

BRB No. 99-0754

THOMAS F. WATKINS, Jr.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED:
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision on Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision on Motion for Reconsideration (98-LHC-0670) 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained a knee injury in 1993, underwent surgery, and was then assigned to a light duty position with employer as a bench welder. Subsequently, his knee began to hurt and he went to employer's clinic on April 7, 1997. He was

referred to Dr. White, and an arthrogram was performed. In late June 1997, Dr. White performed surgery and released claimant for light duty work on September 16, 1997, with the same restrictions he was under previously. Claimant did not return to work after his clinic visit on April 7, 1997. He called the shipyard at least every five days and left a recorded message as to the reasons for his absence. Employer requested documentation for the absences, but claimant alleges that he did not receive the letters. He did eventually receive a June 12, 1997, dismissal letter and he filed a grievance in early July, which was denied on November 20, 1997. Claimant sought temporary total disability benefits under the Act for the period from April 9, 1997, to June 24, 1997, and reinstatement of his position at the shipyard based on employer's alleged violation of Section 49 of the Act, 33 U.S.C. §948a.

In his initial Decision and Order, the administrative law judge found that claimant was entitled to ongoing temporary total disability benefits commencing April 7, 1997. In addition, the administrative law judge found that as claimant's discharge violated Section 49 of the Act, claimant is entitled to reinstatement, at which time claimant's entitlement to temporary total disability benefits would cease. However, upon employer's motion for reconsideration, the administrative law judge found that as there was no specific statement from a physician that claimant could not return to work between April and June 1997, he is not entitled to temporary total disability benefits for that period. He found claimant entitled to temporary total disability benefits between June 27 and September 15, 1997, following surgery. In addition, based on the parties' stipulation, the administrative law judge found that claimant has a post-injury wage-earning capacity of \$306.64, commencing September 16, 1997. As employer paid claimant benefits under the schedule for his knee impairment, the administrative law judge found that claimant is not entitled to benefits after September 15, 1997, the date of maximum medical improvement. In addition, the administrative law judge found that claimant's termination was not in violation of Section 49 of the Act.

On appeal, claimant contends that the administrative law judge erred in finding that he did not establish a *prima facie* case of total disability based solely on the finding that Dr. White did not state that he was unable to work during April through June 1997. In addition, claimant contends that the administrative law judge erred in finding that his discharge was not in violation of Section 49. Employer responds, urging affirmance of the administrative law judge's decision on reconsideration.

Initially, claimant contends that the administrative law judge erred in finding that he was not totally disabled based solely on the fact that Dr. White did not state that he was unable to work during April through June 1997. Prior to April 7, 1997, claimant established his inability to return to his former employment due to his 1993

knee injury and was performing light duty work provided at employer's facility. He alleged that he was no longer able to perform this work after April 7, 1997, due to the recurring pain he was suffering from the original injury. Thus, as claimant had previously met his burden of establishing his *prima facie* case of total disability, the issue here is whether employer met its burden of establishing that the light duty position it provided claimant during this period was suitable.¹ See generally *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Thus the absence of an opinion that claimant cannot work is not dispositive.

The record indicates that claimant reported to the clinic on April 7, 1997, that he had been experiencing knee pain for the past two months, and he was referred to a doctor for care. Claimant testified that the pain he was experiencing prevented him from performing his duties. During the two months claimant was absent prior to surgery, Dr. White faxed employer his reports of continuing care. Moreover, due to claimant's continuing complaints, a second operation was performed in June 1997. Inasmuch as this evidence was not addressed by the administrative law judge, and it may be sufficient to establish that the light duty job was not suitable for claimant during this period, we vacate the administrative law judge's finding that claimant is not entitled to temporary total disability benefits for the period from April 1997 to June 1997. We remand the case for further consideration of this relevant evidence, keeping in mind employer's burden of proof on the issue of suitable alternate employment.² See generally *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941,

¹Employer does not contest claimant's entitlement to temporary total disability benefits from the date of the second surgery, June 24, 1997, to September 15, 1997, the date claimant was released to light duty work.

²While employer contends that it would have offered claimant a suitable position during that time if it had known of his restrictions, no evidence was presented as to what the position would have been or that suitable positions were available. Such a position thus cannot satisfy employer's burden of establishing the existence of suitable alternate employment. See generally *Letendre v. Braswell*

25 BRBS 78 (CRT)(5th Cir. 1991).

Claimant also contends that the administrative law judge erred in finding that claimant was not improperly discharged in violation of Section 49 of the Act. Section 49 of the Act prohibits an employer from discharging or discriminating against an employee based on his involvement in a claim under the Act, and if the employee can show he is the victim of such discrimination, he is entitled to reinstatement and back wages. 33 U.S.C. §948a. To establish a *prima facie* case of discrimination, a claimant must demonstrate that his employer committed a discriminatory act motivated by discriminatory animus or intent. See *Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124(CRT) (4th Cir. 1988), *aff'g* 20 BRBS 114 (1987); *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103(CRT) (D.C. Cir. 1988), *aff'g* *Geddes v. Washington Metropolitan Area Transit Authority*, 19 BRBS 261 (1987); *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). The essence of discrimination is treating the claimant differently than other employees. *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

The United States Court of Appeals for the Fifth Circuit reviewed a case with similar facts in *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212 (CRT)(5th Cir. 1999). The claimant was off from work for several months due to an alleged back injury. He was contacted by his supervisor several times requesting medical documentation that he was medically disqualified from returning to work, and was cautioned that failure to do so would result in termination. As the claimant did not respond, he was terminated for “abandonment of job.” Subsequently, the claimant filed a claim for benefits under the Act and contended that his termination was a discriminatory act in violation of Section 49. However, the court affirmed the administrative law judge’s finding that there was no evidence of discriminatory motive as the evidence established that the claimant was terminated for failure to present medical evidence to substantiate his absence from work. *Ledet*, 163 F.3d at 904, 32 BRBS at 214

Shipyards, Inc., 11 BRBS 56 (1979).

In the instant case, claimant contends that employer had documentation of his medical absence prior to his termination and thus that employer's basis for discharging him is invalid. This contention relates to whether the evidence establishes that claimant was properly discharged rather than to whether claimant was discriminated against based on his filing a claim under the Act. The administrative law judge does not have the authority to adjudicate whether or not an employee was dismissed for justifiable cause according to the terms of the collective bargaining agreement. See *Holliman*, 20 BRBS at 118; *Dill v. Sun Shipbuilding & Dry Dock Co.*, 6 BRBS 738 (1977). The only evidence received by employer prior to the institution of the termination proceedings were reports by claimant's treating physician that he was being treated for his knee injury, without any reference to a change in disability status.³ Moreover, claimant has offered no evidence that he was treated differently from other employees in like circumstances. Thus, as claimant's termination in the instant case was in accordance with employer's established policy requiring documentation for absences, and there is no evidence of discrimination or a punitive motive for the discharge, we affirm the administrative law judge's finding that Section 49 is inapplicable as it is supported by substantial evidence. See *Ledet*, 163 F.3d at 904, 32 BRBS at 214.

Accordingly, the decision of the administrative law judge denying temporary total disability benefits for the period from April 7, 1997 to June 25, 1997, is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion. However, the administrative law judge's finding that claimant's dismissal does not violate Section 49 of the Act is affirmed.

SO ORDERED.

ROY P. SMITH

³Although claimant submitted a form from Dr. White stating that claimant had been under restrictions, which may be evidence that he could not perform the light duties he was assigned, this evidence was not presented to employer until after the decision was made to institute termination proceedings and thus cannot be used as evidence that employer's motive for termination was based on discriminatory animus or intent. Moreover, a determination of the sufficiency of this evidence in establishing medical documentation for claimant's absence under the collective bargaining agreement is not comparable to a determination of the sufficiency of the evidence to establish whether the light duty was suitable alternate employment under the Act.

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge