BRB Nos. 96-0245
and 96-0245A

ROBERT C. BROWN)
)
Claimant-Respondent)
Cross-Petitioner)
)
v.)
)
BATH IRON WORKS CORPORATION) DATE ISSUED: ______________________
)
and)
)
BIRMINGHAM FIRE INSURANCE)
COMPANY/AMERICAN)
INTERNATIONAL ADJUSTMENT)
COMPANY)
)
Employer/Carrier-)
Petitioners)
Cross-Respondents) DECISION and ORDER

Appeals of the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Janmarie Toker (McTeague, Higbee, MacAdam, Case, Watson & Cohen), Topsham, Maine, for claimant.

Richard van Antwerp and Elizabeth Connellan (Robinson, Kriger & McCallum), Portland, Maine, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (93-LHC-3067) of Administrative Law Judge Frederick D. Neusner 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 July 22, 1988, while working for employer, claimant was rushed to the hospital in acute respiratory distress and was diagnosed as having hyperactive airway disease or asthma, due to inhalation of fumes, dust, and other industrial inhalants. Claimant was immediately removed from his work for employer as a grinder, and was placed in other employment at employer's facility. Claimant first worked in employer's alternate work program, but around September 1990 was placed in a position as a distribution clerk at employer's computer facility. Claimant continued to perform this clerical job successfully until February 3, 1993, when he was terminated for violating a company rule prohibiting threatening another employee after he made threatening remarks regarding his supervisor, Mr. Fitzgerald. On March 7, 1991, because claimant's asthmatic condition precluded him from passing the required physical examinations, claimant was forced to resign from the Air National Guard.[1] Due to the combined effect of his physical limitations, loss of wage-earning capacity, loss of his National Guard career, and resultant financial problems, including bankruptcy and an inability to pay for medical bills incurred after his daughter sustained a collapsed lung at birth, claimant alleged that he sustained severe mental strain and depression which resulted in his having homicidal dreams and an inability to sleep. The parties stipulated that claimant's pre-injury average weekly wage in his work for employer was $355, and that claimant was paid $47 per week for his part-time work in the National Guard. Employer voluntarily paid claimant partial disability compensation at a rate of $67 per week from July 13, 1989, through the time of the hearing. Tr. 11-12. Claimant sought permanent partial disability benefits under the Act from July 14, 1989 to February 2, 1993, and permanent total disability compensation thereafter, as well as medical benefits, alleging both physical and psychological problems resulting from the July 22, 1988, work injury.

The administrative law judge found that there was a causal connection between claimant's asthma and his employment. He also found that a partial but material causal relationship existed between claimant's hyperactive airways disease and such psychological symptoms he continues to suffer as a result of the work-related injury. The administrative law judge then determined that while claimant was unable to perform his usual work due to the physical effects of his work injury, employer had provided claimant with suitable alternate employment at its facility at all times since claimant was injured, that claimant was able to perform this clerical job with his physical and psychological problems, and that his loss of this job was a result of his termination and not due to his work-related condition. Nonetheless, the administrative law judge awarded claimant temporary total disability benefits from July 22, 1988, until March 12, 1992, and permanent total disability benefits thereafter. The administrative law judge further determined that claimant's average weekly wage was $355, his stipulated longshore earnings, reasoning that as claimant's longshore work during the year prior to his injury was regular and continuous his average weekly wage was properly calculated pursuant to Section 10(a), 33 U.S.C. §910(a), which unlike Section 10(c), 33 U.S.C. §910(c), does

[1]Prior to working for employer, claimant was in the military for three years. He then went to night school while continuing to serve part-time in the Air National Guard, where he received positive military evaluations, including special commendations for physical fitness. Claimant earned an Associate in Science degree in night school as part of his career plan to obtain a commission in the service.

not allow for consideration of claimant's earning capacity at the time of injury. In addition, he awarded claimant medical benefits for his physical and psychological conditions and determined that employer was entitled to an offset for the disability compensation it had previously paid.

Employer appeals the administrative law judge's award of permanent total disability benefits, alleging that the administrative law judge erred as a matter of law in awarding claimant permanent total disability compensation from March 12, 1992, until the present as employer established the availability of suitable alternate employment, and claimant's inability to continue performing this suitable work was due to his termination for threatening to kill his supervisor, which was unrelated to his work-related injury.[2] On cross-appeal, claimant challenges the administrative law judge's average weekly wage determination, arguing that the administrative law judge erred in excluding his military wages from this computation. Employer responds to claimant's appeal, urging affirmance of the administrative law judge's average weekly wage assessment.[3]

On appeal, employer initially argues that inasmuch as claimant was able to perform the clerical job provided by employer from both a physical and psychological perspective and would have been able to continue to successfully perform that job but for the fact that he was terminated for threatening to kill his supervisor, the administrative law judge erred in awarding him total disability benefits because claimant's inability to work stems from a legitimate personnel action rather than his work injury. Although we do not agree with employer that the administrative law judge misinterpreted Dr. Bourne's opinion, we hold that the administrative law judge erroneously awarded total disability benefits as a matter of law, vacate this award, and remand this case for further consideration.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment. In order to invoke the Section 20(a) presumption, claimant must prove that he suffered a harm and that employment conditions existed or an accident occurred which could have caused, aggravated, or accelerated the condition. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Stevens v. Tacoma Boatbuilding, Co*., 23 BRBS 191 (1990). Once claimant establishes a *prima facie* case, the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. *Holmes v. Universal Maritime Service Corp*., 29 BRBS 18 (1995); *Kier v. Bethlehem Steel Corp*., 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. *Stevens,* 23 BRBS at 191. It is well-settled that a psychological impairment which is work related is compensable

[2]Employer does not challenge the award of temporary total disability prior to March 12, 1992, or the award of medical benefits. These awards are thus affirmed.

[3]Since claimant's cross-appeal was filed on November 24, 1995, this date determines the one-year period for review.

under the Act. *See Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989). However, a legitimate personnel action is not a working condition that can form the basis of a compensable injury. *Marino v. Navy Exchange*, 20 BRBS 166 (1988). An injury need only be due in part to work-related conditions to be compensable under the Act. *See Peterson v. General Dynamics Corp.*, 25 BRBS 78 (1991), *aff'd sub nom.*, *Ins. Co. of North America v. U.S. Dept. of Labor,* 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

In the case at hand, the administrative law judge thoroughly evaluated all the medical evidence and came to the conclusion that a partial but material causal relationship does exist between claimant's hyperactive airways disease and such psychological symptoms as he continues to suffer as a result of the work-related injury. In arriving at this conclusion, the administrative law judge noted that claimant had established invocation of the Section 20(a) presumption, and employer had not established rebuttal. The administrative law judge found Dr. Bourne's psychiatric evaluation to be an authoritative summary of the events that led to claimant's discharge, and a reliable statement of the causal connection between the work related pulmonary disease and claimant's erratic behavior after the onset of the injury. Contrary to employer's assertion, the administrative law judge rationally determined that Dr. Bourne's opinion supports the finding of causal connection between the pulmonary injury and at least a material part of the psychological sequelae.[4]

Although the finding that claimant's psychological condition is work-related is supported by substantial evidence, this finding does not lead to the conclusion that claimant is totally disabled. To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. Once claimant has established that he is physically unable to return to his pre-injury employment, the burden shifts to his employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991). In order to meet this burden, the employer must show that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Id.; see also New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Jones v. Genco, Inc.,* 21 BRBS 12 (1988). As the administrative law judge noted, claimant's own testimony, as well as the opinion of Dr. Bourne, supports the fact that employer established suitable alternate employment in that claimant performed his clerical job successfully.

Where, as here, employer provides claimant with a suitable job, but claimant is terminated for reasons unrelated to his work-related disability, employer does not bear the renewed burden of

[4]Dr. Bourne concluded that it was his opinion that claimant sustained losses which are in part attributable to his occupational lung condition, that the loss of claimant's military aspirations had been a serious loss, along with the financial adversity and medical bills for his first born daughter. He further indicated that it was appropriate to conclude that claimant's psychological losses were attributable, in part, to his respiratory condition. CX-18.

showing other suitable alternate employment. *See, e.g., Brooks v. Newport News Shipbuilding & Dry Dock Co.,* 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993); *Harrod v. Newport News Shipbuilding & Dry Dock Co.,* 12 BRBS 10 (1980). In such a case, claimant is at most partially disabled, and his earnings in the suitable job form the basis for the administrative law judge to determine his wage-earning capacity. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Harrod*, 12 BRBS at 17. In the present case, the administrative law judge found that claimant's termination was the result of remarks he made to Donna Beauregard, and that pursuant to the testimony of Mr. Fitzgerald, had claimant not made these threatening remarks, he would have remained with employer. Furthermore, the administrative law judge relied on the opinion of Dr. Bourne that claimant was fully employed despite the issues of loss with which he was coping and that his unemployment came about because of the threatening remarks he made, which were unrelated to his employment related condition. CX-18. Accordingly, employer established suitable alternate employment, as well as that claimant's termination was unrelated to his job-related injury.

Since employer established the availability of suitable alternate employment, claimant is not permanently totally disabled. However, despite his finding that employer successfully established the availability of suitable alternate employment, the administrative law judge nonetheless awarded total disability benefits instead of partial disability benefits as he found that employer had failed to meet its burden of proof as to what claimant's clerical job paid at the time of the injury. In this respect, the administrative law judge erred.

An award for permanent partial disability in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988). If a claimant is unable to return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of injury are compared to claimant's pre-injury wages to determine if claimant has sustained a loss of wage-earning capacity as a result of his injury. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels that the job paid at the time of injury. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). As there was no evidence in the record as to what claimant's post-injury job paid at the time of the injury, rather than awarding permanent total disability, the administrative law judge should have utilized the National Average Weekly Wage to provide a percentage by which to adjust claimant's post-injury wages downward. *See Richardson*, 23 BRBS at 331. Accordingly, we vacate the administrative law judge's award of total disability benefits, and remand the case for the administrative law judge to make the appropriate adjustments to claimant's post-injury wages pursuant to *Richardson*. The administrative law judge should then calculate claimant's post-injury wage-earning capacity under Section 8(h) and award benefits pursuant to Section 8(c)(21), if claimant has a loss in wage-earning capacity.

Finally, we agree with claimant's assertion on cross-appeal that the administrative law judge erred in excluding his earnings from his part-time work for the National Guard from the calculation of claimant's average weekly wage under Section 10(a). Section 10(a) applies when "the injured

employee shall have worked in the employment in which he was working at the time of the injury, **whether for the same or another employer**, during substantially the whole of the year immediately preceding his injury." 33 U.S.C. §910(a). (emphasis added). Thus, the administrative law judge erred in disregarding claimant's additional earnings because they were from other employment. The wages which claimant was earning in all jobs held at the time are injury are includable in the average weekly wage calculation where, as here, claimant's ability to earn the wages in both the job in which he was injured and the job other than the one which claimant's injury occurred were affected by his work-related injury. *See Liberty Mutual Ins. Co. v. Briton*, 233 F.2d 699 (D.C. Cir. 1956); *Harper v. Office Movers/E.E. Kane, Inc.*, 19 BRBS 128 (1986); *Lawson v. Atlantic Gulf Grain Stevedores Co.*, 6 BRBS 770 (1977); *Stutz v. Independent Stevedore Company, Inc.*, 3 BRBS 72 (1977). *See also SGS Control Services v. Director, OWCP*, 86 F.3d 438 (5th Cir. 1996). Accordingly, we vacate the administrative law judge's determination that claimant's average weekly wage was $355 and, consistent with the parties' stipulations, modify his decision to reflect claimant's entitlement to compensation based on an average weekly wage of $402, which results from the addition of his $355 per week earnings with employer and the $47 per week he earned working part-time in the National Guard.

Accordingly the administrative law judge's award of permanent total disability benefits is vacated, and the case is remanded for the administrative law judge to reconsider the extent of claimant's disability in accordance with this opinion. The administrative law judge's average weekly wage determination is also vacated, and his Decision and Order is modified to reflect claimant's entitlement to compensation based on an average weekly wage of $402. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge