BRB No. 93-1221

JAMES H. MASON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter & Montagna), Norfolk, Virginia, for claimant.

Melissa A. Robinson Link (Mason & Mason), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (92-LHC-1637) of Administrative Law Judge Richard K. Malamphy 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).

On October 2, 1990, claimant, a welder, sustained an injury to his left knee while working for employer. Employer paid claimant weekly compensation in the amount of $318.48 for temporary total disability on October 3, 4, and 8, 1990; October 25, 1990 through December 12, 1990; and September 12, 1991 through September 22, 1991. Subsequently, claimant was additionally compensated for a five percent permanent partial disability of the left knee. Claimant was terminated from his position with employer on October 7, 1991, for being absent without leave (AWOL).[1] Claimant alleged that his termination was discriminatory because he had filed a

[1]Article 15, Section 3.(a)4. of the agreement between the union and employer states, "Continuous

compensation claim under the Act. In his Decision and Order, the administrative law judge denied claimant reinstatement and back pay after finding that claimant's discharge from employer was not in violation of Section 49 of the Act, 33 U.S.C. §948a. On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial.

Section 49 provides that, "It shall be unlawful for any employer . . . to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation . . . ." 33 U.S.C. §948a. There are two elements to a Section 49 claim. First, the employer must have committed a discriminatory act, and, second, the discrimination must have been motivated by animus against claimant due to his pursuit of compensation under the Act. *Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124 (CRT)(4th Cir. 1988); *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103 (CRT)(D.C. Cir. 1988). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has stated that, "Proper matters for inquiry in a [S]ection 49 claim are whether compensation claimants, individually or as a class, are treated differently from like groups or individuals, and whether the treatment is motivated, in whole or in part, by animus against the employee(s) because of compensation claims." *Holliman*, 852 F.2d at 761, 21 BRBS at 128-29 (CRT); *see also Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 3 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993).

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service and the employment relationship shall be automatically terminated when an employee: . . . 4. is absent without leave for five (5) consecutive workdays or longer; . . . ." Agreement Between Newport News Shipbuilding and Dry Dock Company and the United Steelworkers of America (April 1, 1991 through February 5, 1995).

Claimant contends that the administrative law judge erred in finding that his discharge did not violate Section 49. In concluding that employer did not violate Section 49, the administrative law judge found that claimant did not establish that he was treated differently from other employees in the same or similar situation or that he was discharged for any reason other than a violation of the five day rule. Decision and Order at 2-8. As the administrative law judge noted in his Decision and Order, claimant testified at the hearing that he did not believe employer discharged him because of his injury and admitted that his discharge was as a result of not having written documentation explaining his absence from work from September 23, 1991 through October 7, 1991. Decision and Order at 5; Tr. at 39-40. Further, Ms. Bakkethun, for employer, testified in her deposition that she did not take anything into consideration in automatically terminating claimant except for the fact that he had been away from work for five or more days without leave. Emp. Ex. 3 at 16-17. She also testified that she did not consider claimant's injury of October 2, 1990 or his prior disciplinary problems in terminating him.[2] Emp. Ex. 3 at 16, 31-32.

Contrary to claimant's contentions, the record does not reflect that employer's actions in backdating his automatic termination, in discharging him after he submitted a return to light duty slip dated October 4, 1991, and in failing to understand that a genuine misunderstanding between Dr. Stiles and claimant took place establish discrimination. In this case, the administrative law judge noted that Dr. Stiles performed a surgical procedure on claimant's left knee on September 11, 1991. Decision and Order at 3; Jt. Ex. 2(d). On September 17, 1991, Dr. Stiles informed claimant to go back to work on regular duty and return to the office in four weeks. Decision and Order at 3; Jt. Ex. 2(e). Although Dr. Stiles informed employer that claimant was to return to work on September 23, 1991, claimant did not return to work on this day. Claimant was under the mistaken impression that he was to return to work in four weeks and return to the doctor's office in four weeks. Tr. at 17. Subsequently, claimant telephoned employer to locate his missing workers' compensation check and was told he was AWOL and would be automatically terminated unless he had written documentation from Dr. Stiles covering his absence from work from September 23, 1991. Decision and Order at 4; Tr. at 25-30. Claimant then went to Dr. Stiles' office to see if he could obtain the appropriate documentation. Dr. Stiles refused to cover his absence from work from September 23, 1991, and instead gave claimant a return to light duty work dated October 4, 1991. Decision and Order at 6; Emp. Ex. 3 at 7; Jt. Ex. 2(l). When claimant went to work on October 7, 1991, he was told he was AWOL unless he had written documentation covering his absence from September 23, 1991. Tr. at 25-30. Claimant presented Dr. Stiles' note dated October 4, 1991, but employer stated that this was not appropriate documentation since it did not cover the period from September 23, 1991. Therefore, employer automatically terminated claimant and gave him a copy of his automatic termination. Decision and Order at 6; Emp. Ex. 1(a).

Although the automatic termination appears to be backdated to September 20, 1991, no discrimination is established as claimant was paid temporary total disability through September 22, 1991 and had been AWOL for more than five days when he was given a copy of the automatic

[2]Claimant was previously given warnings about violating or ignoring safety regulations. Emp. Ex. 2(a)-(c).

termination. Decision and Order at 7; Emp. Ex. 1(a). Despite claimant's contention that employer only terminated him after receiving the October 4, 1991, light duty note from Dr. Stiles, claimant testified that he was first told he was AWOL unless he had written documentation and then he presented the October 4, 1991 note which employer found was insufficient written documentation to cover his absence from September 23, 1991. Decision and Order at 4; Tr. at 25-30.

Finally, it appears that employer knew that a miscommunication took place between Dr. Stiles and claimant but found it insufficient to excuse claimant's absence from work. Emp. Ex. 3 at 30. As Dr. Stiles would not cover claimant's absence from work from September 23, 1991 through October 7, 1991, employer terminated claimant in violation of the five day rule. Emp. Ex. 3 at 7. The administrative law judge noted that while it is clear that the problem in this case is claimant's misunderstanding of Dr. Stiles' orders, the administrative law judge accurately found that there is no medical opinion in the record to support claimant's absence from work between September 23 and October 7, 1991.

The administrative law judge concluded that claimant did not establish that he was treated any differently from other employees in the same or similar situation or that employer intended to discriminate against him. *See Brooks*, 26 BRBS at 4; Decision and Order at 7. The administrative law judge discussed and weighed the evidence which claimant alleged established discrimination -- including the termination dated October 7, 1991, Dr. Stiles' return to light work note dated October 4, 1991, and the miscommunication between Dr. Stiles and claimant on September 17, 1991. Decision and Order at 3-6. As the administrative law judge's finding that claimant did not present any convincing evidence that he was discharged for any reason other than the violation of the five day rule is supported by substantial evidence including claimant's testimony, we affirm the administrative law judge's decision to deny this claim for reinstatement and back pay. *Holliman*, 852 F.2d at 759, 21 BRBS at 124 (CRT); *see also Brooks*, 26 BRBS at 4; *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge