BRB No. 03-0666

WILLIE E. BOND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: JUN 22, 2004
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Ralph Rabinowitz (Rabinowitz, Swartz, Taliaferro, Lewis, Swartz & Goodove, P.C.), Norfolk, Virginia, for claimant.

James M. Mesnard (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order on Post-Hearing Motions (2001-LHC-3177 and 2002-LHC-1826) of Administrative Law Judge Fletcher E. Campbell, Jr., rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *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 sustained a back injury while working for employer as a shipyard painter on January 22, 1998. Employer conceded that this injury was work-related and that claimant could not return to his previous employment at the shipyard because of the injury. Claimant further alleged a separate work-related injury, bilateral carpal tunnel syndrome. Claimant asserted that the carpal tunnel syndrome was the result of the

repetitive hand and wrist movements required by his long-term employment as a painter. Employer voluntarily paid claimant temporary total disability benefits from Febuary 18, 1998, through November 22, 1998, and from December 9, 1998, through April 3, 2002. Employer's Exhibit 1.

In his decision, the administrative law judge found that claimant established a *prima facie* case that his carpal tunnel syndrome was causally connected to his employment, and that claimant was therefore entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a). Decision and Order at 11-12. The administrative law judge further determined that employer established rebuttal of the presumption by presenting substantial evidence that claimant's bilateral carpal tunnel syndrome was not work-related. Decision and Order at 12. Considering the evidence as a whole, the administrative law judge concluded claimant was unable to establish that his carpal tunnel syndrome was related to his employment. Accordingly, the administrative law judge denied claimant's claim regarding his carpal tunnel syndrome.[1] Recognizing that, based upon the parties' stipulation, claimant was totally disabled from returning to his previous employment due to his back injury the administrative law judge then turned his analysis to whether employer established the availability of suitable alternate employment. Decision and Order at 12-13. The administrative law judge considered the labor market survey submitted by employer and concluded that six of the ten identified positions constituted suitable alternate employment for claimant. Decision and Order at 13. The administrative law judge further concluded that claimant failed to demonstrate diligence in finding employment. The administrative law judge thus determined that claimant had a residual wage-earning capacity and was entitled to ongoing permanent partial disability compensation at a rate of $276.03 per week from January 22, 1998.

On appeal, claimant challenges the administrative law judge's finding that claimant's bilateral carpal tunnel syndrome is not work-related. Claimant further challenges the administrative law judge's determination that employer established the availability of suitable alternate employment. Employer responds, urging affirmance of the administrative law judge's Decision and Order and Order on Post-Hearing Motions.

[1] In his "Order on Post-Hearing Motions" issued subsequent to the Decision and Order, the administrative law judge rejected claimant's assertions and again found that employer established rebuttal of the *prima facie* case. The administrative law judge further held, again, that once the presumption was rebutted, the entirety of the evidence of record failed to establish the work-relatedness of claimant's carpal tunnel syndrome.

CLAIMANT'S BILATERAL CARPAL TUNNEL SYNDROME

Claimant asserts that the administrative law judge erred in determining that claimant's bilateral carpal tunnel syndrome is not work-related. Claimant avers that Dr. Kerner, a spine surgeon, never treated claimant for the condition as the physician was only treating claimant for his lower back injury. Claimant argues that Dr. Kerner indicated that he would defer to the opinion of Dr. Waller, claimant's family physician, with regard to the cause of claimant's carpal tunnel syndrome. Claimant further contends that the physician who actually treated his carpal tunnel syndrome was Dr. Hersh, who opined that that the syndrome was job-related. Claimant argues that the administrative law judge failed to address Dr. Hersh's opinion and that, based on the physician's status as claimant's treating physician, Dr. Hersh's opinion should have been accorded superior weight.

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving that he sustained an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused, contributed to or aggravated by his employment. *Moore,* 126 F.3d 256, 31 BRBS 119(CRT); *Bridier v. Alabama Dry Dock & Shipbuilding Co.*, 29 BRBS 84 (1995). If the presumption is rebutted by employer, it drops from the case, *see Moore*, 126 F.3d 256, 31 BRBS 119(CRT), and the administrative law judge must then weigh all the evidence and resolve the causation issue on the record as a whole with claimant bearing the burden of persuasion. *See generally Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

In the instant case, the administrative law judge found the evidence sufficient to invoke the Section 20(a) presumption that claimant's bilateral carpal tunnel syndrome was work-related, but concluded that employer produced substantial evidence rebutting the presumption. On appeal, claimant initially challenges this conclusion. The administrative law judge based his finding on the opinion of Dr. Kerner. As this opinion supports a conclusion that claimant's bilateral carpal tunnel syndrome was not work-related, we affirm the administrative law judge's conclusion that employer produced

substantial evidence rebutting the Section 20(a) presumption.[2] *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Bridier*, 29 BRBS 84.

In weighing the evidence in the record as a whole, the administrative law judge concluded that claimant's bilateral carpal tunnel syndrome is not related to claimant's employment. The administrative law judge found that there was no evidence "other than the statement of Dr. Waller" that there was a connection between claimant's carpal tunnel syndrome and his employment. Decision and Order at 12. The administrative law judge further found that Dr. Kerner's statement that he would defer to Dr. Waller's opinion on carpal tunnel causation was a "mere[] exercise of professional courtesy" and did not refute Dr. Kerner's previous specific statements that claimant's arm problems were not caused by his work. Order on Post-Hearing Motions at 2. Moreover, the administrative law judge found that while Dr. Bergfeld's opinion did not support rebuttal of the Section 20(a) presumption, *see* Order on Post-Hearing Motions at 2 n.2, the opinion did support a conclusion that claimant did not affirmatively establish work-related causation with regard to the carpal tunnel syndrome.

In the instant case, the relevant medical evidence regarding bilateral carpal tunnel syndrome consists of the conclusions of five physicians, Drs. Kerner, Bergfield, Hersh, Waller and Ross. As claimant asserts, in addressing the cause of this condition, the administrative law judge did not discuss the opinion of Dr. Hersh, who treated claimant for it.[3] Dr. Hersh opined that claimant suffered from atypical carpal tunnel syndrome, CX12-6, and made the following statement:

> I also discussed with the patient that his symptoms are consistent with carpal tunnel syndrome and working as a painter with repetitive hand motions with pulling and twisting and lifting with his hands over a prolonged period of time can aggravate things and result in carpal tunnel syndrome. This is a repetitive-type injury.

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[2] The administrative law judge concluded that Dr. Ross's opinion that claimant did not have carpal tunnel syndrome was not supportive of "substantial rebuttal" at Section 20(a) as the opinion did "not speak specifically to the question of the work-relatedness of Claimant's hand injury (whatever the nature of the injury was)." Order on Post Hearing Motions at 2 n.2.

[3] The administrative law judge only noted Dr. Hersh's opinion in the context of reviewing employer's evidence of the availability of suitable alternate employment, *i.e.*, that Dr. Hersh approved some of the suitable alternate employment positions. Decision and Order at 13.

CX 12-5(a). The failure of the administrative law judge to consider the relevant medical opinion of Dr. Hersh requires remand under the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). *See McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); *see also Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). In addition, in view of the administrative law judge's reliance on his finding that only Dr. Waller's opinion demonstrated workplace causation, remand for consideration of Dr. Hersh's consistent opinion is necessary. We therefore vacate the administrative law judge's finding that claimant's carpal tunnel syndrome is not work-related and remand this case for the administrative law judge to consider Dr. Hersh's opinion in conjunction with the other relevant opinions of record with regard to the causal nexus between claimant's carpal tunnel syndrome and his employment.[4]

SUITABLE ALTERNATE EMPLOYMENT

Claimant asserts that the jobs listed in the labor market survey which the administrative law judge found established suitable alternate employment were not appropriate for claimant. Claimant asserts that the labor market survey relied upon "stale" restrictions imposed by Dr. Kerner in 1999, prior to claimant's second surgery. Claimant argues that even the opinion of employer's physician, Dr. Ross, supports a conclusion that reliance upon such stale restrictions is not acceptable. Claimant argues that the labor market survey conducted by Mr. Kay, dated June 17, 2002, Employer's Exhibit 57, and updated on November 22, 2002, Employer's Exhibit 70, is thus flawed as it is based on the May 1999 restrictions. Claimant asserts that Mr. Kay failed to get updated work restrictions from Dr. Manginess, who performed the subsequent surgery on claimant's back. Claimant also contends that the opinion of another vocational counselor, Mr. Hanbury, contradicted the conclusion that these jobs were suitable and found that claimant has zero earning capacity based upon claimant's "previous manual work history, his present physical limitations, and his lack of transferable skills." Claimant's Exhibit 3. Lastly, claimant asserts that jobs identified in employer's labor market survey required claimant to travel distances in excess of his post-injury restrictions.

[4] We note, however, that, contrary to claimant's assertion, on remand the administrative law judge need not accord superior weight to the opinion of Dr. Hersh based on the physician's status as claimant's treating physician. Treating physicians' opinions are to be weighed and credited along with the opinions of any other expert of record, and it is within the administrative law judges discretionary powers to determine the weight accorded the evidence of record, including the opinions of the medical experts. *See, e.g., Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

The parties agree that claimant's disability is permanent and that he cannot return to the job he held prior to his back injury. Thus, claimant has met his burden of establishing a *prima facie* case of permanent total disability. *Green v. I.T.O. Corp. of Baltimore*, 32 BRBS 67, 70 n.5 (1998), *modified on other grounds*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Once a claimant establishes a *prima facie* case of total disability, the burden shifts to the employer to demonstrate the availability of jobs within the community that the claimant is capable of performing based upon his age, education, work experience, and physical restrictions. *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988).

We affirm the administrative law judge's determination that employer has established the availability of suitable alternate employment. Claimant's assertions are tantamount to a request that the Board reweigh the evidence, a role outside of the Board's scope of review. *See generally Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). The administrative law judge rationally credited the conclusions of employer's vocational expert, Mr. Kay, regarding suitable jobs available to claimant, rather than the contrary conclusion of Mr. Hanbury that claimant was unable to work, because Mr. Kay's conclusions were based on a more thorough understanding of claimant's physical capabilities and not merely upon the statements of claimant. *See Jones v. Genco, Inc.*, 21 BRBS 12 (1988). The administrative law judge rationally concluded that all of the jobs deemed suitable for claimant were approved by one or more physician, *i.e.*, Dr. Hersh, Dr. Kurowski, Dr. Kerner and/or Dr. Ross, and that no physician concluded that any of the jobs was not suitable for claimant. Further, the administrative law judge reasonably relied upon the opinion of Dr. Ross in determining claimant's ability to travel to the described jobs, and thus in delineating the relevant community. *See See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Trans-State Dredging v. Benefits Review Board [Tarner]*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). Lastly, the administrative law judge rationally concluded that claimant was not diligent in seeking employment, as he failed to seek employment for a substantial period of time. *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). The administrative law judge rationally concluded that a range of jobs existed which were reasonably available and which claimant would realistically be able to secure and perform. *See Lentz*, 852 F.2d 129, 21 BRBS 109(CRT); *Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *see also Tarner*, 731 F.2d 199, 16 BRBS 74(CRT). We therefore affirm the administrative law judge's findings regarding the availability of suitable alternate employment and his award of permanent partial disability benefits.

Accordingly, the administrative law judge's Decision and Order and Order on Post-Hearing Motions are vacated as to the finding that claimant's carpal tunnel syndrome is not work-related, and the case is remanded for further consideration of the issue. In all other respects, the administrative law judge's Decision and Order and Order on Post-Hearing Motions are 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