BRB No. 14-0148

DARYL R. JUDISH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: Nov. 24, 2014
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts (The Law Offices of Scott Roberts, LLC), Groton, Connecticut, for claimant.

Jeffrey E. Estey, Jr. (McKenney, Quigley, Izzo & Clarkin), Providence Rhode Island, for self-insured employer.

Before: HALL, Acting Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-LHC-00485, 2013-LHC-00417) of Administrative Law Judge Colleen A. Geraghty rendered on claims 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 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 back on January 2, 2002, while working for employer as an area superintendent when he was crawling through a submarine tank and fell through a lighting ring, hitting the floor. Tr. 33-34; CX 8. Claimant treated with Dr. Abella and attended physical therapy, but he did not lose time from work or receive restrictions due to his back injury. Over the years, claimant occasionally saw Dr. Abella for treatment of

his back pain.[1] CX 10; Tr. 34-39. Claimant took paid vacation from March 21-30, 2012. Tr. 46. On March 27, 2012, claimant again returned to Dr. Abella, complaining of back pain. CX 10 at 13. Dr. Abella issued work restrictions and an impairment rating for claimant's back. *Id.* Claimant did not return to work after his vacation; he retired on April 2, 2012, allegedly due to his back pain.[2] Tr. 42-46, 61; EX 4; EX 5. Claimant conceded he is capable of working in some capacity but has not looked for work. Tr. 67.

Claimant filed a claim under the Act, seeking compensation and medical benefits for his back injury.[3] The administrative law judge found that claimant established a prima face case of a work-related injury based on Dr. Abella's opinion and claimant's complaints of pain, but that employer rebutted the presumption with Dr. Krompinger's opinion.[4] Based on the record as a whole, the administrative law judge found claimant established that his back condition is related to his 2002 work injury. In so finding, the administrative law judge found claimant's testimony credible and Dr. Abella's opinion entitled to greater weight than Dr. Krompinger's, given Dr. Abella's status as claimant's treating physician. Based on the restrictions imposed on claimant by Drs. Abella and Krompinger,[5] the administrative law judge found that claimant cannot perform his usual

[1] On April 25, 2006, claimant saw Dr. Abella for back pain and returned to work without restrictions. CX 10. In 2010, claimant returned to Dr. Abella for his persistent back pain, and Dr. Abella issued work restrictions limiting claimant's overtime work. Tr. 34-39; CX 10 at 7-9. Claimant continued to experience pain at work. He testified that "everything" bothered his back, including climbing ladders and stairs, and crawling around the ship on the staging and inside the tanks. Tr. 37.

[2] Claimant testified that he retired because his "back just couldn't take it anymore . . . it's the sciatic nerve that really, really kills me . . . . I would hobble home some nights and wonder how I got up the sidewalk because it just killed me." Tr. 42.

[3] Claimant also alleged a hand injury, but the administrative law judge denied the claim. Claimant's hand injury is not at issue on appeal.

[4] Dr. Abella opined that claimant's condition is causally related to his 2002 work injury, and claimant testified that, since the 2002 injury, he has had chronic pain which progressed over the years from intermittent to constant. CX 10 at 4-6; CX 12; Tr. 37,42. By contrast, Dr. Krompinger opined that claimant's pain and symptoms are due to his pre-existing lumbar spondylosis and not necessarily to his 2002 work injury. EX 13 at 7, 25.

[5] Dr. Abella imposed restrictions on March 27, 2013, limiting standing and walking, and proscribing heavy lifting, climbing ladders, and overtime work. CX 10 at

employment which required significant walking, use of ladders, and contorting himself into awkward positions when crawling through tanks. Further finding that employer established the availability of suitable alternate employment as of March 13, 2003, and that claimant did not seek alternate employment, the administrative law judge awarded claimant permanent total disability benefits from April 2, 2012 to March 12, 2013, and ongoing permanent partial disability benefits from March 13, 2013, as well as medical benefits. Employer appeals the award, and claimant responds, urging affirmance.

Once, as here, the Section 20(a) presumption is invoked and rebutted, the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Under the aggravation rule, if a work-related injury contributes to, combines with, or aggravates a pre-existing condition, the entire resultant disability is compensable. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008).

Employer first contends the administrative law judge erred in finding that claimant established, based on the record as a whole, a causal relationship between his back condition and his 2002 work injury. Employer asserts there is nothing in the record to connect claimant's March 2012 back complaints to work. Rather, employer argues that claimant's back condition is related to a condition that pre-dated his 2002 injury. Specifically, employer relies on Dr. Krompinger's opinion that claimant's complaints are separate exacerbations or flare ups of his underlying lumbar spondylosis. EX 13 at 25. We reject employer's contention. On March 27, 2012, Dr. Abella diagnosed progressive lumbar left lateral spinal stenosis with recurrent left L4-radicular pain, and he opined "within reasonable medical probability" that it was "causally related from a work injury occurring on or about 1/2/02."[6] CX 10 at 13. Although Dr. Krompinger stated that claimant's 2012 complaints are not necessarily related to his 2002 work injury, the administrative law judge found his testimony skewed by employer's mischaracterization of claimant's back symptoms as being present "for literally decades," dating back to the

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13. Dr. Krompinger imposed restrictions on February 21, 2013, of at least light-duty work with no repetitive bending and no lifting over 15-20 pounds. EX 13 at 25.

[6] Employer concedes claimant injured his back at work on January 2, 2002. Emp. Br. at 14.

1970s and 1980s.[7] EX 13 at 8-10; *see generally Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Thus, in weighing the record as a whole, the administrative law judge rationally rejected Dr. Krompinger's opinion and assigned greater weight to Dr. Abella's opinion in light of his status as claimant's treating physician. *Id.*; *see also Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). We, therefore, affirm the administrative law judge's finding that claimant's 2012 back condition is related to his 2002 back injury at work as it is supported by substantial evidence. *Service Employees Int'l, Inc. v. Director, OWCP [Barrios]*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT).

Employer next asserts the administrative law judge erred in finding claimant entitled to disability benefits, alleging that claimant is a "voluntary retiree." Specifically, employer asserts that claimant's complaints of disabling back pain as the reason for his retirement are not credible because he did not seek out treatment for his pain until after his last day of active employment. We reject employer's contention. Initially, there is no dispute that claimant suffered a traumatic injury in 2002. Contrary to employer's assertion, the voluntary/involuntary retirement analysis is limited to occupational disease cases. 33 U.S.C. §§902(10), 908(c)(23), 910(d). *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997).[8] In a traumatic injury case, the relevant inquiry is whether a claimant's return to his usual work is precluded by his work injury, irrespective of his eligibility for retirement based on other factors. *Harmon*, 31 BRBS at 48. If the claimant establishes an inability to return to his usual work, the burden shifts to his employer to establish the availability of suitable alternate employment. *See Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

In this case, the administrative law judge rationally found that claimant is unable to perform his usual employment due to pain caused by his 2002 work-related back injury. Decision and Order at 16. This finding is supported by the opinion of Dr. Abella, who issued work restrictions and an impairment rating in 2012 attributing claimant's

[7] As the administrative law judge found, "there is only one office note from 1978 in which [c]laimant complained of back pain and the x-ray at that time showed no significant abnormalities." Decision and Order at 12.

[8] In *Harmon*, the Board held that an inquiry into the retirement status of a claimant is relevant only when the claimant has an occupational disease, as the 1984 Amendments to the Act provide a formerly unavailable remedy to retirees whose occupational disease manifests itself after retirement. *See* 33 U.S.C. §§902(10), 908(c)(23), 910(d); *Harmon*, 31 BRBS at 48. Thus, the retiree provisions were added to expand the disability benefits available to retired workers with occupational diseases.

back condition to his 2002 injury, and by claimant's own testimony that he did not return to work after his vacation because his work duties caused him too much pain. The administrative law judge credited claimant's explanations that he did not seek medical treatment more often because he did not think there were any treatment options available to improve his condition,[9] and that he avoided seeking work restrictions because he genuinely believed they would affect his performance ratings or cost him his job. *Id*. The administrative law judge's credibility determination is within her discretion. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, as both doctors of record issued restrictions in 2012 limiting claimant's use of ladders and repetitive bending, and as it is undisputed that claimant's position as an area superintendent required significant use of ladders and contorting himself when crawling through tanks, the administrative law judge rationally found that claimant can no longer perform his usual work due to his work injury. *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT); *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT). As employer did not establish the availability of suitable alternate employment until March 13, 2003, we affirm the administrative law judge's award of permanent total disability benefits from April 2, 2012 through March 12, 2013, and of ongoing permanent partial disability benefits from March 13, 2013.

[9] The administrative law judge noted that surgery was not recommended, and she credited claimant's testimony that taking medication made him sick and he did not like the risks associated with injection therapy. Decision and Order at 16; Tr. 36-37, 41

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge