BRB No. 13-0127

LAMONT A. BROWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SSA COOPER, LLC	)	DATE ISSUED: 09/27/2013
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order Granting Petition for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

E. Paul Gibson (Riesen Law Firm, LLP), Charleston, South Carolina, for claimant.

Richard P. Salloum (Franke & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order Granting Petition for Reconsideration (2011-LHC-00936) of Administrative Law Judge Daniel A. Sarno, Jr., 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 if they 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).

On November 13, 2010, claimant sustained injuries to his back and left ankle when he fell while working as a lasher. Claimant was stabilized at the site of the work incident, transported to a local hospital, and released the following morning. Claimant subsequently received medical treatment for ongoing complaints of pain. He last sought medical care for his ankle condition on January 24, 2011, but has continued to seek treatment for his ongoing back complaints. Claimant has not returned to gainful employment since the date of his work injury.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant's ankle condition reached maximum medical improvement on January 24, 2011, found that claimant's back condition reached maximum medical improvement on August 29, 2011, and determined that claimant is unable to return to his usual employment duties on the waterfront. The administrative law judge found that employer did not establish the availability of suitable alternate employment. Thus, the administrative law judge awarded claimant temporary total disability compensation from November 14, 2010 through August 28, 2011, and permanent total disability compensation from August 29, 2011. 33 U.S.C. §908(a), (b). The administrative law judge also held employer liable for claimant's medical expenses. 33 U.S.C. §907. Both claimant and employer filed motions for reconsideration with the administrative law judge.

In his Decision and Order Granting Petition for Reconsideration, the administrative law judge granted claimant's motion and corrected the rate of weekly benefits due claimant during his period of permanent total disability. The administrative law judge accepted into evidence additional documentation regarding post-injury employment opportunities available for claimant and found that employer established the availability of suitable alternate employment as of October 5, 2011. Consequently, the administrative law judge awarded claimant temporary total disability compensation from November 14, 2010 through August 28, 2011, permanent total disability compensation from August 29, 2011 through October 4, 2011, and ongoing permanent partial disability compensation from October 5, 2011. 33 U.S.C. §908(a), (b), (c)(21), (h).

On appeal, employer challenges the administrative law judge's findings regarding the extent of claimant's disability. Claimant responds, urging affirmance of the administrative law judge's decision. Employer has filed a reply brief.

Employer challenges the administrative law judge's award of ongoing disability compensation, averring that it presented substantial medical evidence sufficient to establish that claimant's present back condition does not require the imposition of physical restrictions. Specifically, employer contends the administrative law judge erred in relying on the opinion of Dr. Patel, over the contrary opinions of Drs. Kolehma and

Jervey, to conclude that claimant's physical activities are restricted by his back condition. Dr. Patel, who is Board-certified in physical, rehabilitation, and pain medicine, commenced treating claimant on February 3, 2011. He initially diagnosed a lumbar disc bulge and bilateral lumbar radiculopathy for which he prescribed epidural injections. *See* CX 6 at 16. When claimant continued to complain of back pain, Dr. Patel ordered additional injections. *Id.* at 18. A March 2011 MRI confirmed a disc bulge at L3-4, *id.* at 19, and Dr. Patel subsequently diagnosed sacroiliac joint dysfunction for which he administered a local injection. *Id.* at 26, 30. Dr. Patel thereafter ordered an additional epidural steroid injection and the prescription Lyrica for neuropathic pain. *Id.* at 37-38, 40, 44. He opined that claimant can lift up to 15 pounds; has restrictions on climbing, bending, and stooping; and requires the ability to alternate sitting and standing. Dr. Patel stated claimant requires ongoing medication and treatment for his pain. *Id.* at 75, 77. In contrast, Dr. Kolehma, reviewed claimant's records on August 29, 2011, and placed no restrictions on claimant with respect to his lumbar spine. *See* EX 16. Dr. Kolehma's subsequent examination of claimant on February 28, 2012, documented claimant's continued complaints of pain and resulted in the imposition of a 50-pound lifting restriction. Dr. Kolehma's accompanying "Disability Medical Evaluation Form" indicated that the immediate cause of claimant's disease/injury resulting in disability is both an alleged seizure and claimant's November 2010 work injury. *See* CX 8 at 9, 11. On February 27, 2012, Dr. Jervey specifically stated that claimant was not under his care for a lumbar injury but, rather, for a post-injury seizure. *See* CX 15 at 3.

In addressing claimant's restrictions, the administrative law judge relied on the opinion of Dr. Patel, claimant's primary treating physician for his back complaints, in concluding that claimant has physical restrictions as a result of his work-related back condition. *See* Decision and Order at 14. It is well-established that an administrative law judge has considerable discretion in evaluating and weighing the evidence of record, and may draw inferences therefrom. *See Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 6(CRT) (4th Cir. 2003); *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 Board may not reweigh the evidence or disregard the administrative law judge's findings on the ground that other conclusions and inferences might have been more reasonable. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *see also Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001). In this case, the administrative law judge discussed all of the medical evidence presented by the parties and rationally concluded that the opinion of claimant's treating physician establishes that claimant's work-related back condition requires the imposition of physical restrictions. As employer has not established error in the administrative law judge's decision to rely upon the opinion of Dr. Patel, we affirm the administrative law judge's conclusion that claimant

has physical restrictions based upon his back condition as it is rational and supported by substantial evidence.[1]

Employer also challenges the administrative law judge's award of total disability compensation. Employer avers that it presented evidence sufficient to establish that claimant is capable of returning to work on the waterfront without a loss in wage-earning capacity. In order to establish a prima facie case of total disability, claimant must establish that he is unable to perform his usual work due to the work injury. *See Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005).

Employer relied on the testimony of Ms. Favaloro, its vocational expert, that it was her understanding that claimant's union allowed injured employees working on the Charleston waterfront to file for "exemptions" from performing jobs which are outside of their restrictions. *See* Tr. at 86-88. Thus, employer contended that claimant was capable of returning to work for employer. Claimant, in response, presented a December 13, 2010, letter from his union's vice-president which stated in part that:

> ILA Local 1422 requires that [an injured employee] return back to the work force with a 100% physical ability.
>
> Due to the nature of our industry, it is virtually impossible for an individual to work with restrictions such as weight limitations, lifting, bending, etc. There is no light-duty or sedentary work in our industry.

[1]Employer's reliance on *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and Federal Rule of Evidence 702, in support its contention that the administrative law judge erred in relying on Dr. Patel's opinion is misplaced. In *Daubert*, the United States Supreme Court held that, under Federal Rule of Evidence 702, an expert's opinion, in order to be admissible into evidence, must be based on "scientific knowledge" resting on a "scientific methodology." In this case, however, employer has not challenged the admissibility of Dr. Patel's opinion but, rather, the weight given to that opinion by the administrative law judge. Moreover, the administrative law judge is not bound by formal rules of evidence or procedure. 33 U.S.C. §923(a); *see Casey v. Georgetown Univ. Medical Center*, 31 BRBS 147 (1997).

See CX 9. In addressing this issue, the administrative law judge addressed each party's position, credited the letter from claimant's union, and concluded that claimant had "demonstrated that he would not be eligible for union work. Therefore, I find that the Claimant was incapable of returning to his prior waterfront employment because of his work-related injury, and, therefore, the Claimant has established a prima facie case that he is totally disabled." Decision and Order at 15.

We affirm the administrative law judge's finding that claimant established his prima facie case of total disability. The administrative law judge is entitled to determine the weight to be accorded to competing evidence. *Cherry*, 326 F.3d 449, 37 BRBS 7(CRT). The administrative law judge rationally chose to rely on the union's letter to find that an employee with restrictions, such as claimant, is not capable of returning to his usual work.[2] We, therefore, affirm the administrative law judge's finding that claimant established a prima facie case of total disability as it is supported by substantial evidence. *See Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001). Consequently, as claimant has not appealed the administrative law judge's finding that employer established the availability of suitable alternate employment as of October 5, 2011, we affirm the administrative law judge's award of permanent partial disability benefits to claimant commencing on that date. *LaRosa v. King & Co.*, 40 BRBS 29 (2006).

[2]Employer avers that a similar case arising as a result of an injury sustained by a worker on the Charleston waterfront supports its position that claimant could seek a union exemption from employment duties outside of his physical restrictions. The case cited by employer, however, is merely an order awarding benefits based upon the stipulations of the parties, which are not set forth in the decision. It demonstrates no relevance to the case at bar. *See Bess v. Universal Maritime Service Corp.*, 2010-LHC-01669 (Aug. 11, 2011). Moreover, employer's citations to claimant's Collective Bargaining Agreement and Seniority Plan do not reveal details of an "exemption" program utilized by claimant's union. *See* EXs 25, 26.

Accordingly, the administrative law judge's Decision and Order and Decision and Order Granting Petition for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge