

BRB Nos. 00-0544
and 00-0544A

KENNETH A. HAWKINS)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
TARMAC AMERICA, INCORPORATED)	DATE ISSUED:
)	
and)	
)	
AIG CLAIM SERVICES)	
)	
Employer/Carrier- Respondents)	
Cross-Petitioners)	DECISION and ORDER

Appeals of the Decision and Order Granting Benefits to the Claimant and Decision and Order on Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Granting Benefits to the Claimant and Decision and Order on Motion for Reconsideration (97-LHC-1278) 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 administrative law judge's findings of fact

and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, while working for employer on February 11, 1996, sustained injuries to his back, head, neck and hands when the crane he was operating collapsed and fell over backwards.¹ On February 12, 1996, claimant was initially diagnosed with a cervical thoracolumbar sprain and informed that he could return to restricted work. Employer did not provide any light duty work and, in fact, terminated claimant pursuant to its Drug and Alcohol Policy after a urine drug screen performed on February 12, 1996, was positive for marijuana. Claimant has not worked since his accident.

An MRI revealed that claimant had a cavernous angioma in the right half of the spinal cord at C-2. On May 9, 1996, Dr. Partington, a board-certified neurosurgeon, opined that claimant's symptoms of chronic neck and low back pain are consistent with cervical and lumbar myofascial pain syndrome and noted at that time that claimant's cavernous angioma was unrelated to his current difficulties. Dr. Partington subsequently opined, on July 10, 1996, that the bulk of claimant's symptomatology, *i.e.*, worsened back pain along his spine, was now due to the cavernous angioma, and further observed in April 1997, that claimant's cavernous angioma was playing a significant role in his symptoms and that it would permanently disable him. Dr. Partington repeatedly stated that the cavernous angioma was not caused by claimant's work-related accident.

In his decision, the administrative law judge determined that claimant's cervical and lumbar myofascial pain syndrome was work-related but that the cavernous angioma was neither caused nor aggravated by claimant's work accident. The administrative law judge then found that claimant was unable to perform his regular duties as a result of his work-related injuries, and that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from February 11, 1996, and continuing, as well as medical benefits for the treatment of claimant's work-related cervical and lumbar myofascial pain syndrome. On reconsideration, the administrative law judge determined that, absent the non-work-related cavernous angioma, claimant would have recovered from his work-related myofascial pain syndrome in six months and would have been able to return to work at that time. As such, the administrative law judge modified his prior decision to reflect that claimant is entitled to

¹Claimant also performed work for employer as a sandblaster and/or painter although his job predominantly involved the operation of a crane.

temporary total disability benefits only from February 11, 1996, until August 11, 1996.

On appeal, claimant challenges the administrative law judge's finding that his cavernous angioma is not work-related, and the denial of benefits after August 11, 1996. Employer responds, urging affirmance of the administrative law judge's finding that claimant's cavernous angioma is not work-related. In its cross-appeal, employer challenges the administrative law judge's award of temporary total disability benefits. Claimant responds, urging affirmance of the administrative law judge's award of benefits.

Claimant initially contends that the administrative law judge erred in not finding that his cavernous angioma was work-related because this condition was aggravated or accelerated as a result of the work-related injury on February 11, 1996. Claimant maintains that he has successfully invoked the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to the cavernous angioma and that employer has not met its burden to show that this condition was not accelerated or aggravated by his work injury.

It is claimant's burden to prove 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 a *prima facie* case. See *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); see also *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Where claimant has established his *prima facie* case, Section 20(a) of the Act provides him with a presumption that his condition is causally related to his employment; the burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's condition was neither caused nor aggravated by his employment. See *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*); *Swinton v. J. Frank Kelley, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds the Section 20(a) presumption rebutted, it drops from the case. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The administrative law judge then must weigh all the evidence and resolve the issue of causation on the record as a whole with claimant bearing the burden of persuasion. *Id.*; see also *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); see generally *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In his decision, the administrative law judge initially acknowledged that claimant's claim for total disability is based on two distinct injuries: the cervical and lumbar myofascial pain syndrome which he found was work-related, and the cavernous angioma, which he

found was not. In addressing whether the cavernous angioma was work-related,² the administrative law judge relied on the opinion of Dr. Partington, whom he observed was the only medical expert to testify in this case. Specifically, the administrative law judge found that claimant had the cavernous angioma before he suffered injuries from the February 11, 1996, crane accident, and that Dr. Partington could not recall a single case in which a trauma made a previously asymptomatic cavernous angioma become symptomatic. Additionally, the administrative law judge determined that Dr. Partington stated that while a cavernous angioma can enlarge and change over time, it is not caused by trauma or any other external cause. The administrative law judge further noted that Dr. Partington repeatedly stated that there is no objective evidence to indicate that the accident caused, aggravated, or combined with the cavernous angioma to result in a greater disability.³ He found that Dr. Partington based this opinion on the absence of any evidence of a recent hemorrhage in and around this angioma, as well as the fact that there was no MRI evidence that the work injury made the cavernous angioma symptomatic. In this regard, Dr. Partington found that there was merely a temporal relationship between the onset of symptoms from the angioma and the accident, since when he first saw claimant, he was just having paresthesias, or tingling in his arm in an isolated way which would have been suggestive of a disc problem. It was only over time that he became more comfortable in saying that claimant's symptoms were related to the angioma. Consequently, based on Dr. Partington's opinion, the administrative law judge found that the cavernous angioma was neither caused nor aggravated by claimant's work

²The administrative law judge set out the appropriate standard for causation under Section 20(a). With regard to rebuttal, he noted that although the cavernous angioma is not a direct result of claimant's work accident, any resulting disability related to it is compensable under the Act, if the employment-related injury contributed to, combined with, or aggravated this pre-existing condition. He further recognized that it is employer's burden to establish that claimant's cavernous angioma was not caused or aggravated by his employment. The administrative law judge's consideration of whether claimant's cavernous angioma was caused or aggravated by his employment is necessarily based on a finding that claimant established a *prima facie* case under Section 20(a). *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

³The record contains two depositions of Dr. Partington. Employer's Exhibits (EX) 10, 11. While Dr. Partington did, at times, note that the question of whether the work accident did or did not aggravate claimant's cavernous angioma is "unanswerable," EX 10 at 27; EX 11 at 16-17, 34, he nevertheless repeatedly stated that the angioma could not be construed as a work-related problem, EX 10 at 16, 25; EX 11 at 13, 17, and the administrative law judge rationally concluded that Dr. Partington's opinion is supported by objective medical evidence.

accident, and accordingly concluded that any disability that stems from the cavernous angioma is not compensable under the Act. As the administrative law judge's determination that claimant's cavernous angioma was neither caused nor aggravated by claimant's work accident is rational, supported by substantial evidence and in accordance with law, it is affirmed. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Moreover, although the administrative law judge blended the second and third steps of the causation analysis, *i.e.*, whether employer rebutted the Section 20(a) presumption and weighing the evidence of causation as a whole, the administrative law judge did not commit reversible error on these facts as the evidence he credited is sufficient both to rebut the presumption and to support his decision on the record as a whole. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT)(5th Cir. 1998).

Claimant also argues that the administrative law judge erred in finding that he is not entitled to benefits after August 11, 1996. In addition, claimant asserts that Dr. Partington explicitly opined, in his 1999 deposition, that claimant's low back pain, which arose as a result of the work-related accident, played a significant part in impairing his ability to perform his work duties at the shipyard and thus establishes that claimant continues to be totally disabled due to his work-related injuries. On the issue of disability, employer, in its cross-appeal, asserts that claimant was terminated solely because of his positive drug test and that thus, pursuant to *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993), *aff'g* 26 BRBS 1 (1992), he is not entitled to any disability benefits. Employer also argues that it has established suitable alternate employment by establishing the availability of light duty work at its facility and therefore it is not liable for continuing disability benefits.⁴

⁴Employer also avers that a continuing award of disability benefits extending beyond the date of the hearing is violative of the Administrative Procedure Act (APA) and its due process rights since no evidence regarding claimant's condition was submitted after that date and therefore there can be no basis for such an award. We reject employer's contention for the reasons articulated by the United States Court of Appeals for the Fourth Circuit in *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513 (4th Cir. 2000). *See generally* 5 U.S.C. §557(c)(3); 33 U.S.C. §908(e).

Claimant establishes his *prima facie* case of total disability if he is unable to perform his usual employment duties due to a work-related injury. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). Where claimant establishes his *prima facie* case, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Employer may meet this burden by offering claimant a suitable position in its facility. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT)(5th Cir. 1996).

With regard to the issue of disability, the administrative law judge initially determined that claimant was unable to perform his regular duties due to his work-related injuries. After considering *Brooks*, 2 F.3d 64, 27 BRBS 100(CRT), the administrative law judge determined that employer did not establish the availability of suitable alternate employment and thus concluded that claimant is entitled to temporary total disability benefits. As the administrative law judge properly found, the instant case is distinguishable from *Brooks*,⁵ as employer did not establish that a suitable job was actually available to claimant in its facility but for his termination. The fact that employer terminated claimant for cause does not alleviate employer's burden to show the availability of suitable alternate employment, where, as here, claimant is unable to return to his usual work. See generally *Brooks*, 2 F.3d 64, 27 BRBS 100(CRT); see also *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT)(4th Cir. 1999). As the administrative law judge found, employer did not provide evidence regarding any specific light duty work for the judge's consideration, but merely offered testimony by its safety manager, Fred Cone, that employer has a "strong policy" of providing jobs to injured employees that are within their work restrictions, and that it had an "across the board policy" to provide light duty work for employees. We agree with the administrative law judge's determination that employer's presentation of this "hypothetical" evidence does not meet its burden of demonstrating that suitable alternate employment existed as employer made no effort to describe suitable employment actually available for claimant during that time. See *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); see also *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21

⁵In *Brooks*, the claimant falsified his employment application and a pre-employment medical history. This fact was discovered after he suffered an injury at work. The claimant *had returned to work for employer in light duty status*, with no loss in actual wages, when he was terminated for falsifying his application in violation of a company rule. Claimant sought *total* disability compensation after his discharge, which an administrative law judge awarded. The Board reversed, however, holding that as claimant's discharge was for reasons unrelated to his disability, employer was not required to show different suitable alternate employment outside its facility. *Brooks*, 26 BRBS at 6. The United States Court of Appeals for the Fourth Circuit affirmed the Board's decision in *Brooks*, based on the Board's reasoning. *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT)(4th Cir. 1993).

BRBS 94 (1988). Accordingly, the administrative law judge's findings that employer did not establish the availability of suitable alternate employment, and thus that claimant is entitled to temporary total disability benefits between February 11, 1996, and August 11, 1996, are affirmed.

Claimant's argument that the administrative law judge erred in terminating his entitlement to temporary total disability benefits as of August 11, 1996, has merit. This conclusion must necessarily rest on evidence that after six months claimant, but for the angioma, would be able to return to his regular employment. In making this determination, the administrative law judge relied on the testimony of Dr. Partington that it may take up to six months for claimant to recover from his work-related cervical and lumbar myofascial pain syndrome and return to work. However, as the administrative law judge acknowledged in his initial decision, Dr. Partington stated that "after an appropriate non-surgical course of treatment over three to six months, I would have the expectation that [claimant] would go back *at least to a light-duty position*."⁶ EX 10 at 22 [emphasis added]. This statement indicates that claimant may not have been able to return to his *usual* employment after six months. See *Marinelli v. American Stevedoring, Ltd*, 34 BRBS 112 (2000). We, therefore, vacate the administrative law judge's finding that claimant is not entitled to temporary total disability benefits after August 11, 1996, and remand the case for further consideration of claimant's entitlement to benefits after August 11, 1996.

Accordingly, the administrative law judge's termination of claimant's entitlement to temporary total disability benefits as of August 11, 1996, is vacated, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

⁶The administrative law judge found that Dr. Partington's second deposition was much less credible than his first, since he did not submit or cite any new evidence to support his change in testimony regarding the cause for claimant's continued inability to perform work. The administrative law judge therefore accorded diminished weight to Dr. Partington's statement, at his second deposition, that claimant's low back pain played a significant role in impairing claimant's ability to perform his work duties. Thus, contrary to claimant's contention, that statement is insufficient to establish that claimant continues to be totally disabled due to his work-related injuries.

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge