BRB No. 98-1517

FRANKLIN R. WATKINS	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: Aug. 17, 1999
	)	
v.	)	
	)	
NORTH FLORIDA SHIPYARDS, INCORPORATED	)	
	)	
and	)	
	)	
ARM INSURANCE SERVICES	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Franklin R. Watkins, Jacksonville, Florida, *pro se*.

Mary Nelson Morgan and Jeremy Brahim Akel (Cole, Stone, Stoudemire, Morgan & Dore, P.A.), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (94-LHC-2222) of Administrative Law Judge Jeffrey Tureck 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine 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); 20 C.F.R.

§§802.211(e), 802.220.

Claimant, 34 years old at the time, was injured on July 11, 1993, while moving hatches, having worked for employer for ten months as painter, laborer and rigger. The day following the accident, claimant sought medical treatment at EmployMed, where a physician's assistant diagnosed lumbar strain. Claimant's lumbar spine x-rays were normal. Emp. Ex. 1 at 7, 8. He was released for work the same day with a 20-pound lifting restriction, and given a muscle relaxant and hydrotherapy. Emp. Ex. 5. Claimant did not return to work. Claimant returned to EmployMed on July 14 and July 16, where he again saw a physician's assistant, who released him for work with 10 and 20 pound lifting restrictions. Emp. Exs. 6, 7. Claimant again did not go back to work. On July 19, 1993, Dr. McCormick at EmployMed, released him for full duty work. Emp. Exs. 1 at 23; 8. Claimant refused to sign the release. Employer's Personnel Director, Mr. Shiffert, testified that claimant never contacted employer during this time period. He stated that it is company policy to terminate employees who fail to return to work for three consecutive days and that claimant was recorded as a "voluntary quit" on July 16, 1993, because he failed to call in or report for work for three consecutive work days. Emp. Ex. 13. An MRI, authorized by employer two years after the accident revealed degenerative disc disease at L5-S1. Claimant never returned to any work after his accident.

In his Decision and Order, the administrative law judge found that claimant was not entitled to any compensation inasmuch as he failed to establish any work-related injury after July 19, 1993, the day Dr. McCormick released him for full-duty work. The administrative law judge further concluded that employer established the availability of suitable alternate employment within its facility and that employer was not liable for any benefits. On appeal, claimant, representing himself, challenges the administrative law judge's denial of his claim for disability and medical benefits. Employer responds, urging affirmance.

As claimant is proceeding without the assistance of counsel, the Board will review any findings of fact and conclusions of law adverse to claimant to ascertain whether they accord with law and are supported by substantial evidence in the record. We first address the administrative law judge's finding that claimant is not entitled to compensation from July 12, 1993, the day after the accident when claimant was released for light duty work, until July 19, 1993, when claimant was released for full duty work. Emp. Exs. 1 at 23; 8. Where claimant establishes that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of specific jobs within the geographic area in which claimant resides which he is, by virtue of his age, education, work experience, and physical restrictions, capable of performing and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79

(CRT)(5th Cir. 1986), *cert. denied,* 479 U.S. 826 (1986). Employer may meet this burden by offering claimant a job in its facility. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Peele v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 133 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). In order for such a job to constitute suitable alternate employment, however, the job must be actually available to claimant. *See Wilson v. Dravo Corp.,* 22 BRBS 463 (1989); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

In this case, the administrative law judge's determination that employer established the availability of suitable alternate employment in its facility during this period is supported by substantial evidence. Employer's Personnel Director, Mr. Shiffert, testified that there was light duty available to claimant, Tr. at 34-36, and the administrative law judge credited this testimony. Decision and Order at 3. Thus, as the administrative law judge properly credited evidence that employer made alternate work at its facility available when claimant was released for light duty work, we affirm the administrative law judge's finding that claimant is not entitled to compensation from July 12, 1993 to July 19, 1993.[1]

We next consider the administrative law judge's conclusion that claimant is not entitled to any compensation after July 19, 1993. To establish a *prima facie* case of total disability, claimant must show that he is unable to return to his usual employment due to his work-related disability. *See Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197, 201 (1998); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). The administrative law judge found claimant failed to do so. The administrative law judge weighed the evidence regarding claimant's back condition and found that the opinions of the physicians who found no

[1]In addition, we note that the administrative law judge credited testimony that pursuant to company policy claimant was discharged for failing to report to work for three days. Thus, claimant lost any opportunity for employment with employer as a result of his violating a company rule, rather than because of the work injury. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 7 (1992), *aff'd*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993).

permanent effect from claimant's accident were persuasive and outweighed Dr. Sury's testimony to the contrary. *See* Decision and Order at 3-5. The administrative law judge found that the medical reports regarding claimant's back complaints from Drs. McCormick and Scharf, finding no permanent effect from the accident, are better reasoned and more credible than the contrary opinion of Dr. Sury.

Further, in determining that claimant failed to establish any work-related injury after July 19, 1993, the administrative law judge found that claimant's assertions of pain were exaggerated. The administrative law judge noted that according to the credible medical evidence, claimant's responses to medical questions and tests were inconsistent and likely an effort to mislead physicians as to his condition. He also questioned claimant's credibility because of inconsistencies in his employment application relating to his back problems and his failure to seek medical treatment for nine months after the initial consultations following the accident. *See Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988). Credibility determinations are solely within the administrative law judge's authority and will not be overturned unless they are inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Consequently, we affirm the administrative law judge's finding that claimant had no work-related disability after July 19, 1993.[2]

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

[2]We note that the administrative law judge also stated that claimant's degenerative disc disease did not arise out of or in the course of his employment with employer and was not aggravated by that employment. This analysis goes to causation, and the administrative law judge failed to analyze the relevant evidence in accordance with Section 20(a) of the Act, 33 U.S.C. §920(a). Any error committed by the administrative law judge in this regard is harmless, however, as the finding that claimant is not disabled is supported by substantial evidence. With regard to medical benefits, moreover, neither Dr. McCormick nor Dr. Scharf, whose opinions the administrative law judge gave determinative weight, recommended further treatment.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge