BRB No. 91-711

RICHARD L. BODWIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EMPIRE/UNITED STEVEDORES	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL ADMINISTRATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Richard L. Bodwin, Beaumont, Texas, *pro se*.

Britt K. Davis (Fulbright & Jaworski), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant, without legal representation, appeals the Decision and Order Awarding Benefits (89-LHC-1642) of Administrative Law Judge C. Richard Avery 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). In an appeal by a *pro se* claimant, the Board will review the administrative law judge's Decision and Order under its statutory standard of review. We must affirm the findings and conclusions 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 March 17, 1986, claimant sustained an injury to his neck in the course of his employment, when he was lifting a pallet with a co-worker and was pulled off balance. Claimant returned to work for several weeks, but had to stop due to pain. Except for several hours in 1987, he has not worked or applied for a job since that time. Claimant consulted several physicians and eventually saw Dr. Cameron, a board-certified orthopedic surgeon, who became his treating physician on August 25, 1986. Dr. Cameron diagnosed a cervical and lumbar sprain on September

18, 1986, and performed a partial laminectomy, foraminotomy and cervical fusion at C6-7. Following this surgery, Dr. Cameron examined claimant periodically and reported that the surgery appeared to have been successful in obtaining a solid fusion, that accordingly he would start claimant on an exercise program and that he would start weaning him from his cervical collar. In February 1987, however, on his way to see Dr. Cameron in Houston, claimant's car broke down, and he was given a ride by a man in a truck which turned out to be stolen. Claimant and the driver of the truck were stopped by the Texas police who, at gunpoint, made claimant lie down on the road and handcuffed him.[1] When claimant saw Dr. Cameron several days later, on February 16, 1987, he complained of renewed pain and reported that he had missed the earlier appointment due to car trouble. Claimant related to Dr. Cameron that he had been jerked around by the police and that he had pain in his neck, shoulder and arm since the incident. Dr. Cameron felt that claimant sustained a sprain and put him back in a cervical collar. However, x-rays taken in April 1987 revealed that the fusion was no longer solid. In response to claimant's complaints of continuing pain, a CT-scan was performed, which revealed a bulging disc at the C5-6 level and a small herniation at the same level, new abnormalities not previously present on a cervical myelogram performed prior to the September 1986 surgery. By July 1987, Dr. Cameron determined that further surgery was warranted. On February 2, 1989, he again operated on claimant to repair the failed fusion at C6-7, and to extend it to C5. Employer voluntarily paid temporary total disability compensation for the period of March 15, 1986 to September 17, 1987. Claimant, who was represented by counsel at the hearing level, sought additional compensation under the Act.

The administrative law judge awarded claimant temporary total disability compensation for the period from March 14, 1986 to May 17, 1987, and reasonable and necessary medical expenses. He denied compensation for the period subsequent to May 17, 1987, however, finding that any disability related to the March 1986 work accident would have terminated on May 17, 1987, the anticipated date of maximum medical improvement from claimant's first surgery, and that the February 1987 police incident was an intervening cause of any disability with respect to the failed fusion at C6-7 and the need to extend the fusion to C5. The administrative law judge also found claimant had no permanent disability after reaching maximum medical improvement as he was capable of performing his usual work without restriction. Finally, the administrative law judge determined that even assuming claimant could not perform his former employment, employer had successfully established the availability of suitable alternate employment. Claimant, representing himself, appeals the administrative law judge's denial of additional compensation. Employer responds, urging affirmance.

[1]Claimant was released when it was determined that he was not an accomplice in the theft.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment. In order to invoke the Section 20(a) presumption, claimant must prove that he suffered a harm and that employment conditions existed or an accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1991); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Because it is undisputed that claimant suffered a harm, *i.e.*, a neck injury, and that the work accident occurred, the administrative law judge in the present case properly found that claimant established a *prima facie* case pursuant to Section 20(a). *See Cairns v. Matson Terminals Inc.*, 21 BRBS 252 (1988).

Once claimant establishes a *prima facie* case, the burden shifts to employer to rebut the presumption. If the presumption is rebutted, the administrative law judge must weigh all the evidence, pro and con, in reaching a decision. Employer can rebut the presumption by producing substantial evidence that claimant's disabling condition was caused by a subsequent non-work-related event which was not the natural or unavoidable result of the initial work injury. *See Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987), *aff'd mem.* No. 89-4803 (5th Cir. April 19, 1990). Where the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, employer is relieved of liability for disability attributable to the intervening cause. *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991); *Merrill*, 25 BRBS at 144.

After careful review of the record, we affirm the administrative law judge's determination that the February 1987 police incident constituted an intervening cause of claimant's disability related to the failed fusion and herniation at C5-6, as it is rational and supported by substantial evidence in the record. *See O'Keeffe, supra*. In concluding that claimant's temporary total disability due to the work accident ceased in May 1987 and that the subsequent surgery and problems leading to it were due to the police incident rather than the work injury, the administrative law judge credited the account of the police incident contained in Dr. Cameron's February 16, 1987 office notes over claimant's contrary deposition and hearing testimony.[2] In so concluding, the administrative law judge noted that claimant has an extremely poor memory and is an unreliable historian and that Dr. Cameron's February 16, 1987 office notes which indicated that claimant had informed him that the police had "jerked him around quite a bit" and that he had "pain in his neck, arms and shoulder since" were corroborated by the deposition testimony of Arthur Snow, the man who had stolen the truck which led to the police incident. Mr. Snow deposed that a policeman stood over claimant with his foot on claimant's back, that the police threw claimant to the ground roughly then jerked him up by the hand cuffs to a standing position, and that immediately thereafter claimant screamed about his neck hurting.

[2]In his deposition and at the formal hearing claimant denied rough treatment by the police. He deposed that he told the policeman of his surgery and said he could not stand rough treatment. He did admit that the police handcuffed him at gunpoint, made him lie down on the ground and put a knee to his cheek. Emp. Ex. 13 at 105, 111, 113-114; Tr. at 33-34, 57-58.

In addition, the administrative law judge credited Dr. Cameron's deposition testimony that it was his belief, to a reasonable degree of medical certainty, that the police incident had caused the healing fusion following the September 1986 surgery to fail. Dr. Cameron testified that common sense dictated such a conclusion because the first fusion which appeared to have been solid prior to this incident was found to be broken at the time of the second surgery. Dr. Cameron also testified that he believed that claimant's symptoms were the result of a new injury because abnormalities were found at the C 5-6 intervertebral disc level after the police incident, which had not previously been present in the cervical myelogram performed prior to the September 1986 surgery. Inasmuch as the administrative law judge properly weighed the conflicting evidence and acting within his discretion resolved the question of causation in favor of employer, we affirm his determination that the February 1987 police altercation, which was not a natural or unavoidable result of the primary work injury, constituted an intervening cause of claimant's disability. As the administrative law judge reasonably found that claimant would have reached maximum medical improvement from the work-related injury as of May 17, 1987 but for the second unrelated injury, based on Dr. Cameron's testimony that maximum medical improvement generally occurs 6 to 8 months post-surgery, his finding that employer's liability for temporary total disability compensation ceased as of that date is affirmed. *See generally Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

We also affirm the administrative law judge's determination that claimant had no permanent disability after reaching maximum medical improvement. To establish a *prima facia* case of total disability, it is claimant's burden to establish that he is unable to return to his former employment due to his work injury. *See Brooks v. Newport News Shipbuilding & Dry Dock Co., 26 BRBS 1 , 5 (1992); Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468, 470-71 (1989). If claimant meets this burden, employer must establish the existence of realistically available job opportunities within the geographical area where claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1931, 14 BRBS 156 (5th Cir. 1981).

In the present case, the administrative law judge found that claimant failed to meet his initial burden, noting that his testimony with regard to his work capabilities and work requirements was incredible. In addition, he found the opinion of Dr. Andrew that claimant did not need any permanent restrictions and could return to his former employment[3] better reasoned than Dr. Cameron's opinion imposing a 50-pound lifting restriction on claimant. In making this determination, the administrative law judge found that while Dr. Cameron had been claimant's treating physician, he gave no reason for the restriction he placed on claimant's ability to lift. He also noted that both physicians were equally qualified and had evaluated claimant's condition at the same stage of recovery, well beyond maximum medical improvement following his second surgery.

[3]Dr. Andrew, a board-certified orthopedic surgeon, reviewed the medical records and conducted an independent medical examination on March 8, 1990. He deposed that although claimant had a 25 percent loss of flexion and extension of his cervical spine, his neck was actually stronger following the fusion. Therefore, he stated lifting will not cause neck sprain and should not cause any pain related to his neck problems.

As Dr. Andrew's opinion provides substantial evidence to support the administrative law judge's finding that claimant's injuries do not preclude him from performing his usual work, and the administrative law judge's decision to discredit claimant and credit Dr. Andrew's opinion over Dr. Cameron's opinion was neither inherently incredible nor patently unreasonable, we affirm the administrative law judge's finding that claimant failed to establish a *prima facie* case of total disability.[4] *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

Accordingly, the Decision and Order of the administrative law judge denying claimant disability compensation subsequent to May 17, 1987 is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[4]Because we affirm the administrative law judge's finding that claimant is able to return to his usual work, we need not address whether employer established suitable alternate employment.