BRB No. 08-0288

D.E.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PETROLEUM SERVICE CORPORATION	)	DATE ISSUED: 08/12/2008
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-In-Interest	)	DECISION and ORDER

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

Lloyd N. Frischhertz and Dominick F. Impastato, III (Frischhertz & Associates), New Orleans, Louisiana, for claimant.

F. Scott Kaiser and Erin Wolder-Doomes (Phelps Dunbar LLP), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2006-LHC-0288) 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 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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).

Claimant, while working for employer in 1998 and 2001, sustained injuries to his neck and lower back respectively. On August 19, 2002, claimant sustained another work-related injury to his back. Claimant subsequently experienced back and right leg pain for which he has since undergone medical treatment. Claimant has not returned to work for employer; however, in September 2003, claimant commenced unpaid employment in a grocery store owned by his wife's family. In October 2004, claimant discontinued this employment due to his ongoing symptoms of back pain and the recommendation of his treating physician. Employer voluntarily paid claimant temporary total disability compensation from August 20, 2002, through September 15, 2003, and permanent partial disability compensation from September 16, 2003, through October 11, 2004. *See* 33 U.S.C. §908(b), (c)(21).

At the formal hearing, claimant sought permanent total disability compensation from October 12, 2004, and continuing. In response, employer averred that claimant remains only partially disabled; alternatively, employer asserted that if claimant is totally disabled, that disability is due to a pre-existing condition and/or a subsequent non work-related automobile accident. In his Decision and Order, the administrative law judge found that employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption with regard to the causal relationship between claimant's lumbar pain and his employment. After assuming, *arguendo,* that rebuttal had been established by employer, the administrative law judge found that the preponderance of the evidence demonstrates that claimant's August 19, 2002, work-incident aggravated his pre-existing degenerative lumbar disc disease, and that this condition thus became symptomatic and resulted in claimant's continuing back pain. Next, the administrative law judge found that claimant's condition reached maximum medical improvement on November 20, 2002, and that the evidence establishes that claimant is unable to return to gainful employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from August 20, 2002, to November 20, 2002, permanent total disability compensation from November 21, 2002, to September 15, 2003, permanent partial disability compensation from September 16, 2003, to October 11, 2004, and permanent total disability compensation from October 12, 2004, and continuing. 33 U.S.C. §908(a), (b), (c)(21). Lastly, the administrative law judge denied employer's request for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's finding that claimant's present back condition and pain are related to his employment with employer. Employer additionally contends that the administrative law judge erred in awarding claimant total disability compensation subsequent to October 11, 2004. Alternatively, employer asserts that the administrative law judge erred in determining that it did not establish entitlement to relief pursuant to Section 8(f) of the Act.[1] Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Causation

Employer initially challenges the administrative law judge's finding that claimant's present symptoms, specifically his back pain, are causally related to his August 19, 2002, work-injury. In support of its contentions of error, employer avers that claimant's conditions subsequent to October 11, 2004, are the result of either the gradual progression of his pre-existing degenerative disc disease or claimant's involvement in a September 10, 2004, automobile accident. Once, as in this case, the Section 20(a), presumption has been invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's conditions were not caused or aggravated by his employment.[2] *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury.[3] *See, e.g., Cairns v. Matson*

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[1] The Board has received employer's petition requesting that the Board schedule this case for oral argument. 20 C.F.R. §802.305. As oral argument is not necessary for the disposition of this appeal, employer's request is denied.

[2] Although employer challenges in its brief the application of the presumption at Section 20(a) of the Act, it concedes that a work accident occurred on August 19, 2002, and that claimant has experienced continuing back pain from that date through the present day. We therefore affirm the administrative law judge's determination that claimant is entitled to invocation of the Section 20(a) presumption.

[3] The aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). This rule applies not only where the underlying condition itself is

Terminals, 21 BRBS 252 (1988). An opinion given within a reasonable degree of medical certainty that the employee's injury is not work-related is sufficient to rebut the Section 20(a) presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

Moreover, employer can rebut the presumption by producing substantial evidence that claimant's disabling condition was caused by a subsequent non work-related event that was not the natural or unavoidable result of the initial work injury. *See Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983); *Cyr v. Cresent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987), *aff'd mem.* No. 89-4803 (5th Cir. Apr. 19, 1990); *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995). Where the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, employer is relieved of liability for disability attributable to the intervening cause. *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993). 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 O'Kelley*, 34 BRBS 39; *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

We affirm the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption linking claimant's present symptoms to his employment with employer, as he rationally found the opinion of Dr. Clark, upon whom employer relies in support of its contention of error, did not rebut the presumption. Dr. Clark opined that claimant's August 19, 2002, work-incident resulted in his pre-existing degenerative lumbar disc disease becoming symptomatic, that consequently this work-injury triggered claimant's back pain which has continued since the work-incident, and that, therefore, claimant's present disability is a result of his August 19, 2002, work-injury. *See* CX 5 at 28-29, 42. Thus, as the opinion of Dr. Clark supports the conclusion that claimant's August 19, 2002, work-injury was a precipitating cause of the onset of his continuing back pain and disability, it cannot rebut Section 20(a).[4] Moreover, the sole medical report authored by Dr. Farries following claimant's September 2004 automobile accident does not address this issue. *See* EX 14 at 237; *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). Accordingly, as the presumption has not been rebutted, we

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affected but also where the injury "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986).

[4] To support a finding of rebuttal, employer's reliance is misplaced on Dr. Clark's opinion that claimant's condition reached maximum medical improvement, as the issue of whether claimant's condition is permanent pertains to the nature of his disability, not to the presumed causal link between his condition and his employment with employer.

affirm the administrative law judge's finding that claimant's present back condition with accompanying pain is causally related to his employment with employer. *See Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

Extent of Disability

Employer next challenges the administrative law judge's award of total disability compensation to claimant subsequent to October 11, 2004; specifically, employer avers that claimant was, at a minimum, capable of part-time sedentary employment as of October 11, 2004, and that it established the availability of such employment.[5] It is well-established that where, as in the instant case, claimant has established a *prima facie* case of total disability by demonstrating his inability to perform his usual employment duties with employer, the burden shifts to employer to establish the availability of suitable alternate employment.[6] *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that in order to meet this burden, employer must establish that job opportunities are available within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir.), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Turner*, 661 F.2d 1031, 14 BRBS 156. In determining the extent of claimant's current disability, the administrative law judge in this case appropriately began by reviewing the relevant evidence in order to assess claimant's physical capabilities.

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[5] Employer avers that it correctly reduced its permanent partial disability payments to claimant commencing September 16, 2003, when claimant began unpaid employment in a family-owned grocery store, based upon claimant's potential earning capacity at that time. *See* Employer's br. at 17. The administrative law judge determined that claimant, who did not brief this issue, abandoned any claim regarding additional benefits during this period of post-injury employment. Decision and Order at 29.

[6] Employer concedes that claimant is incapable of resuming his usual employment duties as a tankerman. *See* Employer's br. at 14.

Claimant testified that he has treated with Dr. Clark on a regular and continuous basis since his August 11, 2002, work-injury, and that, although he has received multiple epidural steroid injections in his back and one in his neck since the work-incident, his back pain has never ceased or improved. Regarding his present physical condition, claimant testified that he cannot return to work due to his ongoing lower back and right leg pain and the amount of medication that he has been prescribed. Additionally, claimant stated that he frequently requires the use of a cane, which eases the pain in his back, and that without a cane he at times becomes unstable and unable to use his right leg.

Dr. Clark, claimant's treating physician, first saw claimant in 1998 following claimant's initial work injury. Subsequent to claimant's August 19, 2002, work-injury, Dr. Clark performed multiple lumbar steroid injections on claimant, ordered physical therapy, and prescribed multiple medications for claimant's ongoing pain.[7] Additionally, claimant has undergone a lumbar discogram. Claimant's complaints of ongoing low back and right leg pain continued and, on October 11, 2004, Dr. Clark determined that claimant's symptoms precluded him from working even part-time; consequently, Dr. Clark removed claimant from all work. CX 4 at 37. In reports dated November 15, 2004, February 7, 2005, and October 25, 2006, Dr. Clark reiterated his opinion that claimant was unable to work due to the continued severity of his symptoms. *Id.* at 40; EX 14 at 242, 317. Subsequently, during his February 22, 2007, deposition, Dr. Clark testified that based upon claimant's pain level, gait instability, medication history and history of falls, he considered claimant to be in an "off-work status[,] completely," EX 13 at 46, and that it was not safe for claimant to return to gainful employment including full-time sedentary work. *Id.* at 45 – 50. Dr. Clark then testified that claimant may be capable of part-time sedentary employment; however, should an attempt be undertaken to find such work for claimant, Dr. Clark stated that he would want to perform another functional capacities evaluation on claimant. *Id.* at 50 – 53. Dr. Clark stated that such an evaluation was not necessarily an important piece of information since it would reflect only a one day snapshot of claimant's capabilities, while claimant's pain would vary day-to-day with his activities, the weather and the psycho-emotional stressors in his life. Dr. Clark concluded by stating that claimant was going to experience good and bad days. *Id.* at 53 – 54.

On May 21, 2007, Dr. Broussard examined claimant at the request of employer and thereafter opined that claimant was disabled from gainful and functional employment. After noting the extensive medical records regarding claimant's condition, Dr. Broussard further stated that no orthopedic intervention is indicated and that while

[7] On May 9, 2007, Dr. Clark wrote that claimant's medications included Soma, Lyrica, Roxicodone, Percocet, Voltaren and Xanax. CX 4 at 66.

"just about everything that could have been tried has been tried," claimant should continue his treatment with Dr. Clark. He concluded but that any attempt to try to rehabilitate claimant in an effort to return him to work would result in "throwing good money after bad." EX 15.

We affirm the administrative law judge's determination that claimant is unable to work. In addressing this issue, the administrative law judge discussed claimant's testimony and the opinions of Drs. Clark and Broussard. While finding that Dr. Clark's testimony and records as to claimant's current disability status were somewhat equivocal, the administrative law judge found that the totality of that physician's testimony indicated an expectation that while claimant might have reached a point where he could perform part-time sedentary work, such a determination would need to be confirmed through a functional capacities evaluation. The administrative law judge then concluded that when Dr. Clark's statements were combined with claimant's testimony and the opinion of Dr. Broussard, the preponderance of the evidence in the record establishes that claimant is unable to work at even a part-time sedentary level.

It is well-established that in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Employer's arguments regarding claimant's physical capabilities in effect seek a reweighing of the evidence, which the Board is not empowered to do. The administrative law judge was entitled to assess claimant's credibility, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and his decision that claimant is incapable of part-time sedentary employment is supported by that testimony and the credited medical evidence. Decision and Order at 28. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (choice from among reasonable inferences is left to the administrative law judge). Thus, as it is supported by substantial evidence, the administrative law judge's finding that claimant is incapable of any employment is affirmed. It follows that claimant is totally disabled.[8] *See generally Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT). Accordingly, we affirm the administrative law judge's conclusion that claimant is entitled to permanent total disability compensation as of October 12, 2004.

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[8] The administrative law judge therefore committed no error in not addressing employer's labor market surveys.

Section 8(f)

Alternatively, employer challenges the administrative law judge's decision to deny its request for relief pursuant to Section 8(f) of the Act. Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. To obtain the benefit of Section 8(f) relief in a case where claimant is permanently totally disabled, employer must show (1) that the employee had a pre-existing permanent partial disability, (2) that this disability was manifest to the employer prior to the subsequent injury, and (3) that claimant's permanent total disability is not due solely to the subsequent injury. *See Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997); *Two "R" Drilling Co. v. Director, OWCP,* 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990).

Employer initially challenges the administrative law judge's determination that claimant's pre-2002 degenerative lumbar disc disease was not manifest to employer. A pre-existing disability will meet the manifest requirement of Section 8(f) if prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence from which the condition was objectively determinable. *See Ceres Marine Terminal v. Director, OWCP [Allred],* 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997); *Callnan v. Morale, Welfare & Recreation, Dept. of the Navy,* 32 BRBS 246 (1998); *Wiggins v. Newport News Shipbuilding & Dry Dock Co.,* 31 BRBS 142 (1997); *Esposito v. Bay Container Repair Co.,* 30 BRBS 67 (1996). The medical records pre-existing the injury need not indicate the severity or precise nature of the pre-existing condition in order for the condition to be manifest; rather, medical records will satisfy this requirement as long as they contain sufficient and unambiguous information regarding the existence of a serious lasting physical problem. *Wiggins*, 31 BRBS 142.

In order to establish that claimant's degenerative lumbar disc disease constituted a manifest pre-existing permanent partial disability, employer submitted into evidence the records of claimant's ongoing treatment with Dr. Clark since 1998. EX 14. Contained within these records are Dr. Clark's treatment notes following claimant's January 11, 2001, work-related slip and fall accident. *Id.* at 165 – 180. Specifically, on January 25, 2001, claimant informed Dr. Clark that since his fall his back pain had become gradually progressive. X-rays taken of claimant's lumbar spine during this visit revealed diffuse sponoylosis with mild degenerative disc disease and facet hypertrophy. *Id.* at 165. Claimant subsequently reported continued back pain during a number of visits with Dr. Clark through April 2, 2002. *Id.* at 167 – 180. In addressing this issue, the administrative law judge did not specifically discuss the medical records relied upon by employer; rather, the administrative law judge stated

> [Claimant's] degenerative lumbar disc disease may have been a sufficient pre-existing condition and clearly added to the 2002 injury to make his final disability worse than it would have been without the pre-existing condition. However, the record does not establish that it was manifest to such a degree that it would have caused a caution [sic] employer to discharge him.

Decision and Order at 29. Thus, the administrative law judge did not specifically discuss or analyze the evidence relied upon by the employer. As the administrative law judge did not fully address relevant evidence on this issue in light of the applicable precedent, we vacate his finding that claimant's degenerative lumbar disc disease was not manifest to employer for purposes of establishing entitlement to Section 8(f) relief, and we remand the case for him to consider this issue.

Employer also contends that the administrative law judge erred in finding that it did not establish the contribution element of Section 8(f) with regard to claimant's 1998 herniated cervical disc condition. Specifically, employer asserts that claimant's pre-existing cervical disc condition combined with the August 2002 aggravation of claimant's pre-existing degenerative lumbar disc disease to prevent claimant from returning to work. To establish the contribution element, employer must show that claimant's subsequent injury alone would not have resulted in his permanent total disability. *See Ceres Marine Terminal*, 118 F.3d 387, 31 BRBS 91(CRT); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

The administrative law judge initially found that claimant had a manifest, pre-existing permanent partial disability to his cervical area. Decision and Order at 30. The administrative law judge then determined that employer did not establish that claimant's cervical condition contributed to claimant's present permanent total disability, and he accordingly denied employer's request for Section 8(f) relief based upon that pre-existing condition. We affirm this finding. Although he placed restrictions on claimant's physical activities as a result of his pre-2002 neck injuries, Dr. Clark did not specifically opine as to whether claimant's pre-existing cervical condition contributed to his present total disability. Dr. Clark stated that he treated claimant predominantly post-2002 for his degenerative lumbar disc condition and back pain, and that the symptoms claimant experienced from those conditions precluded his return to work. EX 13 at 40 – 49. While Dr. Clark testified that claimant's neck "bothers him too," he opined that claimant's inability to return to work is "related to his back pain and leg pain." *Id.* at 50. Thus, contrary to employer's contention, the opinion of Dr. Clark is insufficient to establish that claimant's disability is not solely due to his lumbar condition. We thus affirm the administrative law judge's finding that employer is not entitled to relief pursuant to Section 8(f) as a result of his pre-existing cervical condition.

Accordingly, the administrative law judge's determination that employer did not establish that claimant's degenerative lumbar disc disease was manifest to employer is vacated, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge