BRB No. 96-0295

DEANNIE FRANKLIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY, FORT GORDON, GEORGIA	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of George A. Fath, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-2083) of Administrative Law Judge George A. Fath 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 August 17, 1986, claimant sustained a back injury while performing custodial work during the course of her employment for employer; claimant contends that this work-related incident has resulted in ongoing physical and psychological difficulties. Claimant returned to work a few days later and continued to work until January 1987; she has not worked since that time. Claimant underwent surgery for a possible disc problem on April 18, 1988. Employer paid temporary total disability benefits to claimant for the periods of August 18 to September 23, 1986, and from January 15, 1987, until March 14, 1994. 33 U.S.C. §908(b).

In his Decision and Order, the administrative law judge initially noted that the record

contained complaints of depression but no medical diagnosis of clinical depression and stated that this condition is not connected to the work-incident. Next, the administrative law judge found that claimant is incapable of performing her usual employment duties as a housekeeper for employer, that claimant reached maximum medical improvement, that employer established the availability of suitable alternate employment as of February 22, 1994, and that claimant suffered no loss of wage-earning capacity as of that date. Accordingly, the claim for additional compensation was denied.

On appeal, claimant challenges the administrative law judge's denial of her claim for compensation. Employer has not responded to this appeal.

Claimant initially contends that the administrative law judge erred in failing to link her psychological condition, specifically her depression, to her August 17, 1986, work incident. In his decision, the administrative law judge declined to find a causal relationship between claimant's psychological condition and her employment, stating

> [t]he record contains complaints of depression, but there is no medical diagnosis for clinical depression. The term appears as a complaint in the medical histories reported by claimant's doctors. It is a recent complaint, and it is not connected to the injury by time, or medical opinion.

See Decision and Order at 4.

It is well-settled that a psychological impairment, which is work-related, is compensable under the Act. *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989). Furthermore, the Section 20(a), 33 U.S.C. §920(a), presumption is applicable in psychological injury cases. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 384 n.2 (1990). In order to invoke the Section 20(a) presumption, claimant must establish that she has sustained a harm and that an accident occurred or working conditions existed which could have caused that harm. *See Sanders*, 22 BRBS at 340.

In the instant case, the parties stipulated that an accident occurred on August 17, 1986, and medical evidence of record, specifically the opinion and reports of Dr. Snowdy, establishes the existence of a harm, *i.e.*, depression. *See* EX 12. Claimant, thus, has established her *prima facie* case and is entitled to invocation of the Section 20(a) presumption. We, therefore, vacate the administrative law judge's finding on this issue, and remand the case for the administrative law judge to consider whether employer has rebutted the presumption. Specifically, on remand, the administrative law judge must consider whether employer rebutted the presumption with specific and comprehensive evidence that claimant's psychological condition was not related to her employment injury. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

Claimant next contends that the administrative law judge erred in finding she had reached maximum medical improvement. Specifically, claimant asserts that since she is currently being treated for depression, a finding of maximum medical improvement is inappropriate at this time. We disagree. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Thus, a finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984). In his decision, the administrative law judge found that the medical consensus is that claimant has reached maximum medical improvement. Specifically, the administrative law judge noted that Dr. Snowdy, who treated claimant for both her physical and psychological complaints, opined that claimant had reached maximum medical improvement and was capable of performing light duty work. *See* CX 12 at 77. Dr. Snowdy's opinion is supported by that of Dr. Crosland, who opined that claimant reached maximum medical improvement and probably did so within six months of her surgery. *See* CX 11. Thus, even if the administrative law judge finds on remand that claimants' depression is related to the August 1986 work incident, such a finding would not affect the administrative law judge's finding that claimant reached maximum medical improvement, which is supported by substantial evidence. Accordingly, the administrative law judge's finding on this issue is affirmed. *See generally Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986).

Lastly, claimant asserts that the administrative law judge erred in failing to find that she is totally disabled as a result of the August 1986 work incident. Where, as in the instant case, a claimant is unable to return to her usual employment duties, the burden shifts to employer to establish the existence of realistically available job opportunities within the geographical area where the claimant resides which she is capable of performing, considering her age, education, work experience, and physical restrictions, and which she could secure if she diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing. *See Wilson v. Dravo Corp.*, 22 BRBS 459 (1989) (Lawrence, J., dissenting). If employer establishes the availability of suitable alternate employment, claimant nevertheless can prevail in her quest to establish total disability if she demonstrates that she diligently tried and was unable to secure such employment. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In the instant case, the administrative law judge, based upon the testimony of employer's vocational consultant, Ms. Cayne, concluded that employer established the availability of suitable alternate employment. Ms. Cayne identified ten job opportunities which were within Dr. Snowdy's physical restrictions and were specifically approved by Dr. Crosland as within claimant's physical

capacity.[1] Ms. Cayne based her job survey on the most restrictive limits proposed by Drs. Snowdy and Crosland, as well those placed on claimant by the Work Performance Center, which also evaluated claimant. Although limitations provided by medications must be considered in determining the availability of suitable alternate employment, *see Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992), the record reflects that neither Dr. Snowdy, who treated claimant for both her physical and psychological conditions, nor Dr. Crosland indicated that claimant's medications were problematic. Rather, both physicians released claimant to light duty work without indicating that claimant was adversely affected by any continuing treatment. In this regard, Dr. Crosland specifically reviewed the identified positions and stated claimant could perform all of the included jobs. DX 13-1 at 31. Based upon the record before us, the administrative law judge's finding that claimant is capable of performing the identified jobs of sales clerk and cashier, since those positions are within her physical restrictions and her academic skills, is supported by substantial evidence and consistent with law. *See Wilson*, 22 BRBS at 465; *Jones v. Genco, Inc.*, 21 BRBS 12 (1988). Accordingly, we affirm the administrative law judge's finding that employer has established the availability of suitable alternate employment.

Claimant additionally contends that the administrative law judge erred in failing to address her testimony that she did attempt to secure work post-injury but was unable to do so. Claimant testified that she sought employment as a cashier and/or clerk in 1993 and 1994 but was unable to obtain a job. Tr. at 43-46. Although the administrative law judge noted that claimant made an attempt to return to work by applying for a job as a sales clerk, he concluded that

> ...claimant has not, and will not seek employment not because she lacks the physical ability, but rather because she lacks the will to work. Her attitude as well as her prognosis is poor. There is nothing the employer, or anyone but claimant can do about that.

See Decision and Order at 6. We hold that the administrative law judge's failure to address both the totality of claimant's testimony regarding her attempts to secure employment as well as the copies of employment applications contained in the record, *see* EX 12 at 51, requires that we vacate the administrative law judge's finding on this issue. Accordingly, we remand the case to the administrative law judge for him to consider all of the evidence and testimony regarding claimant's attempts to secure post-injury employment. *See Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT); *Hooe*, 21 BRBS at 258.

Accordingly, the administrative law judge's Decision and Order is affirmed in part, vacated in part, and remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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[1]We note that claimant's statement that these employers were not contacted is in error as the record reflects that Ms. Cayne telephoned the identified employers to establish general job duties, discussed some of the physical requirements and restrictions faced, and the options of whether the job could be physically and safely performed within those restrictions. Tr. at 79-81, 88-89.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge