BRB No. 93-1249

LAWRENCE V. SENIRAJJANGKUL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEA-LAND SERVICES	)	DATE ISSUED:
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

David W. Ballew (Davies, Roberts & Reid), Seattle, Washington, for claimant.

Russell A. Metz (Metz, Frol & Jorgensen, P.S), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (91-LHC-2998) of Administrative Law Judge Edward C. Burch 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).[1] We must affirm

[1]By Order dated June 3, 1994, the Board dismissed employer's appeal of the administrative law judge's Second Supplemental Order Awarding Attorney's Fees, BRB No. 93-2149S, at employer's

the findings of fact and conclusions of law of the administrative law judge if they 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).

On February 12, 1990, claimant injured his lower back, middle back, and shoulder, while lifting 110-pound bags of wheat as a checker/loader for employer. Claimant had sustained previous work-related injuries to his shoulder, neck and back in 1988 and 1989 while engaging in heavy lifting for employer, but had returned to full duty work with no restrictions after each prior injury. Following treatment for claimant's February 12, 1990 back sprain, however, Dr. Warwick opined that claimant was no longer capable of performing his usual work, and released him to sedentary, light or medium work with a restriction of lifting no more than 25 pounds. The parties stipulated that claimant reached maximum medical improvement on May 12, 1990, and that employer voluntarily paid temporary total disability benefits from February 13, 1990 to November 19, 1990, and permanent partial disability benefits from November 20, 1990 to July 1, 1991, based upon an average weekly wage of $610.93. Claimant sought additional permanent partial disability benefits, arguing that he sustained a loss of wage-earning capacity of $370 per week.

The administrative law judge found that although claimant was unable to resume his former employment as a checker/loader after he reached maximum medical improvement from his back injury on May 12, 1990, employer had established the availability of suitable alternate employment as of November 1, 1990 which paid an average of $314.40 per week. Accordingly, he awarded claimant permanent partial disability compensation pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), based on 66 and 2/3 percent of the difference between claimant's stipulated average weekly wage of $610.93 and his post-injury wage-earning capacity in the alternate work identified by employer, commencing November 1, 1990. The administrative law judge also found that employer was entitled to Section 8(f), 33 U.S.C. §908(f), relief.

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request.

On appeal, employer challenges the administrative law judge's award of permanent partial disability compensation. Employer argues that in making this award the administrative law judge failed to recognize that two orthopedists, Drs. Burns and Martin, agreed that claimant has no residual disability from the subject work injury and that Drs. Warwick and Martin attributed claimant's inability to perform his former work to his frail build and temporary muscular decompensation rather than to the effects of the subject work injury or concerns that claimant would aggravate his back condition. Claimant responds, urging affirmance.[2] The Director, Office of Workers' Compensation Programs (the Director), has not responded to this appeal.

After review of the administrative law judge's Decision and Order in light of the evidence of record, we affirm his award of permanent partial disability compensation because his finding that claimant is unable to perform his usual work due to the residual effects of the subject work injury is rational, in accordance with applicable law, and is supported by the medical opinions of Drs. Warwick and Martin, CXS 2, 3, 9. *See O'Keeffe*, 380 U.S. at 359. While the administrative law judge did note that the contrary opinion of Dr. Burns, indicating that claimant has no residual disability, is also credible, he acted within his discretion in according greater weight to the opinions of Drs. Warwick and Martin because they treated claimant over a period of time[3] and were more familiar with his medical history and condition. *See generally Caudill v. Sea Tac Alaska Shipbuilding, Inc.*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Employer correctly asserts that in making his award the administrative law judge neglected to consider a June 27, 1991, letter in which, after reviewing Dr. Burns' May 23, 1991, report, Dr. Martin indicated that Dr. Burns appeared to have reached appropriate conclusions, CX 3 at 40, 41-45. Any error the administrative law judge may have made in this regard is harmless on the facts presented, however, because, upon re-examining claimant on July 15, 1991, Dr. Martin ultimately concurred with Dr. Warwick's opinion that claimant's former work would be inappropriate because it would aggravate his soft tissue injuries and was incompatible with his physical capabilities. CX 3 at 37. Because the medical opinions of Drs. Warwick and Martin provide substantial evidence to support the administrative law judge's finding that claimant is unable to perform his usual work due to the effects of the work injury, and employer does not otherwise dispute the administrative law judge's findings, or raise any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, his award of permanent partial disability benefits is affirmed. *See generally Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

[2]Although claimant contested the timeliness of employer's appeal in his initial response brief, he thereafter withdrew this issue from consideration in a subsequent brief.

[3]Dr. Burns examined claimant only once, on May 23, 1991. EX 9 at 6. Dr. Warwick, claimant's treating physician since January 21, 1988, has treated claimant for his work-related back injuries of January 26, 1989, May 4, 1989 and February 12, 1990. CX 9 at 3, 5-10. Dr. Martin, an orthopedic surgeon, provided additional treatment to claimant from August 14, 1989 to October 18, 1989 upon referral from Dr. Warwick, and examined claimant again on July 15, 1991. CX 3 at 37, 39, 41-45.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge