

JEROME D. PARKER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WESTERN TRANSPORTATION)	DATE ISSUED: _____
COMPANY/JAMES RIVER)	
CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Jerome D. Parker, Portland, Oregon, *pro se*.

Delbert J. Brenneman (Hoffman, Hart & Wagner), Portland, Oregon, for employer.

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

PER CURIAM:

Claimant, without the aid of counsel, appeals the Decision and Order Denying Benefits (92-LHC-3630) of Administrative Law Judge Henry B. Lasky 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.) In an appeal by a claimant without representation, the Board will review the administrative law judge's decision to determine if the findings of fact and conclusions of law 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); 20 C.F.R. §§802.211(e), 802.220.¹

¹The Board cannot consider the new evidence submitted by claimant for the first time on appeal. 20 C.F.R. §802.301(b).

On January 10, 1991, claimant sustained various injuries when a truck hit the trailer in which claimant was working during the course of his employment as a warehouseman for employer. Claimant's treating physician, Dr. Berselli, diagnosed acute cervical and thoracic strains. CX 4. Claimant was also examined by Drs. Rich and Marble of the Orthopedic Consultants. By report dated February 26, 1991, they indicated that no further treatment was recommended for claimant's relatively minor injury and opined that there was no reason to suspect that claimant could not soon return to his usual work. EX 2. Dr. Berselli concurred in this report on March 8, 1991. EX 3 at 6. Claimant returned to his regular employment duties on March 18, 1991, pursuant to Dr. Berselli's release. CX 5 at 9; Tr. at 28. Employer voluntarily paid claimant temporary total disability compensation from January 15, 1991 to March 12, 1991. 33 U.S.C. §908(b). Claimant subsequently filed a claim for additional disability benefits under the Act.

The administrative law judge credited the February 26, 1991, report of Drs. Rich and Marble, and found it significant that claimant's treating physician concurred in this report without exception. He thus determined that claimant was able to return to his regular work as of February 26, 1991. The administrative law judge also found that claimant incurred no loss of wage-earning capacity due to his January 10, 1991, work accident. Consequently, the administrative law judge denied claimant's request for additional benefits.

On appeal, claimant, without benefit of counsel, challenges the administrative law judge's denial of his claim. Employer responds, urging affirmance.

Claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). In this case, the administrative law judge found that the February 26, 1991, opinion of Drs. Marble and Rich, in which Dr. Berselli concurred, was well reasoned and supported by the physicians' findings on examination. EXS 2, 3. The administrative law judge's credibility determination is rational and within his purview as factfinder, and the credited opinions constitute substantial evidence supporting his finding of no permanent disability as of February 26, 1991. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Therefore, we affirm the administrative law judge's determination that claimant was capable of resuming his usual employment duties with employer as of February 26, 1991.

Next, we note that claimant bears the burden of proof in establishing any loss of wage-earning capacity due to his January 10, 1991, work accident. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985); *West v. Port of Portland*, 21 BRBS 87 (1988), *modifying on recon.* 20 BRBS 162 (1988). In this case, the administrative law judge rejected claimant's argument that he was unable to take advantage of overtime opportunities as a result of his work accident; rather, the administrative law judge found that claimant had limited his overtime opportunities by his own actions. Specifically, the administrative law judge discussed testimony elicited at the hearing indicating that claimant, post-injury, had voluntarily transferred from employer's Front Avenue to its Terminal One facility, which had less available overtime, Tr. at 29-

30, 36, 38-40, 70; that claimant had not bid for the Rivergate facility which had more or the same amount of available overtime when compared to Front Avenue, Tr. at 68-69, 71, 72, 75, 77; and that claimant did not sign-up for any overtime post-injury until September 1992, and, even then, he signed-up for swing-shift overtime only, Tr. at 35-37, 57, 86. Because the administrative law judge's finding that claimant sustained no loss of wage-earning capacity as a result of his January 10, 1991, work accident is supported by substantial evidence, we affirm that finding. *See Portland Stevedoring Co. v. Johnson*, 442 F.2d 411, 412 (9th Cir. 1971)(per curiam); *Sears v. Newport News Shipbuilding and Dry Dock Co.*, 19 BRBS 235 (1987). We thus affirm the administrative law judge's denial of additional disability benefits beyond February 26, 1991.²

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

²Claimant asserts that his former counsel is attempting to recover attorney's fees from him. However, the administrative law judge awarded no attorney's fees or costs payable by claimant. 33 U.S.C. §928(c). Rather, the administrative law judge indicated that since claimant had not prevailed, his counsel was not entitled to an award of attorney's fees and costs. Any attempt to obtain payment of attorney's fees or costs from claimant under these circumstances is a violation of the Act. 33 U.S.C. §928(e).