BRB No. 93-0671

BEN STEVENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
METAL TRADES, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
AMERICAN INTERNATIONAL ADJUSTMENT COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Granting Benefits of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Carl H. Jacobson (Urichio, Howe, Krell, Jacobson, Toporek and Theos, P.A.), Charleston, South Carolina, for claimant.

W. Jefferson Leath, Jr. (Young, Clement, Rivers & Tisdale), Charleston, South Carolina, for employer/ carrier.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Granting Benefits (85-LHC-116) of Administrative Law Judge John C. Holmes, 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).

This is the second time that this case has been before the Board. In the initial appeal in this case, which dealt solely with the issue of jurisdiction, the Board affirmed the administrative law judge's finding that claimant was an employee covered under Sections 2(3) and 3(a) of the Act, 33 U.S.C. §§902(3), 903(a), and remanded the case for further appropriate

action. *Stevens v. Metal Trades, Inc.*, 22 BRBS 319 (1989).[1] The present appeal relates to the administrative law judge's findings regarding the merits of the claim.

On May 8, 1984, claimant sustained a serious injury while working as a welder for employer when an explosion occurred which threw him 30 feet. Employer does not dispute that as a result of this industrial accident claimant sustained a 30 percent impairment of his right leg and a 57 percent impairment of his right arm. Employer voluntarily paid claimant temporary total disability benefits from the date of the accident until January 29, 1987, at which time employer commenced payment of temporary partial disability compensation. Claimant sought permanent total disability compensation under the Act, contending that in addition to the injuries to his right arm and leg, the work-related accident also resulted in his having chronic back pain, either due to the trauma of the explosion or to his abnormal gait, as well as a psychological injury.

In his Decision and Order, the administrative law judge found that inasmuch as employer presented convincing evidence that claimant's back condition involves a disease process of unknown origin, and claimant has not provided any medical opinion which specifically links his back condition to his work injury, employer rebutted the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), and established that claimant's back condition was not causally related either directly or indirectly to the work accident. While recognizing that pursuant to *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 278 (1980), claimant would not be limited to the schedule if his right leg and arm injuries resulted in permanent total disability, the administrative law judge found that because employer established the availability of suitable alternate employment, claimant was limited to an award of permanent partial disability compensation under the schedule, 33 U.S.C. §908(c)(1), (2), (19). Accordingly, he awarded claimant temporary total disability benefits from May 8, 1984 until January 25, 1989, and permanent partial disability benefits under the schedule thereafter for a 57 percent loss of use of the right upper extremity and a 30 percent loss of use of the right lower extremity.

On appeal, claimant contends that the administrative law judge erred in finding that his back condition was not causally related to the work injury. Claimant further argues that even if his back injury is not work-related, he is nonetheless entitled to permanent total disability compensation because, contrary to the administrative law judge's determination, the vocational testimony of Ms. Crawford is insufficient to meet employer's burden of establishing the availability of suitable alternate employment. Employer responds, urging that the administrative law judge's decision be affirmed.

In establishing that an injury is causally related to employment, claimant is aided by the Section 20(a) presumption that his disabling condition is related to his employment. 33 U.S.C. §920(a). *Konno v. Young Brothers, Ltd.*, 28 BRBS 57, 59 (1994). Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption by presenting specific and

[1]The Board held that claimant, who was injured while repairing an amphibious military vehicle at a military storage facility located about a mile from the nearest water, met both the status and the situs requirements of the Act. Claimant's usual work involved repairing ships and the facility, which was used for the repair of vessels, was located in an area of, and adjacent to, commercial maritime sites.

comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976) *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 the evidence and resolve the causation issue based on the record as a whole. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

In the present case, the administrative law judge properly found claimant entitled to invocation of the Section 20(a) presumption, as it is undisputed that claimant suffers from chronic back pain and that the work accident occurred. Decision and Order at 6. *See Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988). He erred, however, in finding that employer successfully rebutted the presumption based on evidence that claimant's back condition involves a disease of unknown origin; employer must present evidence sufficient to rule out the employment accident as a cause of claimant's condition. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990); *Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989); *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). Moreover, the administrative law judge's reliance on the fact that claimant introduced no medical opinion which specifically links claimant's back condition to his employment or describes a back problem which is traumatic in nature fails as a matter of law to rebut the presumption; in so concluding the administrative law judge erred by placing the burden on claimant to establish that his condition was work-related. *See Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Inasmuch as employer failed to introduce specific and comprehensive evidence sufficient to sever the potential connection between claimant's back condition and the May 8, 1984 work accident[2], we reverse the administrative law judge's finding of rebuttal and hold that claimant's back condition is causally related to the work injury as a matter of law. *See Bass v. Broadway Maintenance*, 28 BRBS 11, 16 (1994).[3]

In light of our reversal of the administrative law judge's determination that claimant's back injury is not work-related, his finding that claimant is limited to permanent partial disability

[2]We note that the only evidence introduced by employer in this case was the labor market survey and vocational report of Carroll Crawford. Employer's Exhibit 1.

[3]Contrary to employer's assertion in its response brief, the medical opinion of Dr. Hinnant is insufficient to establish rebuttal of the Section 20(a) presumption. Dr. Hinnant recognized in his April 25, 1990, opinion that claimant had previously been evaluated for severe degenerative disk disease throughout the spine with spondylosis and scolioses, and concluded based on claimant's history of back pain that claimant was at that time undergoing a deteriorating process which was leading to chronic dysfunction and a chronic pain syndrome, but he voiced no opinion as to the cause of these conditions. *See* Claimant's Exhibit 7 at 8-9. We further note that the fact that claimant's back problems did not become apparent until one and one-quarter years after the subject work accident is insufficient, by itself, to establish rebuttal of the Section 20(a) presumption. *See Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

compensation under the schedule must be vacated. Although the administrative law judge found that claimant's scheduled right arm and leg injuries did not result in permanent total disability, he nonetheless concluded based on Dr. Bowen's April 18, 1989, medical opinion that the combination of claimant's right arm, right leg, and back conditions render him permanently totally disabled. *See* Decision and Order at 6. Inasmuch as the administrative law judge made the necessary findings of fact regarding the effect of claimant's back condition on his overall disability, we modify his Decision and Order, consistent with these findings, to reflect claimant's entitlement to permanent total disability compensation.

We agree with claimant, however, that even if his back condition were not work-related, he would be entitled to permanent total disability compensation for his scheduled injuries on the facts presented in this case. As it is uncontested that claimant is unable to return to his usual longshoring position, claimant established a *prima facie* case of total disability and the burden shifted to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in order to meet this burden, employer must establish that a range of specific available jobs opportunities exists which are reasonably available and which the disabled employee is realistically able to secure and perform. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); *see also Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984). In the present case, the administrative law judge found that employer met its burden of establishing suitable alternate employment opportunities based on the Labor Market Survey performed by Carroll H. Crawford. While Mr. Crawford found that claimant's restrictions limit him to sedentary type employment, and gave several examples of the types of jobs which he believed claimant could perform, including weight tester, traffic clerk, cashier, ticket seller, dispatcher, lumber estimator, trouble locator, and customer service worker, however, he neglected to identify any specific, available job opportunities. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988).[4] Moreover, as Mr. Crawford indicated that additional counseling and job placement assistance would be necessary in order for claimant to return to the work force following such an extended absence, the work he identified is not realistically available to claimant. *See generally Hoard v. Willamette Iron & Steel Co.*, 23 BRBS 38, 41 (1989). In light of these facts, we reverse the administrative law judge's finding that employer successfully established the availability of suitable alternate employment based on Mr. Crawford's January 25, 1989, labor market survey and report and hold that in the absence of a work-related back condition, claimant would nonetheless be entitled to permanent total disability compensation due to his back and arm injuries.[5]

[4]We note that the report itself contains a recommendation that claimant be provided with specific job openings and assistance with arranging interviews. Employer's Exhibit 1.

[5]In light of our holding that claimant would be entitled to permanent total disability compensation based on these injuries, we need not address claimant's assertion that the scheduled injuries in combination with his psychological impairment would render him permanently totally disabled. We further note that claimant has raised no additional arguments relating to the alleged psychological injury.

Accordingly, the administrative law judge's finding that claimant's back condition was not work-related and his denial of permanent total disability compensation are reversed for the reasons stated in this opinion. In all other respects, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge