BRB No. 12-0177

ELLEN M. STEIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVY EXCHANGE	)	DATE ISSUED: 12/17/2012
	)	
and	)	
	)	
NEXCOM	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Granting in Part and Denying in Part Employer/Carrier's Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C.), New London, Connecticut, for claimant.

Donald E. Wallace (MacDonald & Wallace), Quincy, Massachusetts, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Order Granting in Part and Denying in Part Employer/Carrier's Motion for Reconsideration (2010-LHC-1666) of Administrative Law Judge Lee J. Romero, Jr., 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a florist for eleven years. On August 3, 2004, she suffered a back injury at work. Claimant immediately went to the hospital; she was diagnosed with a disc protrusion and swelling. CX 2. On August 26, 2004, claimant's primary care physician, Dr. Vani, allowed her to return to work for three hours per day with no lifting greater than ten pounds and no standing for long periods of time. CX 3. Claimant worked until December 15, 2005, when she had back surgery. CX 28. In the spring of 2006, she attempted to return to work but learned she had been terminated due to her prolonged absence. Tr. at 29-30. Subsequent pain treatments were unsuccessful, so claimant had a spinal cord stimulator implanted on September 22, 2008. CX 61. Claimant started treating with Dr. Iovino for depression in 2007. CX 21; EX 13 at 24-25; EX 19. In November 2007, claimant began weekly psychotherapy with Kathleen Smith, LCSW. CX 81.

The parties stipulated that claimant's August 3, 2004, back injury occurred during the course and scope of her employment with employer, and that employer voluntarily paid temporary total disability benefits from August 4 through August 22, 2004, and from December 15, 2005, through January 10, 2010; and temporary partial disability benefits from August 23, 2004, to December 14, 2005, and from January 11, 2010, through November 3, 2011. 33 U.S.C. §908(b), (e), (h). The parties disputed whether claimant's psychological injury is work-related, the nature and extent of claimant's disability after December 15, 2005, and whether claimant's condition has reached maximum medical improvement. The administrative law judge found that claimant provided sufficient evidence to invoke the Section 20(a), 33 U.S.C. §920(a), presumption linking her psychological condition to the work injury and that employer did not present substantial evidence to rebut the presumption. Nevertheless, the administrative law judge also found that, even if employer rebutted the presumption, the record as a whole establishes that claimant's psychological condition is work related. Additionally, the administrative law judge found that claimant has been totally disabled by her back injury since December 15, 2005, as claimant is unable to return to her former employment, employer did not establish the availability of suitable alternate employment, and claimant has been unable to obtain suitable employment despite her exercise of due diligence. The administrative law judge further found that claimant's back condition reached maximum medical improvement on October 5, 2009, but that claimant's psychological condition has not yet reached maximum medical improvement. The administrative law judge awarded claimant temporary total disability benefits from August 4 through August 22, 2004, temporary partial disability benefits from August 23, 2004, to December 14, 2005, and permanent total disability benefits from December 15, 2005, onward. The administrative law judge awarded claimant medical benefits for her back pain and psychological treatment. 33 U.S.C. §907(a).

Employer filed a motion for reconsideration, alleging that it is premature to find that claimant's back injury is permanently disabling when her psychological condition has not reached maximum medical improvement. In the alternative, employer requested that, if an award of permanent disability benefits is made on claimant's back injury alone, the onset date for permanent disability benefits should be October 5, 2009, the date claimant's back condition reached maximum medical improvement. Claimant agreed that the date of maximum medical improvement is October 5, 2009. The administrative law judge upheld his finding that claimant is entitled to permanent total disability benefits based on her back injury alone; however, he amended the onset date for the award of permanent total disability benefits to October 5, 2009. Employer appeals the administrative law judge's decisions, challenging the findings that claimant's psychological condition is work-related and that claimant is permanently and totally disabled by her back condition. Claimant responds, urging affirmance.

Employer initially contends the administrative law judge erred in finding that Dr. Borden's opinion does not rebut the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's psychological injury is work-related. Once the Section 20(a) presumption has been invoked, as in this case, the burden shifts to the employer to rebut the presumption with substantial evidence that claimant's condition was not caused by her employment. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge found that claimant established a prima facie case of a causal connection between her psychological condition and her work-related back injury. The administrative law judge credited claimant's testimony and Dr. Selden's diagnosis of major depression related to claimant's back injury. The administrative law judge found that Dr. Borden's opinion does not rebut the Section 20(a) presumption because, although Dr. Borden concluded that claimant suffered from pre-existing depression, he also opined that claimant's depression was aggravated by the multiple invasive treatments for the pain resulting from her work-related back injury.[1] Decision and Order at 41; EX 15 at 5. As the administrative law judge accurately characterized Dr. Borden's opinion, we affirm his finding that Dr. Borden's opinion does not rebut the Section 20(a) presumption. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT). As

[1]Dr. Borden found claimant's "high level of pain sensitivity appears to result from emotional issues," and she is "apt to have exaggerated negative reaction to stressful or invasive medical procedures, creating a vicious cycle with depression." EX 15 at 5.

employer has offered no other rebuttal evidence, we affirm the administrative law judge's finding that claimant's psychological condition is work-related. *Id*. Thus, we affirm the award of medical benefits for this condition.

Employer next contends the administrative law judge erred in finding claimant to be totally disabled by her back injury as of December 15, 2005. To establish a prima facie case of total disability, claimant must show that she is unable to return to her regular or usual employment as a result of her work injury. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). The burden then shifts to the employer to establish the availability of suitable alternate employment. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). In order to meet this burden, an employer must show the availability of realistic job opportunities in the relevant community, which claimant, by virtue of her age, education, work experience, and physical restrictions, is capable of performing. *Id.* Claimant can rebut the employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if she shows she diligently pursued alternate employment opportunities but was unable to secure a position. *Palombo,* 937 F.2d 70, 25 BRBS 1(CRT).

In this case, the administrative law judge found that claimant established she was totally disabled by her back condition as of December 15, 2005, based on the medical evidence of record.[2] Decision and Order at 46. Employer submitted the April 21, 2011, vocational report of Ms. White, in which she identified seven positions she believed claimant was capable of performing.[3] The survey identified sedentary to light-duty

[2]The administrative law judge found that Dr. Pugsley kept claimant out of work from December 15, 2005, until January 15, 2006, and at no time thereafter did any doctor release claimant to lift more than 20 pounds, which claimant testified she had to do in her former position. Decision and Order at 42- 43; CX 21, 23, 26, 29, 30, 34, 37, 39, 44, 54, 56, 67, 69, 71, 75, 76; EX 19. Substantial evidence supports these findings. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, employer does not challenge them and specifically concedes on appeal that claimant is unable to return to her former job with employer.

[3]Although employer submitted two other labor market surveys, dated September 3, 2009, and February 2, 2011, employer does not challenge the administrative law judge's finding that these surveys do not establish the availability of suitable alternate employment.

receptionist, front desk, and customer service positions.[4] EX 17. The administrative law judge found that none of the positions is suitable because the positions either exceeded claimant's physical restrictions from her back injury or the descriptions were not sufficiently specific to allow a comparison to claimant's physical capacity. Decision and Order at 56. The administrative law judge further found that claimant made a diligent, but unsuccessful, effort in attempting to obtain employment since losing her job with employer.[5] *Id*. at 57. Consequently, the administrative law judge found that claimant established her entitlement to total disability benefits for her back condition as of December 15, 2005.

Although employer asserts the administrative law judge erred in failing to find that the cashier position at Mystic Aquarium in Ms. White's labor market survey establishes suitable alternate employment, employer does not challenge the administrative law judge's finding that claimant diligently pursued alternate employment but was unable to secure a position. Decision and Order at 57. A claimant retains eligibility for total disability benefits, despite an employer's showing of suitable alternate employment, where she shows she diligently pursued, but was unable to obtain, suitable alternate employment similar to the jobs identified by employer. *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT). The administrative law judge found that claimant diligently pursued, *inter alia*, receptionist and front desk jobs identified in the 2011 labor market survey, and this finding is supported by substantial evidence. *See Fortier v. Elec. Boat Corp.*, 38 BRBS 75 (2004). Thus, any error the administrative law judge may have made in finding the position at Mystic Aquarium or Ms. White's labor market survey, as a whole, does not establish the availability of suitable alternate employment is harmless. Consequently, we affirm the administrative law judge's award of total disability benefits. *Id*.

Employer additionally contends the administrative law judge's finding of permanency is premature because claimant requires further treatment for her psychological condition and because, at the time of hearing, claimant was considering surgery to remove the neuro-stimulator implant from her back. A disability is considered

[4]The labor market survey listed two receptionist positions at Howard Johnson Motel, one receptionist position at both Best Western Hotel and JC Penney Hair Salon, a cashier position at Mystic Aquarium, and two bank teller positions at Bank of America. EX 17.

[5]Claimant inquired about the positions in Ms. Farland's 2011 labor market survey and applied for the positions that were available at that time. The administrative law judge found that claimant also performed job searches on her own in 2007 and 2010, and the record reflects her efforts in applying to numerous positions at her local mall and other area businesses. Decision and Order at 57; *see* CX 80; EX 8, EX 13; Tr. at 42-60.

permanent as of the date a claimant's condition reaches maximum medical improvement or if it has continued for a lengthy period and appears to be of lasting or indefinite duration. *See, e.g., Pittsburgh & Conneaut Dock Co. v. Director, OWCP,* 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). If surgery is anticipated, maximum medical improvement has not been reached. *Kuhn v. Associated Press*, 16 BRBS 45 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986).

In this case, Dr. Sella advised on December 7, 2010, that claimant may undergo a procedure to have her nerve stimulator removed/moved. CX 75 at 3. Claimant testified at the hearing that she is considering this because she suffers pain at the implant site. Tr. at 65-66. As surgery is not scheduled and as the mere possibility of future improvement does not undermine the administrative law judge's conclusion that claimant's condition is stable and of long-standing duration, *see Pittsburgh & Conneaut Dock,* 473 F.3d 253, 40 BRBS 73(CRT), we reject employer's assertion that claimant's considering future back surgery affects the permanency of her back condition.

We also reject employer's contention that the temporary nature of claimant's psychological condition affects the administrative law judge's award of permanent total disability benefits. The administrative law judge found that claimant's entitlement to total disability benefits is premised solely on his finding that claimant is *physically* incapable of returning to her former employment as of December 15, 2005, due to her August 3, 2004, back injury. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT). Thus, the administrative law judge rationally found that he need consider only the permanency of claimant's back condition in assessing the nature of claimant's total disability. *See Watson*, 400 F.2d 649; *see generally Macklin v. Huntington Ingalls, Inc.*, 46 BRBS 31 (2012). The administrative law judge found claimant's back condition reached permanency on October 5, 2009, based on Dr. Feng's treatment notes, indicating that claimant's pain was controlled and her back condition remained unchanged after this date. Decision and Order at 50. Employer does not challenge the administrative law judge's rationale for selecting this date. Consequently, we affirm the administrative law judge's award of permanent total disability benefits, commencing on October 5, 2009, as it is rational and supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order and the Order Granting in Part and Denying in Part Employer/Carrier's Motion for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge