BRB No. 99-0102

NATHAN E. HUFFMAN, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: 9/20/99
	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

J. Bradford Doyle, Corte Madera, California, for claimant.

Richard M. Slagle and Joan L.G. Morgan (Slagle Morgan & Ellsworth, LLP), Seattle, Washington, for employer/carrier.

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

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand Awarding Benefits (91-LHC-1502) of Administrative Law Judge Henry B. Lasky 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).

This case is before the Board for the third time. On April 26, 1990, claimant, a casual longshoreman, injured his right shoulder and cervical spine while working for employer. Claimant was initially treated on April 30, 1990, by Dr. Strange, who diagnosed a right shoulder strain, and referred claimant on May 3, 1990, to Dr. Mysliwiec, an orthopedic specialist, who opined that claimant could not return to his longshore work, but released claimant to light duty work on January 31, 1991. Paul Tomita, a vocational rehabilitation counselor, identified job opportunities within claimant's physical restrictions as a motel desk clerk, customer service representative, and bank teller, which were available as of January 31, 1991, and Dr. Mysliwiec approved these positions. On November 18, 1991, claimant returned to Dr. Strange, who noted that claimant was depressed. Dr. Strange attributed this condition to multiple causes, including claimant's cervical injury, and he prescribed Prozac. Employer voluntarily paid claimant temporary total disability compensation from May 4, 1990 through March 2, 1992. Claimant sought additional disability compensation and medical benefits under the Act for his cervical injury and depression.

In his initial decision, the administrative law judge rejected claimant's testimony that his depression is related to his cervical injury, and found that claimant's depression was due to his legal problems with the Internal Revenue Service and the State of Washington, a pending paternity suit, and his multiple unrelated medical problems. The administrative law judge also determined that any disability resulting from the cervical injury ceased as of January 31, 1991, when employer established the availability of suitable alternate employment which paid more than claimant was earning at the time of his injury. The administrative law judge further concluded that there was no credible evidence that claimant's depression would preclude him from performing the suitable alternate work established by employer, citing Dr. Mysliwiec's deposition testimony which reflects that claimant is capable of performing reasonably continuous gainful employment in light, sedentary occupations. CX 29 at 59-60.

Claimant appealed, arguing that he was entitled to ongoing temporary total disability compensation from November 18, 1991, for depression caused in part by his work-related cervical injury. Claimant also challenged the administrative law judge's calculation of his average weekly wage.

The Board vacated the administrative law judge's determination that claimant's depression was not related to his work injury as he did not analyze the relevant evidence in light of the Section 20(a) presumption, 33 U.S.C. §920(a). As it was undisputed that claimant suffers from depression and that a work accident occurred, the Board concluded that claimant was entitled to invocation of the Section 20(a) presumption, and remanded for the administrative law judge to reconsider claimant's entitlement to disability compensation.

With respect to the administrative law judge's determination that there was no credible evidence that claimant's depression would preclude his performing the suitable alternate work established by employer, the Board noted that the administrative law judge's reliance on Dr. Mysliwiec's deposition testimony was misplaced as his opinion that claimant was capable of performing gainful employment in light, sedentary occupations was premised only on claimant's physical capabilities. CX 29 at 59-60. In addition, the administrative law judge did not address Mr. Tomita's testimony that, while he was unaware of whether claimant's depression was chronic or acute or whether he had been prescribed medication for it, the condition would affect his employability. Tr. at 244. The Board, however, affirmed the administrative law judge's determination that claimant failed to establish a loss in his wage-earning capacity based on his physical injuries, concluding that the administrative law judge rationally determined that claimant's average weekly wage was $166.89, which was less than his unchallenged post-injury wage-earning capacity of $240. *Huffman v. Stevedoring Services of America*, BRB No. 92-2397 (April 29, 1996)(unpublished). Thereafter, employer sought review of the Board's Decision and Order before the United States Court of Appeals for the Ninth Circuit, which dismissed employer's appeal as interlocutory. *Stevedoring Services of America v. Director, OWCP*, No. 96-70520 (9th Cir. Sept. 16, 1996).

In a Decision and Order on Remand Denying Benefits, the administrative law judge did not follow the Board's decision holding claimant entitled to the benefit of the Section 20(a) presumption. Instead, citing *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), he reaffirmed his prior Decision and Order, stating that the Board misstated the law and facts with respect to Section 20(a) presumption, as employer did not concede that claimant has depression and as claimant did not present any credible lay or medical testimony sufficient to establish that he suffered from depression as a result of his April 1990 cervical injury. In finding that claimant was not entitled to the Section 20(a) presumption, the administrative law judge also noted that claimant did not mention depression until he saw Dr. Strange in November 1991, 19 months after his cervical injury, and that there was no medical diagnosis of clinical depression by a board-certified psychiatrist.[1] The administrative law judge determined, however, that even if the Section

[1]The administrative law judge specifically found that the testimony of claimant's girlfriend stating that claimant was depressed and that she believed that it was related to his inability to do what he had done previously, was insufficient to establish any relationship between claimant's alleged depression and his work injury, characterizing it as unconvincing, unreliable, and biased. In addition, he also found the testimony of claimant's classmate that claimant was depressed because of his insurance problems, insufficient to invoke Section 20(a) as it was tainted by information provided by claimant and was contradicted by testimony provided by Drs. Strange and Mysliwiec. Moreover, he determined that there was

20(a) presumption was invoked, it was rebutted and that the record as a whole is replete with evidence that any alleged stress, depression, anxiety, or similar condition is not causally related to claimant's 1990 cervical injury. Finally, the administrative law judge disagreed that he erred in failing to consider Mr. Tomita's testimony regarding claimant's employability; he found that as claimant did not have any work-related depression and as claimant had conceded that he had a $249 per week residual wage-earning capacity based on the alternate jobs identified by Mr. Tomita, consideration of this testimony was unnecessary. Accordingly, he again denied the claim.

Claimant again appealed to the Board. The Board initially noted that it specifically held in its first decision that claimant is entitled to the Section 20(a) presumption. Thus, on remand, the issues before the administrative law judge were the cause of claimant's depression in light of the presumption and the extent of his disability, if any, resulting therefrom.[2] Moreover, the Board stated that its prior holding that claimant was entitled to invocation of the Section 20(a) presumption is in accordance with *U.S. Industries*, 455 U.S. at 608, 14 BRBS at 631, as it was based on claimant's diagnosed depression and the

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no medical evidence of clinical depression by a board-certified psychiatrist but merely record notations by an orthopedist and family practitioner, Drs. Mysliwiec and Strange, who have no qualifications in this regard, and who merely accepted claimant's assertion that he felt depressed.

[2]Thus, in reconsidering claimant's entitlement to invocation of the Section 20(a) presumption on remand, the administrative law judge erred by failing to follow the Board's directive. *See Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990); 20 C.F.R. §802.405(a).

undisputed work injury, noting that the administrative law judge erred in raising for the first time the issue of whether claimant indeed suffers from depression, as employer challenged only the work-relatedness of the depression and as the administrative law judge found in his initial decision that claimant had depression, although it was neither work-related nor disabling.[3] *Huffman v. Stevedoring Services of America*, BRB No. 97-1259 (June 10, 1998) (Brown, J., dissenting).

The Board next held that the administrative law judge erred in his rebuttal analysis. The administrative law judge found the "purported" diagnoses of depression by Drs. Strange and Mysliwiec were not credible inasmuch as they were premised on claimant's mendacious complaints. The Board held that the administrative law judge abused his discretion by substituting his judgment for the uncontradicted opinion of claimant's treating physicians that claimant was experiencing depression, at least in part due to his work injury, based upon his finding that claimant's symptoms were not credible, citing *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84 (CRT) (2d Cir. 1997). The Board further stated that even if it were rational to discredit all the medical evidence of record, employer still would not have overcome the statutory presumption with affirmative evidence severing the presumed connection between claimant's depression and the work injury, and that the fact that the doctors attributed the depression to causes in addition to the work injury is insufficient to rebut Section 20(a). Inasmuch as employer did not introduce any evidence sufficient to rebut the Section 20(a) presumption, the Board held that a causal relationship between claimant's depression and his work injury was established as a matter of law.

Finally, the Board again remanded the case to the administrative law judge to reconsider claimant's entitlement to disability compensation, noting that Dr. Mysliwiec's opinion that claimant could perform light to sedentary work was premised only on claimant's physical condition and that Mr. Tomita stated that depression and any medication prescribed therefor would affect claimant's employability.

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[3]The Board noted that employer introduced no affirmative evidence that claimant was not depressed, and stated that in relying upon his own conclusion regarding claimant's complaints rather than on the medical evidence of record, the administrative law judge used identical reasoning to that rejected by the United States Court of Appeals for the Second Circuit in *Pietrunti v. Director, OWCP,* 119 F.2d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

On remand, the administrative law judge awarded claimant continuing total disability benefits, stating he was compelled to so find by the Board. The administrative law judge found that since employer did not present evidence of suitable alternate employment that claimant could perform with his mental condition, claimant is totally disabled.[4]

[4]The administrative law judge concluded that "[t]his Dickensian result from the Board's exegesis is an award of benefits to a Claimant whose mendacity cannot be reasonably disputed." Decision and Order on Remand Awarding Benefits at 5. As discussed, *infra*, in fact the award of benefits here is the result of employer's failure to defend a psychological injury claim with any medical evidence.

Employer appeals the administrative law judge's award of benefits.[5] Employer contends that claimant is not entitled to the Section 20(a) presumption because his depression did not occur at work, but at home 19 months after the work accident.[6] Employer further avers that claimant did not establish his *prima facie* case for invocation of the Section 20(a) presumption as he lied about being depressed and about the reasons for his alleged depression. Employer also contends that the Section 20(a) presumption is rebutted, and that there is no evidence of disability related to depression. Claimant responds, urging affirmance of the award of benefits. Employer subsequently filed a Motion for Summary Review, stating that the Board has previously ruled on each issue it has raised in the current appeal, and seeking summary affirmance so that it may appeal the Board's prior decisions to the court of appeals.

The Board has indeed ruled on the issues relating to causation, and the Board's prior opinions in this matter constitute the law of the case. *See, e.g., Buchanan v. Int'l Transportation Services*, 33 BRBS 32 (1999). We wish to reiterate a few points, however, in light of the employer's overriding contention, and the administrative law judge's firm belief, that claimant is not entitled to benefits because he, and those who testified on his behalf, are utterly lacking in credibility. An administrative law judge is entitled to determine the credibility of all witnesses, and these credibility determinations must be upheld by the Board unless they are inherently incredible and patently unreasonable. *Cordero v. Triple A*

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[5]Employer also appealed the administrative law judge's decision to the United States Court of Appeals for the Ninth Circuit, which dismissed the appeal for lack of jurisdiction. *Stevedoring Services of America v. Huffman*, No. 98-71409 (9th Cir. May 4, 1999).

[6]This contention is specious. Employer is liable for all consequences of the work injury, regardless of when those consequences manifest themselves. *See, e.g., Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *James v. Pate Stevedoring*, 22 BRBS 271 (1989); *Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987); *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986).

Machine Shop, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The Board in this case did not interfere with the administrative law judge's determinations that claimant and his lay witnesses are not credible. Rather, the Board held that notwithstanding those credibility determinations, the administrative law judge was not entitled to disregard medical evidence describing claimant's condition in the absence of other medical evidence calling those opinions into question.

The record contains evidence from only two medical doctors, both of whom treated claimant for some length of time.[7] Dr. Strange first diagnosed depression on November 18, 1991, which he noted claimant attributed to several sources, one of which is the cervical injury. CX 2. Dr. Strange prescribed Prozac, which he felt was improving claimant's condition. *Id.* at 31; CX 30 at 32. Dr. Mysliwiec first noted that claimant "felt depressed" on March 5, 1992.[8] Dr. Strange specifically stated that claimant was not a malinger, CX 2 at 37, that he never felt claimant was exaggerating, CX 30 at 29, and that he had no reason to believe claimant was trying to manipulate him. *Id.* at 48-49, 58. In light of the diagnosis of depression and the prescribing of Prozac, Dr. Strange's opinion that claimant was not malingering or misleading and that the depression is due at least in part to the work accident, and in view of the fact that employer did not introduce *any* contrary evidence in this case, *see Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); 33 U.S.C. §920(a), the administrative law judge's finding that claimant does not have work-related depression, on the basis of his impression that claimant is a liar, is an impermissible substitution of his judgment for that of the medical providers. *Pietrunti*, 119 F.3d at 1043-1044, 31 BRBS at 89-91(CRT) (administrative law judge erred in rejecting doctor's assessment of claimant's psychiatric condition, on the sole ground that the claimant's symptoms were subjective and not credible, in the absence of contrary medical evidence, as the doctor is the expert on this subject). As claimant is entitled to the Section 20(a) presumption as a matter of law, and as employer does not allege that the record contains any evidence sufficient to sever the connection between the depression and the work injury, claimant's depression is work-related as a matter of law.[9] *See Manship v. Norfolk &*

[7]Employer did not have claimant examined, in relation to claimant's mental status, by any physicians.

[8]Reading Dr. Mysliwiec's reports and deposition as a whole, one could conclude that he believes claimant's depression is due to claimant's knee injury, which is unrelated to the cervical injury. CX 29 at 32-33, 60-61. He stated he did not have a "good understanding" of the depression's relationship to the cervical injury. *Id.* at 61. This opinion, however does not sever the connection between the cervical injury and the depression, as opinions of alternative causes of the condition are insufficient to rebut Section 20(a). *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Western Ry. Co., 30 BRBS 175 (1996).

With regard to the issue of suitable alternate employment, the Board noted in its prior decisions that Dr. Mysliwiec's opinion regarding claimant's work restrictions and employability in light thereof could not support the administrative law judge's finding that suitable alternate employment was established, as Dr. Mysliwiec's opinion only accounted for claimant's physical restrictions. Dr. Strange, however, deposed that when claimant's depression began, he was unable to work, but he expected that as the condition improved, claimant would be able to engage in gainful employment. CX 30 at 25-29. Mr. Tomita testified he was aware of Dr. Strange's diagnosis of depression, but was unaware of whether it had resolved or whether claimant was prescribed medication for it (which he in fact was). Tr. at 243. He noted that whether the condition was acute or chronic could affect claimant's employability. Tr. at 244. Inasmuch as it is employer's burden to establish the availability of suitable jobs, taking into account claimant's physical and mental restrictions, *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995), and employer's evidence here accounts only for claimant's physical restrictions, claimant is entitled to benefits for total disability.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[9]We agree with employer that the Ninth Circuit's decision in *Parsons Corp. v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980), placing the ultimate burden of persuasion on the employer even after the presumption is rebutted, is no longer valid in light of the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43(CRT) (1994). *See Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995).

I concur:

ROY P. SMITH
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, dissenting:

As I did in the prior appeal to the Board, I dissent from my colleagues' decision. I agree with employer's contention that claimant does not suffer from depression related to his work injury, for the reasons given by the administrative law judge in his prior decisions. Therefore, I would reinstate the administrative law judge's denial of benefits.

JAMES F. BROWN
Administrative Appeals Judge