BRB Nos. 98-0522
and 98-0522A

JACK E. JONES	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CARDINAL SERVICES, INCORPORATED	)	DATE ISSUED: 9/28/99
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Marcus J. Poulliard (Seelig, Cosse,' Frischhertz & Poulliard), New Orleans, Louisiana, for claimant.

David K. Johnson, Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (96-LHC-1095) of Administrative Law Judge Lee J. Romero, 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 Outer

Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq*. (the Act).[1] 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'Keeffe v. Smith, Hinchman, & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant alleged he sustained a back injury, and a resulting psychological disability, as a result of his employment on an offshore oil rig on May 29, 1995. Claimant did not report the injury that day and he accepted work for the following morning. On May 30, 1995, two co-workers met claimant near his home where he informed them that he was unable to work. Claimant reported the injury to employer later that day. He was instructed to see Dr. Serio for an examination and to go to a nearby facility for a drug test per employer's policy regarding a report of a work-related injury. Instead, claimant received treatment and a drug test on May 31, 1995, at Southwest Mississippi Regional Medical Center in McComb, Mississippi. Claimant informed employer that he received treatment and a drug test, whereupon he was terminated on the basis that he failed to complete an accident report and to submit to a drug test at the designated facility. Claimant filed a claim for medical benefits and compensation under the Act, which employer controverted.

In his Decision and Order, the administrative law judge initially rejected claimant's contention of retaliatory discharge under Section 49 of the Act, 33 U.S.C. §948a. The administrative law judge reasoned, *inter alia*, that claimant's discharge was due to his own malfeasance for violating a company rule when he failed to submit to a drug test at the facility designated by employer. The administrative law judge next found that, as a result of claimant's justifiable termination, claimant is not entitled to compensation under the Act, pursuant to *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993), despite his inability to return to his usual work due to his injury. The administrative law judge further found that claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), that his back

[1]By Order dated March 24, 1998, the Board dismissed both appeals, and remanded the case to the administrative law judge for modification proceedings. On March 4, 1999, the Board received claimant's Motion requesting reinstatement as employer had filed with the administrative law judge an unopposed motion to dismiss without prejudice its petition for modification. Subsequently, the Board received a Motion from employer requesting reinstatement of its appeal. By Order dated April 12, 1999, the Board granted the motions and reinstated the appeals. The one-year period for review thus commences on April 12, 1999.

injury and resulting psychological disability are work-related and that employer failed to rebut the presumption. The administrative law judge thus awarded claimant medical benefits for both of these conditions.

On appeal, claimant contends that he is entitled to compensation under the Act and that the administrative law judge erred by applying *Brooks* to the facts of this case to deny compensation. In its cross-appeal, employer contends that the administrative law judge erred in finding that claimant presented sufficient evidence to invoke the Section 20(a) presumption.[2] Moreover, employer argues that, should claimant be entitled to compensation under the Act, his average weekly wage should be $592.44, pursuant to Section 10(c), 33 U.S.C. §910(c).

We first address claimant's appeal. BRB No. 98-0522. Claimant argues that the administrative law judge erred in denying compensation in spite of his determination that claimant is totally disabled. In this regard, claimant contends that his discharge from employer does not affect his entitlement to benefits. We agree.

It is claimant's burden to establish his inability to perform his usual work due to his work injury. *See, e.g., Diosdado v. Newpark Shipbuilding & Repair, Inc.,* 31 BRBS 70 (1997). Once claimant establishes this *prima facie* case, the burden shifts to employer to establish the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In *Brooks,* the Board held that where employer establishes suitable alternate employment by providing claimant light-duty work which he successfully performs,

[2]Employer attached to its brief the October 19, 1996, emergency room report of Dr. Grigsby. This report was not admitted into the record before the administrative law judge. Accordingly, we will not consider the report on appeal as the Board's scope of review is limited to the evidence admitted by the administrative law judge. *See generally Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985).

but he is subsequently discharged for breaching company rules and not for reasons related to his disability, employer does not bear a renewed burden of providing other suitable alternate employment.[3] *Brooks*, 26 BRBS at 5-6; *see also Walker v. Sun Shipbuilding & Dry Dock Co.,* 19 BRBS 171 (1986); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

[3]In *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996), the Board noted that *Brooks* does not exempt the employer from meeting the normal tests for establishing suitable alternate employment nor does it address loss of wage-earning capacity. *Id.* at 43 n.4. Thus, a claimant would retain entitlement to any permanent partial disability benefits he was receiving in the alternate job, absent evidence of a higher wage-earning capacity.

In the instant case, *Brooks* is clearly inapplicable as claimant was not discharged from a light duty job. One prerequisite for establishing suitable alternate employment is that the claimant is capable of working. The administrative law judge found, based on the medical evidence of record, that claimant is unable to work at all, and thus is totally disabled from May 29, 1995, due to his work-related back injury and psychological disability.[4] This finding is not contested by employer. Thus, the administrative law judge found it premature to address employer's evidence of suitable alternate employment. Since claimant is physically unable to work because of his injuries, claimant's termination by employer is not relevant to his entitlement to benefits under the Act; claimant's entitlement to total disability benefits in this case rests solely on his physical inability to work irrespective of his discharge. Accordingly, the administrative law judge's denial of compensation is reversed, and we hold that claimant is entitled to continuing benefits for temporary total disability, 33 U.S.C. §908(b), in accordance with the administrative law judge's findings. We remand this case to the administrative law judge for a determination as to claimant's average weekly wage and corresponding compensation rate.[5] *See* 33 U.S.C. §910.

In its cross-appeal, employer contends that the administrative law judge erred in invoking the Section 20(a) presumption; specifically, employer asserts that the administrative law judge erred in finding that claimant sustained an accident since claimant's testimony is not credible and there is no medical evidence linking claimant's back condition to the work injury. We disagree. In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish his *prima facie* case by showing that he suffered a harm and that an accident occurred or working conditions existed which could have caused the injury or harm. *See Konno v. Young Bros., Ltd.,* 28 BRBS 57 (1994); *Volpe v. Northeast Marine Terminals,* 14 BRBS 17 (1981), *rev'd on other grounds,* 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). Contrary to employer's assertion, claimant, in establishing his *prima facie* case, is

[4]Dr. Feldman, claimant's treating physician, stated that claimant cannot return to his usual work or to any other position, and that claimant is a candidate for back surgery.

[5]We express no opinion on employer's argument concerning claimant's average weekly wage as this issue must be initially addressed by the administrative law judge on remand. *See generally Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

not required to introduce affirmative medical evidence proving that the accident or working conditions in fact caused the harm; rather, claimant must show only the existence of an accident or working conditions which could have conceivably caused the harm alleged. *See Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989).

In the instant case, we hold that the administrative law judge properly invoked the Section 20(a) presumption, as he found that claimant suffered a harm and that an accident occurred which could have caused the harm. *See generally Universal Maritime Corp. v*. *Moore*, 126 F.2d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). The administrative law judge credited claimant's testimony regarding the occurrence of a work accident on May 29, 1995, despite finding his testimony not credible concerning: the events after claimant realized he was injured but before he notified the co-workers the following day; the reason he went to McComb, Mississippi, for treatment; and the delay in submitting to a drug test. However, the administrative law judge found claimant's testimony as to the work injury credible as it is supported by the medical evidence, evidence that claimant is not malingering, and because claimant consistently and without variation recounted the details of his accident. We hold that the administrative law judge acted within his discretion as fact-finder to credit claimant's testimony and to find that a work accident occurred on May 29, 1995, notwithstanding that claimant's testimony was not found credible in other respects. *See Cordero v. Triple A Machine Shop,* 580 U.S. 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 470 U.S. 911 (1979). The administrative law judge further found that claimant established that the work accident could have caused, aggravated or accelerated claimant's back condition based on the initial emergency room report, a June 1995 MRI, and the testimony of claimant and of Drs. Berry and Feldman. Drs. Berry and Feldman testified that a traumatic event such as the work accident described by claimant could have precipitated claimant's back symptomatology. CX1; EX1. This evidence is sufficient to entitle claimant to the benefit of the Section 20(a) presumption, and we affirm the administrative law judge's finding in this regard. *Champion v. S & M Traylor Bros.,* 690 F.2d 285, 15 BRBS 33 (CRT)(D.C. Cir. 1982); *Sinclair,* 23 BRBS at 152-154. As employer does not contest the administrative law judge's finding that it did not rebut the Section 20(a) presumption, we affirm the administrative law judge's finding that a causal relationship exists between claimant's back condition and his employment, and the consequent award of medical benefits.

Accordingly, the administrative law judge's Decision and Order denying disability compensation is reversed, and the case remanded for further proceedings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge