BRB Nos. 95-1168
and 96-0293

WILLIAM F. CORBETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order and the Order Granting Claimant's Motion for Modification and Affirming Decision of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Permanent Partial Disability from September 1, 1990, and Beyond, and Denying Compensation and Treatment for "Carpal Tunnel Syndrome" and the Order Granting Claimant's Motion for Modification and Affirming Decision (94-LHC-357/1329) 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 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, who worked at employer's shipyard for 43 years, primarily as a crane inspector, was awarded temporary total disability compensation from June 20, 1988, through July 7, 1988, for multiple work-related traumatic injuries to his neck. Employer's motion for reconsideration was summarily denied. On appeal, the Board affirmed the administrative law judge's award of benefits. *Corbett v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 91-931 (May 18, 1992)(unpublished). On July 8, 1988, claimant was released to return to work with climbing restrictions. Employer initially provided claimant with work inspecting shorter cranes and locomotives. On September 8, 1988, however, claimant informed his treating physician, Dr. Rinaldi, that his job was being changed to include nondestructive testing (NDT). Inasmuch as this job would place considerable pressure on claimant's neck, Dr. Rinaldi wrote a note to employer that day, indicating that claimant was restricted from performing NDT duties. Employer's clinic note dated September 8, 1988, reflects that claimant saw Dr. Rinaldi that day and that claimant brought in a note requesting therapy and light duty. Claimant continued to work until August 31, 1990, when he alleges he was forced to retire because of employer's continued refusal to honor his work restrictions and its assignment of NDT duties. Claimant also sought medical benefits for treatment of carpal tunnel syndrome which Dr. Rinaldi diagnosed in April 1992, following claimant's retirement.

In a Decision and Order dated February 22, 1995, the administrative law judge summarily found that claimant voluntarily retired and had not demonstrated that permanent partial disability should be paid for his cervical injury on or after September 1, 1990. The administrative law judge also denied claimant medical benefits for carpal tunnel syndrome, finding that while claimant was entitled to the Section 20(a) presumption based on Dr. Rinaldi's 1992 opinions relating claimant's carpal tunnel syndrome to his employment, employer had rebutted the presumption because the medical reports of Drs. Reagan, Peach, and Mullins did not confirm this diagnosis. Based on the record as a whole, the administrative law judge determined that neither compensation nor medical benefits for the "claimed" carpal tunnel syndrome was warranted. Claimant appealed the denial of his disability and medical benefits claims on March 13, 1995.

On April 24, 1995, claimant requested modification before the administrative law judge, in an effort to introduce new evidence to substantiate his claim that he suffers from work-related carpal tunnel syndrome. On October 17, 1995, the administrative law judge issued an Order Granting Claimant's Motion for Modification and Affirming Decision. In this Order, the administrative law judge determined that while the newly submitted March 1995, medical report of Dr. Peach did confirm that claimant had a diagnosis of carpal tunnel syndrome, the Section 20(a) presumption had been rebutted and the absence of causation established based on Dr. Peach's deposition testimony.

Accordingly, the administrative law judge reaffirmed his prior denial of medical benefits for this condition based on his determination that claimant's carpal tunnel syndrome was not work-related. Claimant appeals the administrative law judge's Order on modification, contending that the administrative law judge erred in finding the Section 20(a) presumption rebutted. BRB No. 96-0293. By Order dated November 13, 1995, the Board consolidated claimant's appeal of the administrative law judge's initial Decision and Order, BRB No. 95-1168, with his appeal of the administrative law judge's Order Granting Claimant's Motion for Modification and Affirming

Decision, BRB No. 96-0293, for purpose of decision. 20 C.F.R. §802.104(a).[1] Employer responds to both appeals, urging affirmance.

I. Disability for Cervical Injury

Claimant initially argues that the administrative law judge erred in denying him disability benefits for his cervical injury because it is undisputed that when he returned to work on July 8, 1988, he was unable to perform his former work, and employer thereafter neglected to provide him with suitable alternate employment, forcing him to retire. Claimant maintains that in denying his claim, the administrative law judge erred by failing to evaluate whether the work tendered by employer constituted suitable alternate employment in light of claimant's restrictions based on all of the relevant factors and evidence. Claimant asserts that although his treating physician, Dr. Rinaldi, imposed permanent restrictions regarding climbing, his post-injury work as a locomotive and jib crane inspector required him to climb vertical ladders and was only slightly lighter than his prior work. In addition, claimant avers that he was required to perform NDT, a job which Dr. Rinaldi expressly stated in a letter dated September 8, 1988, that claimant was not able to perform. Claimant avers that although employer was aware of Dr. Rinaldi's restriction regarding NDT, claimant had complained about this work to his supervisor and to Dr. Bobbitt at the shipyard's medical clinic, and he had filed a grievance, employer continued to place him in NDT jobs, ultimately forcing him to retire on August 31, 1990.

In addition, claimant asserts that the administrative law judge erred in concluding that claimant was not being required to work outside of his restrictions without providing any rationale or identifying the evidentiary basis for this finding in violation of the Administrative Procedure Act (APA), 5 U.S.C. §557(c). Claimant avers that the administrative law judge's findings that he was not required to work outside his restrictions and had voluntarily retired are irrational and not supported by substantial evidence. He contends that he should be awarded permanent partial disability benefits based on the difference between his average weekly wage of $513.75 and his post injury wage-earning capacity in a minimum wage job of $170 per week from August 31, 1990, and continuing.

In denying the disability claim, the administrative law judge summarily found that claimant was not entitled to permanent partial disability benefits because his job duties were changed in late 1988, he performed his new duties until he voluntarily retired in August 1990, and the medical records possessed by the employer prior to that time did not reflect that claimant was required to work beyond his physical limitations. Decision and Order at 8. While recognizing that in a note written to employer in June 1990, claimant had requested retirement on account of his injuries, the administrative law judge noted that claimant's statement was non-specific and not accompanied by medical reports. The administrative law judge further noted that claimant had acknowledged that his retirement paperwork was based on age and years of service rather than on medical disability. He

[1]The Board has determined that in consolidated cases, the one year period for review provided by P.L. 104-134 and the omnibus appropriation bill enacted on September 30, 1996, commences on the date the last appeal was filed, which is October 26, 1995, in this case.

then apparently inferred from this acknowledgement that claimant voluntarily retired and denied the claim for permanent partial disability benefits on or after September 1, 1990.

We agree with claimant that the administrative law judge's denial of permanent disability compensation cannot be affirmed. In making this determination the administrative law judge failed to adequately identify, discuss, and weigh the conflicting record evidence on the issue of whether claimant's post-injury work for employer constituted suitable alternate employment within his restrictions consistent with the requirements of the APA.

Although the administrative law judge determined that claimant's job duties changed in late 1988 and he remained in that capacity until he retired, the administrative law judge never explicitly identified claimant's physical limitations or compared them with claimant's specific job duties to determine whether the work he performed during that period was suitable. Moreover, although the administrative law judge found that the medical records possessed by employer prior to claimant's retirement do not reflect that claimant was required to work beyond his physical limitations, he did not identify the medical records which formed the basis for this conclusion.

In addition, the administrative law judge erred in disregarding Dr. Rinaldi's office note dated September 8, 1988, which indicated that claimant should not perform NDT, EX-2(f), as inconsequential based on the fact that there was no documentation that employer ever saw the note of that date until well after claimant's retirement. Contrary to the administrative law judge's determination, however, employer's knowledge of claimant's restrictions is not necessary for claimant to be disabled; the relevant inquiry is whether claimant is able to perform his usual work and, if not, whether employer established the availability of suitable alternate employment within his restrictions. *See Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). Moreover, the administrative law judge's finding that employer was unaware of the information contained in Dr. Rinaldi's September 8, 1988, note, CX-5, until after claimant retired is, in any event, incorrect, as employer's clinic note of September 8, 1988, states that claimant "saw Dr. Rinaldi today - brings note requesting therapy and light duty; states he has Motrin 800." EX-1(t).

Finally, although the administrative law judge found that claimant voluntarily retired because he acknowledged that he had filed his retirement paperwork based on his age and years of service, in reaching this conclusion, it appears that the administrative law judge took claimant's testimony out of context. Although claimant did testify that he retired at age 64 based on his age and years of service, Tr. at 18, he also indicated that the motivation behind his retiring was the fact that employer was requiring him to perform NDT work beyond his physical limitations. *See* Tr. at 17-18. In light of the totality of evidence which the administrative law judge did not consider, we vacate his denial of claimant's permanent disability claim. The case is remanded for him to reconsider this issue in light of all of the relevant evidence, and to identify and explain the evidentiary basis for any conclusions he makes consistent with the requirements of the APA. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985).

II. Carpal Tunnel Syndrome-Entitlement to Medical Benefits

As discussed previously, in his initial Decision and Order, the administrative law judge denied the claim for medical benefits for carpal tunnel syndrome based on his determination that the medical reports of Drs. Reagan, Peach, and Mullins, failed to confirm Dr. Rinaldi's September 1992 diagnosis of this condition. After reopening the record on modification to allow the submission of Dr. Peach's subsequent March 1995 report and deposition, which did confirm that claimant has carpal tunnel syndrome, the administrative law judge nonetheless reaffirmed his prior denial of medical benefits. In so concluding, the administrative law judge initially found that claimant was entitled to the Section 20(a) presumption based on Dr. Rinaldi's September 1992 opinion that claimant suffered from occupationally-related carpal tunnel syndrome. He then concluded, however, that employer established rebuttal of the Section 20(a) presumption based on the deposition testimony of Dr. Peach. Weighing the evidence as a whole, he ultimately concluded that claimant failed to establish that his carpal tunnel syndrome was work-related, based on his crediting of Dr. Peach's testimony.[2]

We conclude that the administrative law judge's denial of medical benefits for carpal tunnel syndrome cannot be affirmed because he erred in finding rebuttal established based on Dr. Peach's deposition testimony. Dr. Peach testified that carpal tunnel syndrome usually occurs spontaneously and can be due to many causes. Dr. Peach further opined that the fact that a period of 18 months had elapsed between claimant's employment and the manifestation of his symptoms made it impossible for him say that the probable cause of claimant's carpal tunnel syndrome was his work environment, EPX-1 at 8, 20, 21, 31, 32. This testimony is insufficient to establish rebuttal of the Section 20(a) presumption, however, because Dr. Peach did not explicitly rule out claimant's employment as a cause of his condition. *See generally Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). As there is no other evidence sufficient to establish rebuttal, we reverse the administrative law judge's finding that causation was not proven and hold that claimant has established that his carpal tunnel syndrome is work-related as a matter of law. Accordingly, the case is remanded to allow the administrative law judge to award claimant reasonable and necessary medical benefits for this work-related condition. *See Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).[3]

Accordingly, the administrative law judge's Decision and Order Denying Permanent Partial

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[2]Claimant argued in his initial appeal, BRB No. 95-1168, that in denying the claim for medical benefits in the initial Decision and Order, the administrative law judge erroneously determined that claimant did not have carpal tunnel syndrome. This argument has been rendered moot by the administrative law judge's subsequent reversal of that determination in his Order Granting Claimant's Motion for Modification and Affirming Decision.

[3]We reject employer's argument made in its response brief that if claimant's carpal tunnel syndrome is found to be work-related, it is entitled to Section 8(f), 33 U.S.C. §908(f), relief. Only medical benefits were awarded for this condition and even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. *See Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987).

Disability from September 1, 1990, and Beyond, and Denying Compensation and Treatment for "Carpal Tunnel Syndrome" is vacated, and the case is remanded for reconsideration of claimant's entitlement to permanent partial disability benefits for his cervical condition consistent with the requirements of the APA. BRB No. 95-1168. The administrative law judge's denial of medical benefits for carpal tunnel syndrome contained in the administrative law judge's Order Granting Claimant's Motion for Modification and Affirming Decision is reversed, BRB No. 96-0293, and the case is remanded for the administrative law judge to award claimant reasonable and necessary medial benefits for this condition.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge