BRB Nos. 02-0487
and 02-0487A

WILBERT M. HILL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: MAR 25, 2003
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Chanda W. Stepney (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick), Newport News, Virginia, for employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (00-LHC-3184) 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, an electrician, alleged that he injured his knee during the course of his

employment on February 12, 1997; claimant subsequently underwent arthroscopic surgery to repair a meniscal tear. Following his surgery on April 22, 1997, claimant performed light duty work at employer's shipyard until May 24, 2000, when the imposition of permanent work restrictions prevented him from performing any work available at the shipyard, and he was passed out of work. Claimant sought temporary total disability compensation from May 25, 2000, the date of his termination, until January 3, 2001, when he obtained employment as a school bus aide.[1]

In his decision, the administrative law judge concluded that despite inconsistencies in claimant's description of the incident in which he was injured, he established invocation of the presumption with regard to causation pursuant to Section 20(a), 33 U.S.C. §920(a). The administrative law judge further found that employer did not rebut the Section 20(a) presumption. The administrative law judge found that claimant is unable to return to his usual work, and that employer established the availability of suitable alternate employment. Nonetheless, the administrative law judge awarded claimant total disability benefits from May 25 until September 25, 2000, finding that claimant had exercised due diligence in seeking appropriate employment during this period. The administrative law judge found, however, that claimant did not diligently seek employment after September 25, 2000, and thus is limited to the partial disability award under the schedule which employer had already paid.

Claimant appeals, contending that the administrative law judge erred in finding that employer established the availability of suitable alternate employment and that claimant did not diligently seek employment after September 25, 2000.[2] Employer cross-appeals, arguing that the administrative law judge erred in finding causation established and in concluding that claimant demonstrated diligence in seeking employment prior to September 25, 2000.

We will first address employer's appeal of the administrative law judge's finding that claimant's injury is work-related. In establishing that an injury is causally related to his

[1]Employer made voluntary payments for the prior periods of disability including payment under the schedule for a permanent impairment to claimant's left knee. EX 1.

[2]Claimant seeks temporary total disability compensation from September 25, 2000, until January 1, 2001, when he obtained employment with another employer.

employment, claimant is aided by Section 20(a) which provides a presumed causal nexus between the injury and the employment. In order to be entitled to the Section 20(a) presumption, however, claimant must establish a *prima facie* case by showing that he suffered a harm and either that a work-related accident occurred or that working conditions existed which could have caused the harm. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Claimant bears the burden of establishing each element of his *prima facie* case by affirmative proof. *See Bolden v. G.A.T.X. Corp.*, 30 BRBS 71 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

It is undisputed that claimant suffered a harm, *i.e.*, a meniscal tear to his left knee. Employer contends, however, that the administrative law judge erred in concluding that claimant established the second prong of his *prima facie* case, *i.e.*, an accident or working conditions. In finding that claimant was injured at work, the administrative law judge reviewed claimant's two versions of the alleged event: his clinic records stating that he was kneeling down and welding at the time, CX 6, and his hearing testimony that he was lying down and twisted his knee in some pipes, HT at 20-24. Although the administrative law judge concluded that the inconsistencies diminish claimant's credibility, either accident could have caused the knee injury.[3] In this regard, the administrative law judge based his conclusion on the opinion of Dr. Reid, the shipyard physician at the time of the accident, who testified that claimant's injury could have occurred in either manner.

While the Section 20(a) presumption does not aid claimant in establishing either element of a *prima facie* claim, *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988), employer's argument that claimant failed to establish working conditions because Dr. Reid, the only physician who addresses causation, could not definitively state that either version of the precipitating incident caused the harm is without merit. Contrary to employer's assertion that claimant must establish that the accident in fact caused the condition, claimant is not required to introduce affirmative evidence establishing that the accident in fact caused the alleged harm in order to invoke the Section

[3]In reviewing the two versions, the administrative law judge concluded that the first version, *i.e.*, that the knee was injured while claimant was kneeling down while welding was probably the more accurate since claimant attested to that account in his medical records at the time of the injury. Decision and Order at 10.

20(a) presumption. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). In order to invoke the presumption, claimant must prove that an accident occurred or working conditions existed which could have caused his harm. *See generally U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982); *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982). In this case, the administrative law judge's finding that an accident occurred, notwithstanding the discrepancy in the versions of the event, is rational and supported by substantial evidence. *See Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994), *aff'g Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993).

Employer further argues that claimant's activities were "common to everyday life" and do not establish his injury arose from the "hazards of his employment," citing *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 179, 23 BRBS 13, 20(CRT) (2d Cir. 1989). Employer's reliance upon *Gencarelle* is misplaced, as the administrative law judge properly found. *See* Decision and Order at 11. In *Gencarelle*, the Second Circuit addressed whether claimant's injury, chronic synovitis, was an occupational disease for purposes of the extended statute of limitations contained in Section 13(b)(2) of the Act, 33 U.S.C. §913(b)(2). Claimant in the present case was not asserting that he suffered from an occupational disease, rather, he alleged a traumatic injury to his knee which occurred on a particular day during his work activity of welding, either while he was kneeling or was prone. The *Gencarelle* court did not hold, as employer asserts, that a claimant's injury is not work-related merely because it occurred in a work activity, such as kneeling, that is common to everyday life. Indeed, the court did not disturb the Board's holding that the claimant's injury was work-related. *See Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989). Finally, except for its mere assertion that the possibility exists, employer offers no evidence that claimant was injured in an accident occurring outside the workplace. Accordingly, we affirm the administrative law judge's determination that claimant established his *prima facie* case and his consequent invocation of the Section 20(a) presumption. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *aff'd in pert. part.*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). As employer does not challenge the administrative law judge's finding that it did not present substantial evidence to rebut the Section 20(a) presumption, we affirm the administrative law judge's conclusion that claimant's injury is work-related.

In his appeal, claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Once, as here, claimant establishes his inability to perform his usual work, the burden shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing given his age, vocational and educational background, and physical restrictions.

Lentz v. Cottman Co., 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1996). In finding suitable alternate employment established, the administrative law judge relied upon the opinion and physical restrictions provided by Dr. Nevins, claimant's surgeon and treating physician, as supported by the testimony and report of employer's vocational consultant, William Kay, that suitable positions were available. Claimant argues that the administrative law judge erred in relying upon Mr. Kay's report because he was not fully aware that claimant was restricted to sedentary work.[4]

We reject claimant's contention. Although claimant declined to meet with him, Mr. Kay developed a list of clamant's transferable skills based on his vocational and personal history, and considering Dr. Nevins's restrictions, located nine jobs in three fields: customer service, unarmed security guard, and driver. HT at 89. He submitted these nine positions to Dr. Nevins, who approved seven of them as suitable for claimant. Exs 8, 9. The administrative law judge found that Dr. Nevins approved the jobs on the same day that he issued claimant's permanent restriction to sedentary work, thereby implying that he considered the jobs to fall within this restriction. Additionally, the administrative law judge reviewed the requirements of the proffered jobs and found that they also were appropriate given claimant's educational and vocational background. As the administrative law judge fully considered claimant's contention, and as his finding that employer established the availability of suitable alternate employment is rational and supported by substantial evidence, we affirm it. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002).

Both parties appeal the administrative law judge's findings regarding the diligence of claimant's job search. Employer alleges error in the finding that claimant was diligent in the period prior to September 25, 2000, and claimant alleges error in the finding that he was not diligent after September 25, 2000. Claimant contends that this diligence is borne out by his obtaining a job in January 2001.

Once employer meets its burden of demonstrating that suitable jobs are available, the burden shifts back to claimant to demonstrate that he was unable to secure employment although he diligently tried. If claimant so demonstrates, he retains entitlement to total

[4]Dr. Nevins initially restricted claimant from climbing ladders, kneeling, and squatting, and to climbing stairs only to and from the job site. Subsequently, Dr. Nevins restricted claimant to "sedentary, sit-down type work," CX 1u, restricting him from climbing ladders or stairs to and from work, crawling, kneeling or squatting, working on step ladders and to minimal stair climbing. EX 8.

disability benefits. *Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). In addressing this issue, the administrative law judge must make specific findings regarding the nature and sufficiency of claimant's alleged efforts to obtain employment of the general type shown by employer to be suitable and available. *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT).

In finding that claimant diligently sought work prior to September 25, 2000, the administrative law judge relied on the job log that claimant kept in order to qualify for unemployment benefits. This log showed that claimant applied for or inquired about two jobs per week. CX 10; HT 59. After September 25, claimant stopped keeping the log and testified, contradictorily, both that he ceased looking for work after September 25, 2000, and that he continued to look for work throughout October, November and December of 2000. HT at 55. Claimant also did not inquire about any of the positions Mr. Kay located. HT at 47. Noting claimant's inconsistent testimony and his failure to document any additional job searches, the administrative law judge concluded that claimant's diligence faltered after September 25, 2000, and consequently denied total disability compensation after this date.

We affirm the administrative law judge's findings in this regard, rejecting both parties' allegations of error. Employer contends that claimant did not establish that the jobs for which he applied were suitable for him. Although claimant acknowledged that some of the jobs would require him to stand beyond his restriction, he also testified that the jobs might have been part-time, and therefore suitable. HT at 58-59. Claimant contends that the diligence of his job search after September 25 is evidenced by his obtaining employment in January 2001. While the administrative law judge could have drawn this inference, he was not required to do so in light of the contradictory nature of claimant's testimony and the lack of additional evidence of diligence. *See generally Pittman Mechanical Contractors*, 35 F.3d at 127, 28 BRBS at 95(CRT).

It is well established that the administrative law judge has the authority to address questions of witness credibility and to weigh the evidence. As the administrative law judge's determinations concerning claimant's testimony are rational, *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 as substantial evidence supports his finding, we affirm the administrative law judge's finding that claimant exercised diligence prior to September 25, 2000 and failed to do so thereafter. *See generally Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP [Fransen]*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). The administrative law judge's award of compensation for total disability from May 25 to September 25, 2000, and his denial of it thereafter are therefore affirmed.

Accordingly, 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