BRB No. 04-0819

MICHAEL N. MARTIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DYNCORP AEROSPACE OPERATIONS	)	DATE ISSUED: 07/18/2005
	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Order Denying Motion for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Jonathan W. Cartee and R. Stan Morris (Cartee & Morris, L.L.C.), Birmingham, Alabama, for claimant.

Keith L. Flicker and Kenneth M. Simon (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and the Order Denying Motion for Reconsideration (2003-LHC-642) of Administrative Law Judge Larry W. Price 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law 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, an installation technician of security systems, injured his back at work on April 22, 2000, while attempting to move an extremely heavy security door at the United States Embassy in Paris, France. Claimant alleged that his work-related back injury subsequently caused a psychiatric injury. Employer voluntarily paid claimant temporary total disability benefits for his back injury from April 23, 2000, through June 16, 2001. Dr. Hakim, claimant's treating neurologist, returned claimant to light to medium work in June 2001. Claimant returned to work from approximately June through December 2001 for employer in the United States writing manuals for security systems. In January 2002, claimant started working as a manager for employer on a State Department contract in the United States. He was terminated from this position on June 20, 2002, due to excessive absenteeism. Claimant was hospitalized from June 18 through June 21, 2002, and from June 12 through June 17, 2003, due to his psychological condition.

The administrative law judge found that claimant's psychological condition is not related to his back injury. He found that claimant established his *prima facie* case of total disability with respect to his back injury, but that employer provided claimant a suitable alternate position and was not under a continuing obligation to establish the availability of suitable alternate employment once claimant was terminated from this position for reasons unrelated to his work injury. On reconsideration, the administrative law judge affirmed the denial of benefits and held that claimant sustained no loss in his post-injury wage-earning capacity as he earned the same wages post-injury as pre-injury and that these wages reasonably represented his wage-earning capacity.

On appeal, claimant challenges the administrative law judge's findings that his psychiatric condition is not work-related and that employer established the availability of suitable alternate employment with no loss in wage-earning capacity. Employer responds in support of the administrative law judge's decisions.

Claimant first argues that the administrative law judge erred in finding that his work-related back injury did not cause his psychiatric condition. Section 20(a) provides claimant with a presumption that his condition is causally related to his employment if he establishes a *prima facie* case by showing that he suffered the alleged condition and that working conditions existed which could have caused the condition or aggravated a pre-existing condition. *See American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2^{d} Cir. 2001). Once claimant has invoked the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial evidence to the contrary. *Id.* If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established, with claimant bearing the burden of persuasion. *Id.; see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *John W.*

McGrath Corp. v. Hughes, 289 F.2d 403 (2d Cir. 1961).

The administrative law judge properly invoked the Section 20(a) presumption linking claimant's psychological condition to the work-related back injury.[1] The administrative law judge then found that Dr. Hilton's opinion, that claimant's depression and schizophrenia were not caused or related to his work-related back injury, established rebuttal of the Section 20(a) presumption.[2] As the administrative law judge's finding that Dr. Hilton's opinion is sufficient to rebut the Section 20(a) presumption is supported by substantial evidence, it is affirmed. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); Decision and Order Denying Benefits at 27; Order Denying Motion for Reconsideration at 1; Emp. Exs. A at 11-12; C at 19, 32; E at 1; Tr. at 159, 161, 162.

The administrative law judge then weighed the evidence, and he credited Dr. Hilton's opinion over the opinions of Drs. Hakim and Lachman that claimant's work-related back injury caused his psychological condition. The administrative law judge found that Dr. Hilton's opinion more accurately reflects the progression and treatment of claimant's psychiatric illness. The administrative law judge gave less weight to the opinion of Dr. Hakim, claimant's treating Board-certified neurologist, that claimant's depression was caused by chronic pain he experienced from his work-related back injury and that the back injury precipitated his psychiatric injury, Cl. Ex. 21 at 40, 45, 53-54, because it is inconsistent with his treatment notes. The administrative law judge accurately reported that Dr. Hakim had first prescribed Celexa, an antidepressant, for claimant's unspecified anxiety and frustration on October 9, 2000, but that it was discontinued shortly thereafter. Cl. Ex. 4. On December 11, 2000, the prescription was

[1] Drs. Hilton, Hakim, and Lachman diagnosed claimant with depression. Emp. Exs. A, B; Cl. Exs. 4, 8, 9. Dr. Hilton also diagnosed schizophrenia which Dr. Lachman provisionally diagnosed. Emp. Exs. A, B; Cl. Exs. 8, 9. Dr. Lachman also diagnosed post-traumatic stress disorder. Cl. Exs. 8, 9. Drs. Hakim and Lachman stated that claimant's psychiatric condition is related to the back injury.

[2] In his report, Dr. Hilton stated that there is "no credible evidence to support any linkage at all between his work injury and his psychiatric problems." Emp. Ex. A at 11-12. At the hearing, Dr. Hilton responded, "No, absolutely not," when questioned whether claimant's schizophrenia was caused by his reaction to his back injury. Tr. at 159. Moreover, he testified that claimant's depression was not caused by his reaction to his back injury. *Id.* When asked whether claimant's schizophrenia is related to his back injury or his reaction to his back injury, Dr. Hilton replied, "No." Tr. at 161. Dr. Hilton stated that claimant's depression is not "in any way related to his reaction to the back injury." Tr. at 162.

restarted after Dr. Hakim reported that claimant was very anxious and nervous about a scheduled brain biopsy. *Id.* Subsequently, Dr. Hakim reported on May 25, 2001, that claimant was anxious about his brain tumor and worried that it could cause a stroke. *Id.* The administrative law judge noted that Dr. Hakim did not prescribe Celexa after the tumor was found to be benign and that there is no indication in the record that any doctor prescribed antidepressants for claimant until after a 2002 suicide attempt.[3] Therefore, the administrative law judge concluded that Dr. Hakim's prescription of an antidepressant was due to claimant's concern about the brain tumor and not his work-related back injury. The administrative law judge's conclusion is supported by Dr. Hilton's testimony that Dr. Hakim's notes do not reflect treatment for depression due to back pain. *See* Tr. at 152-154.

The administrative law judge also gave less weight to the opinion of Dr. Lachman, claimant's treating psychiatrist since June 12, 2003, who opined that claimant's psychiatric injury was triggered by his work-related back injury. Cl. Ex. 20 at 65-70. The administrative law judge found that Dr. Lachman did not have full knowledge of claimant's previous psychiatric history initially and her report was silent as to the abuse and sexual orientation issues discussed by Dr. Hilton. Cl. Ex. 8; Tr. at 228-230. Contrary to claimant's assertions, the administrative law judge was not required to credit Dr. Lachman's opinion as claimant's treating psychiatrist in the face of Dr. Hilton's contrary opinion and in view of the administrative law judge's rational finding that Dr. Lachman's opinion was based on a less accurate history of claimant's previous psychiatric illness. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997)(treating psychiatrist's opinion entitled to great weight *in the absence of conflicting medical evidence*). As the administrative law judge discussed and weighed all relevant evidence and acted within his discretion in crediting Dr. Hilton's opinion with persuasive weight, we affirm the administrative law judge's conclusion that claimant's psychological condition was not caused or related to his work-related back injury.[4] *John*

[3] Although claimant asserts that Dr. Hakim referred claimant for psychiatric treatment for depression, this referral was not until June 12, 2003, three years post-injury and after claimant was first hospitalized for his psychiatric condition.

[4] Claimant's arguments regarding the remaining evidence of record are rejected. Dr. Moon did not recommend that claimant undergo a psychiatric evaluation on April 19, 2001, but merely reported that he, as an osteopathic physiatrist, Board-certified in physical medicine and rehabilitation, had performed his typical psychiatric evaluation. Emp. Ex. P at 29. Although Dr. Moon did report claimant's current symptoms to include a "new onset" of "depression and/or anxiety," that claimant has "significant psychosocial issues" which include "severe defensiveness," "suspiciousness," and has "related stress issues," the physiatrist does not state the cause of these symptoms. *Id.* at 24, 34, 35. Dr. Moon's opinion was that claimant intentionally feigned his subjective complaints because

W. McGrath Corp., 289 F.2d 403; Decision and Order Denying Benefits at 28-29; Order Denying Motion for Reconsideration at 1; Emp. Ex. A at 11-12; Tr. at 159, 161, 162.

Claimant also argues that the administrative law judge, in addressing his back injury claim, erred in finding that employer established the availability of suitable alternate employment. Where, as here, claimant establishes his *prima facie* case of total disability, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). Employer can meet this burden by providing claimant with a suitable job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). If a claimant successfully performs a suitable alternate position but is discharged for violating company policy, the employer does not bear a renewed burden of demonstrating the availability of suitable alternate employment thereafter. *Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 133 (1980); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980); *Conover v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 676 (1979).

The administrative law judge found that claimant's post-injury job with employer, a position in which claimant reported to government officials after reviewing four employees' field reports, was necessary work and therefore constituted suitable alternate employment. The administrative law judge further found that employer was not obligated to demonstrate other suitable alternate employment after claimant was terminated from this job due to attendance problems in which claimant did not report to work and did not call employer to explain his absences.[5] Claimant does not contend that his absences were due to his work-related back injury, and we have affirmed the administrative law judge's finding that claimant's psychiatric condition is not work-related.[6] Therefore, as the administrative law judge's finding that claimant was

---

there is no objective basis for them. *Id.* at 34. The administrative law judge did not discuss Dr. Moon's report but any error is harmless as Dr. Moon's opinion does not address the cause of claimant's psychiatric condition.

[5] Claimant began working with employer as a manager in January 2002. Emp. Ex. Y at 14, 18. Initially, employer was pleased with his work. *Id.* at 28. Prior to May 2002, claimant would schedule leave in advance. *Id.* at 39. However, in May 2002, claimant would miss work two to three times per week without explanation, and no one was able to reach him. *Id.* at 37-40. Finally, Mr. Alsop, the State Department's project manager, asked that claimant be removed from the contract because of his attendance problems. *Id.* at 21, 41-42, 53, 61-62.

[6] Claimant was hospitalized for psychiatric reasons prior to his termination from

terminated for reasons unrelated to his work injury is rational and supported by substantial evidence, it is affirmed, as is the administrative law judge's consequent conclusion that employer's obligation to identify suitable alternate employment was fulfilled. *Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Brooks*, 2 F.3d 64, 27 BRBS 100(CRT); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed.Appx. 126 (5th Cir. 2002); Decision and Order Denying Benefits at 32; Order Denying Motion for Reconsideration at 1-2; Emp. Exs. G at 24; Y at 26, 28, 35, 37, 39-40, 42-43, 53, 61-63.

Claimant lastly argues that the administrative law judge erred in finding that he did not sustain a loss in his post-injury wage-earning capacity. Under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), an award for permanent partial disability benefits 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). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's post-injury wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984). The administrative law judge concluded that claimant suffered no loss in his post-injury wage-earning capacity, as his post-injury job with employer fairly represented claimant's post-injury wage-earning capacity and paid the same wages that claimant earned overseas pre-injury. Order Denying Motion for Reconsideration at 2; Emp. Ex. Y at 66-67. Claimant misconstrues the burden of proof with respect to wage-earning capacity in asserting that employer did not prove that his post-injury wages were representative of his true post-injury wage-earning capacity. The party seeking to prove that actual post-injury wages are not representative, which is claimant in the instant case, has the burden of proof on that issue. *Avondale Shipyards*, 967 F.2d 1039, 26 BRBS 30(CRT). Because claimant did not meet his burden here, the administrative law judge committed no reversible error in his determination. We therefore affirm the administrative law judge's finding that claimant had no loss in wage-earning capacity and the consequent denial of additional disability benefits. *Arnold*, 35 BRBS 9; *Ward v. Cascade General, Inc.*, 31 BRBS 65 (1996).

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief

---

his job. Emp. Exs. C, D; Cl. Exs. 6, 7.

Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge