BRB No. 92-1219

BILLY S. RICE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TINKER AIR FORCE BASE	)	DATE ISSUED:
	)	
and	)	
	)	
AIR FORCE INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

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

Charles L. Brower, Randolph Air Force Base, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (90-LHC-2749) of Administrative Law Judge Charles P. Rippey 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 began working on January 4, 1989 as a material sorter in the Metal Recycling Yard at Tinker Air Force Base in Oklahoma. It is undisputed by the parties that claimant injured his right arm on May 24, 1989, while sorting metal. Following the injury, claimant reported to the base hospital, where a physician diagnosed lateral epicondylitis (tennis elbow) and returned him to limited duty. Emp. Ex. 8. Complaining of continued pain and limited motion, claimant sought treatment for his injury by Dr. Thompson, who determined on June 1, 1989, that claimant could not perform any work at that time due to the work-related injury. Subsequently, Dr. Thompson did

release claimant for "limited work of any kind" on September 28, 1989. *See* Cl. Exs. 16, 19. In accordance with Dr. Thompson's advice that claimant refrain from any work prior to September 28, 1989, employer paid claimant temporary total disability benefits from June 2, 1989 through September 28, 1989. However, claimant continued to complain of pain and limited use of his arm, and he sought permanent total disability benefits under the Act.

The administrative law judge found that claimant was fully able to perform the limited duty work that was offered to him on September 27, 1989, by employer, which carried the same rate of pay he was receiving when he was injured. The administrative law judge therefore concluded that claimant did not suffer a loss in wage-earning capacity. The administrative law judge rejected medical reports of the physicians of record who found continued disability to the claimant's right arm and shoulder as they were based solely on claimant's claimed tenderness and limitation of motion, and concluded that claimant was "consciously faking an injury to his right arm." Decision and Order at 7. Thus, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that claimant did not suffer a shoulder injury and in finding that claimant was capable of performing the light duty position that was offered to him. Employer responds, urging affirmance of the administrative law judge's findings as they are supported by substantial evidence.

We reject claimant's contention that he has any injury that prevents his performing the light duty job offered by employer. Once claimant establishes a *prima facie* case of total disability by showing that he cannot return to his regular or usual employment due to his work-related injury, the burden shifts to employer to show the availability of realistic job opportunities which the claimant, by virtue of his age, education, work experience and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). A job in employer's facility may satisfy employer's burden of establishing suitable alternate employment. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

In the present case, the treating physician's notes state that claimant's shoulder pain had resolved by August 1, 1989, as the diagnosis only discussed the elbow condition.[1] Cl. Ex. 2. Although still under treatment for his elbow, claimant was released for light duty by his treating physician and by base doctors by September 28, 1989.[2] Cl. Exs. 16, 19. Contrary to claimant's

[1]Any error the administrative law judge may have committed in finding that claimant did not suffer an injury to his right shoulder on May 24, 1989, is harmless, inasmuch as Dr. Thompson's notes state that claimant's shoulder pain had resolved prior to the date Dr. Thompson released claimant for limited duty.

[2]The record also contains the medical reports of Drs. Nash and Ramadan who concluded that claimant continues to suffer a work-related impairment to his upper right extremity. The administrative law judge rejected the diagnoses of these doctors as they were based on claimant's subjective complaints of pain and limited motion that the administrative law judge found were not credible. Moreover, both Drs. Nash and Ramadan opined that claimant was capable of performing the light duty offered by employer with his current condition. Emp. Exs. 31, 32.

contention, the administrative law judge rationally rejected claimant's allegation that he had a note signed by his treating physician, Dr. Thompson, on or about September 26, 1989, that stated he was unable to return to any work, inasmuch as the record contains a note from Dr. Thompson dated September 28, 1989, that states claimant may return to limited work. Cl. Ex. 19. Neither party introduced a note dated September 26, 1989, and Dr. Thompson's medical notes that were entered into evidence do not mention that claimant could not work after September 28, 1989. Cl. Exs. 1-3.

The administrative law judge also credited the testimony of a private investigator hired by employer to observe claimant on three occasions in August 1991. The investigator testified that claimant did not exhibit restrictions in motion except when he was approaching his doctors' offices. We reject claimant's contention that the testimony provided by the private investigator is not credible because he did not provide any pictures of his investigation. The administrative law judge's credibility determinations are rational and based on the record as a whole. We therefore affirm the finding that claimant's complaints of pain are not credible. *See generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Claimant was offered a light duty clerical position that was necessary to employer's operation. This position paid the same as claimant's original job. As there is no evidence of record other than his own testimony and subjective complaints to support his allegation that he is disabled due to the work-related injury to his right upper extremity, we affirm the administrative law judge's finding that claimant can perform the light duty position offered by employer and the finding that claimant does not have a loss in wage-earning capacity. *See generally Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge