BRB No. 98-1342

MICHAEL D. O'NEAL	)	
	)	
Claimant-Respondent	)	DATE ISSUED: June 28, 1999
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Granting Temporary Total Disability and Medical Treatment of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Temporary Total Disability and Medical Treatment (96-LHC-10) of Administrative Law Judge Richard K. Malamphy 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 a painter from 1971 until March 27, 1989, the date of his accident. On that day, he was working on a submarine, when his safety line broke, causing him to fall 35 feet onto the dry dock below. As a result, he suffered fractures to his jaw and both hands, injured both knees, busted his lip and knocked out several teeth. Claimant underwent a series of surgical procedures for his orthopedic injuries, including two arthroscopic surgeries to the right knee. Employer paid temporary total disability benefits from March 28, 1989 through March 24, 1993, and permanent partial disability benefits for both of claimant's legs and his right arm pursuant to the schedule, 33 U.S.C. §908(c)(1)(2). Claimant has not returned to any work since his injury. He sought permanent total disability benefits from June 12, 1995, and continuing. He also sought medical benefits for treatment of depression and a tear of the lateral meniscus of his right knee, conditions whose work-relatedness employer denied. In the alternative, claimant sought additional permanent partial disability benefits in the form of increased ratings to his upper and lower extremities, as well as permanent partial disability benefits for an unscheduled back injury.

The administrative law judge awarded temporary total disability benefits from June 12, 1995, and continuing. He found that claimant established causation with respect to both his psychiatric condition and his torn right meniscus. Noting that employer did not contest increased disability ratings to claimant's left lower extremity and right and left upper extremities, the administrative law judge declined to address claimant's request for a higher impairment rating to his right lower extremity, finding that due to suggested additional surgery to claimant's right knee, claimant had not reached maximum medical improvement as to that member. He also deferred an opinion regarding claimant's allegation of a back injury, as he found claimant temporarily totally disabled. He therefore concluded that employer was liable for temporary total disability compensation and medical benefits for the psychiatric and knee conditions.

On appeal, employer contends that the administrative law judge erred in finding that claimant's depression and present right knee problems are related to his work injury. Employer also asserts that the administrative law judge erred in finding that employer failed to establish the availability of suitable alternate employment and in finding claimant temporarily totally disabled. Claimant responds, urging affirmance.

Initially, we reject employer's argument that claimant's psychiatric condition is not causally related to his April 28, 1993, work-related injury. It is undisputed that claimant is entitled to invocation of the Section 20(a) presumption to link his depression to the employment injury. Once the Section 20(a) presumption is

invoked, the burden shifts to employer to rebut it with substantial evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds the Section 20(a) presumption is rebutted, he must weigh all the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

In this case, the administrative law judge found the presumption rebutted. After weighing the relevant evidence pro and con, the administrative law judge rationally found that claimant's depression was work-related based on his crediting of the opinion of Dr. Thrasher. *See Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988). It is well established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See 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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Dr. Thrasher, a psychiatrist, rendered the opinion that it was the realization of the extent of his physical limitations and attendant loss of financial security and family which caused claimant's depression, resulting in terribly diminished energy, motivation, easy fatigue and poor concentration. However, according to Dr. Taylor, a clinical psychologist and certified rehabilitation counselor, claimant's passive-aggressive personality traits and low average general intellectual ability predate his industrial injury, and the present symptoms of anxiety and depression are transient, coming and going in reaction to stress. In crediting Dr. Thrasher's opinion over that of Dr. Taylor, the administrative law judge relied on the fact that Dr. Thrasher was claimant's treating psychiatrist; that he was the only board-certified psychiatrist to render an opinion on claimant's condition; that Dr. Thrasher's opinion was consistent with claimant's own testimony of severe depression following the work injury; and that the record does not support Dr. Taylor's opinion of a chronic depressive condition predating the injury. Inasmuch as the medical opinion of Dr. Thrasher provides substantial evidence to support the administrative law judge's determination that claimant's psychological condition is work-related, and employer has failed to establish any reversible error, we affirm this determination. *See Manship v. Norfolk & Western Railway Co.,* 30 BRBS 175, 179 (1996).

The administrative law judge's finding that claimant's right meniscus tear is causally related to his March 27, 1989, work injury is affirmed as well. Claimant was treated by Dr. Stiles, a board-certified orthopedic surgeon, who performed a number

of surgeries on claimant's knees and arms and gave claimant work restrictions in 1992. He did not treat claimant from 1992 until September 1995, when claimant returned with a tear in the lateral meniscus of his right knee. It is the cause of this tear which is now at issue.

The administrative law judge found that claimant established a *prima facie case* of causation, which employer rebutted. Upon weighing the evidence as a whole, the administrative law judge credited Dr. Stiles's opinion that claimant's 1989 work injury initially damaged the meniscus, weakening it in the sense that it caused a loss of continuity in its stability, leaving it more susceptible to further injury, which could even occur from basic daily activity. In crediting Dr. Stiles's opinion, the administrative law judge reasoned that he provided a rational explanation as to why claimant's meniscus tear is related to the prior injury despite the fact that there was no indication of the tear at the time of the second arthroscopy, whereas Dr. Cohn merely stated that as the meniscus was repaired after the work injury and a tear did not appear in subsequent arthroscopy, it was not work-related. The administrative law judge noted that Dr. Cohn did not address whether the initial tear rendered the meniscus more susceptible to further injury.

Employer argues on appeal that the administrative law judge did not address Dr. Cohn's conclusion that claimant's tear had resolved or explain how the present tear can be work-related when it had not appeared at the time of the second knee surgery. Employer has failed to establish reversible error in this regard, as that is precisely the issue which the administrative law judge addressed. Moreover, as the administrative law judge found, employer's suggestion that claimant may have sustained an injury to the knee unrelated to his work injury is without support in the record. Inasmuch as employer has failed to demonstrate error in the administrative law judge's weighing of the evidence and his decision to credit Dr. Stiles's opinion over Dr. Cohn's contrary opinion, we affirm his finding that claimant's lateral meniscus tear is work-related. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 372 U.S. 954 (1963). The finding that this condition is work-related is accordingly affirmed.

We next turn to employer's arguments regarding the administrative law judge's finding that claimant is entitled to temporary total disability compensation for the combined effect of his physical and psychological injuries. Initially, the parties agree that claimant established a *prima facie* case of total disability by establishing that he is unable to return to his usual work. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Lentz v. The Cottman Co*., 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). The burden therefore shifted to employer to demonstrate the availability of suitable alternate

employment that claimant is capable of performing. *Id. See also New Orleans (Gulfwide) Stevedores, Inc. v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In finding that employer failed to meet its burden, the administrative law judge examined the report and testimony of Ms. Chaney, employer's vocational expert. Tr. at 16-74; Emp. Ex. 10. The administrative law judge found Ms. Chaney's opinion of alleged suitable employment unconvincing, as she conceded that at the time she prepared her labor market survey, she was not aware of claimant's psychological problems. In addition, he found she did not have Dr. Stiles's records, and thus was unaware of claimant's current lateral meniscus tear. Tr. at 46-47, 53. Moreover, lacking those records, she relied on the 1993 restrictions of Dr. Tornberg, who saw claimant only twice. As employer's argument that Ms. Chaney's report establishes suitable alternate employment is based on the premise that neither claimant's depression nor his current knee problem is work-related, and we have affirmed the administrative law judges finding that both conditions are related to the March 27, 1989 accident, we reject employer's argument in this regard. Dr. Thrasher's credited psychiatric opinion is that claimant is totally unemployable at this time due to his depression and attendant diminished energy, motivation, easy fatigue and poor concentration. The administrative law judge further found that none of the positions in Ms. Chaney's labor market survey fall explicitly within Dr. Stiles's restriction of claimant to work that is strictly sitting. Accordingly, as substantial evidence supports his finding, we affirm the administrative law judge's determination that employer failed to establish the existence of suitable alternate employment.[1] As we affirm the continuing award of temporary total disability, we need not address employer's contention that claimant is not entitled to further permanent partial disability benefits.

Accordingly, the Decision and Order Granting Temporary Total Disability and Medical Treatment of the administrative law judge is affirmed.

SO ORDERED.

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[1]Contrary to employer's assertion, the administrative law judge did not rely on the reports and testimony of Edith Edwards, who conducted a labor market survey, examining each position identified by Ms. Chaney and concluding that claimant could not reasonably compete for any of them, to find that employer did not establish suitable alternate employment. While the administrative law judge noted that Ms. Edwards based her labor market survey on relevant factors, including claimant's psychological condition, functional illiteracy and low intellectual ability, he recognized that there was some question of bias, as she has filed a breach of contract suit against employer.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge