BRB Nos. 99-0769
and 99-0769A

PASQUALE PONTORIERO	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Pasquale Pontoriero, North Arlington, New Jersey, *pro se*.

Christopher J. Field (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals, and employer cross-appeals, the Decision and Order - Awarding Benefits (96-LHC-1978, 97-LHC-0432) of Administrative Law Judge Paul H. Teitler 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). As claimant appeals without representation by counsel, we will review the administrative law judge's findings of fact and

conclusions of law to determine whether they are supported by substantial evidence, are rational, and are 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. If so, they must be affirmed.

The case currently on appeal involves two work-related injuries suffered by claimant, who worked as a checker for employer. The first injury occurred on October 12, 1993, when claimant slipped on steps outside the stuffing office. He broke his fall with his right hand but nevertheless injured his left knee and back. Claimant was diagnosed with a torn medial meniscus, for which he underwent arthroscopic surgery on February 3, 1994, disc herniation at the L5-S1 level, and mild stenosis at the L4-5 level, but with no impingement on the nerve roots. Employer voluntarily paid temporary total disability benefits from October 20, 1993 through August 28, 1994. Claimant returned to work for employer in early May 1996, but on May 10, 1996, he slipped on oil residue on employer's warehouse floor and fell, injuring his left leg and lower back. Due to continued complaints of pain, claimant has not returned to work.

In his Decision and Order, the administrative law judge found that subsequent to the October 12, 1993 injury, claimant was capable of returning to his former employment with employer as of August 16, 1994, based on the opinions of Drs. Lerman, Nehmer and Zaretsky. Since claimant received temporary total disability compensation until August 28, 1994, the administrative law judge determined that claimant is not entitled to any additional benefits prior to the second work-related accident. With regard to the May 10, 1996 accident, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, and that employer failed to rebut the presumption. After discrediting claimant's description of his job duties, complaints of pain and his physical abilities, the administrative law judge determined that claimant is capable of returning to his former employment, and awarded claimant temporary total disability compensation from May 10, 1996 until March 27, 1997, 33 U.S.C. §908(b). Lastly, the administrative law judge found that claimant is limited to recovering permanent partial disability benefits under the schedule at Section 8(c)(2), 33 U.S.C. §908(c)(2), for a 10 percent impairment to the left knee.

Claimant, representing himself, has filed an appeal of the administrative law judge's decision. Employer responds, urging affirmance. Employer has filed a cross-appeal, contending that the administrative law judge erred in awarding claimant temporary total disability compensation for the period subsequent to May 28, 1996.

Claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 59 (1980). In the event of an injury to a scheduled member, a claimant's permanent partial disability under Section 8(c) is confined to the schedule, and any loss in wage-earning capacity is irrelevant. *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). If claimant establishes that he is permanently or temporarily totally disabled, however, he may receive benefits under either Section 8(a) or (b) of the Act, 33 U.S.C. §908(a), (b). In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. *See, e.g., Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

Initially, we hold that the administrative law judge rationally accepted employer's written job description of claimant's duties as a checker. Though claimant alleged that his job as a checker involved standing or walking about seven hours per day and occasionally operating a hi-lo in order to move cargo, *see* Cl. Ex. 19, the administrative law judge found that claimant's written job description and his testimony were contradicted by employer's job description and the testimony of Stanley Lysik, employer's safety and health manager. The administrative law judge gave greater weight to employer's job description, which stated that some of claimant's duties as a checker require standing for brief periods of time, but most of the work can be accomplished from a seated position, and that the physical level of the job was sedentary to light duty. Emp. Ex. 24. Specifically, the administrative law judge noted that claimant concurred with Mr. Lysik's testimony that checkers are not required to operate hi-los and union rules do not permit them to do so. Tr. 129-130, 212-213, 222-223, 238.

With regard to the 1993 injury, the administrative law judge rationally found that Dr. Steinway's opinion that claimant was totally disabled by his work injury, *see* Cl. Ex. 8, was outweighed by the opinion of Dr. Zaretsky, who opined on March 19, 1996 that claimant was capable of returning to his usual employment as a checker, based on the job description by employer. Emp. Ex. 18. The administrative law judge found Dr. Zaretsky's report better reasoned than Dr. Steinway's and more reliable since, unlike Dr. Steinway's report, it listed the examination modalities. Decision and Order at 22-23. Moreover, the administrative law judge found that Dr. Zaretsky's conclusion was supported by the opinions of Drs. Lerman and Nehmer, each of whom found no residual disability to either claimant's knee or back and opined that claimant could return to his regular duties. Emp. Exs. 10, 13. Applying the date of Dr. Lerman's report, the administrative law judge rationally found that claimant could return to his former employment as of August 16, 1994.

With regard to the 1996 injury, the administrative law judge similarly found that the opinion of Dr. Birotte, that claimant is permanently totally disabled, was outweighed by the opinions of Drs. Greifinger and Flax.[1] In his May 30, 1996 report, Dr. Flax opined that based on his examination, claimant had no residual disability as a result of the May 10, 1996 incident, that no treatment was necessary and claimant is capable of working. Emp. Ex. 22. Dr. Greifinger opined that claimant's complaints were out of proportion to the clinical evaluation, that the positive findings with respect to the knee and back were not significant, and that based on claimant's job description, he could return to work as a checker. Emp. Ex. 29 at 48-51, 53, 120. The administrative law judge particularly credited Dr. Greifinger's opinion regarding claimant's ability to return to work, as he considered both claimant's and employer's job descriptions, and the administrative law judge found that claimant could return to his usual employment as of March 27, 1997, the date of Dr. Greifinger's report. As the administrative law judge's credibility determinations are within his discretion, and there is no reversible error in the administrative law judge's weighing of the conflicting evidence, we affirm the administrative law judge's finding that claimant can perform his usual employment as of March 27, 1997, and the denial of benefits thereafter. *See generally Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). Based on this conclusion, we reject employer's contention in its cross-appeal that the administrative law judge should have used the date of Dr. Flax's report, as the administrative law judge's reliance on the date of Dr. Greifinger's report is rational and consistent with his decision to particularly credit Dr. Greifinger's opinion. Decision and Order at 29.

[1]In addition, the administrative law judge found that Dr. Birotte's opinion was not well reasoned, as he had not reviewed claimant's physical therapy records, was not aware of claimant's daily activities and provided no testimony regarding claimant's job duties. Decision and Order at 29; Cl. Ex. 36 at 111, 116, 140-141.

Accordingly, the Decision and Order - Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge