BRB No. 97-205

ARTIS MOSS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAERSK STEVEDORING COMPANY	)	DATE ISSUED:_____
	)	
and	)	
	)	
LAMORTE BURNS (WEST), INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Derek B. Jacobson (McGuinn, Hillsman & Palefsky), San Francisco, California, for claimant.

Laura G. Bruyneel (Mullen & Filippi), San Francisco, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (95-LHC-912) of Administrative Law Judge Ellin M. O'Shea 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 was injured on June 8, 1993, during the course of his employment with

employer. He was hired to drive trucks from the Army base to the docks for transport on ships. He slipped and fell, injuring his shoulder and back, while running to catch the return bus. Emp. Ex. 122; Tr. at 322. According to claimant and his treating physician, Dr. Kucera, claimant was unable to work until September 1993, when Dr. Kucera released him to return to work but restricted him from lifting over 50 pounds. Claimant stated he was able to drive a forklift for only three hours before his back pain prevented him from continuing. Claimant has not worked since then. Cl. Ex. 2; Tr. at 352-353. Claimant received temporary total disability benefits from employer for the period between June 8, 1993 and December 16, 1994, and filed a claim for permanent total disability benefits under the Act.

After discussing the evidence of record, the administrative law judge found that claimant failed to satisfy his burden of establishing a *prima facie* case of total disability. Crediting employer's witnesses over claimant and his witnesses, the administrative law judge found that claimant was capable of returning to his usual work as a tractor and lift driver as of December 16, 1993. Therefore, she denied the claim for benefits. Decision and Order at 10-11, 14-16. Claimant appeals the denial of benefits, contending he is permanently totally disabled and cannot return to any work. Employer responds, urging affirmance of the administrative law judge's decision.[1]

Claimant specifically contends the administrative law judge erred in rejecting the testimony and evidence he submitted and in crediting employer's witnesses and evidence. Employer argues in response that the decision is supported by substantial evidence. Under the Act, claimant has the burden of proving the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). Claimant must establish a *prima facie* case of total disability by proving his work injury prevents him from performing his usual work. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). If claimant meets his burden, then employer has the burden of coming forth with evidence of the availability of suitable alternate employment, thereby establishing that claimant's disability is, at most, partial. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988); *Bumble Bee Seafoods,* 629 F.2d at 1327, 12 BRBS at 660.

In this case, there is substantial evidence to support the administrative law judge's determination that claimant is capable of returning to his usual work. Although Dr. Kucera believed claimant cannot return to his usual work, and he imposed permanent restrictions on claimant, including no repetitive bending, no prolonged sitting or jarring of the spine, and

[1]On September 17, 1997, the Board dismissed the appeal in this case due to the failure of the district director to forward the record. The case was reinstated on the Board's docket by Order of December 11, 1997.

no lifting over 50 pounds, Tr. at 92-94, Dr. Palmer testified that claimant has fully recovered from his work injury and can return to his tractor driver job without restrictions. Tr. at 539, 543, 560. Further, although a September 1993 MRI revealed a disc herniation at L2-3, Dr. Palmer stated that such objective finding was not pertinent to claimant's problems because his symptoms are not compatible with the symptoms which would be caused by an L2-3 herniation. Tr. at 535-536, 549.

In addition to the conflicting medical evidence, there is conflicting lay testimony concerning claimant's ability to perform his usual work. Mr. Stauber, employer's vocational consultant, who studied the duties of a tractor driver by riding with other drivers and videotaping his experience, reported that he believed claimant could return to his regular job even in light of the restrictions imposed by Dr. Kucera. Tr. at 477-479, 481-483. In contrast, a union representative, Mr. Romero, and claimant's vocational consultant, Mr. Morris, stated that the tractor driver position is considered heavy work and supported claimant's conclusion that he cannot return to his regular job as a tractor driver. Cl. Ex. 8; Tr. at 32-33, 38-39.

The administrative law judge expressly credited the opinions of Dr. Palmer and Mr. Stauber over those of claimant's witnesses, finding their opinions to be better reasoned. Decision and Order at 10, 15. It is within the discretionary powers of the administrative law judge to determine the credibility of witnesses and to evaluate and draw inferences from the medical evidence of record. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30 (CRT) (9th Cir. 1988); *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). Additionally, the administrative law judge may find, as she did here, that claimant can return to his usual work despite his complaints of pain. *Peterson v. Washington Metropolitan Area Transit Authority*, 13 BRBS 891 (1981). Inasmuch as the administrative law judge's finding that claimant can return to his usual work is rational and supported by substantial evidence, we reject claimant's contention of error, and we affirm the denial of benefits. *Chong v. Todd Pacific Shipyards Corp.,* 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP,* 909 F.2d 1488 (9th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JAMES F. BROWN
Administrative Appeals Judge