

ALGENE VAN WRIGHT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LOCKHEED SHIPBUILDING)	DATE ISSUED:
COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order and Order on Reconsideration of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Robert M. Keefe, Seattle, Washington, for claimant.

Raymond H. Warns, Jr. (Witherspoon, Kelley, Davenport & Toole), Seattle, Washington, for self-insured employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order and Order on Reconsideration (88-LHC-1343) of Administrative Law Judge Edward C. Burch awarding benefits 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant alleged that she sustained an injury to her left knee on April 7, 1987, in the course of her employment as a ship scaler. Employer voluntarily paid compensation under the Act for temporary total disability, 33 U.S.C. §908(b), and medical benefits. Dr. Robinson performed an arthroscopy on July 30, 1987, during which he removed a torn medial meniscus. The operation revealed mild to moderate degenerative joint disease.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988). Claimant informed Dr. Robinson that her knee failed to improve after the surgery and subsequent

physical therapy. On November 27, 1987, Dr. Robinson reported that there was nothing more he could do to improve claimant's knee function. In January 1988, employer terminated its voluntary compensation payments and medical benefits because it received a statement from claimant's boyfriend that her knee injury was not work-related. He subsequently attributed his statement to anger over the break-up of their relationship. Employer declined to reinstate claimant's compensation and medical benefits. Claimant, therefore, requested a formal hearing, which was held on August 15, 1988. Claimant filed a pre-hearing statement on July 13, 1988, in which she alleged she had a work-related knee injury and also a resulting back injury.

The administrative law judge found that claimant sustained a work-related knee injury; however, he found she failed to prove the existence of a back injury. Based on Dr. Robinson's report and deposition testimony, the administrative law judge found that claimant's knee injury reached maximum medical improvement on November 27, 1987, and he accordingly awarded claimant benefits for temporary total disability from April 7 to November 26, 1987. He also credited claimant's testimony and the opinions of Drs. Robinson and Brigham to conclude that claimant is entitled to benefits for a 5 percent permanent partial knee impairment. *See* 33 U.S.C. §908(c)(2), (19). Claimant's motion for reconsideration was denied.

On appeal, claimant contends that because she was unable to obtain medical treatment after employer terminated benefits in January 1988, she was unable to produce evidence that her knee condition had not reached maximum medical improvement and that she sustained a resulting back injury. Accordingly, claimant argues that the administrative law judge erred by finding that her knee had reached maximum medical improvement and that she did not establish the existence of a back injury. Claimant also contends that the administrative law judge erred by failing to apply the Section 20(a) presumption, 33 U.S.C. §920(a), in determining that claimant failed to establish the existence of a back injury. Claimant further argues that her permanent knee impairment is greater than 5 percent. Employer responds, urging affirmance.

The Section 20(a) presumption applies to the issue of whether an injury is casually related to employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). In order for Section 20(a) to apply, claimant must establish a *prima facie* case by proving that she suffered harm or pain and that working conditions existed or an accident occurred that could have caused the harm or pain. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Claimant's credible complaints of pain and evidence that working conditions existed that could have caused the alleged injury is sufficient to invoke the presumption. *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS at 75 (CRT) (D.C. Cir. 1990); *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); *see also Welch v. Pennzoil Co.*, 23 BRBS 395, 401 (1990).

We agree with claimant's argument that the administrative law judge failed to adequately discuss the evidence relevant to whether she sustained a back injury. *See generally Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). Claimant testified that she suffers from back pain, Tr. at 31, 50-51, and Dr. Robinson, although not informed by claimant of her alleged back symptomatology, testified that her back pain could be attributed to the knee injury and subsequent surgery, CX 8 at 52-53. Although claimant's allegations of pain or harm must go beyond "mere fancy," *see Champion v. S & M Traylor Bros.*, 690 F.2d 285, 295, 15 BRBS 33, 41 (CRT) (D.C. Cir. 1982), her testimony, if credited by the administrative law judge, is substantial evidence to establish the existence of a harm. The administrative law judge erred by not addressing this testimony. Furthermore, the administrative law judge also did not address Dr. Robinson's testimony linking her alleged back pain to the knee injury. We therefore vacate the administrative law judge's finding that claimant failed to prove the existence of a back injury.¹ On remand, the administrative law judge must address claimant's credibility and determine whether claimant sustained a harm or pain to her back. If he finds that claimant established a harm, then Dr. Robinson's testimony establishes that the knee injury could have caused the harm. If claimant is entitled to invocation of the Section 20(a) presumption, employer may rebut with evidence that claimant's injury is not caused by her employment. *See Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).

We also agree with claimant's contention that the administrative law judge's finding that claimant has a 5 percent permanent knee impairment fails to comply with the Administrative Procedure Act. Section 557(c)(3)(A) of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), requires that the administrative law judge state the reasons or bases for his findings on all material issues presented in the record. This requirement, *inter alia*, permits reviewing bodies to discern the rationale for the administrative law judge's findings and thereby determine whether they are supported by substantial evidence and in accordance with law. *See Corcoran v. Preferred Stone Setting*, 12 BRBS 148, (1979).

¹We reject claimant's argument that she was unable to establish the existence of a back injury and that her knee has not reached maximum medical improvement due to employer's alleged wrongful termination of medical benefits. On July 8, 1988, claimant's knee was examined by Dr. Brigham, and on July 13, 1988, she was reevaluated by Dr. Robinson. Claimant, therefore, had ample opportunity one month before the formal hearing to present her complaints to these physicians. The administrative law judge's finding of maximum medical improvement is based on the testimony and November 27, 1987, report of Dr. Robinson that nothing further could be done to improve claimant's knee function, and the administrative law judge's finding is supported by substantial evidence. Dr. Robinson's report was generated before employer terminated its payments of medical benefits. Since claimant was examined on two occasions one month prior to the hearing, employer's refusal to provide further medical care was not prejudicial to claimant's case.

In his Decision and Order, the administrative law judge stated that based on the opinions of Drs. Robinson and Brigham, he found claimant sustained a permanent impairment resulting in a permanent partial disability of five percent. Dr. Brigham's credited testimony establishes that claimant is capable of returning to her usual employment as a ship scaler and has a five percent permanent knee impairment. This testimony would be substantial evidence supporting the administrative law judge's impairment finding. *See generally King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85 (CRT)(9th Cir. 1990). However, the administrative law judge also credited Dr. Robinson's testimony, which states that claimant is disabled due to her knee injury and able to work with limitations. In his Order on Reconsideration, the administrative law judge further stated: "I based this award on the opinions of two attending physicians and claimant's own testimony." Order on Reconsideration at 1. The testimony of Drs. Brigham and Robinson and claimant's testimony, upon review as a whole, is not reconcilable with the administrative law judge's conclusion that claimant's work-related knee injury resulted in a permanent impairment of 5 percent. While Dr. Brigham's testimony supports the administrative law judge's conclusion, the reports and testimony of Dr. Robinson and claimant's testimony establish a greater extent of impairment. For example, while Dr. Brigham opined that claimant could return to her usual heavy-duty employment, Dr. Robinson stated that her knee impairment requires that claimant only perform light-duty work, and claimant testified that she is incapable of working. *Compare Ex 12 at 21 with CX 8 at 48-49, Tr. at 32-33.* If claimant is unable to return to her usual work, she is entitled to permanent total disability benefits unless employer establishes the availability of suitable alternate employment. *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139, 141-142 (1986). Accordingly, we vacate the administrative law judge's award of benefits for a 5 percent knee impairment. On remand, the administrative law judge must address the conflicting evidence of record and specify the rationale for his determination of the extent of claimant's knee impairment.

Accordingly, the administrative law judge's Decision and Order and Order on Reconsideration are vacated as to the administrative law judge's findings that claimant did not establish the existence of a back injury and that she has a 5 percent knee impairment, and the case is remanded for further proceedings consistent with this decision. In all other respects, the Decision and Order and the order on reconsideration are affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge