BRB No. 89-0891

JAMES L. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEYERHAEUSER COMPANY	)	DATE ISSUED:_____)
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of R. S. Heyer, Administrative Law Judge, United States Department of Labor.

Michael Stebbins (Stebbins & Coffey), North Bend, Oregon, for claimant.

Mildred J. Carmack (Schwabe, Williamson & Wyatt), Portland, Oregon, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (86-LHC-1188) of Administrative Law Judge R.S. Heyer 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).

Claimant who worked for employer from 1962 until 1986 performing various jobs, including that of a logster operator, sought benefits under the Act for injuries sustained on March 5, 1984, in the course of his employment when he attempted to start a chain-saw and injured his left shoulder. Claimant attempted unsuccessfully to return to work but was advised by Dr. Bert, his treating physician, against continuing work at that time. On July 10, 1984,

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

claimant underwent surgical repair of a torn rotator cuff in his left shoulder, and returned to his employment as a logster operator on January 2, 1985. Claimant continued to work as a logster operator for employer until June 1986 when the employees, including claimant, went on strike. Claimant did not return to work after the strike because, in September 1986, he accepted employer's offer of a severance package of $12,500 to retire voluntarily.

The parties' stipulations included that claimant returned to work on January 2, 1985, the date his shoulder reached maximum medical improvement, and that before the occurrence of the 1984 injury, claimant underwent seven operations to his left shoulder due to injuries sustained in the late 1940's. The administrative law judge awarded claimant temporary total disability compensation under 33 U.S.C. §908(b) from March 28, 1984 until January 2, 1985 at two-thirds of his average weekly wage of $617.97. The administrative law judge found that although claimant sustained a cumulative 20 percent impairment to his left shoulder, he did not suffer from any permanent loss of wage-earning capacity as a result of his March 5, 1984 injury. The administrative law judge found further that whether or not claimant's reasons for permanently leaving his job with employer were valid, these reasons were nonetheless unrelated to claimant's physical condition resulting from his March 5, 1984 injury.

On appeal, claimant contends that the administrative law judge erred in failing to award him a permanent partial disability award of $209.86 per week for a loss in wage-earning capacity resulting from the injury.[1] Claimant contends he only was able to perform his usual job through the assistance of his co-workers and that he could not compete on the open labor market due to his injury. Claimant also contends that his employment with employer was uncertain. Employer responds, urging affirmance of the decision.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). The mere presence of a physical impairment is insufficient to entitle claimant to benefits; he also must establish a loss in earning capacity due to the injury. *See generally Darcell v. FMC Corp., Marine & Rail Equip. Div.*, 14 BRBS 294 (1981).

[1]Claimant arrives at this figure by subtracting $300, the weekly amount the vocational expert stated claimant could earn on the open market, from his average weekly wage of $617.77, and dividing the remainder by two-thirds. *See* 33 U.S.C. §908(c)(21).

In the instant case, the administrative law judge found that claimant's treating physician advised him to return to his regular employment as a logster operator on January 2, 1985, without stating any restrictions, and that claimant performed this work from January 2, 1985 until June 1986, when he stopped only because of the strike. The administrative law judge found further that although claimant had difficulty performing the winch and cable work upon returning, he was able to perform his work satisfactorily with the help of the deckhand for approximately one and one-half years after returning to work and received a higher hourly wage than before the injury. The administrative law judge then determined that neither claimant nor his supervisor identified any change in claimant's work performance or ability after his return. The administrative law judge stated that although employer might have eventually terminated claimant's employment, the reasons for such action have been identified by the parties as either disciplinary in nature or because of factors other than claimant's physical inability to perform his job. Based on this evidence, the administrative law judge concluded that claimant did not establish a loss in wage-earning capacity due to the injury.

We affirm the administrative law judge's findings. Contrary to claimant's contention that he performed his work only through the help of co-workers, the administrative law judge rationally credited the medical evidence that claimant was released to perform his usual work without restrictions, *see* Emp. Ex. 49, and the testimony of claimant's supervisor that claimant's job performance was not affected by his shoulder injury, *see* Johnston dep. at 17-19. *See generally Peterson v. Washington Metropolitan Area Transit Authority*, 13 BRBS 891 (1981). Moreover, the evidence supports the administrative law judge's determination that claimant's injury was not the basis for his inclusion on a list of employees targeted for disciplinary action.[2] *See* Johnston dep. at 36; Taylor dep. at 16, 18. Thus, the administrative law judge rationally concluded that claimant's future employment with employer was not uncertain because of his injury, and that claimant had no loss in earning capacity due to the injury. *See generally 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). As claimant was able to perform his usual work, his ability to compete on the open market is irrelevant. *Darcell*, 14 BRBS at 297.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the evidence and to draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and his assessment of the credibility of witnesses is not to be disturbed unless it is inherently incredible or patently unreasonable. *See Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT)(9th Cir. 1990), *cert. denied*, 111 S.Ct. 1582 (1991); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case the administrative law judge rationally found that claimant was able to perform his usual work and that he left this employment voluntarily. As substantial evidence supports the administrative law judge's findings, we affirm the administrative law judge's determination that claimant suffered no compensable disability. *See generally Chong*, 22 BRBS at 245.

[2]Claimant testified that he retired from employer when they offered the severance package because he "felt he wasn't wanted" due to his inclusion on the list of employees. Claimant stated his belief that the employees on the list either were involved in litigation with the company or were strong supporters of the union. Cl. Dep. at 61, 64, 68-69.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge