BRB No. 09-0863

BILLY C. PHILLIPS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UMS/SEA-LAND	)	
	)	DATE ISSUED: 06/15/2010
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Billy Phillips, Oakhurst, Texas, *pro se*.

Steven L. Roberts and Daniel Johnson (Sutherland Asbill & Brennan, LLP), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2008-LHC-00863) of Administrative Law Judge Russell D. Pulver 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 claimant without counsel, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law 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 injured his back on April 13, 2001, while working as a crane operator for employer. Claimant was diagnosed with a lumbar strain. Employer voluntarily paid claimant temporary total disability benefits from April 14, 2001, through January 4, 2002. Claimant formally retired in July 2002 and relocated some 100 miles from his former employment. At the time of the December 18, 2008, formal hearing, claimant was 76 years old, and had not been employed anywhere since his April 2001 work accident.

The administrative law judge found that claimant's work injury disabled him only from April 14, 2001, through December 11, 2001. Therefore, he denied the claim for additional benefits. Because the administrative law judge found claimant entitled to only temporary disability benefits, he did not reach the issue of employer's entitlement to Section 8(f) relief. 33 U.S.C. §908(f).

On appeal, claimant, representing himself, challenges the administrative law judge's denial of his claim for disability benefits under the Act. Employer responds, urging affirmance of the administrative law judge's decision.

It is well-established that claimant bears the burden of establishing that he is disabled by his work injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

The administrative law judge found that none of the physicians who examined claimant stated that he was unable to work after December 11, 2001. This finding is supported by substantial evidence. Claimant's treating physician, Dr. DeBender, restricted claimant from working on each of claimant's first seven visits, through August 31, 2001. CX 4 at 2-8. The September 28, 2001, doctor's note, however, is silent as to claimant's ability to work, as are the remaining reports through October 30, 2008. *Id.* at 9. The December 5, 2002, report states that claimant had retired. *Id.* at 11-12. Dr. Handel performed an MRI on December 7, 2001, and stated that it showed no abnormalities that would limit claimant's recreational or work activities.[1] EX 24 at 222. On October 30, 2001, Dr. Weiner noted that claimant's complaints were out of proportion to his objective findings; he opined claimant would be at maximum medical improvement

[1] Dr. Handel stated claimant "had a remarkably good looking spine" for a man his age. EX 24 at 221.

in six weeks. EX 28.6 at 329. On November 14, 2001, Dr. Weiner stated claimant could resume work as a crane operator, an opinion he reiterated on April 1, 2002, and December 9, 2008. EX 28.8 at 333; EX 28.11 at 337; EX 31 at 365-367. Dr. Caram performed an independent examination of claimant on October 8, 2002. He stated claimant could work as a crane operator, noting that claimant was at that time building a workout facility in his barn. CX 7; Tr. at 87.

The administrative law judge also found that claimant's hearing testimony did not establish his inability to return to his usual work. Claimant testified at his deposition that he had just wanted to retire in 2002, and that his retirement was not due to his injury. EX 2 at 72-73; Tr at 79. Claimant filed for a "regular" retirement on June 26, 2002, which was granted on July 1, 2002. EXs 10, 11. The administrative law judge also noted that claimant regularly drove a tractor around his new home, which is similar to claimant's job as a crane operator. Tr. at 62, 85-87. Thus, the administrative law judge discredited claimant's testimony that his back pain prevents him from returning to his usual work. Tr. at 57. This finding is within the administrative law judge's discretion. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

The administrative law judge rationally rejected claimant's hearing testimony concerning his pain and limitations, finding them belied by the evidence concerning claimant's retirement and activities since that time. Moreover, the medical evidence supports the conclusion that claimant was not restricted from performing his usual work after a period of recovery from his back strain. The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Therefore, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the finding that claimant was not disabled by his work injury after December 11, 2001. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998); *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 is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge