BRB No. 10-0176

WILEY BREWSTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WACKENHUT SERVICES	)	DATE ISSUED: 07/23/2010
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Herbert J. Chestnut, Marietta, Georgia, for claimant.

Jerry R. McKenney and Billy J. Frey (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2008-LDA-00341) of Administrative Law Judge Daniel A. Sarno, 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 Defense Base Act, 42 U.S.C. §1651 *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 injured his right ankle while working for employer as a firefighter at Camp Sykes, in Tal Afar, Iraq, on November 18, 2005. Claimant returned to the United States on November 20, 2005, and employer voluntarily began to pay medical and compensation benefits. After conservative treatments proved ineffective, claimant underwent surgical procedures on his right ankle, first by Dr. Wilson on February 27, 2006, and then by Dr. Sumida on June 26, 2007. In a surgical follow-up with Dr. Sumida on August 6, 2007, claimant complained of lower back pain radiating into his buttocks and leg as well as right knee pain. Claimant stated that he then attempted to make additional appointments with Dr. Sumida but that employer refused authorization for further medical treatment. Additionally, on January 18, 2008, employer suspended its voluntary payment of total disability benefits, which began on November 25, 2005, citing a lack of current evidence regarding the nature and extent of claimant's disability.

Claimant eventually returned for further treatment with Dr. Sumida on June 23, 2008, with continued complaints of ankle, knee and lower back pain. Dr. Sumida subsequently diagnosed claimant's knee condition as chondromalacia and his back condition as an L4-L5 disc herniation, and recommended physical therapy, as well as an evaluation by a spine surgeon. Claimant was further evaluated by Dr. D'Auria who opined, on January 12, 2009, that claimant's knee and back injuries occurred as a result of his altered gait caused by his original right ankle injury. Meanwhile, claimant was examined by Drs. Hammesfahr and Edwards who each opined that claimant had reached maximum medical improvement with regard to his right ankle injury. Employer's vocational experts conducted a labor market survey on November 24, 2008, which identified positions which they deemed as suitable alternate employment for claimant. Claimant also underwent a functional capacity evaluation on March 13, 2009, which led Wendy Salerno, OT, to opine that claimant was functioning at a light-duty physical demand level. Claimant has not worked since sustaining his right ankle injury on November 18, 2005.

In his decision, the administrative law judge found that claimant is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his right knee and back conditions to his work-related ankle injury and that employer did not submit evidence rebutting the presumption. The administrative law judge therefore concluded that claimant's right ankle, right knee and back conditions are work-related. The administrative law judge further found that claimant had not yet reached maximum medical improvement with regard to his conditions, that claimant was not capable of returning to his usual employment, and that employer did not meet its burden of establishing the availability of suitable alternate employment. Consequently, the administrative law judge concluded that claimant is entitled to temporary total disability benefits. 33 U.S.C. §908(b).

On appeal, employer challenges the administrative law judge's findings regarding the work-related nature of claimant's right knee and back conditions and the nature and extent of his alleged disabling conditions. Claimant responds, urging affirmance.

Employer contends that the administrative law judge erred in finding that claimant's right knee and back injuries are compensable since claimant never filed a claim with regard to either condition and has not shown that these conditions are the natural or unavoidable result of his right ankle injury. Employer also argues that the administrative law judge incorrectly distinguished this case from the decision reached by the United States Court of Appeals for the Fifth Circuit in *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008).[1]

It is well settled that employer is liable for any sequelae resulting from the original injury. *See, e.g., Seguro v. Universal Maritime Service,* 36 BRBS 28 (2002); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988). Employer argues that the administrative law judge erred in involving the Section 20(a) presumption to link claimant's knee and back conditions to his ankle injury, asserting that in *Amerada Hess,* the Fifth Circuit "held that the Section 20(a) presumption did not apply to secondary injuries under the Act." Employer Brief at 9. As employer acknowledges, however, the court's holding in *Amerada Hess* rested on the fact that the presumption applies only to the claim made by claimant, *citing U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), and claimant in that case filed a claim only for a back injury and did not claim that a subsequent heart attack was related to this injury. Moreover, in *Amerada Hess*, the claimant did not provide any medical evidence to support an allegation that the heart attack was related to treatment for the back injury. As no claim was made for the heart attack, the court held that the administrative law judge erred in invoking Section 20(a) to presume that the subsequent heart attack was the natural and unavoidable result of the work injury. The court held that under these circumstances the claimant must establish by substantial evidence that his subsequent condition arose naturally or unavoidably from the treatment for his work-related injury in order for the subsequent condition to be compensable.

[1] We note that this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. Nonetheless, we shall address employer's contention regarding the administrative law judge's application of *Amerada Hess* in rendering his decision.

The administrative law judge properly distinguished *Amerada Hess* in the present case as claimant's claim here includes all of the conditions that the administrative law judge found were work-related. Claimant initially filed a claim for an injury to his right ankle and specifically noted, with regard to the nature of the injury, that he "lost ability to run or walk normally." EX 1. The administrative law judge found that a memorandum issued following informal conference held on May 16, 2008, stated that the "present claim" involved authorization for continuing medical treatment and reinstatement of total disability benefits for claimant's "ankle, leg and back pain," CX 20, and that this document constitutes "a claim since it disclosed the claimant's intent to assert a right to compensation," based on all of his injuries relating to his work accident. Decision and Order at 29. This finding is rational and supported by substantial evidence. *See U.S. Industries*, 455 U.S. at 613 n.7, 14 BRBS at 633 n.7 (noting informal nature of workers' compensation proceedings, court stated that "considerable liberality is afforded in amending claims"); *Meehan Seaway Service Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998)(cumulative trauma theory raised prior to hearing); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998) (claimant's letter to district director indicating claimant's intent to seek compensation is sufficient to constitute a claim). The claim here thus encompasses claimant's right knee and back conditions and asserts these conditions resulted from his employment injury. The administrative law judge properly applied the Section 20(a) presumption to the conditions that were included in the claim filed.

Moreover, in this case, unlike *Amerada Hess,* claimant submitted evidence that his right knee and back conditions were related to the initial work injury. In this regard, Dr. D'Auria opined that claimant's right knee and back injuries are the result of his altered gait caused by the original work-related right ankle injury and thus, are most likely "a natural consequence of [claimant's] work-related accident,"[2] EX 45, Dep. at 59. CX 29 at 15, 27, 43. The administrative law judge found that Dr. D'Auria's opinions were persuasive and that employer had failed to present evidence in support of its allegations.[3]

[2] Additionally, Dr. Sumida indicated that claimant had a low back injury secondary to a fall with possible L4-5 right sided herniated nucleus pulposus, EX 6, and Dr. Edwards opined that "due to his abnormal gait, [claimant] appears to have some soft-tissue irritation in the right paraspinal muscles and the right SI joint with muscle spasm noted at L3 through L5," as well as "some chondromalacia or crepitance" in the right knee on flexion-extension. CX 22. Moreover, claimant's pre-employment physical indicated that claimant's spine and lower extremities were all "normal." EX 13.

[3] The administrative law judge found employer offered no evidence that claimant's back and/or knee conditions did not occur as a result of claimant's work-related right ankle injury, or that claimant's back and knee conditions developed as a result of an independent or intervening cause. As such, we affirm the administrative law

The administrative law judge specifically stated that in weighing the medical evidence as a whole, Dr. D'Auria's opinion establishes claimant's secondary injuries were the natural consequences of his initial work accident. Thus, unlike *Amerada Hess*, not only are claimant's right knee and back conditions encompassed within the claim made by claimant under the Act, but claimant also established via credited medical evidence that his secondary injuries arose as a natural consequence of the initial work injury. Consequently, we reject employer's argument that the Fifth Circuit's decision in *Amerada Hess* leads to a different result in this case, and we affirm the administrative law judge's finding that claimant's right knee and back conditions are causally related to his work-related right knee injury, and thus, are themselves work-related injuries.

Employer next contends that the administrative law judge erred in failing to find that claimant's right ankle condition reached maximum medical improvement. Employer maintains that Drs. Hammesfahr and Edwards each found claimant reached maximum medical improvement for his right ankle as of October 6, 2008, and that moreover, claimant's own treating physician, Dr. Sumida, stopped treatment for claimant's right ankle in August 2007. Claimant is entitled to temporary disability benefits until he reaches maximum medical improvement, the date of which is determined by medical evidence. *See generally Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant has reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). However, if a physician believes that further treatment should be undertaken, then a possibility of success exists, and even if, in retrospect, it was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

We note that employer's contention concerns only claimant's right ankle injury and that it is claimant's entire work-related condition that must be assessed in determining the nature and extent of claimant's disability. Nonetheless, substantial evidence supports the administrative law judge's finding that claimant's right ankle injury has not reached maximum medical improvement. Although Dr. Hammesfahr stated that claimant had reached maximum medical improvement with regard to his right ankle injury in reports dated February 14, 2007, and October 6, 2008, that physician also recommended in his 2008 report that claimant take a prescription pain reliever and

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judge's finding that employer did not offer substantial evidence to rebut the Section 20(a) presumption. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

suggested three different treatment approaches for claimant's right ankle.[4] EXs 14, 22. Moreover, as the administrative law judge found, claimant's treating physician, Dr. Sumida, has not yet opined that claimant reached maximum medical improvement with regard to his right ankle injury. In his report dated June 23, 2008, Dr. Sumida noted that claimant was having more pain in his right ankle with increased crepitation, and in his most recent report of record, dated December 12, 2008, Dr. Sumida indicated that he would plan to see claimant again in 3 months for his right ankle.[5] EX 39. As Drs. Hammesfahr, Edwards,[6] and Sumida all anticipated and/or recommended additional medical treatment with a view to improving claimant's right ankle condition, we affirm, as rational, the administrative law judge's conclusion that claimant has not yet reached maximum medical improvement with regard to that condition. *Methe*, 396 F.3d 601, 38 BRBS 99(CRT); *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT).

Employer further argues that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment via its November 24, 2008, labor market survey. Employer maintains that the administrative law judge's finding that none of the identified jobs had been approved by any physician is factually incorrect since Drs. Wilson, Hammesfahr, Edwards, and D'Auria all agreed that claimant was capable of performing light-duty work and all of the jobs in question were of a sedentary nature. Where, as in the instant case, claimant has established that he is unable to return to his usual employment duties with employer as a result of his work-related injury, the burden shifts to employer to establish the availability of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores*

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[4] Dr. Hammesfahr suggested: 1) selective cortisone injections to trigger points at the anterolateral aspect of the right ankle; 2) diagnostic xylocaine injections to block the nerve and see how much this relieves claimant's discomfort; and 3) if there is significant discomfort loss following the nerve block, then a DIC resection and proximal burial may be indicated since it is unlikely that an exploration of that nerve would be of any substantial benefit.

[5] These reports belie employer's assertion that Dr. Sumida had stopped treating claimant's right ankle injury as of August 2007.

[6] While Dr. Edwards stated, in his report dated April 16, 2009, that he believed that claimant was at maximum medical improvement for his right ankle condition, the physician also recommended that claimant continue to see Dr. Sumida for further evaluation, and physical therapy and treatment by the pain clinic as needed. CX 22.

v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986).

The administrative law judge reviewed employer's labor market survey, which identified 25 jobs employer believed were within claimant's restrictions and abilities, and concluded that each position listed was not within claimant's physical capabilities. As the administrative law judge found, while the labor market survey acknowledged claimant's statement that he has pain in his right ankle, right knee and lower back, as well as Dr. Sumida's June 23, 2008, diagnoses regarding claimant's back and right knee, it only considered the October 6, 2008, limitations imposed by Dr. Hammesfahr which relate solely to claimant's right ankle injury.[7] EX 19. Thus, the administrative law judge found that the vocational experts did not take claimant's right knee and back conditions into consideration in evaluating alternative work or consider the functional capacity evaluation, which found additional limitations due to all of claimant's injuries shortly after the labor market survey was issued.[8] The administrative law judge considered the totality of claimant's condition and concluded that the labor market survey was not compiled after consideration of all of claimant's limitations.[9] Consequently, we affirm the administrative law judge's finding that the labor market survey is insufficient to meet employer's burden to establish the availability of suitable alternate employment.[10] *See*

[7] Dr. Hammesfahr placed restrictions relating to claimant's right ankle injury of no ladder climbing, no kneeling, no crawling, no squatting, no work in unprotected elevated areas and limited standing and walking.

[8] The functional capacity evaluation added limitations as to claimant's ability to sit, *i.e.*, on a continuous basis for up to an hour before a change of positions, as well as with regard to his ability to lift and carry, *i.e.*, 30 pounds on an occasional intermittent basis from floor to waist, 40 pounds on an occasional basis and 20 pounds on a frequent basis from a waist level height. CX 21.

[9] Additionally, as the administrative law judge found, employer's vocational experts submitted requests to both Drs. Hammesfahr and Sumida for opinions regarding the viability of the positions identified in the labor market survey but the record does not contain any response from either physician.

[10] In light of this holding, we need not address employer's other arguments regarding suitable alternate employment. Moreover, the administrative law judge rationally found that claimant undertook a diligent yet unsuccessful post-injury job search as the record establishes that claimant attempted to apply for each job listed in the labor market survey without any success. HT at 41-45; CX 18; *see generally Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004).

generally Wilson v. Crowley Marine, 30 BRBS 199 (1996). Accordingly, the administrative law judge's award of temporary total disability benefits is affirmed.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge