BRB No. 04-0164

DAVID A. VILLA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:FEB 17, 2005
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

David A. Villa, Mobile, Alabama, *pro se*.

Donald P. Moore (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant, appearing without legal representation, appeals the Decision and Order (2002-LHC-2125) of Administrative Law Judge C. Richard Avery 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). In reviewing an appeal where 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 whether they are rational, supported by substantial evidence, and 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 alleged he sustained an injury to both wrists on November 18, 1998, during the course of his employment for employer as a joiner when a drill locked, which resulted in his twisting both arms. Claimant was examined on April 12, 1999, for left carpal tunnel pain. On May 11, 1999, Dr. Crotwell performed releases of claimant's left

carpal tunnel, ulnar nerve, and Guyon's canal. EX 6 at 8. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from May 11 to July 6, 1999, and for a six percent permanent partial disability of the left hand, 33 U.S.C. §908(c)(3). Claimant returned to light-duty work for employer on July 7, 1999. Dr. Crotwell opined that claimant's left wrist reached maximum medical improvement on September 24, 1999. Claimant stopped working for employer on October 24, 1999, as employer was unable to provide claimant employment within his injury-related work restrictions.

Dr. Crotwell reexamined claimant in January 2000 for, *inter alia*, right hand pain. Claimant began treating with Dr. Fleet, a neurologist, for bilateral carpal tunnel pain on November 29, 2000, on a referral from Dr. Crotwell. On December 12, 2001, Dr. Fleet referred claimant to Dr. Barbour, an orthopedic surgeon, for a possible right carpal tunnel release. CX 2 at 90. Claimant sought compensation under the Act for total disability from October 25, 1999. Claimant alternatively sought compensation for a 5 percent permanent partial disability of the right hand. Tr. at 69. Claimant also asserted that bilateral carpal tunnel surgery is reasonable for the treatment of his injuries, and that employer is liable for Dr. Fleet's treatment.

In his decision, the administrative law judge accepted the parties' stipulation that a work injury occurred on November 18, 1998, and the administrative law judge found that claimant injured his left wrist in this accident. The administrative law judge found the evidence insufficient to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), that claimant also injured his right wrist in this incident. The administrative law judge credited the opinion of Dr. Crotwell that claimant could return to light-duty work on July 7, 1998, that claimant's left wrist injury reached maximum medical improvement on September 24, 1999, and that claimant sustained a six percent impairment of the left hand. The administrative law judge credited employer's April 7, 2003, labor market survey to find that employer established the availability of suitable alternate employment on September 24, 1999, and he found that claimant did not diligently seek suitable employment. Thus, the administrative law judge awarded claimant compensation for a six percent permanent impairment of the left hand. With regard to the issue of additional surgery, the administrative law judge credited the opinions of Drs. Blevins and Crotwell and found that further surgery on claimant's left wrist is not warranted. The administrative law judge determined that Dr. Crotwell referred claimant to Dr. Fleet, and that Dr. Fleet's treatment of claimant's left wrist thereafter was reasonable and necessary.

On appeal, claimant, without the assistance of counsel, appeals the administrative law judge's denial of additional compensation and authorization for additional surgery in both wrists.[1] Employer responds, urging affirmance.

We cannot affirm the administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption linking his November 18, 1998, work injury to his right wrist condition. Decision and Order at 6 n.6. 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 Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. Claimant is not required to affirmatively prove that his work injury in fact caused or aggravated the harm; rather, claimant need only establish that the work injury could have caused or aggravated the harm alleged. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982). 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*, 124 S.Ct. 825 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge then must weigh all the evidence and resolve the causation issue based on the record as a whole with claimant bearing the

[1] By Order dated January, 12, 2004, the Board granted claimant's request that this case be remanded to the administrative law judge for modification proceedings, 33 U.S.C. §922, and claimant's appeal to the Board was dismissed. However, claimant requested reinstatement of his appeal on January 20, 2004. Pursuant to claimant's request, on March 23, 2004, the administrative law judge issued an order canceling a hearing scheduled for April 2, 2004. In his correspondence with the Board dated March 29, 2004, claimant included documents he believes are relevant to his appeal of the administrative law judge's decision. On April 1, 2004, and again on October 14, 2004, employer filed a motion to strike any documents that were not previously admitted into the record by the administrative law judge. On May 19, 2004, the Board reinstated claimant's appeal of the administrative law judge's initial decision. The Board's review of the administrative law judge's decision is limited to consideration of evidence in the formal case record. 33 U.S.C. §921(b)(3). Accordingly, the Board will not consider the documents attached to claimant's March 29, 2004, correspondence.

burden of persuasion. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, the record establishes that claimant, who is right-hand dominant, underwent carpal tunnel surgery on his right wrist in May 1998. He was released for light-duty work on June 29, 1998.[2] CX 2 at 50. Thus, the issue relevant to invoking Section 20(a) is whether claimant's November 18, 1998, work injury could have aggravated his pre-existing right wrist condition. *See Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *see also Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Claimant testified that on the date of injury he was drilling holes into foundations, when the drill locked and he twisted both arms. Tr. at 24. The administrative law judge did not discuss this testimony. Decision and Order at 6 n.6.

Moreover, the basis for the administrative law judge's finding that the evidence is insufficient to invoke the Section 20(a) presumption is not supported by substantial evidence. The administrative law judge found that employer's LS-207 Notices of Controversion address only claimant's left hand injury; review of the record, however, indicates that employer's February 9, 2000, notice states that the right to compensation is controverted, *inter alia*, on the basis that claimant's right hand injury was the subject of another claim with different OWCP numbers, and its August 2, 2000, notice controverts an injury to claimant's right hand and arm. EX 3 at 2, 4. The administrative law judge found that all of Dr. Crotwell's notes following the November 1998 injury address only claimant's left wrist condition. However, Dr. Crotwell's January 13, 2000, report notes only right hand pain, and his July 9, 2001 report describes chronic problems with both hands. EX 6 at 3-4. The administrative law judge reasoned that Dr. Fleet tested only claimant's left hand in June 2002, but Dr. Fleet also stated that claimant's right wrist was probably not tested in February 2002 because the compensation carrier would not authorize testing of the right wrist. CX 2 at 18. Finally, the administrative law judge reasoned that Dr. Blevins noted only very minimal discrepancies in the right hand. In fact, Dr. Blevins, who examined claimant's wrists at employer's request on September 10, 2002, opined on October 11, 2002, that electrodiagnostic testing of both wrists on

[2] Dr. Crotwell's records and claimant's testimony also establish that claimant had surgery on his left thumb on November 6, 1995, for gamekeeper's thumb and chronic laxity of the ulnar collateral ligament and claimant underwent right thumb surgery on September 29, 1997, for trigger thumb. CX 2 at 40-49. In its Post-Trial Brief, employer stated that claimant was paid for a three percent permanent impairment due to the right thumb injury, and for a seven percent permanent impairment to the right hand related to his right wrist carpal tunnel condition. Post Trial Brief at 3.

September 24, 2002, showed mild bilateral median neuropathy of the right wrist and minimal neuropathy of the left. EX 7 at 1-3.

We, therefore, vacate the administrative law judge's finding that claimant did not injure his right wrist on November 18, 1998. On remand, the administrative law judge must reconsider whether claimant is entitled to the Section 20(a) presumption that his right wrist condition is related to his 1998 work injury in light of the aggravation rule. *See generally Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999). Should the administrative law judge find that a causal relationship exists between claimant's right wrist condition and his 1998 work injury, he must address the nature and extent of this injury, and claimant's contention, pursuant to Section 7 of the Act, 33 U.S.C. §907, that he is entitled to treatment for this injury, including surgery. *See* discussion, *infra.*

We next address the administrative law judge's finding that further surgery on claimant's left wrist is not necessary. In the context of addressing whether claimant's left wrist condition is at maximum medical improvement, the administrative law judge also addressed claimant's contention that additional wrist surgery is reasonable and necessary. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment...medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette W. Corp.,* 20 BRBS 184 (1988). In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. *See Pardee v. Army & Air Force Exch. Serv.,* 13 BRBS 1130 (1981); 20 C.F.R. §702.402.

In this case, the administrative law judge found that Dr. Fleet's testimony does not support a finding that further left wrist surgery is warranted. The administrative law judge reasoned that Dr. Fleet opined only that surgery is not contraindicated. Dr. Fleet stated that claimant had requested surgery, and he further opined there was only a 50 percent chance that claimant's condition would improve after another wrist operation. CXs 2 at 21; 3 at 26. The administrative law judge found that claimant's subjective complaints of pain are not sufficient reason to authorize surgery in this case, since Drs. Blevins and Crotwell determined that further surgery is unnecessary. Dr. Crotwell's July 9, 2001, office note states that claimant has chronic problems with both hands, which should be treated with medication. EX 6 at 3. Dr. Blevins examined claimant at employer's request on September 10, 2002. In his report, Dr. Blevins recommended against further surgery for bilateral hand numbness. EX 7 at 9-10. The administrative law judge found that Drs. Blevins and Crotwell are more qualified than Dr. Fleet to assess the necessity for additional wrist surgery since they are orthopedic surgeons who specialize in hand surgery, while Dr. Fleet is a neurosurgeon.

We cannot affirm the administrative law judge's finding that the proposed left wrist surgery is not reasonable and necessary, as our review of the record reveals that the administrative law judge's rationale was based on a mischaracterization of the medical evidence of record. *See, e.g., Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). Dr. Crotwell referred claimant to Dr. Fleet in July 2001 for further treatment of claimant's medical conditions and to manage claimant's medication regimen. CX 2 at 62-63. In his decision, the administrative law judge found that Dr. Fleet therefore became claimant's treating physician. Decision and Order at 10. Dr. Fleet's reports indicate that he agreed with claimant's request on December 12, 2001, for right wrist surgery, and that on February 6, 2002, claimant requested surgery on both wrists. CX 2 at 90, 92. In his deposition testimony, Dr. Fleet opined that this surgery may benefit claimant based on his clinical examination of claimant and repeated nerve conduction studies, which showed mild carpal tunnel syndrome. CX 3 at 19-20. Dr. Fleet stated that claimant initially requested carpal tunnel surgery and that he never recommends this surgery unless the patient asks for it first. *Id*. at 26-27. Contrary to the administrative law judge's finding, this testimony is substantial evidence that claimant's request for wrist surgery is reasonable and that such surgery is necessary. *See Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999). The administrative law judge also erred in relying on Dr. Crotwell's July 2001 office note recommending that claimant's carpal tunnel syndrome be treated only with medication, as claimant did not request wrist surgery until November 2001. CX 2 at 90. Dr. Crotwell's recommendation in July 2001 therefore does not indicate that claimant's subsequent requests for surgery were unreasonable. Moreover, the administrative law judge credited the opinions of Drs. Crotwell and Blevins based on their qualifications as orthopedic surgeons who specialize in hand surgery, whereas Dr. Fleet is a neurosurgeon. The record, however, shows that Dr. Fleet is a board-certified neurologist, and there is no evidence that either Dr. Crotwell or Dr. Blevins specializes in hand surgery. CX 3 at 31. The record shows only that Dr. Crotwell is an orthopedic surgeon, while Dr. Blevins's medical specialty, if any, is not of record. CX 2 at 71.

The Board is not bound to accept an ultimate finding or inference by an administrative law judge if the decision discloses that it was reached in an invalid manner. *See Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965); *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002). Because the administrative law judge did not accurately characterize the evidence relevant to a determination of whether claimant's request for wrist surgery is reasonable and necessary, we must vacate his conclusion denying claimant's request for left wrist surgery, and remand the case for further consideration. Consequently, we also vacate the administrative law judge's finding that claimant's wrist condition reached maximum medical improvement on September 24, 1999, as the administrative law judge based this finding, in part, on his conclusion that further surgery for claimant's left wrist condition is not warranted. *See*

generally Louisiana Ins. Guar. Ass'n v. Abbott, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000).[3]

Finally, we address the administrative law judge's findings that employer established the availability of suitable alternate employment and that claimant did not diligently seek alternate employment. Where, as here, it is uncontested that claimant is unable to return to his usual employment, claimant has established a *prima facie* case of total disability and the burden shifts to employer to establish the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing and which he could realistically secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F. 2d 1031, 14 BRBS 156 (5th Cir. 1981). In addressing this issue, the administrative law judge must compare claimant's physical restrictions and vocational factors with the requirements of the positions identified by employer in order to determine whether employer has met its burden. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.2d 901, 32 BRBS 212(CRT) (5th Cir. 1999). Claimant can rebut employer's showing of suitable alternate employment, and retain entitlement to total disability compensation, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *See generally Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

In this case, the administrative law judge found that claimant's injuries and surgeries limit his lifting abilities, and he credited Dr. Crotwell's opinion that claimant is capable of performing light-duty work. The administrative law judge also credited employer's labor market survey, which stated that Vinson Guard Service hired two security guards in the period around September 24, 1999, Nyco Security hired four guards, and Clarke Oil/Exxon hired four convenience store cashiers to find that employer established the availability of suitable alternate employment on this date. The administrative law judge rejected claimant's testimony that he diligently sought alternate employment. The administrative law judge reasoned that, while claimant called prospective employers, he failed to actually apply for most jobs or otherwise make an effort to find employment, and that he was frank in telling prospective employers of his work restrictions. Decision and Order at 8-9.

[3] Should the administrative law judge find on remand that additional surgery is reasonable and necessary, he is not, however, precluded from also finding that claimant's wrist condition reached maximum medical improvement prior to his requesting further wrist surgery. *See generally Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1969), *cert. denied*, 394 U.S. 976 (1969).

We must vacate the administrative law judge's findings that employer established the availability of suitable alternate employment and that claimant did not exercise diligence in seeking alternate employment. The administrative law judge did not compare claimant's physical restrictions to the requirements of the specific jobs identified in employer's labor market survey. *See Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). In this regard, on September 24, 1999, Dr. Crotwell restricted claimant to light duty and imposed work restrictions of infrequent lifting not exceeding 30 pounds, frequent lifting not exceeding 20 pounds, and no extensive repetitive motions. EX 6 at 5. On October 25, 1999, Dr. Crotwell revised claimant's restrictions to no lifting over 15 pounds, no twisting, torguing or repetitive work with the left hand, and limited use of hand-held power tools. *Id*. at 6. Finally, after treating claimant for bilateral hand pain on July 9, 2001, Dr. Crotwell completed a workers' compensation assessment form in which he stated that claimant was able to return to light-duty work on December 5, 2000, with lifting restrictions of frequent lifting of no more than 20 pounds, infrequent lifting up to 30 pounds, a requirement of a 10-minute break every 90 minutes, and restrictions against extensive repetitive motions. *Id*. at 2. Employer's April 7, 2003, labor market survey did not take into account the additional restrictions imposed by Dr. Crotwell on July 9, 2001. *See* EX 14 at 2. On remand, therefore, the administrative law judge must identify claimant's specific work restrictions and assess the suitability of the identified jobs in light of these restrictions.[4] *Hernandez,* 32 BRBS 109.

Should the administrative law judge find that employer established the availability of suitable alternate employment, the administrative law judge also must reconsider claimant's contention that he diligently sought, but was unable to obtain, suitable employment. *See Roger's Terminal & Shipping Corp.*, 784 F.2d 687, 18 BRBS 79(CRT); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). The administrative law judge is required to address the nature and sufficiency of claimant's search for jobs of the general type employer has shown to be both suitable and available. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Fortier v. Electric Boat Corp.*, ___ BRBS ___, BRB No. 04-0351 (Dec. 14, 2004).

In his decision, the administrative law judge found claimant did not exercise diligence, stating that claimant failed to apply for most jobs and that many prospective

[4] Notwithstanding that claimant sustained an injury falling under the schedule, he may be entitled to compensation for temporary partial disability, 33 U.S.C. §908(e), based on a loss of wage-earning capacity should the administrative law judge find that employer established the availability of suitable alternate employment prior to the date claimant's work injury reached maximum medical improvement. *See generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

employers were hesitant to hire him because claimant was frank about his work restrictions. Decision and Order at 9. This does not necessarily indicate a lack of diligence. As claimant is seeking work within his restrictions, it follows that he must tell prospective employers about them, and if claimant is unable to obtain work within these restrictions, he may be entitled to total disability benefits. *Fox*, 31 BRBS 118. In contrast, if a claimant exaggerates his restrictions, the administrative law judge is entitled to find that claimant's search was not diligent. *See generally Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). In this case, the administrative law judge did not support his finding that claimant lacked diligence by citing to any evidence of record and he did not fully discuss the nature and sufficiency of claimant's job search. *See, e.g.*, *Fortier*, slip op. at 6-8. On remand, the administrative law judge should support his findings with record evidence and credibility determinations and should assess the sufficiency of claimant's job search in terms of the jobs he finds suitable and available.[5] *Id.*

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for the administrative law judge to address whether claimant's right wrist condition is related to the November 18, 1998, work injury and whether further surgery is warranted. The administrative law judge must reconsider employer's evidence of suitable alternate employment in light of claimant's work restrictions. The administrative law judge also must reconsider the issue of whether claimant diligently sought suitable work. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

[5] In this regard, the administrative law judge must weigh claimant's testimony that he contacted numerous security guard companies whom, he testified, told him they required prior security guard or military experience, and that some of these employers also had a lifting restriction. Tr. at 37, 41-43, 58.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge