BRB Nos. 99-1007
and 99-1007A

KARL B. LANE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
BELL HELICOPTER COMPANY	)	DATE ISSUED: _____
	)	
and	)	
	)	
CIGNA	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Gary B. Pitts (Pitts & Associates), Houston, Texas, for claimant.

Keith L. Flicker and Kenneth M. Simon (Flicker, Garelick & Associates), New York, New York, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order (98-LHC-1012) of Administrative Law Judge James W. Kerr, 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 worked as a civilian for employer in Saudi Arabia and Kuwait during the

Gulf War. During his tenure, he was exposed to numerous toxic substances. Claimant testified that since his return from the war he has suffered from skin rashes that leave scars, and has extreme sleep problems, irritability, impotence, numbness, equilibrium problems, clumsiness, chronic fatigue, mental confusion, and short -term memory loss. In addition he suffers from headaches and dizziness, muscle weakness and pain, joint pain, and sensitivity to chemicals. H. Tr. at 79, 81-81, 91, 93-95, 121, 123. Claimant also learned in 1992 that he developed colon cancer, for which he has had a number of operations, and he developed Hepatitis C from the blood transfusions received during this time. Following his return from the war, claimant continued to work for employer until September 4, 1997, when he was fired for "insubordination." Although claimant attempted to work at three other aviation companies following his release from employer, he stopped working due to poor health. Claimant sought permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant failed to establish that his colon cancer was due to his exposure to chemicals during his employment during the war. However, the administrative law judge did find that claimant established that his neurocognitive deficits were caused by his exposure to pesticides, depleted uranium, and oil fire smoke during the war. The administrative law judge also found that claimant could not return to his former duties as a customer representative. In reviewing whether employer established the availability of suitable alternate employment, the administrative law judge rejected the positions identified by employer's labor market survey as they were "infeasible due to his neurocognitive impairments in judgment, performance of executive functions, abstract reasoning, problem solving and decision making." Decision and Order at 27. Thus, the administrative law judge awarded claimant temporary total disability benefits from September 4, 1997, and continuing, except for the periods during which claimant worked for other employers, when he was awarded temporary partial disability benefits. The administrative law judge also awarded necessary and reasonable medical expenses for claimant's multisystem chronic illness, but denied medical benefits for claimant's colon cancer.

The administrative law judge also credited claimant's testimony that he was "counseled" by his supervisor to relinquish his claim under the Act or jeopardize his position. After reviewing the evidence surrounding claimant's dismissal, the administrative law judge found that claimant established a *prima facie* case under Section 49, 33 U.S.C. §948a, and that employer did not prove that its adverse personnel action was not motivated by claimant's filing a claim under the Act. Thus, the administrative law judge fined employer $5,000 pursuant to Section 49.

On appeal, employer contends that the administrative law judge erred in addressing Section 49, as this issue was not raised by the parties in the pre-hearing statements, at the hearing, or in the post-hearing briefs. Employer also contends that the administrative law

judge erred in finding that claimant was totally disabled as of the date he was discharged, and in finding that claimant was not capable of performing the identified alternate employment. On cross-appeal, claimant contends that the administrative law judge erred in finding that his colon cancer was not causally related to his work exposure to carcinogens during the Gulf War.

Section 20(a)

Initially, we will address claimant's contention on cross-appeal. Claimant contends that the administrative law judge erred in finding that his colon cancer was not causally related to the carcinogens to which he was exposed in the course of his employment during the war. When addressing the causation issue with respect to the colon cancer, the administrative law judge found only that:

> Claimant argues that his colon cancer was precipitated by his exposure to toxic chemicals during his employment with Respondent. Conversely, the Court finds that the evidence presented does not support such a determination. Claimant's family history establishes that Claimant was at high risk of colon cancer....Thus, this Court finds that Claimant's colon cancer was not caused by a work-related injury, and is, therefore, not compensable.

Decision and Order at 24-25. Section 20(a), 33 U.S.C. §920(a), which the administrative law judge did not apply in this case, provides claimant with a presumption that his injury is causally related to his employment, if claimant establishes that he has a physical harm, and that an accident occurred or working conditions existed that could have caused the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *see also U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

While it is not disputed that claimant had a serious family history of colon cancer, he underwent annual colonoscopies and did not have cancer when he left for the Gulf War. It is also undisputed that he subsequently developed colon cancer. The record contains evidence that claimant was exposed to mustard gas and depleted uranium, both carcinogens, during the course of the war. Cl. Ex. 161; H. Tr. at 78. Dr. Rea, a specialist in environmental medicine upon whom the administrative law judge relied in establishing a causal nexus between claimant's neurocognitive deficits and his work-related exposure to toxic substances, stated that the carcinogens encountered by claimant during the war could have acted as a "trigger" to claimant's cancer. Cl. Ex. 166 at 18. We therefore hold that invocation of the Section 20(a) presumption is established as a matter of law. *See Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. INA v. United States Department of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

Once the Section 20(a) presumption is invoked, an employer may rebut it by producing facts to show that a claimant's employment did not cause, accelerate, aggravate or contribute to his injury. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000); *Swinton v. J. Frank Kelly, Inc*., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Employer contends that Dr. Sanders's statement that claimant's greatest risk factor for developing cancer was his genetic history supports the administrative law judge's finding that claimant's colon cancer was unrelated to his employment. However, Dr. Sanders stated that he could not address whether exposure to environmental toxins causes colon cancer. Further, he stated that he is not an oncologist, and that he was not familiar with the extent to which claimant was exposed to depleted uranium and mustard gas, or whether these substances were carcinogens. Emp. Ex. W at 31-32. If claimant's work played a role in the manifestation of a disease, the entire resulting condition is compensable, as the only legally relevant question is whether the work exposure is a cause of the condition, not whether it is the sole cause. *See Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). Therefore, as Dr. Sanders does not state that claimant's exposures during the war did not cause or contribute to the development of claimant's colon cancer, we hold that Dr. Sanders's opinion is legally insufficient to rebut the Section 20(a) presumption. *See Conoco*, 194 F.3d at 690, 33 BRBS at 192 (CRT). Moreover, as there is no other evidence of record sufficient to rebut the Section 20(a) presumption, we hold that a causal relationship between claimant's colon cancer and his work exposure is established as a matter of law. *See Bath Iron Works Corp. v. Director, OWCP*,109 F.3d 53, 31 BRBS 19 (CRT) (1st Cir. 1997). The administrative law judge's finding to the contrary therefore is reversed, and claimant is entitled to medical benefits for this condition. *See Romeike v. Kaiser Shipyard*, 22 BRBS 57 (1989).

Section 49

On appeal, employer contends that the administrative law judge erred in raising the issue of Section 49 *sua sponte* and in finding that claimant was improperly discharged in violation of Section 49.[1] An administrative law judge may consider, at any time prior to the

[1]Section 49, 33 U.S.C. §948a, provides:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter....Any employer who violates this section shall be liable to a

filing of the compensation order in the case, a new issue upon his own motion, but is required to give the parties no less than 10 days' notice of the hearing on such new issue. 20 C.F.R. §702.366(b); *Cornell University v. Velez*, 856 F.2d 402, 21 BRBS 155(CRT) (1st Cir. 1988); *Ramirez v. Sea Land Services, Inc.*, 33 BRBS 41 (1999).

In the present case, the issue of Section 49 was not raised in the parties' pre-hearing statements or the parties' stipulations of the issues presented to the administrative law judge at the hearing. Moreover, the issue was not mentioned in counsels' opening statements at the hearing, or in the post-hearing briefs. There was an issue regarding the circumstances around claimant's discharge, but this related to the extent of claimant's disability; specifically, whether claimant was discharged because he could no longer perform his duties due to his claimed condition or because of his alleged insubordination. Employer did not have the opportunity to address the element of discrimination relevant under Section 49. Claimant's counsel contends that employer was placed on notice of the issue two months prior to the hearing by a letter noting that a Section 49 violation was being investigated. However, there was no further indication that this issue would be included in the hearing. We therefore hold that the administrative law judge erred in considering Section 49 without affording the parties reasonable notice, and we vacate the administrative law judge's finding that claimant was discharged in violation of Section 49 and remand for further consideration. The administrative law judge, on remand, must allow the parties the opportunity to submit additional evidence and argument relevant to the Section 49 issue. *See Velez*, 856 F.2d at 402, 21 BRBS at 155 (CRT); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984).

Extent of Disability

Employer also contends that the administrative law judge erred in finding that claimant could not perform his usual employment as of September 4, 1997, the date of his discharge by employer. It is claimant's burden to establish that he is unable to return to his former employment due to his work injury. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). Claimant's credible complaints of pain may constitute substantial evidence to meet his burden of proof. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339

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penalty of not less than $1,000 or more than $5,000, as may be determined by the deputy commissioner.

(1988).

Claimant testified that at the time of his discharge he was suffering from memory loss, lack of concentration, and irritability. H. Tr. at 104. Although claimant testified that he continued to attempt to work at other jobs until September or October 1998, he testified that he felt he should not have been working during this time because he was not "safe." H. Tr. at 111. As the administrative law judge found, Drs. Rea and Didriksen opined that claimant is not capable of returning to his regular employment. Cl. Ex. 166 at 33, 37, 47; Cl. Ex. 167 at 56, 82. Although she did not examine claimant until after his discharge, Dr. Didriksen opined that claimant's reported behavior prior to his discharge was symptomatic of his neurocognitive dysfunction. Cl. Ex. 167 at 72-76. Moreover, claimant testified that he had noticed a change in his behavior at work since his return from the war. Thus, we affirm the administrative law judge's finding that claimant was unable to perform his usual duties as of September 7, 1997, as it is supported by substantial evidence. *See generally Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

Lastly, employer contends that the administrative law judge erred in finding that employer failed to establish the availability of suitable alternate employment. If claimant establishes that he cannot return to his usual employment, the burden shifts to employer to establish the availability of suitable alternate employment or realistic job opportunities which the claimant is capable of performing and which he could secure if he diligently tried. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 89(CRT) (2d Cir. 1997); *Palombo*, 937 F.2d at 73, 25 BRBS at 6 (CRT).

In the present case, employer contends that the administrative law judge erred in rejecting the following "non-mechanic" positions:

> 1) Bombardier Business Jet Solutions: a position which required data collection verification and integrity;
> 2) Lockheed Martin Tactical Aviation: a specialist position in project planning; and
> 3) The Saver Group Recruiting Dept: a project manager in a management position.

Emp. Ex. I. The administrative law judge rejected these positions as they would require claimant to exercise diagnostic, management, and organizational skills which would be infeasible due to his neurocognitive impairments in judgment, performance of executive functions, abstract reasoning, problem solving and decision making. Dr. Didricksen opined that due to claimant's condition, he "may make very grave errors in judgment" and that he is "not capable of making good decisions." Cl. Ex. 167 at 83. As the administrative law judge's finding is rational, and based on the opinions of Drs. Rea and Didricksen, we affirm the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment. *See generally Wilson v. Crowley Maritime*, 30 BRBS 199

(1996).

Accordingly, the administrative law judge's finding that claimant's colon cancer was not causally related to his work exposure to carcinogens is reversed, and the case is remanded for the administrative law judge to resolve any other outstanding issues regarding this condition. In addition, the administrative law judge's finding that claimant was improperly discharged in violation of Section 49 of the Act is vacated. On remand, the administrative law judge must give the parties the opportunity to submit evidence and argument on this issue. The administrative law judge's decision is affirmed in all other respects.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge