BRB No. 93-1426

JOSEPH E. DAVIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (91-LHC-2729) of Administrative Law Judge Michael P. Lesniak awarding benefits 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 senior optical detailer, twisted his back while working for employer on August 23, 1990, when he tripped on a section of carpet. Tr. at 33-34. Claimant, who had previously undergone disk surgery in 1989 for a non-work-related back injury, was initially treated for his August 23, 1990, back injury by Dr. McAdam. Based on the results of a myelogram which revealed a defect at L4-L5 region consistent with a herniated disk and spinal stenosis, E-8 at 29-30, Dr. McAdam performed a lumbar laminectomy on October 10, 1990, E-8 at 33-34. After a subsequent CT scan and EMG proved normal, Dr. McAdam returned claimant to light duty work on April 1,

1991, with permanent restrictions of no lifting over 40 pounds,[1] no repeated forward bending, no climbing on scaffolding or standing on ladders and frequent change of positions. E-8 at 50. Although claimant returned to his usual job as a designer on April 1, 1991, he continued to complain of severe back pain. After continued complaints of pain, Dr. McAdam performed another myelogram which was normal. E-8 at 58. On June 3, 1991, Dr. McAdam indicated that claimant "should be able to work provided that he not be required to do a great deal of climbing, no overhead work, minimal bending and 30 pounds lifting." E-8 at 63-64. Claimant, thereafter was seen by neurosurgeons Holloway, Walker, Hall, and Jane, EXS-7, 10, 11, 13, and again by Drs. McAdam and Griffith, each of whom found no objective findings which would preclude claimant's return to his prior work. Claimant sought permanent total disability or alternatively permanent partial disability compensation under the Act commencing as of June 3, 1991, the stipulated date of maximum medical improvement.

[1]Pursuant to Dr. McAdam's restrictions, claimant was limited to lifting less than 20 pounds for the first 60 days after returning to work and to 30 pounds for the next 60 days thereafter.

The administrative law judge, finding claimant's testimony that he has been in continuous pain which precludes the performance of his prior work duties completely credible and sufficiently substantiated by various myelogram and CT scan test results documenting spinal defects and irregularities, awarded him the permanent total disability compensation claimed.[2] Employer appeals this award and claimant responds, urging affirmance.

After review of the administrative law judge's Decision and Order in light of the record evidence, we affirm his award of permanent total disability compensation. Although employer argues that the administrative law judge erred in failing to rely on the unanimous opinions of Drs. McAdam, Holloway, Walker, Griffith, and Jane, that claimant is able to perform his usual job, we disagree. The administrative law judge considered these medical opinions and, acting within his discretion as trier-of-fact, nonetheless concluded that claimant was unable to perform his usual job duties based on claimant's subjective complaints of pain and his description of how he performed his job duties. *See generally Simond v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994). At the hearing, claimant testified that he felt he could not continue to do his former job because it was too hard on his back and he cannot sit still. Tr. at 46-47. Claimant further testified that the pain in his back makes it hard for him to concentrate and that the only reason he continues to work is to survive. Tr. at 47-48. Moreover, claimant indicated that because he was required to perform constant bending across the table, his former work was outside his work restrictions, Tr. at 78-79, and rated his pain on a daily basis as 8 on a scale from 1 to 10. Tr. at 53. Inasmuch as claimant's credible complaints of pain can provide substantial evidence to meet claimant's burden of establishing his *prima facie* of total disability, and the administrative law judge's decision to credit this testimony is neither inherently incredible nor patently unreasonable, the administrative law judge determination that claimant is unable to perform his usual work is affirmed. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53, 56 (1992); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 21 (1989); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 343 (1988). Inasmuch as employer does not assert that it has demonstrated the availability of suitable alternate employment that claimant is capable of performing, the administrative law judge's finding that claimant is permanently totally disabled is affirmed. *See generally Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988).

Although employer also contends that the administrative law judge's failure to consider evidence which establishes that claimant is using the workers' compensation system to obtain a larger retirement in violation of the Administrative Procedure Act, 5 U.S.C. §554 *et seq.*, mandates that the case be remanded, we disagree. Employer argues that the administrative law judge was explicitly advised that claimant was attempting to obtain a larger retirement than he was otherwise entitled to receive. The hearing testimony which employer cites in support of this assertion indicates only that claimant would have received less in retirement benefits than in disability compensation and is silent as to claimant's motivation. Tr. at 48-52. The administrative law judge's failure to explicitly address this testimony is harmless given that his decision that claimant is disabled is supported by substantial evidence.

[2]The administrative law judge also found that employer is entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge