

MICHAEL T. BREMBY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: <u>Dec. 16, 1999</u>
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Claimant's Motion for Reconsideration of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. and Chanda L. Wilson (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for self-insured employer.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Claimant's Motion for Reconsideration (97-LHC-2640) of Administrative Law Judge Fletcher E. Campbell, 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 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 allegedly injured his left wrist on April 5, 1995 while grinding welds. Claimant went to employer's clinic the next day complaining of wrist pain, and was given work restrictions which remained in place until July 6, 1995. Claimant then began to undertake treatment by Dr. Freund on July 14, 1995. Claimant was on and

off restricted duty over the next several months, and had surgery for a non work-related ganglion cyst on October 31, 1995. During this surgery, Dr. Freund found two additional abnormalities, which he removed. Claimant returned to work on restricted duty on November 16, 1995. Claimant's restrictions were discontinued on February 16, 1996.

On May 29, 1996, claimant returned to Dr. Freund, complaining of pain in his left wrist after pulling line and climbing ladders. Dr. Freund found dorsal tenderness, and again reinstated and discontinued work restrictions on several occasions. The last set of restrictions was placed on November 1, 1996, with an expiration date of February 20, 1998. On December 6, 1996, employer laid off claimant from his light duty job at employer's facility for economic reasons. Claimant began full-time employment with Norfolk Naval Shipyard on February 24, 1997. Claimant filed a claim for temporary total disability benefits from December 6, 1996 through February 24, 1997.

The administrative law judge found that claimant failed to present sufficient evidence to establish invocation of the presumption of Section 20(a) of the Act, 33 U.S.C. §920(a), and thus found that claimant's wrist injury is not work-related. He alternatively found that if Section 20(a) was invoked, employer presented insufficient evidence to establish rebuttal. The administrative law judge also found alternatively that claimant failed to establish that his disability is due to his work injury. Consequently, the administrative law judge denied benefits. The administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant contends that the administrative law judge erred in finding that his wrist injury is not work-related, and contests his alternative finding that claimant is not entitled to temporary total disability benefits from December 6, 1996 through February 24, 1997. Employer responds, urging affirmance.

Claimant first contends that the administrative law judge erred in finding that the Section 20(a) presumption is not invoked. Claimant has the burden of proving the existence of a 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. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once claimant establishes his *prima facie* case, Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment. The burden then shifts to employer to rebut it with substantial countervailing evidence. See *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1999).

In the instant case, the administrative law judge found that claimant established the first element of his *prima facie* case, *i.e.*, the existence of a physical harm, based predominantly on the records of Dr. Freund, who diagnosed claimant as suffering from tendinitis, possible ligament damage, an enlarged area in the dorsal capsule, and a thickened area in the extensor. The administrative law judge also noted that Dr. Reid originally diagnosed synovitis which, the administrative law judge found, is consistent with Dr. Freund's diagnosis. The administrative law judge, however, found that claimant failed to establish the "working conditions" element of his *prima facie* case because he presented no medical evidence to link his injuries to his work environment, and because no physician of record discusses claimant's job requirements and how his condition might relate to his employment.¹

We agree with claimant that the administrative law judge erroneously placed the burden on claimant to establish affirmatively that his injury is in fact related to his working conditions. Claimant need only show, in order to establish the second element of his *prima facie* case, that working conditions existed which *could* have caused the harm. Claimant's theory as to how the injury occurred must go beyond mere fancy, see *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982); see also *U.S. Industries/ Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), but a claimant is not required to introduce expert evidence, medical or otherwise, linking, in fact, his ailment to the conditions of his employment. See, *e.g.*, *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

In this case, claimant testified his left hand began to hurt while he was working and that he reported this pain to employer's clinic the next day. Tr. at 26-28. The clinic notes bear this out. EX 3. This evidence, the credibility of which was not called into question by the administrative law judge, is sufficient to establish that working conditions existed that could have caused claimant's hand and wrist pain. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998) (holding that the claimant's uncontradicted testimony concerning exposure to loud noise is sufficient to establish the existence of working conditions that could have caused the claimant's hearing loss). We, therefore, reverse the administrative

¹The administrative law judge stated that he, as a lay person, could not find that claimant's work activities could be responsible for claimant's condition without the aid of expert opinion. Decision and Order at 7-8.

law judge's finding that the Section 20(a) presumption is not invoked.

The administrative law judge also found, assuming, *arguendo*, the invocation of the Section 20(a) presumption, that employer did not rebut it. Employer alleges in its response brief that the opinion of Dr. Collier is sufficient to establish that any disability claimant may have had after July 6, 1995, when he released claimant to work without restrictions, was not related to the work accident due to the absence of any physiological condition at that time. We affirm the finding that employer's evidence is insufficient to rebut the Section 20(a) presumption. Dr. Collier's opinion is not sufficient to sever the connection between the injury and the employment as he assumes that, because claimant had a non work-related ganglion cyst, any pain claimant had thereafter was due to this condition alone. He does not address the other conditions diagnosed by Dr. Freund, and indeed, stated he did not have Dr. Freund's reports for review. Thus, this opinion does not state that all of the conditions diagnosed by Dr. Freund are not work-related. See *generally Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Claimant's condition therefore is work-related as a matter of law. See *generally American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999).

We also must vacate the administrative law judge's denial of disability compensation, and remand this case for further findings. Claimant was laid off from his job with employer on December 6, 1996, at a time when he was working under restrictions. This layoff was solely for economic reasons. Nonetheless, claimant is entitled to total disability compensation for the period of the layoff from the light duty job, unless employer shows the availability of other suitable alternate employment. *Norfolk Shipbuilding & Dry Dock Co. v. Hord*, 193 F.3d 797 (4th Cir. 1999); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). In *Hord*, the United States Court of Appeals for the Fourth Circuit recently held that an employer may not satisfy its burden of demonstrating suitable alternate employment based solely on the post-injury internal light duty employment subjected to the layoff. In this case, claimant obtained a job with Norfolk Naval Shipyard on February 24, 1997, and employer introduced into evidence a labor market survey and the testimony of a vocational counselor regarding the availability of alternate work during the layoff period. See EX 22; Tr. at 84. Therefore, we remand the case for the administrative law judge to reconsider claimant's entitlement to disability benefits under *Hord* as claimant was employed in a light duty job in employer's facility at the time of his layoff.²

²We note that the administrative law judge did not credit claimant's testimony regarding his alleged recall by employer prior to his obtaining alternate work, as unsupported by the documentary evidence of record. Order on Recon. at 1-2. The

administrative law judge's determination is rational and supported by substantial evidence.

Accordingly, the administrative law judge's finding that claimant's condition is not work-related is reversed. The case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge