BRB No. 10-0440

LARRY D. REMO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EMPIRE SCAFFOLDING	)	DATE ISSUED: 02/23/2011
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Larry D. Remo, Powhatan, Louisiana, *pro se*.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, appearing without representation, appeals the Decision and Order (2009-LHC-00739) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq*. (the Act). In reviewing an appeal in which claimant is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine if they are supported by substantial evidence, are rational, and are in accordance with law; if they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his left lower extremity on December 9, 2006, during the course of his employment for employer as a scaffold builder while being transferred in heavy seas on a rope swing from an oil platform to a ship. As a result of the accident, claimant was unable to work until January 7, 2007, when he returned to light-duty work for employer. He continued to work in this capacity until February 7, 2007, when he complained to his treating physician, Dr. Dansby, of lower back spasms due to his left leg injury. Tr. at 40-41; CX 2. Employer paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from February 9, 2007 to June 1, 2007, the date upon which it believed claimant's treating physician released claimant to return to light-duty work. Claimant was examined by Drs. Berliner, Pribil, and Cupic for continued pain in the left leg, back and neck. CX 5. Dr. Berliner diagnosed thoracic interscapular pain, lumbar pain, and left ankle pain. He ordered MRI testing of claimant's cervical, thoracic and lumbar spine, which revealed a herniated disc at L5-S1, a bulging disc at C4-C5, and straightening of the cervical lordotic curve consistent with muscle spasm. CX 6. Based on the MRI results, Dr. Pribil diagnosed neck pain with cervical radiculopathy, low back pain with lumbar radiculopathy, and thoracic pain, which he opined was probably caused by landing roughly on the deck of the supply ship. CX 6. Dr. Pribil recommended that claimant undergo a lumbar microdiscectomy at L5-S1. Dr. Cupic diagnosed claimant with cervical, thoracic and lumbar strains and a contusion of the left foot. Claimant sought compensation for temporary partial disability, 33 U.S.C. §908(e), from June 2, 2007 to February 20, 2008, and for ongoing temporary total disability commencing February 21, 2008. Claimant also sought medical benefits for his lumbar and cervical conditions, including reimbursement of out-of-pocket expenses related to those conditions. 33 U.S.C. §907.

In his decision, the administrative law judge found that claimant is not entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his back and neck conditions to the work injury. The administrative law judge found that claimant did not report any back pain until February 7, 2007, or neck pain until February 20, 2008. The administrative law judge found that claimant's subjective complaints of neck and back pain are not credible and, therefore, that claimant failed to establish that he suffered any neck and back injuries. The administrative law judge found, however, that claimant cannot return to his usual employment due to his work-related left leg injury, and that employer established the availability of suitable alternate employment on July 19, 2007, when claimant was offered suitable light-duty work in employer's shop paying $10 per hour and a weekly per diem of $275. The administrative law judge calculated claimant's average weekly wage as $439.80 pursuant to Section 10(c), 33 U.S.C. §910(c), by dividing the wages claimant earned in 2006, $21,550.41, by the 49 weeks he worked that year. The administrative law judge awarded claimant compensation for temporary total disability from December 10, 2006 to January 7, 2007, and from February 8, 2007 to July 19, 2007. Claimant was awarded compensation for temporary partial disability based on a weekly loss of wage-earning capacity of $39.80 from January 8, 2007 to February 7,

2007. Claimant appeals the administrative law judge's decision. Employer responds, asserting that the administrative law judge's decision should be affirmed.

As claimant appeals without counsel, we will address the findings of the administrative law judge that are adverse to claimant. We first address the administrative law judge's finding, based on claimant's lack of credibility, that claimant failed to establish a *prima facie* case of neck and back injuries related to the December 2006 work accident. Decision and Order at 14-15. The initial medical and accident reports describe claimant's injury as a sprain or strain of the left leg, knee or ankle. CXs 1-2. Claimant's first recorded complaint of back pain was on February 7, 2007, when he attributed back spasms to his leg injury. CX 2. The administrative law judge found it significant that claimant was released to work without restrictions only a week prior to complaining of back pain. Similarly, the first recorded complaint of neck pain is more than one year after the work accident on February 20, 2008. CX 5. The administrative law judge found that claimant's subjective reporting of neck and back injuries is not credible based on his memory lapses at the hearing as to significant facts and sequences of events and factually incorrect statements. The administrative law judge therefore concluded that "the evidence fails to establish claimant suffered a neck or back injury" and that the Section 20(a) presumption is not invoked. Decision and Order at 15.

We cannot affirm the administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption that his neck and back conditions are related to the work accident. In order to be entitled to the Section 20(a) presumption in this case, claimant must establish a *prima facie* case by showing that he suffered a harm and that a work-related accident occurred that have caused the harm. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986). Claimant is not required to affirmatively prove that his work accident in fact caused or aggravated the harm; rather, claimant need establish only that the work incident could have caused or aggravated the harm. *See Sinclair v. United Fund & Commercial Workers*, 23 BRBS 148 (1989); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). If claimant establishes the elements of his *prima facie* case, Section 20(a) applies to presume the work-relatedness of claimant's harm. *See Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008).

The administrative law judge erred in denying the claim on the ground that claimant's complaint of back and neck pain is not creditable. The record contains uncontradicted, objective medical evidence that claimant has sustained harm to his back and neck. The May 8, 2008 MRI test results show claimant has a herniated disc at L5-S1, a bulging disc at C4-C5, and straightening of the cervical lordotic curve consistent with muscle spasm. CX 6 at 145-149. These test results establish the harm element of claimant's *prima facie* case, irrespective of claimant's credibility as they establish that

something has gone wrong with claimant's frame. *See Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968); *see also S.K. [Kamal] v. ITT Industries, Inc.*, 43 BRBS 78 (2009). The fact that claimant's initial neck and back x-rays were negative does negate the findings on the later, more sophisticated tests.

Claimant also has established the "accident" element of his *prima facie* case. The fall from the rope swing unquestionably occurred and this fall "could have" resulted in harm to claimant's back and neck. Claimant need not establish at this juncture that the fall actually caused the harm, and claimant's theory as to how the neck and back injuries occurred "is not a mere fancy." *Wheatley,* 407 F.2d at 313; *see also Stevens v. Tacoma Boatbuilding Co.,* 23 BRBS 191 (1990); *Sinclair*, 23 BRBS 148. Moreover, Dr. Pribil, the only physician to address causation in terms of claimant's back and cervical conditions, opined in his April 10, 2008 report that, "[M]edical probability that the patient's injuries were caused by landing roughly on the deck of the supply ship." CX 6 at 139. Notwithstanding that claimant first reported back pain in February 2007 and neck pain in February 2008, there is sufficient objective evidence of record entitling claimant to the Section 20(a) presumption linking his neck and back conditions to the work accident of December 2006. The administrative law judge's finding that claimant's subjective reporting of neck and back pain is not credible is not sufficient to support his finding that claimant failed to establish harm to his neck and back in view of the objective MRI evidence of such injuries and the medical opinion of Dr. Pribil linking these injuries to the work accident. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989). Accordingly, we reverse the administrative law judge's finding that claimant failed to establish a *prima facie* case of neck and back injuries related to the December 2006 work accident.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The aggravation rule provides that employer is liable for the totality of the claimant's disability if the work injury aggravates a pre-existing condition. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*).

The administrative law judge did not address rebuttal of the Section 20(a) presumption since he found that claimant did not establish a *prima facie* case. The record shows that claimant previously strained his neck and lumbar spine in a motor vehicle accident in November 1996 and he sustained neck and thoracic spine strains from a motor vehicle accident in February 2005. CX 3 at 2-3. This evidence of prior neck and back injuries is insufficient as a matter of law to rebut the Section 20(a) presumption. The

mere existence of prior injuries cannot rebut the Section 20(a) presumption as it cannot constitute substantial evidence that claimant's condition was not aggravated by the accident at work. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). Moreover, the record does not contain substantial evidence that claimant's back and neck conditions were not caused or aggravated by the work injury. Dr. Pribil's opinion that claimant's neck and back conditions are related to his landing roughly on the deck of the supply ship is the only medical opinion of record addressing the cause of claimant's injuries. As none of the other physicians of record stated that claimant's neck and back conditions were not caused or aggravated by the work accident, their opinions do not constitute substantial evidence sufficient to rebut the Section 20(a) presumption. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *see also C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008). As there is no other evidence of record that can rebut the Section 20(a) presumption, we reverse the administrative law judge's finding that claimant's neck and back injuries are not work-related. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). Claimant therefore is entitled to reasonable and necessary medical benefits for his neck and back conditions. 33 U.S.C. §907(a); *see generally Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). Claimant's supplemental pre-hearing statement raised the issue of his entitlement to reimbursement for out-of-pocket medical expenses after August 20, 2008, for treatment of these conditions. The administrative law judge, therefore, must address this issue on remand.

The administrative law judge addressed the extent of temporary disability resulting from claimant's leg injury.[1] Decision and Order at 15-16. The administrative law judge found that claimant cannot return to his usual work because of his leg injury, but that employer established the availability of suitable alternate employment, based on its July 19, 2007 offer of light-duty employment at its facility. The administrative law judge calculated claimant's average weekly wage by dividing claimant's 2006 earnings of $21,550.41 by the 49 weeks he worked in 2006 to derive an average weekly wage of $439.80. Decision and Order at 13. The administrative law judge found that employer's offer of suitable alternate employment paid $10 per hour for 50 hours of work per week and a weekly per diem of $275. Decision and Order at 16; *see* EX 1. The administrative law judge noted that if the number of hours worked were reduced to 40 with a corresponding reduction in the per diem, claimant would still earn $620 per week, which

[1]The parties stipulated that claimant's leg condition had not reached maximum medical improvement. Therefore, claimant's recovery for this injury is not limited to the schedule. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

is more that his average weekly wage of $439.80. Decision and Order at 17 n.77. Accordingly, the administrative law judge found that claimant did not sustain a post-injury loss of wage-earning capacity due to his leg injury and is not entitled to temporary partial disability benefits as of July 19, 2007. *See* 33 U.S.C. §908(h).

The administrative law judge's finding that employer established the availability of suitable alternate employment based on its July 19, 2007 offer of light-duty employment is supported by substantial evidence, as it relates solely to claimant's leg injury.[2] *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). However, the administrative law judge did not assess the effects of claimant's neck and back conditions on the suitability of this job. Therefore, we must remand the case for further findings in this regard.[3] *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). We affirm as within the administrative law judge's discretion, the calculation of claimant's average weekly wage pursuant to Section 10(c) of the Act. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified in part on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000). Moreover, should the administrative law judge find on remand that employer's offer of light-duty employment satisfies its burden of establishing the availability of suitable alternate employment, we affirm the administrative law judge's calculation of claimant's post-injury wage-earning capacity for a 40-hour per week as it is supported by substantial evidence.[4] *See generally B&D Contracting v. Pearley*, 548 F.3d 338, 42 BRBS 60(CRT) (5th Cir. 2008).

---

[2]Dr. Sandifer released claimant to work in June 2007, from the perspective of claimant's left leg injury. CX 3.

[3]Although the administrative law judge found that employer's light-duty job established the availability of suitable alternate employment, the administrative law judge incorrectly stated that "Claimant was temporarily totally disabled with no loss of earning capacity" from the date he found that employer offered claimant the job on July 17, 2007. *Id*. at 17. Should the administrative law judge find on remand that employer established the availability of suitable alternate employment, claimant is, at most, partially disabled from the date suitable alternate employment is established. *See Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991).

[4]If, on remand, the administrative law judge concludes that claimant does not currently have a loss of wage-earning capacity due to his work injuries, he may address claimant's entitlement to a nominal award, consistent with law. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *see also Gillus v.*

Accordingly, the administrative law judge's finding that claimant's neck and back conditions are not related to the December 9, 2006 work injury is reversed. The administrative law judge's finding that employer established the availability of suitable alternate employment is vacated and the case is remanded for further findings consistent with this opinion. The administrative law judge shall also address claimant's entitlement to medical expenses for his work-related neck and back condition. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

Newport News Shipbuilding & Dry Dock Co., 37 BRBS 93 (2003), *aff'd*, 84 F.App'x 333 (4th Cir. 2004).