BRB No. 03-0652

MARVIN G. FOUNTAIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HAM MARINE, INCORPORATED	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	DATE ISSUED: JUN 29, 2004
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Henry B. Zuber, III (Zuber Law Firm, PLLC), Ocean Springs, Mississippi, for claimant.

Michael J. McElhaney, Jr. (Colingo, Williams, Heidelberg, Steinberger & McElhaney, P.A.), Pascagoula, Mississippi, for employer/carrier.

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

Employer appeals the Decision and Order Awarding Benefits (01-LHC-2011) of Administrative Law Judge Clement J. Kennington 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, working for employer as a structural fitter, began experiencing lower back pain on or about April 15, 1999, while lifting and toting channel iron in the course of his employment. On April 29, 1999, Dr. Bernardo diagnosed claimant as suffering

from a severe lumbar sprain/strain which, following three weeks of physical therapy, significantly improved such that Dr. Bernardo released claimant to return to work, without restrictions, as of May 24, 1999. Upon his return to work as a structural fitter, claimant stated that he continued to experience lower back pain, which, in conjunction with the statement by his foreman that he was not needed if he could not perform his job, prompted him to quit. In July 1999, claimant found employment driving a truck, but continuing back spasms prompted him to seek further treatment.

Dr. McKellar assessed claimant as having lumbar spondylosis and a lumbar sprain/strain, he administered a series of epidural injections, and he recommended that claimant find work other than truck driving, in the light to moderate category where he could change positions frequently. Based on Dr. McKellar's advice, claimant quit driving trucks by July 6, 2000, after which he experienced a significant reduction in his level of lower back pain. A functional capacity evaluation (FCE), conducted on December 27, 2000, indicated that claimant could perform work in the light category of exertion for an eight hour day. Nevertheless, on March 22, 2001, Dr. Flose opined that claimant was unable to hold gainful employment because he could not perform manual labor and he had some deficiencies with regard to reading and writing. On October 23, 2001, however, Dr. Flose recommended that claimant return to work with restrictions against lifting over 15 pounds and repetitive bending or stooping. Similarly, Dr. Beam opined that claimant was capable of working light duty with significant restrictions on his physical movements.

In his decision, the administrative law judge found that claimant is entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), that employer did not establish rebuttal thereof, and thus, that claimant's symptoms of lower back pain are related to his workplace accident. The administrative law judge next determined that claimant is unable to return to his usual work, that claimant was capable of performing light duty work after May 24, 1999, that claimant's post-injury employment as a truck driver did not cause an injury and was not suitable alternate employment, and that employer established the availability of suitable alternate employment as of August 13, 2002. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from April 16, 1999, to May 23, 1999, permanent total disability benefits from May 24, 1999, until August 13, 2002, and permanent partial disability from August 14, 2002, and continuing, as well as all reasonable medical benefits. 33 U.S.C. §§907, 908(a), (b), (c)(21).

On appeal, employer challenges the administrative law judge's findings that it did not establish rebuttal of the Section 20(a) presumption, that claimant's post-injury employment as a truck driver did not cause an intervening injury, that claimant was not capable of returning, post-injury, to his usual employment, and that employer did not

establish the availability of suitable alternate employment prior to August 14, 2002. Claimant responds, urging affirmance.

Employer contends that the record contains substantial evidence to rebut the presumption of a causal relationship between claimant's injury and his work. Employer argues that repeated inconsistencies in claimant's reporting of the alleged work incident and his subsequent testimony regarding such events establish rebuttal of the Section 20(a) presumption. Employer further contends, based on claimant's post-injury employment history as a truck driver which, as claimant readily admitted, subjected him to "steady" jarring and bouncing, and the fact that the record contains no treatment records from May 24, 1999, until October 18, 1999, that claimant's work injury had completely resolved, and that his present condition is due to an intervening aggravation of his work injury.

It is undisputed that the Section 20(a) presumption has been invoked to link claimant's back condition to his work for employer. Thus, the burden shifted to employer to produce substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *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. 1998). 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 Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). Where the subsequent injury is the result of an intervening cause, employer is relieved of liability for the disability and for medical treatment attributable to the subsequent injury, but remains liable for any disability due to the work injury. *Arnold v. Nabors Offshore Drilling Inc.*, 35 BRBS 9 (2001), *aff'd*, 32 Fed. Appx. 126 (5th Cir. 2002); *Plappert v. Marine Corps Exch.*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997).

In addressing rebuttal, the administrative law judge initially acknowledged that claimant gave several different versions of how he injured his back to different people at different times. Nevertheless, the administrative law judge found that these inconsistencies are insufficient to rebut claimant's *prima facie* case of causation since claimant's psychological and psychometric evaluation demonstrated the ability to communicate at the ten-year old level, and because nearly all of claimant's statements indicate that he suffered an injury at work between April 12, 1999, and April 22, 1999. In addition, the administrative law judge rejected employer's assertion that the opinion of Dr. Lee that 50 percent of claimant's disability is attributable to his work driving trucks establishes rebuttal, since there is no evidence in the record that claimant, in fact,

sustained a second injury while driving a truck, and Dr. Lee's statements did not establish that any subsequent injury was not the "natural and unavoidable result of the initial work injury."[1] *See generally White v. Peterson Boat Building Co.*, 29 BRBS 1 (1995). Consequently, the administrative law judge determined that the evidence is insufficient to establish rebuttal of the Section 20(a) presumption. As this finding is rational and supported by substantial evidence, it is affirmed. *See generally Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th 2000); *Bass*, 28 BRBS 11.

Employer next argues that the administrative law judge erred in finding that claimant was not capable of returning, post-injury, to his usual work with employer as a structural fitter as of May 24, 1999, given that claimant's treating physician, Dr. Bernardo, explicitly opined, as of that date, that claimant could return to work without any restrictions. Moreover, employer contends that the record establishes that claimant secured and capably performed strenuous post-injury work as a truck driver from July 9, 1999, until June 2000, which further supports its position that claimant was, in contrast to the administrative law judge's finding, capable of returning to his usual employment without restrictions as of May 24, 1999. In addition, employer contends that the evidence of record establishes that claimant voluntarily left his employment with employer for reasons completely unrelated to his alleged work injury. Employer also contends that claimant's post-injury employment, which he performed from July 1999 until at least June 2000, constitutes suitable alternate employment. Employer further contends that the vocational evidence dated July 5, 2002, sufficiently evinces the availability of suitable alternate employment.

Claimant bears the burden of establishing his inability to perform his usual work due to his work injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Once claimant establishes this *prima facie* case, the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 36(CRT) (5th Cir. 1992); *P & M Crane Co. v. Hayes*, 930 F. 2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). In order to satisfy this burden, employer must demonstrate that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education,

[1]In contrast, the administrative law judge observed that Dr. Beam explained that claimant's driving put him at an increased risk of aggravating his low back muscles and that Dr. McKellar likewise noted that claimant's pain levels significantly improved once he stopped driving trucks. This evidence further supports the administrative law judge's finding that claimant's employment as a truck driver created a temporary exacerbation of his work-related condition and thus that his present permanent condition was the natural or unavoidable result of his initial work injury.

work experience and physical restrictions and could realistically secure if he diligently tried. *Turner*, 661 F.2d 1031, 14 BRBS 156. Additionally, employer may satisfy its burden of establishing the availability of suitable alternate employment either by providing claimant with a suitable light duty job within its facility, or showing that claimant is successfully performing a job he procured on his own. *See generally Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996)*; Shiver v. United States Marine Corps, Marine Base Exchange*, 23 BRBS 246 (1990); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). In determining whether employer has met its burden of establishing the availability of suitable alternate employment, the administrative law judge must compare the requirements of the jobs identified with medical determinations of claimant's physical restrictions and other vocational factors. *See Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992). A job which is outside of claimant's restrictions or too physically demanding for claimant is not suitable alternate employment. *See generally Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998).

With regard to the extent of claimant's back injury, the administrative law judge initially determined that claimant was not capable of performing any work from April 15, 1999, until May 24, 1999. He then found that claimant was capable of engaging only in light duty work from May 24, 1999, as recommended by Drs. McKellar, Folse and Beam, and as detailed by the December 27, 2000, FCE. As such, the administrative law judge rationally rejected Dr. Bernardo's statement that as of May 24, 1999, claimant could return to his usual work without restrictions because the parties stipulated that said work as a structural fitter required a heavy level of exertion.

It is within the administrative law judge's discretion to determine how to credit and weigh the evidence of record, including the opinions of medical experts. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge's decision to credit the post-injury restrictions imposed by Drs. McKellar, Folse, and Beam, in contrast to Dr. Bernardo's opinion that claimant did not have any restrictions as of May 24, 1999, is rational. Consequently, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant, who post-injury was capable only of light duty employment, could not return to his usual employment as a structural fitter, which undisputedly involved a heavy level of exertion. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

In addition, the administrative law judge found that claimant's post-injury employment, as a truck driver, was not suitable alternate employment. In making this determination, the administrative law judge found that this work required activities beyond the scope of his post-injury physical restrictions, *e.g.*, employer's vocational expert, Mr. Pennington, testified that the majority of truck driving jobs required a medium level of exertion. Citing evidence in the record, in particular, claimant's return to Dr. Bernardo on October 18, 1999, for additional treatment, claimant's subsequent treatment by Dr. McKellar, and the causation statements of Drs. Beam and Lee, the administrative law judge found that claimant's performance of said work extensively aggravated his work-related lower back condition. Consequently, crediting the opinion of Drs. Beam and Duffield, advising against any driving employment, the report of Dr. McKellar, indicating that claimant would continue to aggravate his back if he persisted in his truck driving employment, and claimant's own testimony that his pain significantly improved after he quit driving, the administrative law judge concluded that the jobs claimant obtained following his workplace accident are not suitable alternate employment. *Ledet*, 163 F.3d 901, 32 BRBS 212(CRT). In light of the opinions of Drs. Beam and McKellar, we affirm the administrative law judge's finding that claimant's post-injury work as a truck driver does not constitute suitable alternate employment. *Hinton*, 243 F.3d 222, 35 BRBS 7(CRT); *Armfield v. Shell Offshore, Inc.*, 30 BRBS 122 (1996).

The administrative law judge further rejected employer's assertion that it had provided suitable alternate employment via an offer of light duty work at its facility upon claimant's return to work and that claimant had quit this job for reasons entirely unrelated to his work injury. In this regard, the administrative law judge found that claimant's uncontradicted testimony establishes that his inquiry regarding light duty work upon his return to employer was strongly rebuffed by his new foreman, David Seaman, and that there is insufficient evidence to show that employer ever actually offered claimant any such employment. This finding is likewise affirmed as it is supported by substantial evidence. While employer's Corporate Director of Safety, Mr. Parker, testified that employer had a full light duty employment program in place to assist injured workers, he did not have any personal interaction with claimant in this case, and did not state that claimant was, in fact, offered any light duty jobs. Hearing Transcript (HT) at 45-46. Rather, he explained that claimant was terminated because he violated employer's policy by waiting two weeks to report his injury.[2] HT at 161.

[2] Moreover, the record conclusively establishes that claimant did not voluntarily leave his job with employer. In particular, the administrative law judge explicitly determined that claimant could not perform his usual work as a structural fitter because it required a heavy level of exertion beyond claimant's post-injury physical restrictions. This determination, coupled with the administrative law judge's finding that employer

Turning to the labor market surveys, the administrative law judge rejected all of the jobs identified in the July 5, 2000, survey, finding that they were all beyond the scope of claimant's post-injury restrictions and abilities. Specifically, the administrative law judge rejected the jobs as a janitor, a road machine operator, and as a lowboy, boom truck, and dump truck driver, since they all required a light to medium level of exertion which exceeds claimant's maximum lifting restrictions of 15 pounds. He also found that claimant could not, due to his reading and writing deficiencies, meet the basic requirements for the shuttle bus/jockey driving positions. Moreover, the administrative law judge rejected the jobs identified in Pascagoula, Mississippi, and Mobile, Alabama, as they are not in claimant's "local community," *i.e.*, they are located approximately 83 miles from claimant's home, the additional travel is not economically feasible, the travel would, as indicated by Dr. Beam, place claimant at an increased risk of danger, and because the significant driving might pose a considerable risk of further aggravating his back condition. The administrative law judge's finding that all of the positions identified in the July 5, 2000, labor market survey are insufficient to establish the availability of suitable alternate employment is affirmed as it is supported by substantial evidence. *Wood v. U.S. Dept. of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). The administrative law judge found suitable alternate employment established as of August 13, 2002, and this finding is not challenged on appeal. Consequently, the administrative law judge's award of total and partial disability benefits in this case is affirmed.

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did not make suitable alternate employment in a light duty capacity available to claimant upon his return to work establishes that claimant was incapable of performing any work post-injury for employer.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge