BRB No. 98-0782
and 98-0782A

ARTHUR J. ROBINSON	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRY DOCK CORPORATION	)	DATE ISSUED:
	)	
	)	
and	)	
	)	
RICHARD-FLAGSHIP SERVICES, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

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

John H. Klein (Rutter & Montagne, L.L.P.), Norfolk, Virginia, for claimant.

Bradford C. Jacob (Taylor & Walker, P.C.), Norfolk, Virginia, for employer/ carrier.

Before: SMITH, and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Awarding Benefits (95-LHC-1535, 95-LHC-2015) 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).

The facts in this case are largely undisputed. Claimant, a shipfitter,[1] alleged that he injured his right knee while installing angle braces on a barge for employer on an incline on October 27, 1994. He did not report his injury that day, but the next day he informed his supervisor that he had injured his knee and requested medical attention. Claimant was sent to the shipyard clinic which referred him to the Sentara Little Creek Medical Center. Claimant was told he was to remain off work from Friday, October 28, 1994, until Tuesday, November 1, 1994, at which time he was to return to full duty. After leaving the Sentara clinic, claimant returned to the shipyard to provide employer with the above information. On Tuesday, claimant was referred to employer's carrier, where he provided a contractually - mandated urine sample,[2] and was asked by carrier's claims adjuster to fill out various worker's compensation papers. When claimant refused to do so unless he was provided with an opportunity to review the documents, he was told that he could not work and returned home. At that time, claimant informed carrier that he was choosing Dr. Morales as his initial, free choice of treating physician.

Claimant remained out of work between November 1, 1994, and November 8, 1994, allegedly without calling or contacting employer. On November 9, 1994, claimant reported to work with a medical excuse from Dr. Morales. Because of his alleged failure to comply with the "5-day rule," claimant received a notice of termination from employer on November 10, 1994. An MRI performed on November 9, 1994, revealed a medial meniscus tear, which Dr. Morales corrected surgically in December 1994. Claimant remained on a non-work status until March 10, 1995, when Dr. Morales released him for light duty work. Meanwhile, claimant pursued a grievance regarding his termination, and in October 1996, employer agreed to reinstate claimant. *See* Tr. at 147, 151. Claimant was informed that he would be contacted by employer regarding his returning to work once the parties' agreement was reduced to writing. Tr. at 147. In the interim, claimant allegedly attempted to obtain employment with various employers he identified on his own, as well as those identified in labor market surveys conducted by employer's vocational experts, Ms. Yonke and Ms. Davis, in December 1996 and January and February 1997. CX-23; EXS-A 22-31, 34-37; Tr.

[1]Claimant performed shipfitting for various maritime employers dating back to 1965.

[2]Injured employees are apparently required to undergo drug testing. Tr. at 42, 35- 46.

at 190. Through Ms. Yonke, claimant ultimately obtained a job with Goodwill Industries as a stocker. He performed this job from January 27, 1997, until February 10, 1997, when he allegedly quit because of problems with his knee. On February 11, 1997, employer contacted claimant regarding his reinstatement, but his actual reinstatement was delayed until May 20, 1997, because his pre-reinstatement physical revealed that he needed cataract surgery and had uncontrolled diabetes. Claimant performed light duty work for employer from May 20, 1997, until June 4, 1997, when he was informed by employer that it had no further work available within his restrictions. Claimant sought total disability compensation under the Act from October 28, 1994, until May 19, 1997, permanent partial disability compensation from May 20, 1997, until June 4, 1997, and permanent total disability thereafter. In addition, based on the results of an audiogram performed in May 1993, claimant filed a claim for occupational hearing loss benefits against employer in July 1993.

In his Decision and Order, with regard to the knee injury, the administrative law judge determined that as claimant introduced evidence sufficient to entitle him to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, and employer did not introduce evidence sufficient to rebut, claimant established that he sustained a work-related injury to his knee on October 27, 1994. The administrative law judge further determined that this injury reached maximum medical improvement on February 12, 1996, and awarded claimant the following benefits: temporary total disability compensation from October 29, 1994 until November 1, 1994, and November 9, 1994 until February 13, 1996; permanent total disability compensation from February 14, 1996 until January 26, 1997, and February 11, 1997 until May 19, 1997; and permanent partial disability compensation for a 10 percent impairment under the schedule, 33 U.S.C. §908(c)(2),(19), commencing June 5, 1997.[3] The administrative law judge, however, denied the claim for hearing loss benefits, finding that claimant failed to establish that his loss of hearing was work-related.

Employer appeals the administrative law judge's determination that claimant sustained a knee injury arising out of his employment on October 27, 1994. In the alternative, employer argues that the administrative law judge should have found that claimant's knee reached maximum medical improvement on May 5, 1995, based on Dr. Burns's impairment rating of that date, rather than on February 12, 1996, based on Dr. Morale's subsequent rating. Finally, employer contends that after May 8, 1995, claimant should have been limited to his

[3]The administrative law judge further determined that although employer's termination of claimant had been improper, its actions did not constitute a violation of Section 49, 33 U.S.C. §948a.

scheduled recovery. Claimant responds, urging affirmance of the administrative law judge's award of benefits with regard to his knee. Claimant, however, cross-appeals the denial of his hearing loss claim, arguing that the administrative law judge's causation analysis does not comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A) (APA). Employer responds, urging affirmance of the denial of the hearing loss claim.

Initially, we find no merit to claimant's argument on cross-appeal that the administrative law judge's analysis of the cause of his hearing loss does not comport with the APA.[4] After considering the relevant evidence, the administrative law judge properly invoked the Section 20(a) presumption, as he found that claimant suffered a harm, specifically a loss of hearing, and that exposure to work-related noise could have caused that harm. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Upon invocation of the presumption, the burden shifted to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). Once the Section 20(a) presumption has been rebutted, it is incumbent upon the administrative law judge to weigh all of the evidence of record and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

[4]The Administrative Procedure Act (APA) requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefore, 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 must independently analyze and discuss the evidence; and must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985).

On appeal, claimant does not challenge the administrative law judge's determination that employer rebutted the Section 20(a) presumption. Rather, claimant argues that in evaluating the record evidence as a whole, the administrative law judge abdicated his role as a trier-of-fact and failed to comply with the requirements of the APA: to consider the import of claimant's testimony regarding his noise exposure, to evaluate fully the conflicting evidence, to identify the evidence he was crediting and explain his reasons. We disagree. Having set forth the relevant evidence in detail previously when addressing invocation of Section 20(a), the administrative law judge summarized this evidence, noting that while Dr. Berrett suggested that exposure to noise may have increased claimant's hearing loss in the higher frequencies and Dr. Jackson stated that noise exposure could not be totally ruled out as a factor, Drs. Roper and Sataloff ruled out noise exposure as a causative factor in claimant's hearing loss.[5] He then concluded that while the physicians and/or audiologists were divided on the question of aggravation by noise exposure, the weight appeared to tip toward a conclusion of non-aggravation. Decision and Order at 20. The weighing of the evidence lies solely within the administrative law judge's authority, *see generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and the medical opinion of Dr. Sataloff, as corroborated by that of Dr. Roper, provides substantial evidence to support a finding that claimant's hearing loss was not work-related. Inasmuch as the administrative law judge addressed all of the relevant evidence, including claimant's testimony, and it is apparent from his discussion that he considered the evidence which favored claimant's position, but found other evidence disproving causation to be more persuasive, his analysis comports with the requirements of the APA. As claimant has not established reversible error in the administrative law judge's weighing of the conflicting evidence, his denial of the claim for occupational hearing loss benefits is affirmed.[6]

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[5]Contrary to the administrative law judge's determination, only Dr. Sataloff actually stated that it is impossible for claimant's hearing loss to be the result of his present occupation. EX-B 6-20. Dr. Roper opined that noise exposure made little or no contribution to claimant's hearing loss, that its stable progress over the past 20 years appeared compatible with the aging process rather than significant noise exposure, and that external noise exposure had not played a significant role in his hearing loss. EX-B 9-3-3. This opinion thus does not affirmatively state that noise exposure played no contributory role. *See Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (CRT)(4th Cir. 1982). Inasmuch, however, as the overall gist of Dr. Roper's opinion is that claimant's hearing loss is primarily due to aging, it is not inconsistent with Dr. Sataloff's view. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

[6]In light of our affirmance of the administrative law judge's denial of claimant's hearing loss claim, we need not address the arguments raised in employer's response brief that claimant is not entitled to these benefits, in any event, because

We next direct our attention to employer's arguments. Employer argues initially that in finding that claimant sustained a knee injury arising out of his work on October 27, 1994, the administrative law judge erred in affording claimant the benefit of the Section 20(a), 33 U.S.C. 920(a), presumption. Employer does not dispute that claimant demonstrated a physical harm to his knee. Rather, it challenges the administrative law judge's determination that claimant established the existence of an accident or working conditions which could have caused this knee condition.

It is well-established that in order to be entitled to the Section 20(a) presumption, claimant bears the burden of proving 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 his *prima facie* case. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Greenwich Collieries*, 512 U.S. at 267, 28 BRBS at 43 (CRT).

The administrative law judge's determination that claimant satisfied the second element of his *prima case* with regard to the knee injury is affirmed. Employer argues that the administrative law judge's finding in this regard is not supported by substantial evidence because claimant failed to demonstrate that he slipped, tripped, or fell on the date of the alleged accident or to describe any condition of the workplace which could have caused his injury. We disagree. Claimant testified that while working for employer installing ankle braces on a barge on October 27, 1994, he felt his knee pop when he turned with one foot positioned higher than the other. Based on this testimony and notations contained in clinical records which attributed claimant's knee problems to the work experience, the administrative law judge in the present case rationally found that claimant established the existence of working conditions which could have caused his knee injury. *See generally Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Although employer argues that the fact that claimant did not notice any problem with his knee until after he went home demonstrates that he did not injure his knee at work, the administrative law judge specifically considered but rejected employer's argument in this regard; he found claimant's consistent statements to the contrary credible. Decision and Order at 9.

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he failed to provide employer with timely notice, and that if benefits are due, it is entitled to relief under Section 8(f), 33 U.S.C. §908(f).

It is well-established that, in arriving at his decision, the administrative 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). Inasmuch as it cannot be said on the basis of the record before us that the administrative law judge's crediting of this testimony is either inherently incredible or patently unreasonable, or otherwise involved an abuse of his authority, his determination that claimant established his *prima facie* case and his consequent invocation of the Section 20(a) presumption are affirmed. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998). As claimant is entitled to the Section 20(a) presumption and employer does not contest the administrative law judge's determination that it failed to introduce evidence sufficient to establish rebuttal, his finding that claimant established a work-related knee injury arising out of his work for employer on October 27, 1994, is affirmed.[7] *See generally Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of N. America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, U.S. , 113 S.Ct. 1253 (1993).

Employer's argument that the administrative law judge erred in determining the date of maximum medical improvement is also rejected. An employee is considered permanently disabled when he has any residual disability following maximum medical improvement, *see Devine*, 23 BRBS at 279, the date of which is determined solely by medical evidence. *Sketoe v. Dolphin Titan International*, 28 BRBS 212, 221 (1994)(Smith, J., dissenting on other grounds); *see also Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 61 (1985). Employer argues on appeal that the administrative law judge erred in failing to find that claimant's knee condition reached maximum medical improvement on May 5, 1995, based on Dr. Burns's 10 percent impairment rating of that date, rather than on February 12, 1996, based on Dr. Morales's subsequent rating, as claimant's condition did not change in the interim and Dr. Morales ultimately agreed with Dr. Burns that claimant had a residual 10 percent disability. As the administrative law judge noted, however, Dr. Burns actually stated

[7]Employer also suggests that in concluding that claimant sustained a compensable knee injury while working for employer in October 1994, the administrative law judge erroneously assumed that claimant's prior 1991 knee injury was asymptomatic as of the time of the alleged October 1994 knee injury. *See* Decision and Order at 9. Any error made by the administrative law judge in this regard is harmless on the facts presented because it is undisputed that claimant sustained the 1991 knee injury while working for employer and the aggravation rule would apply. *See generally Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988).

at that time that claimant "probably" had reached maximum medical improvement and that he believed Dr. Morales would "probably" give him a 10 percent rating. Decision and Order at 12; EX-A 15, p. 15-1. Inasmuch as Dr. Morales performed claimant's knee surgery and it was not until his February 12, 1996, report that he definitively rated claimant's disability, the administrative law judge rationally found that claimant's condition reached maximum medical improvement on February 13, 1996, based on his crediting of this testimony. *See generally Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Finally, we address employer's assertion that the administrative law judge erred in failing to limit claimant to his scheduled recovery under Section 8(c)(2), 33 U.S.C. §908(c)(2) after May 8, 1995. Employer initially contends that the administrative law judge erred in finding that claimant established his *prima facie* case of total disability after this date because claimant informed Dr. Burns on that date that he could work as a shipfitter within Dr. Morale's restrictions, and Dr. Morales approved claimant's pre-injury job description. We disagree. To establish a *prima facie* case of total disability, claimant must prove that he is unable to perform the employment which he was performing at the time of his injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Contrary to employer's assertions, the record reflects that on May 8, 1995, claimant did not tell Dr. Burns that he could do his usual work as shipfitter, but rather that he could perform light duty work within Dr. Morales's restrictions, CX-8(c), (d). Moreover, Dr. Morales did not release claimant to perform his prior work, but rather imposed permanent restrictions regarding squatting, kneeling, vertical climbing, and lifting more than 30-40 pounds. EX A 21, 39. Inasmuch as the factual premise on which employer relies is not supported by the evidence, we reject employer's argument and affirm the administrative law judge's determination that claimant succeeded in establishing his *prima facie* case.

Employer argues alternatively that claimant should have been limited to his scheduled recovery as of May 8, 1995, because it produced undisputed evidence of suitable alternate employment. Where, as here, claimant had established a *prima facie* case of total disability, the burden shifts to the employer to establish the availability of suitable alternate employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). To do so, the employer must show the existence of realistic job opportunities which the claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the employer satisfies its burden, then the claimant, is at most, partially disabled. *See, e.g., Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). If an employee who has suffered an injury falling under the schedule is only partially disabled, upon reaching maximum medical improvement his recovery is limited to that provided for in

the schedule. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980). Claimant, however, can rebut employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he demonstrates that he diligently sought but was unable to secure, alternate work. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

In awarding claimant total disability compensation after May 8, 1995, the administrative law judge noted initially that between March and September 1995, claimant had contacted a multitude of firms, that additional contacts were made in December 1995 and January 1996, and that thereafter claimant subsequently contacted many of the employers identified by employer's vocational experts in early 1997. Decision and Order at 14. The administrative law judge further noted that employer had not argued that suitable alternate employment was available prior to February 1996. In addition, he determined that employer demonstrated the availability of suitable alternate employment about the time claimant went to work for Goodwill in January 1997, a job which was not suitable,[8] and that shortly thereafter employer offered to reinstate claimant. *Id.* Based on claimant's job search efforts, and his recognition that claimant's job status remained in limbo between employer's February 11, 1997, offer of employment and his May 19, 1997, reinstatement, the administrative law essentially determined that claimant was entitled to total disability compensation during the contested period because claimant had rebutted any showing of suitable alternate employment by demonstrating that, despite his diligent efforts, he was unable to secure alternate work.

On appeal, employer argues that inasmuch as its worker's compensation coordinator, Mr. Walker, provided testimony that suitable alternate employment was available at its facility as early as March 1995, and employer's vocational expert, Ms. Davis, identified suitable alternate job opportunities in labor market surveys performed in late 1996 and early 1997, EX-A 34; Tr. at 210-221, the administrative law judge's award of total disability compensation subsequent to May 8, 1995 is contrary to *PEPCO*. This argument is rejected.

[8]This finding is not contested on appeal.

Employer's assertions that it demonstrated the availability of suitable alternate employment need not be addressed, as any error in this regard is harmless since the administrative law judge rationally found that claimant exhibited due diligence but was unable to secure alternate work during the period at issue.[9] This finding is supported by substantial evidence, *i.e.*, claimant's testimony and the documentation of his job search, CX-23. While employer also argues on appeal that the administrative law judge erred in finding that claimant exhibited due diligence because he made no effort to find alternate work between October 28, 1994, and March 21, 1995, or between July 11, 1995, and June 4, 1997, this argument is also rejected. The record reflects that claimant was on a non-work status during the former interval, see, e.g., CX 2-15, and as discussed previously, the administrative law judge found claimant's testimony regarding his attempts at obtaining alternate work during the later interval credible. Finally, employer asserts that the documentation of claimant's job search attempts contained in CX-23 is a sham for various reasons and that claimant did not attempt to secure alternate work during any of the other periods at issue. Such matters of credibility, however, lie solely within the administrative law judge's discretionary authority. *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994). Inasmuch as the administrative law judge's finding that claimant diligently sought work is rational and supported by substantial evidence, and employer has failed to demonstrate any reversible error, his award of temporary total and permanent total disability compensation for various periods after May 8, 1995, is affirmed. *See generally Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 122 (1998); *Ion v. Duluth, Missabe & Iron Range Rwy. Co.,* 32 BRBS 268 (1998).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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[9]We note, moreover, that Mr. Walker testified that he made no attempt to place claimant in alternate work available at employer's facility at any time prior to May 20, 1997, because of claimant's status as a non-active employee based on the termination. Tr. at 156-157. Thus, Mr. Walker's testimony regarding light duty work is insufficient to satisfy employer's burden of establishing suitable alternate employment as a matter of law because it demonstrates that work at employer's facility were not realistically available to claimant in light of the termination. Although employer may meet its burden of establishing the availability of suitable alternate employment by offering claimant a job in its facility, the job must be actually available to claimant. *See Mendez v. National Steel & Shipbuilding Co.,* 21 BRBS 22 (1988).

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge