BRB Nos. 01-0166
and 01-0166A

GARY DARWELL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED: 10/16/01
	)	
NEWPORT NEWS SHIPBUILDING	)	
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order and Order Denying Motion for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order and Order Denying Motion for Reconsideration (1996-LHC-2434) of Administrative Law Judge Daniel A. Sarno, 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 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, a security guard, alleged that he injured his back at work on February 21, 1996. Claimant was recalled to work on June 17, 1996, but did not

return. Emp. Ex. 13. Claimant sought total disability benefits from the date of his injury to December 15, 1998, and partial disability benefits from December 16, 1998, and continuing, based on his return to part-time work. The administrative law judge found that claimant established invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that his injury is work-related, and that employer did not establish rebuttal. The administrative law judge also found that claimant established his *prima facie* case of total disability but that employer established the availability of suitable alternate employment on April 29, 1997, by offering claimant a light duty position at its facility. The administrative law judge further found that claimant's work injury did not preclude him from working full-time as of December 16, 1998. Thus, the administrative law judge awarded claimant total disability benefits from February 21, 1996, to April 29, 1997, but denied all other benefits sought. The administrative law judge denied summarily employer's motion for reconsideration.

On appeal, claimant challenges the administrative law judge's denial of partial disability benefits from December 16, 1998, and continuing. Employer appeals the administrative law judge's award of total disability benefits from June 17, 1996, to April 29, 1997. Claimant and employer filed response briefs in support of their respective positions.

We first address employer's appeal of the administrative law judge's award of total disability benefits from June 17, 1996, to April 29, 1997.[1] Employer first contends that the administrative law judge erred in finding that claimant established invocation of the Section 20(a) presumption, and that it did not establish rebuttal. Section 20(a) provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered a harm and that a work accident occurred which could have caused the harm. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997). Once claimant has invoked the presumption, the burden shifts to employer to rebut it with substantial countervailing evidence. *Id.*

[1]Employer does not challenge the administrative law judge's award of total disability benefits from February 21, 1996, through June 16, 1996; thus, it is affirmed.

We affirm the administrative law judge's findings that claimant established invocation and that employer did not establish rebuttal of the Section 20(a) presumption as they are rational and supported by substantial evidence. On the date of the work injury, claimant was taken by ambulance to the hospital where he was diagnosed with a contusion of his right buttock and lower spine. Thus, there is substantial evidence to establish a harm.[2] *See generally Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); Decision and Order at 11; Cl. Ex. 3; Emp. Ex. 6 at 2. Additionally, employer's clinic notes reference claimant's complaints of pain after falling at work. These notes, which are corroborated by the opinions of Drs. Stiles and Young relating claimant's back problems to the fall at work on February 21, 1996, constitute substantial evidence that an accident occurred at work which could have caused the harm.[3] *See Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); Decision and Order at 11; Cl. Exs. 5, 8b; Emp. Ex. 3 at 2. Thus, the administrative law judge properly invoked the Section 20(a) presumption.

Moreover, the administrative law judge properly found that Dr. Kyles's opinion that claimant's disability was not related to his 1996 work injury but instead to a 1993 disc herniation is insufficient to establish rebuttal. *See generally Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 2000); *Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997); Decision and Order at 11; Emp. Exs. 2, 15 at 53-54. Dr. Kyles's opinion is insufficient to establish rebuttal because it does not state that claimant's work-related back injury did not aggravate his pre-existing disc herniation. Moreover, the administrative law judge reasoned that Dr. Kyles was unable to explain how claimant could be symptom-free from 1993 until February 1996, and symptomatic thereafter without an event occurring in 1996; in fact, Dr. Kyles agreed that the timing of claimant's symptomatology indicated something happened at that time. Emp. Ex. 15 at 53-54. Additionally, the administrative law judge could reasonably reject the opinions of employer's experts, Drs. Kyles and Ross, that claimant's injuries are non-existent or exaggerated, as they examined claimant only once and only briefly. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); Decision and Order at 11; Emp. Exs.

[2]We reject employer's argument that the diagnosis of a contusion in the absence of skin changes was erroneous as the interpretation of medical data is better left to the medical experts.

[3]Employer's contentions concerning claimant's credibility do not relate to whether claimant suffered a harm and whether an accident occurred at work which could have caused the harm. Emp. Br. at 21-24. Thus, assuming *arguendo*, the administrative law judge should have considered these contentions, any error is harmless as they would not have affected his invocation findings. *See generally Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

2, 15, 29. Lastly, the administrative law judge rationally found employer's assertions that claimant falsified his injury purely speculative and insufficient to rebut. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, the administrative law judge's finding that claimant's back injury is work-related is affirmed as it is supported by substantial evidence.

Employer next contends that the administrative law judge erred in determining that it did not establish the availability of suitable alternate employment from June 17, 1996, to April 29, 1997. The administrative law judge awarded claimant total disability benefits for this period, finding that claimant could not have returned to his usual pre-injury employment duties and that employer's recall was to a full duty job without accommodations. In so finding, the administrative law judge credited Dr. Stiles's opinion restricting claimant to sedentary duties beginning May 6, 1996, over Dr. Kyles's opinion that claimant could work without restrictions as a security officer. The administrative law judge acted within his discretion in according greater weight to Dr. Stiles's opinion as Dr. Stiles is claimant's treating physician and examined claimant many times, whereas Dr. Kyles examined claimant only once and briefly. *See Calbeck*, 306 F.2d 693; *Hughes*, 289 F.2d 403; Decision and Order at 13-14; Cl. Exs. 4a, 5, 6x, 6aa-6dd, 7b; Emp. Exs. 2, 8, 15 at 56. Moreover, the administrative law judge rationally accorded less weight to the opinion of Dr. Kyles, as he attributed claimant's problems to a 1993 injury, but could not explain how claimant could remain symptom-free for three years and suddenly develop symptoms without incurring another injury. Accordingly, we affirm the administrative law judge's conclusion that claimant established he was unable to return to his usual work at this time.

Thus, the burden of proof shifted to employer to establish 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); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). The administrative law judge found that there was nothing in the record indicating that the job to which claimant was recalled was anything other than a full duty job, and that no accommodation was made for claimant's condition. Although employer points out that Commander Grimes testified that there were three positions at employer's facility available to claimant within his restrictions in June 1996, Commander Grimes further testified that he did not personally offer claimant a suitable job prior to April 29, 1997, and did not know whether an offer of a light duty job was made to claimant by Mr. Conte, employer's personnel manager, in June 1996. September 22, 1997, Tr. at 84-86, 93-96. Thus, Commander Grimes's testimony is insufficient to meet employer's burden of establishing the availability of suitable alternate employment at its facility in June 1996 because it does not establish that employer actually offered claimant a light duty job at that time. *See Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Ezell*, 33 BRBS 19. Moreover, claimant testified that no offer of a light duty job was made by employer prior to April 29, 1997. September 22, 1997, Tr. at

40-41, 62-63. Thus, we reject employer's argument that it established the availability of suitable alternate employment at its facility prior to April 29, 1997, and affirm the administrative law judge's conclusion.[4] However, there is evidence of suitable alternate employment which the administrative law judge did not discuss. Ms. Chaney, a vocational consultant, performed a labor market survey identifying alternate positions available as of June 1996.[5] *See* Emp. Ex. 11. The administrative law judge's award of total disability benefits from June 17, 1996, to April 29, 1997, must therefore be vacated and the case remanded for further consideration. On remand, the administrative law judge must determine whether employer established the availability of suitable alternate employment on the open market as of June 1996 by way of the labor market survey of Ms. Chaney. *See Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997)(Brown, J., concurring).

[4]Claimant does not challenge the administrative law judge's denial of total disability benefits from April 29, 1997, through December 15, 1998; thus, it is affirmed.

[5]Ms. Chaney identified the positions of security guard, cashier, parking garage cashier, and donation center attendant as available to claimant as of June 1996. Emp. Ex. 11.

We next address claimant's appeal of the administrative law judge's denial of partial disability benefits from December 16, 1998, and continuing. Claimant contends that the administrative law judge erred in denying benefits because Dr. Stiles, claimant's treating physician, limited claimant to part-time work due to deconditioning as a result of his work injury. The administrative law judge found no evidence of record that, from an orthopedic standpoint, claimant could not work full-time when employer first offered suitable alternate employment on April 29, 1997, and the evidence of record supports this conclusion. Dr. Stiles did not impose any restrictions on claimant's ability to perform the sedentary employment offered by employer. Dr. Stiles, however, imposed a part-time work restriction on October 13, 1997, due to claimant's need to recondition himself because of the length of time he had been away from work due to his work injury. *See* Cl. Ex. 12a at 18, 13l; Emp. Ex. 23 at 2. At his deposition in November 1998 Dr. Stiles recommended that if claimant were to return to a sedentary security guard position, he should initially work four hours a day and gradually increase to eight hours per day to recondition himself. *See* Cl. Ex. 12a at 6, 16-18; Emp. Ex. 36.[6] Although claimant was offered a position in April 1997, he did not actually return to work until December 1998. The administrative law judge denied partial disability benefits upon claimant's return finding no evidence explaining claimant's delay in returning to work, and, in effect, finding that had claimant returned to work on April 29, 1997, when he was able to do so, he would not have had to recondition himself when he did return. We affirm the administrative law judge's denial of partial disability benefits as it is rational and supported by substantial evidence. The administrative law judge considered Dr. Stiles's opinion, and rationally concluded that because claimant had no physical restrictions impeding his performance of the alternate work when it was offered in April 1997 but chose not to return to work at that time, he was not entitled to partial disability benefits based on a part-time work restriction caused by his prolonged inactivity. *See generally Donovan*, 300 F.2d 741.

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are vacated in part, and the case is remanded to the administrative law judge to reconsider his award of total disability benefits from June 17, 1996, to April 29, 1997. In all other respects, the administrative law judge's decisions are affirmed.

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[6]Dr. Stiles stated in his deposition that he restricted claimant to four hours per day at that time, but had not done so earlier, because of the length of time claimant has been out of work, concluding that claimant needs to gradually increase his physical capacity because of deconditioning. Cl. Ex. 12a at 16-18. Dr. Stiles explained that he imposed the part-time work restriction after talking with employer's representatives, who were trying to get claimant back to work, and claimant, who seemed interested in going back to work for four hours a day. Cl. Ex. 12a at 6.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge