BRB No. 97-1258

HONEYETTA FOGARTY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EQUITABLE/HALTER SHIPYARD	)	DATE ISSUED:
	)	
and	)	
	)	
HALTER MARINE, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

David A. Dalia, New Orleans, Louisiana, for claimant.

Peter Koeppel and Andre C. Gaudin (Best, Koeppel), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (95-LHC-0308) of Administrative Law Judge Lee J. Romero, Jr., 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, a welder, sustained injuries to her back and neck on June 23, 1992, when she fell into an open manhole during the course of her employment with employer. Claimant has not returned to work since the date of this incident. Employer voluntarily paid claimant temporary total disability compensation from June 24 to August 10, 1992. 33 U.S.C. §908(b).

In his Decision and Order, the administrative law judge awarded claimant permanent total disability compensation, medical benefits, interest, and attorney fees. On appeal, employer contends that claimant's alleged injuries are either non-existent or unrelated to her work accident and that claimant is capable of returning to her usual job; alternatively, employer alleges that it has established the availability of suitable alternate employment within its own facility. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer initially contends that the administrative law judge erred in invoking the Section 20(a) presumption with regard to claimant's back and neck complaints.[1] *See* 33 U.S.C. §920(a). We disagree. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that she suffered a harm and that an accident occurred or working conditions existed which could have caused the injury or harm. *See Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Volpe v. Northeast Marine Terminals*, 14 BRBS 17 (1981), *rev'd on other grounds*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). In establishing her *prima facie* case, claimant is not required to prove that the working conditions in fact caused the harm; rather, claimant must show only the existence of working conditions which could conceivably cause the harm alleged. *See Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989).

In the instant case, it is uncontroverted that claimant established the existence of a work-related accident which could have caused the harm alleged. In his decision, the administrative law judge relied upon claimant's complaints of pain, which he found to be corroborated by the opinion of Dr. Jarrott and the objective tests of record, in determining that claimant sustained a harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). It is well-established that, in arriving at his decision, the administrative

[1]In his decision, the administrative law judge rejected claimant's contentions regarding alleged work-related injuries to her shoulder, blurred vision, headaches, and psychological impairment.

law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *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). On the basis of the record before us, the administrative law judge's decision to rely upon claimant's testimony is neither inherently incredible nor patently unreasonable; we, therefore, hold that the administrative law judge did not err in finding that claimant established her *prima facie* case. Accordingly, we affirm the administrative law judge's invocation of the Section 20(a) presumption. *See Sinclair*, 23 BRBS at 148.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused, aggravated, or rendered symptomatic by her employment. *See Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). It is employer's burden on rebuttal to present specific and comprehensive evidence to sever the causal connection between the injury and the employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the issue of causation based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 270 (1990).

We affirm the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption. Employer alleges that it established rebuttal of the Section 20(a) presumption based on the "totality of the trustworthy evidence." *See* Brief at 12-13. The administrative law judge's finding, however, is supported by the record, as he rationally found that employer failed to present specific and comprehensive evidence proving the absence of, or severing the connection between, claimant's back and neck injuries and her employment. *See* Decision at 17. In this regard, employer concedes that Dr. Miller rendered no diagnosis relative to claimant's back condition, and the record indicates that Dr. Miller initially diagnosed claimant as having sustained a cervical strain. Accordingly, as employer has failed to set forth evidence sufficient to establish rebuttal of the Section 20(a) presumption, we affirm the administrative law judge's finding that claimant's back and neck conditions are causally related to her employment with employer. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Lastly, employer argues that the administrative law judge erred in finding that claimant is totally disabled; specifically, employer contends that the administrative law judge erred by failing to address the totality of the evidence regarding claimant's alleged capacity to either return to her usual employment duties with employer or, alternatively, to perform suitable alternate employment within employer's facility. We agree.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Const. Co.*, 17 BRBS 56 (1985). In finding that claimant is unable to return to her usual employment duties with employer, the administrative law judge relied upon the opinion of Dr. Jarrott, who testified that claimant is restricted to work of a light, minimal or sedentary nature. *See* EX 18. In rendering this determination, however, the administrative law judge did not fully discuss the contrary evidence of record, specifically the reports of those physicians who opined that claimant could resume her usual employment duties. In this regard, the record reflects that Dr. Segura released claimant to return to light duty work on July 7, 1992, and to her regular work by August 31, 1992. EX 12. Dr. Applebaum found no reason why claimant could not return to her usual and customary occupation by May 5, 1993. EXS 15, 16. Lastly Dr. Miller returned claimant to light to medium duty as of September 23, 1992, and discharged her to return to her usual job on December 10, 1992. EX 14. Thus, the record contains medical evidence not considered by the administrative law judge which, if credited, could establish claimant's ability to perform her usual employment. *See, e.g., Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).

We hold that the administrative law judge's decision on this issue cannot be affirmed since it fails to satisfy the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §554. Hearings of claims arising under the Act are subject to the APA, *see* 33 U.S.C. §919(d), which requires that every adjudicatory decision be accompanied by a statement of

> findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record.

5 U.S.C. §557(c)(3)(A). An administrative law judge thus must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *see also Frazier v. Nashville Bridge Co.*, 13 BRBS 436 (1981). Failure to do so will violate the APA's requirement for a reasoned analysis. *Ballesteros*, 20 BRBS at 187; *see Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). In the instant case, the administrative law judge failed to consider all of the evidence of record relevant to the issue of whether claimant is capable of resuming her usual employment duties with employer. Accordingly, we vacate the administrative law judge's decision regarding the ability of claimant to return to her usual job, and we remand the case for a reasoned analysis of all the medical evidence on this issue.

Lastly, employer contends that even if claimant were found to be unable to return to her usual employment, it established the availability of suitable alternate employment within

its own facility. Where a claimant establishes that she is unable to perform her usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of specific jobs within the geographic area in which claimant resides which she is, by virtue of her age, education, work experience, and physical restrictions, capable of performing and for which she can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986). Employer may meet this burden by offering claimant a job in its facility. *See Darby v. Ingalls Shipbuilding & Dry Dock Co.*, 99 F.3d 685, 30 BRBS 93 (CRT)(1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Although the job within employer's facility must actually be available to claimant, *see Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988), the job may be tailored to claimant's restrictions. *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986).

In support of its assertion that suitable alternate employment is available for claimant at its facility, employer submitted the testimony of Mr. Couch, its current EMT case manager, in order to establish the availability of suitable alternate employment at its facility through its light duty program. Mr. Couch not only noted specific light duty jobs available for claimant, HT at 17, but also testified that if an employee's disability is permanent she is either accommodated within her restrictions and existing skills or retrained for a position with the same rate of pay. HT at 170, 180. Mr. Couch additionally testified that it was employer's policy as part of its light duty program to place each disabled employee at their full salary in a position within their physical restrictions. HT at 177. Employer also submitted the deposition of Mr. Matran, who held the position of EMT manager at the time of claimant's injury and actually tried to work with claimant to place her in a position. EX 20. Mr. Matran deposed that employer has a longstanding light duty program, started before claimant's injury, which provides injured employees with light-duty work tailored to fit their residual abilities. Mr. Matran further testified as to the availability of light duty positions with minimum physical requirements. Moreover, Mr. Matran testified that job offers, such as bench welding, maintenance trades, and security positions, were made to claimant on July 6, 1992, and offered to her approximately four additional times. EX 20 at 20-26.

In addressing this issue, the administrative law judge found that employer failed to meet its burden because employer's proffered evidence lacked the necessary specificity to establish suitable alternate employment. In rendering this determination, however, the administrative law judge failed to address the testimony of either Mr. Couch or Mr. Matran, both of which, if credited, could support a finding that suitable alternate employment was available for claimant at its facility. We therefore vacate the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment; on remand, the administrative law judge must consider and discuss all of the evidence relevant to this issue, make appropriate findings based on the relevant law and evidence, and give a

written explanation of the reasons for his decision.

Accordingly, the administrative law judge's determination that claimant is permanently totally disabled is vacated, and the case is remanded for further findings in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge