BRB No. 05-0939

DEBRA A. SLOCOMB Claimant-Respondent v. AGRIFOS, LP and ZURICH AMERICAN INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 07/24/2006 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Dennis L. Brown and Mike N. Cokins (Law Office of Dennis L. Brown), Houston, Texas, for claimant.

Lance S. Ostendorf, Colin D. Sherman, and Adam G. Young (Ostendorf, Tate, Barnett & Wells, L.L.P.), New Orleans, Louisiana, for employer/carrier.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2004-LHC-01962) of Administrative Law Judge Russell D. Pulver 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 worked for employer as an operator, loading and unloading hazardous and nonhazardous materials. Claimant injured her ankle and back in July 1990 during the course of her employment, and as a result of this injury, she was unable to work from November 1990 to March 1991.[1] Claimant returned to her usual employment, and she eventually became a Class A operator. Thereafter, claimant alleged that she injured her right hip and back during the course of her employment for employer on November 24, 1998. Claimant received medical treatment for her hip while she continued working until her treating physician, Dr. Landon, took her off work in January 2000. Dr. Landon referred claimant to Dr. Watters in March 2001 for treatment of her continuing back symptomatology. Claimant underwent back surgery in August 2002, and on December 18, 2003, Dr. Watters opined that claimant's back condition had reached maximum medical improvement. He released claimant to perform sedentary work with restrictions. Claimant obtained a part-time position as a jewelry clerk on November 7, 2004. She sought benefits under the Act for a loss of wage-earning capacity due to her alleged 1998 back injury.[2] Employer contended that claimant's present disability is attributable to the effects of her July 1990 work injury, which occurred with a prior employer, and, alternatively, that it is entitled to Section 8(f) relief, 33 U.S.C. §908(f), from continuing compensation liability.

In his decision, the administrative law judge found that claimant established that she injured her right hip and back during the course of her employment for employer on November 24, 1998. The administrative law judge found that claimant is unable to return to work as an operator due to her injuries, and that her actual wages as a jewelry clerk

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[1] Employer's facility was owned and operated by Mobil Mining and Mineral at the time of claimant's July 1990 work injury. *See* EX 5.

[2] Employer voluntarily paid claimant continuing compensation for temporary total disability from February 1, 2000 through the date of the hearing on January 13, 2005. Decision and Order at 2.

establish her post-injury wage-earning capacity. The administrative law judge awarded claimant compensation for temporary total disability from January 31, 2000, to December 17, 2003, permanent total disability from December 18, 2003, to November 6, 2004, and permanent partial disability from November 7, 2004, and continuing. Employer's request for Section 8(f) relief was denied. The administrative law judge found that employer failed to establish that claimant's pre-existing back conditions constituted a pre-existing permanent partial disability for purposes of obtaining Section 8(f) relief.

On appeal, employer challenges the administrative law judge's finding that claimant established that she sustained a work-related injury in 1998, the extent of claimant's loss of wage-earning capacity, and the denial of Section 8(f) relief. Claimant responds, urging affirmance.[3] The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of Section 8(f) relief.

Employer argues that the administrative law judge applied the wrong legal standard for establishing rebuttal of the Section 20(a) presumption, 33 U.S.C. §920(a), that he erred by finding that employer failed to rebut the presumption, and that, based on the record as a whole, claimant failed to establish that her back and right hip conditions are related to an injury at work on November 24, 1998. In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that she suffered a harm and that either a work-related accident occurred or that working conditions existed that could have caused or aggravated the harm. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Once claimant has established her *prima facie* case, Section 20(a) of the Act provides her with a presumption that her back injury is causally related to her employment; the burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's injury was not caused or aggravated by her employment.[4] *See Ortco Contractors Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS

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[3] Claimant responded, *inter alia*, that the Board should affirm the denial of Section 8(f) relief. On March 13, 2006, employer filed a motion to strike this section of claimant's response brief. Employer argues that claimant lacks standing to oppose employer's contention that the administrative law judge erred by denying its request for Section 8(f) relief as she has no interest in the source of her compensation. We agree. Accordingly, pages 16 and 17 of claimant's Response Brief addressing the administrative law judge's denial of Section 8(f) relief are stricken from the record. *See Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988); *see also Director, OWCP v. Donzi Marine, Inc.*, 586 F.2d 377, 9 BRBS 404 (5th Cir. 1978).

[4] Although the administrative law judge stated that in order to rebut the Section 20(a) presumption employer must "prove" with "substantial evidence" the absence of a connection between claimant's condition and her employment, any error is harmless in

35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP,* 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1999). If the administrative law judge finds the Section 20(a) presumption rebutted, it drops from the case. *Universal Maritime Corp. 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 issue of causation on the record as a whole with claimant bearing the burden of persuasion. *Id.*; *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge discussed the relevant evidence of record, stated the legal standard for determining causation under the Act, and found that claimant established she sustained a work-related injury during the course of her employment with employer in 1998. Decision and Order at 3-7. Claimant testified that she was kneeling to shovel wet rock that had accumulated underneath a motor mount when she felt a sharp pain in her hip and lower back. Tr. at 38-39. She reported the injury to employer the next day. Tr. at 40-41; CX 19. The administrative law judge explicitly rejected employer's contention that claimant back and hip complaints are attributable to the July 1990 work injury, combined with residuals from a car accident and congenital conditions. Decision and Order at 7. The administrative law judge credited claimant's testimony and that of her husband, William Slocomb, a unit supervisor for employer, that she was able to perform heavy manual as an operator for approximately 13 years and that claimant's condition was asymptomatic for several years before the November 1998 work injury. *See* Tr. at 35-37, 103-104, 143, 151-152. The administrative law judge also credited the deposition testimony of Dr. Watters that claimant's 1990 injury was not serious because claimant was able to return to heavy labor as an operator in March 1991 and stopped treatment for this injury prior to the 1998 work injury. CX 18 at 45-47. The administrative law judge found that claimant's job duties entailed climbing, twisting, bending, kneeling, crawling, lifting, and standing for long periods. *See* Tr. at 36-38, 142-143. The administrative law judge concluded that, based on the medical evidence and claimant's credible subjective complaints, claimant injured her lower back and right hip on November 24, 1998. Decision and Order at 7.

In rendering his decision, the administrative law judge is entitled to determine the weight to be accorded to the evidence and to assess the credibility of all witnesses, and may draw his own inferences and conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, the

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that the administrative law judge did not apply this standard to employer's detriment. *See* discussion, *infra;* Decision and Order at 6-7; *Conoco, Inc. v. Director, OWCP,* 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

administrative law judge stated the evidence he credited in finding that claimant established a work-related injury on November 24, 1998, and he explicitly rejected employer's alternative contention as to the cause of claimant's hip and back injury. Decision and Order at 7. Moreover, employer does not cite to any medical opinion of record stating that claimant's injury was not caused by the November 24, 1998, work incident, or that the incident did not aggravate a prior condition. *See generally Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999). The mere fact that claimant had pre-existing conditions is insufficient to establish that claimant did not injure her back and hip at work in 1998. *See generally Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968)(discussing aggravation rule); Decision and Order at 7. In addition, the administrative law judge rationally credited the testimony of claimant, Mr. Slocomb, and Dr. Watters to find, based on the record as a whole, that claimant injured her right hip and lower back during the course of her employment for employer on November 24, 1998. Accordingly, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established compensable right hip and lower back injuries.[5]

Employer next challenges the administrative law judge's finding as to the extent of claimant's loss of wage-earning capacity due to her injury. Employer argues that the administrative law judge applied an incorrect legal standard by crediting claimant's actual post-injury wages, rather than basing his determination on the record evidence regarding open-market wage rates. Employer contends it submitted substantial evidence of higher paying jobs which claimant could secure.[6] Under Section 8(c)(21), 33 U.S.C. §908(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury weekly wage and her post-injury wage-earning capacity. Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be her actual post-injury earnings if these earnings fairly and reasonably represent her wage-

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[5] We reject employer's contention that the administrative law judge's decision does not comport with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). The administrative law judge stated the evidence on which he relied and provided reasons for his conclusions based on this evidence. Decision and Order at 3-9. Employer has not identified any reversible error in the administrative law judge's decision merely by identifying pre-existing medical conditions. *See generally James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

[6] Employer does not challenge on appeal the administrative law judge's finding that claimant is unable to return to her usual employment as a Class A operator.

earning capacity. It is well established that the party contending that the employee's actual post-injury earnings are not representative of her residual wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *see also Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

In his decision, the administrative law judge acknowledged employer's contention that its labor market survey establishes an annual post-injury wage-earning capacity between $12,584 and $35,000. Decision and Order at 8. However, the administrative law judge credited claimant's unsuccessful participation in vocational retraining due to her work injury and her unsuccessful application for numerous light and sedentary entry level jobs, as supervised by a vocational counselor from the Department of Labor. Tr. at 57, 61-62; *see also* CX 23. The administrative law judge further credited claimant's testimony that she was told by several prospective employers she would not receive $8 per hour, the rate she had requested in her job applications. Tr. at 67-69, 74. The administrative law judge, therefore, concluded that the best evidence of claimant's wage-earning capacity is claimant's part-time employment paying $7.50 per hour. The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). In this case, we hold that the administrative law judge acted within his discretion in crediting claimant's actual post-injury wages as representative of her post-injury wage-earning capacity, and in rejecting employer's evidence of the prospective wages claimant could earn on the open market. *See Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *see also Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). We, therefore, affirm the administrative law judge's award of permanent partial disability benefits.

Employer next challenges that administrative law judge's denial of Section 8(f) relief. Specifically, employer argues that claimant's pre-existing spinal stenosis, spondylolisthesis, and the sequelae of her 1990 work injury establish a pre-existing permanent partial disability for purposes of Section 8(f) relief. Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that her current permanent partial disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997);

Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990).

In this case, the administrative law judge found that employer did not submit sufficient evidence to establish that claimant was permanently disabled prior to her 1998 work injury. Decision and Order at 10. The administrative law judge credited the testimony of claimant and her husband that she was able to perform heavy manual labor as a Class A operator after she returned to work in March 1991 from the July 1990 work injury. *See* Tr. at 35-37, 103, 143. They testified that employer did not treat claimant as if she were disabled after her return to work and, in fact, she continued to crawl, climb, lift, push, and shovel in order to load and unload hazardous and nonhazardous materials at employer's facility. *Id*. The administrative law judge also credited Dr. Watters's deposition testimony that claimant's back surgery and other care were related to the November 1998 work injury. CX 18 at 38, 45. Specifically, Dr. Watters testified that claimant's 1990 injury did not have any role in contributing to claimant's back condition after her 1998 work injury. CX 18 at 46-47. The administrative law judge therefore concluded that employer failed to establish that claimant had a lasting, pre-existing physical problem for purposes of establishing entitlement to Section 8(f) relief.

We affirm the administrative law judge's denial of Section 8(f) relief as the administrative law judge rationally found that claimant's previous back injury and congenital conditions are not pre-existing permanent partial disabilities for purposes of obtaining Section 8(f) relief. The administrative law judge found that there is no evidence that claimant sustained a loss of wage-earning capacity when she returned to her usual work as an operator after her 1990 back injury. Moreover, claimant received an impairment rating of zero percent after this injury. EX 30 at 36. The mere existence of a prior injury is insufficient to establish the existence of a serious lasting physical impairment. *Director, OWCP v. Belcher Erectors, Inc.*, 770 F.2d 1220, 17 BRBS 146(CRT) (D.C. Cir. 1985); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Moreover, the administrative law judge rationally credited claimant's successful return to her usual employment in March 1991 without any work restrictions. *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 7(CRT) (4th Cir. 2003); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Todd Shipyards Corp. v. Director, OWCP [Cortez]*, 793 F.2d 1012, 19 BRBS 1(CRT) (9th Cir. 1986). Accordingly, we affirm the administrative law judge's conclusion that claimant did not suffer from a pre-existing permanent partial disability due to her previous back injury and congenital conditions. *See Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998). Thus, we affirm the denial of Section 8(f) relief.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge