 307; *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). As this evidence of work-related stress is sufficient to entitle claimant to the benefit of the Section 20(a) presumption, we affirm the administrative law judge's finding in this regard. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

[3]In his testimony, claimant also characterized as causing anger, rather than stress, his experiencing racial prejudice on the waterfront, and he denied on direct questioning, but agreed on cross-examination, that having to go over the heads of his immediate supervisors to obtain raises from employer was stressful. Tr. at 61, 67, 91. The administrative law judge rationally determined from this testimony that claimant has an ill-defined understanding of stress. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963).

The administrative law judge next found no evidence that persuasively rebuts the presumption. The administrative law judge rejected the opinion of Dr. Hyman that claimant's heart condition is not related to his employment because Dr. Hyman stated that claimant was not subject to work-related stress. Nevertheless, the administrative law judge considered the evidence as a whole, and she rejected employer's contentions that Drs. Daniel and Scott, who linked claimant's heart condition to his work-related stress, did not have claimant's full medical history and erroneously assumed that claimant's complaints of chest pain and increases in blood pressure were related to his employment. The administrative law judge found claimant's full medical history chronicling the progression of claimant's chest pain, and any significance attributable to claimant's blood pressure readings after he left work, less probative than claimant's symptomatology of chest/arm pain when he attempted to return to work after his heart attack. Decision and Order at 19. The administrative law judge found that the opinions of Drs. Daniel and Scott rely on claimant's reports of chest/arm pain at work, CX 5 at 40, 42, 45; CX 6 at 56-59; CX 14 at 15-17; and that Dr. Wishner, who performed the atherectomy, also opined that mental stress as well as physical exercise precipitated claimant's symptomatology. CX 10 at 155. As the administrative law judge rationally credited the opinions of Drs. Daniel and Scott over the opinion of Dr. Hyman, based on the record as a whole, we affirm the administrative law judge's determination that claimant's heart condition is causally related to his employment. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Goldsmith v. Director, OWCP,* 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988).

With regard to the extent of claimant's disability, employer challenges the administrative law judge's finding that claimant is totally disabled. Once the claimant establishes his inability to perform his usual work due to his work injury, the burden shifts to employer to establish the availability of specific jobs claimant can perform, which, given the claimant's age, education, and background, he could likely secure if he diligently tried. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Stevens v. Director, OWCP,* 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Hairston v. Todd Shipyards Corp*., 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). In the instant case, the administrative law judge credited the opinions of Drs. Daniel and Scott and found that claimant is unable to return to his usual employment as a supercargo clerk. This finding is not challenged on appeal. The administrative law judge then rejected the opinion of Dr. Hyman that claimant could perform any job not requiring heavy labor as he is not claimant's treating physician, and his reports do not demonstrate the detailed physical and cardiac findings reflected in the reports of Drs. Wishner, Daniel, and Scott. Based on the absence of any creditable medical opinion approving the identified jobs as suitable for claimant given the effect of work stress on claimant's heart condition, the administrative law judge concluded that employer failed to establish the availability of suitable alternate employment. Specifically, the administrative law judge found that jobs identified in employer's labor market survey of program

coordinator, school principal, teacher, and job counselor involve questionable stressful circumstances for claimant given his heart condition. The administrative law judge also declined to find suitable the positions identified in employer's survey as a clerk, dispatcher/driver, manager, job training and counselor absent medical approval that the specific jobs are within claimant's stress tolerance. In this regard, employer's vocational consultant, Nedra Myers, testified that she located jobs whose stress level fell in between Dr. Hyman's opinion that claimant could perform almost any job with very few restrictions, and Dr. Scott's opinion that claimant could not withstand any work stress. Tr. at 135. We reject employer's challenge to the administrative law judge's discrediting of the non-teaching positions identified by Ms. Myers, as the administrative law judge rationally discredited the opinion of Dr. Hyman and found that employer failed to carry its burden to establish that the jobs are suitable for claimant given the absence of any medical evidence directly addressing whether the specific job openings identified by Ms. Myers are within claimant's stress tolerance. *See Bumble Bee*, 629 F.2d 1327, 12 BRBS 660; *see also Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). Accordingly, we affirm the administrative law judge's finding that claimant is totally disabled.

Accordingly, the administrative law judge's Decision and Order-Award of Benefits and the Amended Decision and Order on Employer's Granted Reconsideration Petition are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge