BRB No. 88-3370

MATTHEW L. BRADLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Motion for Reconsideration of Reno E. Bonfanti, Administrative Law Judge, United States Department of Labor.

Burt M. Morewitz, Newport News, Virginia, for claimant.

Jonathan H. Walker (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order and Decision and Order on Motion for Reconsideration (87-LHC-388, 87-LHC-389) of Administrative Law Judge Reno E. Bonfanti denying 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). 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant, while working as an insulator for employer, sustained injuries to his back on January 21, 1980 and March 9, 1984. Claimant was off work intermittently following these injuries, during which time employer voluntarily paid claimant temporary total disability compensation. On September 9, 1986, claimant was discharged by employer for an alleged violation of employer's five-day call-in rule. Claimant thereafter filed a claim under the Act seeking permanent disability benefits and alleging that his discharge violated Section 49 of the Act, 33 U.S.C. §948a.

In a Decision and Order issued June 17, 1988, the administrative law judge awarded claimant temporary total disability benefits from January 21, 1980 through August 8, 1980, and from March 9, 1984 through June 7, 1984, determined that claimant's discharge was not in violation of Section 49, and, lastly, found claimant entitled to reasonable medical expenses pursuant to Section 7 of the Act, 33 U.S.C. §907. Subsequently, in a Decision and Order on Motion for Reconsideration issued August 25, 1988, the administrative law judge modified his order to provide that temporary total disability benefits are not awarded for those periods of time set forth in his initial decision, since claimant did not seek compensation for those periods of time.

On appeal, claimant contends that the administrative law judge erred in denying his request for temporary total disability compensation for various periods of time in 1986, and permanent total disability compensation commencing January 1, 1987. Additionally, claimant asserts that his discharge by employer was in violation of Section 49 of the Act, and that he is entitled to penalties, interest and attorney's fees. Employer responds, urging affirmance.

Claimant initially contends that the administrative law judge erred in failing to find him totally disabled; specifically, claimant alleges that the administrative law judge erred in not crediting the testimony of Drs. Stiles and Ward. We disagree. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant must establish that he is unable to return to his usual work. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). An administrative law judge may find an employee capable of performing his usual work despite his complaints of pain where a physician finds no functional impairment. *See Peterson v. Washington Metropolitan Area Transit Authority*, 13 BRBS 891 (1981).

In the instant case, the administrative law judge acknowledged that claimant's subjective complaints may serve as the basis for a finding of disability, but discredited claimant's testimony as self-serving, inconsistent and unsupported by the weight of the record evidence. In making this credibility determination, the administrative law judge credited and relied upon the testimony of Drs. Harmon, Foer and Carmichael, each of whom opined that claimant was malingering to achieve secondary gain. Dr. Harmon, who followed claimant over a seven year period, testified that claimant, who had misrepresented himself on several occasions and who missed appointments, was malingering. *See* EX-33; Transcript at 83-98. Dr. Foer opined that claimant's back sprain would have completely resolved in June 1985, and, thereafter, concluded that "there is a secondary gain here, in terms of workman's compensation, and thus . . . malingering would be confirmed." *See* EX-

37. Dr. Carmichael, after stating that none of the objective medical evidence supports claimant's complaints, concluded that claimant is malingering to achieve secondary gain. *See* EX-26.

We hold that the administrative law judge committed no error in relying upon the testimony of Drs. Harmon, Foer, and Carmichael, over the testimony of Drs. Stiles and Ward,[1] in concluding that claimant was a malingerer with no resultant disability from his work-related injuries. The administrative law judge is entitled to weigh the evidence and draw his own inferences from it, *see generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and he is not bound to accept the opinion of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, as the administrative law judge's credibility determinations are rational and within his authority as factfinder, and as these credited opinions constitute substantial evidence to support the administrative law judge's ultimate findings, we affirm the administrative law judge's determination that claimant sustained no compensable disability as a result of his work-related injuries. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Therefore, as claimant has failed to establish a compensable disability, the administrative law judge's denial of total disability compensation is affirmed.[2]

Claimant next contends that the administrative law judge erred in concluding that his discharge by employer was not in violation Section 49 of the Act; specifically, claimant alleges that employer's failure to produce telephone logs requested by claimant during discovery compels a presumption that claimant's discharge violates Section 49 of the Act.[3] In order to establish a *prima facie* case of a Section 49 violation, claimant must establish that 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* 19 BRBS 261 (1987). The administrative law judge may infer animus from circumstances demonstrated by the record. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS

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[1]Dr. Stiles opined that claimant sustained a 10 percent whole body impairment, while Dr. Ward stated that claimant's ability to work is governed by his pain. *See* EX-15, CX-6, 9.

[2]We thus need not address claimant's contention regarding his alleged loss of wage-earning capacity.

[3]Section 49 provides in pertinent part that:

> It shall be unlawful for any employer . . . to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation . . . .

33 U.S.C. §948a.

1 (1992), *aff'd on other grounds sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993).

In the instant case, the administrative law judge determined that claimant's discharge was based on his violation of employer's five-day call-in rule[4] and was unrelated to the filing of his compensation claim. In support of this finding, the administrative law judge specifically noted claimant's acknowledgment that he both knew of the five-day call-in rule and violated the rule. *See* Decision and Order at 11; Transcript at 61. A review of the record reveals that claimant, during both his deposition and hearing testimony, acknowledged that he was aware of employer's call-in requirement and that more than five work days elapsed between his successive calls to employer on August 25, 1986, and September 4, 1986. *See* EX-23 at 49-52; Transcript at 36, 60-61. *See also* EX-11 at 15. Under the undisputed facts of this case, we hold that the administrative law judge was not required to draw an adverse inference from employer's failure to produce the telephone records requested by claimant. While a party's failure to produce relevant evidence within its control may give rise to an inference that the evidence is unfavorable to it, *see, e.g., Brown v. Pacific Dry Dock*, 22 BRBS 284, 287 (1989), claimant's admission that he violated the five-day call-in requirement

[4]Article 16 of the Collective Bargaining Agreement between employer and claimant's union provides in pertinent part:

> Section 3. Loss of Continuous Service.
> (a) Continuous service and the employment relationship shall be automatically terminated when an employee:
>
> * * *
>
> 4. Is absent without leave for five (5) consecutive workdays or longer;
>
> * * *
>
> 9. Number 4 above shall not apply in the case of an employee who is receiving sickness and accident benefits under this agreement. The requirements of Number 4 shall apply once such benefits have been terminated.

See CX-14.

Pursuant to Article 16, employer has provided employees with the following notice of its 5-day call-in rule:

> All employees are reminded of the Newport News Shipbuilding & Dry Dock requirement that continuous service and the employment relationship shall be automatically terminated when an employee is absent for five work days without notification to the company. In the event an employee is physically incapacitated from notification every five work days due to his/her being hospital confined, someone in the immediate family can do so.

See EX-12 at 6.

militates against a finding that the requested telephone logs were material to resolution of the issue of claimant's compliance with the call-in rule. Similarly, the administrative law judge's failure to compel production of the telephone records, where there was no showing that such failure was prejudicial to claimant, constitutes neither an abuse of the administrative law judge's broad discretionary powers regarding discovery nor a denial of due process. *See, e.g., Bonner v. Ryan-Walsh Stevedoring Co.*, 15 BRBS 321, 325 (1983); *see generally* 20 C.F.R. §§702.338, 702.339. Thus, since claimant's testimony unequivocally indicates that he violated employer's call-in policy, we affirm the administrative law judge's conclusion that there was no violation of Section 49. *See Holliman,* 852 F.2d at 759, 21 BRBS at 124 (CRT)*; Geddes,* 851 F.2d at 440, 21 BRBS at 103 (CRT); *Leon v. Todd Shipyards Corp.*, 21 BRBS 190 (1988).

Claimant additionally contends that he is entitled to penalties pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), and interest on past-due compensation installments. We disagree. Inasmuch as the administrative law judge did not find claimant entitled to any disability compensation, a determination which we affirm, claimant is not entitled to either a Section 14(e) assessment or interest.[5]

Finally, claimant seeks an attorney's fee award. As claimant was unsuccessful on appeal, counsel is not entitled to a fee for work performed before the Board. *See* 33 U.S.C. §928; 20 C.F.R. §802.203; *see generally Cutting v. General Dynamics Corp.*, 21 BRBS 108 (1988). The Board, however, does not have the authority to award an attorney's fee for any work performed before the administrative law judge. *See* 33 U.S.C. §928(c); *Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd sub nom. Kahny v. Director, OWCP*, 729 F.2d 777 (5th Cir. 1984)(table). Thus, in order to seek a fee for work performed before the administrative law judge, claimant's attorney must file with the administrative law judge a fee application which conforms to the requirements of 20 C.F.R. §702.132.

[5]We note that the administrative law judge's award of Section 7 medical benefits cannot support a Section 14(e) penalty. *See, e.g., Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989).

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge