

GERALD L. KIRKLAND)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JACKSONVILLE SHIPYARDS,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order and Denial of Motion for Reconsideration of George A. Fath, Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order and Denial of Motion for Reconsideration (90-LHC-1713) of Administrative Law Judge George A. Fath 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 worked for employer as a rigger from 1957 until August 13, 1984, when he slipped, injuring his wrist, arm and shoulder. Dr. Espinoza, the shipyard's attending physician, who saw claimant the following day, described claimant's injury as "contusion right hand, strain right shoulder." Emp. Ex. I at 172. He further listed findings of "[t]enderness localized on the 4th and 5th fingers - no clinical evidence of fracture - also complaining of right scapular cervical pain." *Id.* at 173. Claimant thereafter saw various physicians, including Dr. Kleinhans, a hand surgeon, who diagnosed a chip fracture of the dorsum of claimant's right wrist. In March 1985, Dr. Kleinhans performed limited carpal fusion surgery on claimant's right wrist, as a result of which claimant developed a wound infection. In July 1988, Dr. Kleinhans performed a full wrist fusion. Claimant attempted unsuccessfully to return to work several times since his surgery. Employer voluntarily paid claimant temporary total disability compensation from August 14, 1984, through April 5, 1987, and from July 14, 1988, through November 1, 1989. Employer also voluntarily paid claimant

permanent partial disability compensation under Section 8(c)(3) of the schedule, 33 U.S.C. §908(c)(3), based on Dr. Kleinhans' November 28, 1989, assessment that claimant sustained a 32 percent permanent impairment of the hand. *See* Emp. Ex. B at 39.

The administrative law judge denied the claim for permanent partial disability compensation under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), finding the evidence of record insufficient to establish that claimant had any residual shoulder or neck impairment. The administrative law judge further determined that inasmuch as claimant's work-related hand injury did not preclude him from performing his usual work, he was not entitled to permanent total disability compensation and was limited to the scheduled benefits for a 32 percent hand impairment pursuant to Section 8(c)(3) of the Act, which he had already been paid. 33 U.S.C. §908(c)(3). Because claimant was only partially disabled and had been fully compensated for his scheduled disability, the claim for additional disability benefits was denied. The administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant initially contends that the administrative law judge erred in finding that he had no residual impairment of his neck and shoulders due to the August 13, 1984, work injury. Claimant argues that while the administrative law judge found that claimant did not complain about his shoulder and neck pain until 1986, Dr. Espinoza, the shipyard doctor, recorded the day after the accident that claimant sustained a right shoulder strain and was complaining of right scapular cervical pain. Claimant further contends that, according to Dr. Kleinhans, claimant had pain which radiated into the neck, and that Dr. Kleinhans requested a second opinion to determine whether claimant might have cervical root compression, as this was not his specialty. Claimant also alleges that in October 1989 Dr. McAuley recorded cervical area complaints, and wrist pain which radiated proximally into claimant's right shoulder. Employer has not responded to this appeal.

After review of the administrative law judge's Decision and Order in light of the record evidence, we affirm his denial of permanent partial disability compensation under Section 8(c)(21), because his finding that claimant sustained no residual shoulder or neck impairment is rational and supported by the record. *See O'Keeffe*, 380 U.S. at 360. Although Dr. Espinoza did relate shoulder and cervical complaints immediately following the injury, the remaining medical reports support the administrative law judge's assessment that these complaints were not significant. In his September 6, 1984, office notes following claimant's initial visit, Dr. Kleinhans refers only to claimant's wrist injury, and he relates the same information in a letter to Dr. Espinoza dated September 20, 1984. As was noted by the administrative law judge, claimant continued to see Dr. Kleinhans thereafter every few weeks, but failed to mention any problems other than those relating to his wrist or hand, until June 16, 1986. Emp. Ex. B at 32. Thereafter, with the exception of a June 24, 1986, letter from Dr. Kleinhans to employer's claims department, in which Dr. Kleinhans attempted to explain why a second opinion was needed to evaluate the possibility of cervical root compression, *id.* at 55, the record contains no other evidence documenting neck or shoulder complaints or injury. Contrary to claimant's contention, Dr. McAuley, who first saw claimant on February 20, 1985, to render a second opinion as to whether claimant should undergo wrist surgery, did not reference problems other than those relating to claimant's wrist. Although following claimant's second visit in October 1989, Dr. McAuley did report claimant's complaint of pain radiating from his wrist into his shoulder, this report contains no reference to shoulder or cervical complaints independent of those directly related to the wrist injury. Emp. Ex. F at 81-83. The reports of the other physicians of record also

do not refer to problems other than claimant's hand injury. *See, e.g.*, Cl. Ex. P at 71; Tr. at 77. Inasmuch as the administrative law judge's finding that claimant sustained no shoulder or neck impairment is rational given the absence of supporting objective medical evidence documenting cervical and shoulder complaints or injury in the record, his denial of permanent partial disability benefits for these conditions under Section 8(c)(21) is affirmed. *See generally Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

The administrative law judge's finding that claimant is limited to permanent partial disability compensation under the schedule for his hand injury also is affirmed. Pursuant to *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), where a claimant sustains injury to a body part falling under the schedule, he is limited to an award under the schedule and cannot seek a higher recovery under Section 8(c)(21). The Supreme Court's decision in *Potomac Electric Power Co.*, however, does not apply where an employee who sustains an injury to a scheduled member is permanently totally disabled. *Id.*, 449 U.S. at 277 n.17, 14 BRBS at 366-367 n.17; *see Rivera v. United Masonry, Inc.*, 24 BRBS 78, 81 (1990), *aff'd* 948 F.2d 774, 25 BRBS 51 (D.C. Cir. 1991). In order to establish a *prima facie* case of total disability, claimant must establish an inability to return to his usual pre-injury employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In limiting claimant to scheduled permanent partial disability compensation, the administrative law judge determined that claimant failed to establish his *prima facie* case. In so concluding, the administrative law judge noted that Dr. Kleinhans had imposed a lifting restriction of ten pounds on claimant, and that claimant stated that he cannot do anything which involves pushing and pulling. While recognizing that these activities are essential to the performance of claimant's former job as a rigger, the administrative law judge determined, based on surveillance evidence introduced by employer depicting claimant lifting 40-pound bags of cow manure, stacking firewood which he was selling beside the road, and pushing a wheelbarrow, that the limitations and symptoms alleged by claimant do not, in fact, exist. The administrative law judge further determined that since the restrictions which Dr. Kleinhans had imposed were based on misinformation he received from the claimant, his opinion was not credible. While claimant challenges the administrative law judge's reliance on the surveillance evidence, the administrative law judge acted within his discretion in crediting this evidence over claimant's testimony and the restrictions imposed by Dr. Kleinhans. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Wheeler v. Interocean Stevedoring Inc.*, 21 BRBS 33 (1988). Because the surveillance evidence introduced by employer provides substantial evidence to support the administrative law judge's finding that claimant is capable of performing his usual job duties, and claimant has failed to raise any error made by the administrative law judge in evaluating the relevant evidence and making credibility determinations, we affirm his denial of permanent total disability compensation in this case. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

Accordingly, the administrative law judge's Decision and Order denying additional

compensation and Denial of Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge