BRB No. 02-0883

BILL D. EZELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:JUN 30, 2003
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

D. Jason Embry (Davis & Feder, P.A.), Gulfport, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Awarding Benefits (2001-LHC-2406) of Administrative Law Judge Richard D. Mills 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 administrative law judge's findings of fact and conclusions of law 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).

Claimant was injured on November 10, 1998, while he was loading a piece of steel angle at employer's facility. He stepped on a small piece of angle, which twisted his foot and caused him to twist his back. He was diagnosed with a pulled muscle or muscle strain and was taken off work until November 15, 1998. Claimant

attempted to return to work at that time, but continued to have pain. He was treated conservatively by Dr. Broussard, who eventually referred claimant to Dr. Smith, a neurosurgeon. Dr. Smith ordered an MRI, which revealed multi-level lumbar stenosis and a herniated disc at L3-4. Dr. Smith attempted to control claimant's pain with therapy and injection treatments, but eventually performed a lumbar microdiscectomy on April 12, 1999. Based on a functional capacity evaluation, Dr. Smith assigned a maximum medical improvement date of September 28, 1999, and released claimant to work with restrictions on October 4, 1999. Claimant returned to modified duty on October 5, 1999, but worked only three weeks before he retired due to medical reasons. Claimant sought benefits under the Act.

In his decision, the administrative law judge found that claimant's condition became permanent on September 28, 1999, the date Dr. Smith stated claimant reached maximum medical improvement. The administrative law judge also found that claimant established that he could not return to his usual work before that time and thus is entitled to temporary total disability benefits until September 28, 1999. The administrative law judge then found that claimant returned to work at a modified position in employer's facility, and that contrary to claimant's contention, this position was suitable given claimant's condition and restrictions. He concluded that claimant's allegation that he was in such pain that he had to take vacation time to cope and eventually had to retire due to his medical condition is not consistent with other evidence, and that since the modified position paid the same wages claimant was earning prior to his injury, claimant is not entitled to benefits after October 5, 1999. With regard to medical benefits, the administrative law judge found that employer is liable for the reasonable and necessary past and future medical expenses associated with claimant's work-related injury to his lower back, including treatment provided by both Dr. Smith, the neurosurgeon, and Dr. Broussard, the general practitioner.

On appeal, claimant contends that the administrative law judge erred in finding that the modified position offered by employer was suitable and that employer should be liable for Dr. Broussard's treatment pursuant to Section 7, 33 U.S.C. §907. Employer responds, urging affirmance of the administrative law judge's decision as it is based on substantial evidence of record.

Initially, claimant contends that the administrative law judge erred in finding that the modified position at employer's facility was suitable for him. A claimant establishes his *prima facie* case of total disability if he is unable to perform his usual employment duties due to a work-related injury. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). Where, as in the instant case, it is uncontested that claimant is unable to perform his usual duties, the burden then shifts to employer to establish the availability of suitable alternate employment, which it may do by providing claimant with a suitable light duty job at its facility. *Darby v. Ingalls*

Shipbuilding, Inc., 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In the instant case, the administrative law judge found that claimant returned to work at a modified position which was approved by Dr. Smith, one of claimant's treating physicians. Cl. Ex. 5. In addition, he found that the Department of Labor's vocational rehabilitation counselor, Mr. Walker, communicated with several supervisors and co-workers regarding claimant's condition and concluded that claimant had not missed any work, nor had he complained to anyone about back or hip pain. Mr. Walker was told that that there were no complaints reported by claimant or the Sheet Metal Department personnel, and claimant reported that he was not having any problems with the modified work activity. Emp. Ex. 23. Likewise, employer's vocational counselor reviewed claimant's work space, interviewed his supervisors and co-workers, and concluded that the work activity was in keeping with the assigned restrictions. Emp. Ex. 24.

The administrative law judge also reviewed the medical evidence and concluded that the post-operative objective evidence was negative. Dr. Smith reported that the surgery was successful and a post-operative MRI revealed nothing wrong with claimant's back. Cl. Ex. 10. Dr. Seidensticker, a consulting orthopedist, reported no degenerative joint conditions. Emp. Ex. 17. In a deposition, Dr. Smith stated that a representative from employer described claimant's actual work duties at the modified position. From that description, Dr. Smith concluded that the position was "well within the restrictions that he was given," Cl. Ex. 10 at 10, and opined that claimant had elected not to continue working, *id*. In addition, the administrative law judge found that while both Drs. Smith and Broussard advised that claimant retire for medical reasons, it was because claimant had requested that they do so. Cl. Exs. 4, 10. Specifically, Dr. Smith stated that he based his recommendation to retire on claimant's age and his continued complaints of pain, which seem in retrospect to be his unwillingness to do the job, as claimant's actual work at the modified position was well within his restrictions. Cl. Ex. 9 at 10. Dr. Broussard reported on October 1, 1999, before claimant's return to modified duty, that claimant felt he is incapable of working at employer's facility and should be retired. Cl. Ex. 4 at 5. The administrative law judge concluded that it was likely that claimant decided he did not want to work in the modified position before he returned to duty and that was the motivation for the retirement, not his inability to perform the job.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963)*; Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962)*; John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge discussed the conflicting

evidence, including claimant's testimony regarding his difficulties performing the modified job at employer's facility and concluded that claimant could have continued to perform the duties of the modified position satisfactorily based on vocational and medical evidence. Moreover, substantial evidence supports the administrative law judge's finding that claimant retired for reasons other than medical necessity. Therefore, we affirm the administrative law judge's finding that the modified position at employer's facility was suitable for claimant as it is rational and supported by substantial evidence.[1]

Accordingly, the Decision and Order of the administrative law judge denying continuing benefits is affirmed.

[1] As we affirm the administrative law judge's finding that the modified position establishes suitable alternate employment, and thus that claimant suffered no loss in wage-earning capacity, we need not address claimant's contentions on appeal regarding his post-retirement wage-earning capacity. *See generally Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). In addition, claimant's contention regarding the necessity of treatment by Dr. Broussard is moot, as the administrative law judge found that claimant is entitled to payment of past and future services and medications provided by Dr. Broussard that are related to his lower back injury. Decision and Order at 14-15.

SO ORDERED.

_____

ROY P. SMITH
Administrative Appeals Judge

_____

REGINA C. McGRANERY
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge