BRB No. 00-0169

BOBBY L. MURPHY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 13, 2000
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Temporary Total Disability of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Christopher R. Hedrick and Lexine D. Walker (Mason, Cowardin & Mason), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Temporary Total Disability (94-LHC-2106) of Administrative Law Judge Richard K. Malamphy 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 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).

Claimant was injured in a serious car accident in 1966. He sustained multiple lacerations, fractured ribs, and a fractured right forearm, right thigh, right ankle and left hip. Claimant subsequently was diagnosed with chronic deep venous thrombosis in his left leg, which was a result of the left hip injury. While at work on August 14, 1973, claimant sustained an abrasion on his lower left leg which became ulcerous. This initial ulcer eventually healed; however, the left calf repeatedly became ulcerous in and around the same spot and eventually resulted in claimant=s requesting retirement on April 1, 1996, for disability attributable to recurrent leg ulcers. Claimant=s left leg ulcers have resulted in multiple hospitalizations for vein debridement, ligation and stripping as well as multiple split thickness skin grafts and Linton procedures since the August 1973 work injury. When his condition rendered claimant unable to work, employer voluntary paid claimant compensation for temporary total disability, 33 U.S.C. '908(b). Claimant primarily worked light-duty for employer after he returned to work following his August 1973 injury, as well as after periods of treatment for recurrent left leg ulcers. Moreover, employer voluntarily paid claimant compensation under the Act for a 15 percent permanent partial impairment of the left leg. 33 U.S.C. '908(c)(2).

In his decision, the administrative law judge found that claimant=s recurrent left leg ulcerations are due, at least in part, to the August 1973 work injury. In this regard, the administrative law judge credited the opinion of claimant=s treating physician since 1979, Dr. Gregory, because of his familiarity with the case. The administrative law judge also noted the absence of any ulcerations prior to the work injury, and he found that the initial ulcer resulting from the work injury lasted approximately ten years.[1] The administrative law judge next found that claimant=s condition has not obtained maximum medical improvement, and he therefore found premature employer=s application for Section 8(f) relief. 33 U.S.C. '908(f). Finally, the administrative law judge credited the vocational report and testimony of Charles DeMark, Jr., in finding that employer failed to establish the availability of suitable alternate employment. Claimant was awarded continuing compensation under the Act for temporary total disability from August 4, 1997.

On appeal, employer challenges the administrative law judge finding that claimant=s recurrent left leg ulcers are related to the August 14, 1973, work injury. Employer also challenges the administrative law judge=s findings that claimant=s left leg condition has not

[1]This finding is in error, as the record establishes that the initial ulcer had healed in 1977.

reached maximum medical improvement and that employer failed to establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

We initially address employer=s contentions that the administrative law judge erred in finding that claimant=s recurrent leg ulcers are related to his August 14, 1973, work injury. It is claimant=s burden to prove the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm in order to establish a *prima facie* case. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Where claimant has established his *prima facie* case, Section 20(a) of the Act, 33 U.S.C. '920(a), provides him with a presumption that his condition is causally related to his employment; the burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant=s condition was neither caused nor aggravated by his employment. *See American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*); *Swinton v. J. Frank Kelley, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds the Section 20(a) presumption rebutted, it drops from the case. *Moore*, 126 F.3d at 256, 31 BRBS at 119(CRT) (4th Cir. 1997). The administrative law judge then must weigh all the evidence and resolve the issue of causation on the record as a whole with claimant bearing the burden of persuasion. *Id.; see also 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, employer challenges the administrative law judge=s weighing of the evidence and his decision to credit the opinion of claimant=s treating physician, Dr. Gregory, that claimant=s recurrent leg ulcers are related to the 1973 injury.[2] After consideration of employer=s contentions on this issue, we affirm the administrative law judge=s finding. Contrary to employer=s contention, the opinions of Drs. Stallard and Harmon do not establish the absence of a causal connection between the 1973 work injury and the recurrent ulcers, as they merely address whether the 15 percent permanent impairment to claimant=s leg, a rating assigned in the late 1970s and early 1980s, is attributable to the work injury. EXs 13, 15. They do not address either the cause of the ulcers recurring after claimant=s initial ulcer healed, or, specifically, the cause of the total disability at issue here.

[2]We note that the administrative law judge=s failure to apply the Section 20(a) presumption is harmless error in that he weighed the evidence as a whole and found in claimant=s favor. *See generally Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

Moreover, the administrative law judge acted within his discretion in crediting the opinion of claimant=s treating physician, Dr. Gregory, that claimant=s recurrent ulcers are related to the 1973 work injury, CX 1i, k, l, over the opinion of Dr. Levy, who stated that the recurrent ulcers Aappear to be secondary to venous insufficiency following his automobile accident, rather than related to the initial contusion suffered in August 1973.@ EX 1. The administrative law judge noted that both physicians are vascular surgeons, and he rationally accorded greater weight to the opinion of claimant=s treating physician, who treated claimant=s ulcerous condition from 1978 to 1984, and from 1992 forward, and who thus is more familiar with the case.[3] Decision and Order at 10. The Board is not empowered to reweigh the evidence. *See generally Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Inasmuch as Dr. Gregory=s opinion constitutes substantial evidence in support of the conclusion that claimant=s recurrent ulcerous condition is work-related, and as the administrative law judge=s decision to credit Dr. Gregory=s opinion over that of Dr. Levy is within his discretion as the fact-finder, *see Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), we affirm the administrative law judge=s finding.[4]

[3]The administrative law judge also noted the opinion of Dr. Ives, who stated that the 1973 work injury is an aggravating event from which claimant never fully recovered and that claimant=s disability is related, at least in part, to the 1973 injury. CX 3. The administrative law judge noted that Dr. Ives is a general surgeon.

[4]We reject employer=s contention that the decisions in *Millburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998), and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438 (4th Cir. 1997), require the reversal of the administrative law judge=s decision. These cases do not authorize the Board to reweigh the evidence or to overturn a decision that is supported by substantial evidence in the record.

Employer next challenges the administrative law judge=s finding that claimant=s leg condition has not reached maximum medical improvement. A claimant=s condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period, *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), or if he has any residual impairment after reaching maximum medical improvement, the date of which is determined by medical evidence. *See SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). In the instant case, the administrative law judge rejected employer=s contention that claimant=s recurrent leg ulcers reached maximum medical improvement on April 28, 1977, when Dr. Wheeler stated that claimant=s ulcerous leg had healed, and that he could return to his usual employment.[5] CX 4. The administrative law judge stated that no physician of record specifically provided a date at which claimant=s condition reached maximum medical improvement. He further reasoned that Dr. Gregory stated in June 1995 that claimant=s ulcerous leg would not reach maximum medical improvement for at least six months, and he noted that claimant has continued to require extensive medical treatment. The administrative law judge therefore found that claimant=s condition was not permanent, and he found premature employer=s request for Section 8(f) relief .

We hold that the administrative law judge erred in finding that claimant=s condition is not permanent. The administrative law judge focused solely on whether a physician provided a date on which claimant=s condition reached maximum medical improvement, and did not discuss whether claimant=s condition is long-lasting and indefinite under the test stated in *Watson*. Indeed, the uncontradicted evidence of record establishes that claimant=s leg condition has continued for a lengthy period and may only further deteriorate in the future. *See generally SGS Control Services*, 86 F.3d at 438, 30 BRBS at 57(CRT). Although claimant=s previous ulcers healed, claimant=s underlying condition is clearly permanent, and, as of the hearing in March 1999, claimant was receiving continuing treatment for an ulcer that initially appeared in August 1994. EX 10a-q. Dr. Ives stated in his July 1997 report that claimant=s leg condition will only deteriorate, and that he considered it possible that claimant may require amputation of the left leg. CX 3. The uncontradicted evidence of record establishes that claimant=s recurrent ulcers are of lasting and indefinite duration, and there is no evidence that claimant=s condition merely awaits a normal healing period. Therefore, we hold that claimant=s ulcerous leg condition is permanent, and we reverse the administrative law judge=s conclusion to the contrary. *See SGS Control Services*, 86 F.3d at 438, 30 BRBS at 57(CRT); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990). Thus, we remand the case to the administrative law judge for a determination of the date claimant=s condition became permanent, and for him to address

[5]In addition, in 1982, Dr. Wheeler rated claimant=s leg as having a 15 percent permanent impairment. CX 4.

employer=s application for Section 8(f) relief.

Employer lastly challenges the administrative law judge finding that it did not establish the availability of suitable alternate employment. Employer contends that the administrative law judge erred by requiring that it establish that the prospective jobs could be modified to enable claimant to keep his left leg elevated. Where, as in the instant case, it is undisputed that claimant is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In order to meet this burden, employer must show the availability of a range of 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. *See Lentz*, 852 F.2d at 129, 21 BRBS at 109(CRT); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). In considering whether employer has established the availability of suitable alternate employment, the administrative law judge must determine whether claimant is physically capable of performing the positions identified by employer. *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996); *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984).

Employer's contentions lack merit. Relying on the credible testimony of claimant=s vocational expert, Charles DeMark, Jr., who testified that claimant could not perform any of the jobs listed in employer's labor market survey, the administrative law judge rationally concluded that none of the jobs identified by employer's vocational counselor constitutes suitable alternate employment because claimant does not have the requisite skills or manual dexterity, and/or the jobs require physical activities inconsistent with claimant's limitations.[6] *See generally Canty v. S.E.L. Maduro*, 20 BRBS 147 (1992). Moreover, contrary to employer's contention, the administrative law judge's findings are consistent with the applicable standard, in that given claimant's physical restrictions, education and work experience, none of the positions set forth in employer's labor market survey is realistically available to claimant.[7] *Lentz*, 852 F.2d at 129, 22 BRBS at 109(CRT). We thus affirm the

[6]The administrative law judge credited the opinions of Drs. Freeman, Gregory and Ives that claimant should sit almost constantly with his leg elevated. Decision and Order at 12; *see also* CXs 1y, 3h; EX 6f. Moreover, the administrative law judge specifically credited Mr. DeMark=s testimony that the only truly sedentary job identified in employer=s survey, that of a pizza order clerk, also required physical activity beyond claimant=s work restrictions during slack periods, that there were few sedentary jobs where claimant could sit with his leg continuously elevated, and that employer=s labor market survey failed to identify such a job within claimant=s vocational abilities. Decision and Order at 13; *see also* Tr. at 101-117.

[7]Accordingly, as Mr. DeMark=s testimony supports the administrative law judge=s

administrative law judge's finding that employer failed to establish the availability of suitable alternate employment, and that claimant, therefore, is totally disabled.[8]

finding, any error the administrative law judge committed in rejecting employer=s vocational counselor=s opinion because he failed to have a physician approve the jobs identified in employer=s labor market survey as within claimant=s work restrictions is harmless.

[8]As the administrative law judge rationally concluded that employer did not establish the availability of suitable alternate employment, we need not address employer=s contentions that claimant did not diligently seek appropriate employment. *See generally Tann*, 841 F.2d at 540, 21 BRBS at 10(CRT).

Accordingly, the administrative law judge=s finding that claimant=s condition is temporary in nature is reversed, and the case is remanded for further proceedings consistent with this opinion. In all other respects, the administrative law judge=s decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge