BRB No. 99-0207

CRAIG A. MORVANT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOUISIANA LOCAL CONTRACTORS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Steven E. Adams (Miller & Adams, APLC), Baton Rouge, Louisiana, for claimant.

Patricia H. Wilton, Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-1515) of Administrative Law Judge Lee J. Romero, 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*. (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).

On April 3, 1995, claimant, a welder and shipfitter, slipped during the course of his

employment and landed on his side against a barge, twisting his back and suffering an aggravation of his pre-existing degenerative back condition and traumatic sciatica of his left leg. Employer voluntarily paid claimant temporary total disability compensation from the date of this incident through August 13, 1996. Claimant thereafter sought continuing total disability compensation, as well as certain medical expenses.

In his Decision and Order, the administrative law judge found that employer established the availability of suitable alternate employment as of June 14, 1996, and that claimant failed to demonstrate that he diligently sought such employment; accordingly, the administrative law judge awarded claimant temporary total disability compensation from the date of claimant's injury through June 14, 1996. Lastly, the administrative law judge found that the medical procedures requested by claimant, specifically a myelogram and CT scan, were neither reasonable nor necessary to the treatment of claimant's work-related condition and, therefore, denied their compensability under Section 7 of the Act, 33 U.S.C. §907.

Claimant now appeals, contending that the administrative law judge erred in denying him further compensation and in not holding employer liable for the requested medical procedures. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Initially, we note that in support of his petition for review claimant has submitted additional evidence developed subsequent to the January 29, 1998 hearing before the administrative law judge . As this evidence was not before the administrative law judge or considered by him in reaching his decision, we may not consider it on appeal.[1] *See* 20 C.F.R. §802.301(b).

Where, as in the instant case, claimant establishes that he is unable to perform his usual employment duties with his employer due to a work-related injury, claimant has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of specific jobs within the geographic area in which claimant resides which he is, by virtue of his age, education, work experience, and physical restrictions, capable of performing and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the employer makes such a showing, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure

[1]New evidence may be considered by the administrative law judge pursuant to the provisions of Section 22 of the Act, 33 U.S.C. §922.

such employment. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986); *see also Turner*, 661 F.2d at 1031, 14 BRBS at 156; *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

After review of the administrative law judge's decision, we find no error in his determination that employer established the availability of suitable alternate employment. Specifically, the administrative law judge found that employer met its burden of establishing the availability of suitable alternate employment based upon the specific positions identified by Mr. Crane, employer's vocational expert. Mr. Crane identified the positions of machinist, pest control technician, and backhoe operator as within claimant's physical restrictions of lifting less than 20 pounds with no repetitive bending, stooping or crawling.[2] CX 9. Each of these positions was approved by both Dr. Maki, claimant's treating physician, EX 16, and Dr. Cenac, EX 6. In finding that employer established suitable alternate employment based upon these identified positions, the administrative law judge specifically found that they were compatible with claimant's restrictions. Thus, as the administrative law judge's finding on this issue is supported by substantial evidence and consistent with law, it is affirmed. *See Sketoe v. Dolphin Titan Int'l,* 28 BRBS 212 (1994)(Smith, J., dissenting on other grounds); *Jones v. Genco, Inc.,* 21 BRBS 12 (1988).

Claimant next contends that the administrative law judge erred in finding that he did not exercise reasonable diligence in attempting to secure employment. If a claimant diligently tries to secure alternative employment, he may still be entitled to total disability benefits. *See Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT); *Hooe*, 21 BRBS at 258. In finding that claimant failed to demonstrate due diligence, the administrative law

[2]Claimant's contention that the vocational consultant failed to consider the impact of his "mental disease" is without merit as the record reflects that Mr. Crane testified not only to claimant's tested intelligence levels but also to his prior hospitalizations, finding them irrelevant in light of claimant's statement that he was undergoing treatment, and that he had worked for some time with these issues and was not experiencing any side effects or attention concentration issues related to his medication. EX 17.

judge relied upon the testimony of employer's vocational consultant that, based upon his follow-up contacts with prospective employers, claimant understated his qualifications, overstated his physical difficulties and did not demonstrate a positive attitude. EX 17. Additionally, the administrative law judge found that claimant failed to pursue employment opportunities on his own. HT at 36. The administrative law judge correctly recognized that it is claimant's burden to establish due diligence; in this instance, he found that claimant did not meet this burden. Accordingly, the administrative law judge's finding that claimant did not demonstrate diligence in seeking alternate work is affirmed. *See Dangerfield v. Todd Pacific Shipyards Corp.,* 22 BRBS 104 (1989).

Lastly, claimant challenges the administrative law judge's decision to deny his request for a myelogram and CT scan to be paid for by employer. Section 7(a) of the Act states that

> [t]he employer shall furnish such medical, surgical, and other attendance or treatment...medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a); *see Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be assessed against employer, however, the expense must be both reasonable and necessary, and it must be related to the injury at issue.[3] *See Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1120 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

[3]Claimant's argument that the Section 20(a), 33 U.S.C. §920(a), presumption of causation is relevant to the issue of entitlement to medical benefits, thus requiring as rebuttal evidence the unequivocal medical opinion of a physician to establish that requested medical procedures are neither reasonable nor necessary, is rejected. Section 20(a) applies to link claimant's physical harm with a work accident or working conditions; claimant bears the burden of proving that the medical expenses are reasonable, necessary and related to the work injury. *See Schoen v. U.S. Chamber of Commerce,* 30 BRBS 112 (1996).

In declining to award payment for the procedures sought by claimant, the administrative law judge relied on the opinions of Drs. Maki and Cenac, both of whom recommended epidural steroid injections. The administrative law judge found that these opinions outweighed that of Dr. Jackson, who recommends the myelogram and CT scan. In rendering this determination, the administrative law judge stated that Dr. Maki was claimant's treating physician and that his opinion was supported by Dr. Cenac, a board certified orthopedic surgeon, while Dr. Jackson had examined claimant only once and was the only doctor suggesting that the procedures be performed. It is well-established that the administrative law judge is entitled to weigh the evidence and draw his own conclusions from it. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). It was, therefore, within the administrative law judge's authority as factfinder to accord greater weight to the opinion of Dr. Maki, the treating physician, as corroborated by Dr. Cenac, than to that of Dr. Jackson. We therefore affirm the administrative law judge's determination that employer is not liable for these two procedures requested by claimant, as that finding is rational and in accordance with law.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge