

RICHARD YOUNG)	
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Claimant-Petitioner)	
)	
v.)	
)	
GLOBAL TERMINALS & CONTAINER)	DATE ISSUED: 08/13/2012
SERVICE, INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Jordan N. Pederson, Jr. (Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, P.C.), Hoboken, New Jersey, for claimant.

John F. Karpousis (Freehill Hogan & Mahar, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2009-LHC-00154) of Administrative Law Judge Theresa C. Timlin 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b) (3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was injured on February 18, 2005, during the course of his employment as a holdman when a beam fell onto his left foot. Dr. Sullivan removed claimant's left middle toe in March 2005. He referred claimant to Dr. Khan, who prescribed pain medication. In October 2007, claimant's primary care physician, Dr. Shah, referred claimant to Mr. Della Pesca for psychological counseling to treat depression and anxiety. Claimant continued to complain of left foot pain and depression. Employer paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from February 22, 2005 to January 3, 2007, as well as two permanent partial disability compensation payments of \$17,352 and \$6,282.96 for a left foot impairment and a loss of the toe, respectively. Claimant asserted that he is unable to return to work as holdman and, therefore, that he is entitled to compensation for total disability due to his left foot impairment and an injury-related psychological condition. Employer contended that claimant's entitlement to compensation ended on January 3, 2007.

In her decision, the administrative law judge found that claimant's left foot injury reached maximum medical improvement in November 2007, at which time claimant's physician, Dr. Khan, completed the adjustments to claimant's medication. Decision and Order at 40. The administrative law judge found that claimant's depression is neither totally disabling nor related to the work injury. *Id.* at 42, 44. The administrative law judge rejected claimant's complaints of chronic left foot pain, and she concluded that claimant's temporary total disability ended when his foot condition reached maximum medical improvement in November 2007.¹ *Id.* at 44. Regarding claimant's entitlement to permanent partial disability compensation, the administrative law judge awarded claimant 16 weeks of compensation for the amputation of his left middle toe as dictated by the schedule. *Id.*; see 33 U.S.C. §908(c)(11). The administrative law judge also found that claimant is entitled to compensation for a 22 percent impairment of the left foot.² *Id.* at 45; see 33 U.S.C. §908(c)(2).

On appeal, claimant challenges the administrative law judge's finding that his total disability ended when his left foot injury reached maximum medical improvement. Employer responds, urging affirmance.

¹It is implicit in the administrative law judge's decision that claimant is entitled to total disability benefits until his foot injury reached maximum medical improvement, but the administrative law judge did not explicitly award these benefits. This omission is not appealed. See Cl. Br. at 4.

²The administrative law judge found that claimant is entitled to continuing medical care for his left foot. 33 U.S.C. §907; Decision and Order at 45-46.

It is claimant's burden to establish his inability to perform his usual work due to his work injury. See, e.g., *Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000). In his appellate brief, claimant sets forth evidence favorable to his assertion that he is unable to return to work due to his left foot and psychological conditions, and he argues that the administrative law judge, therefore, erred in reaching the opposite conclusion. However, it is well-established that, in arriving at her decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences and conclusions from the evidence, see *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963), and the Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981).

In this case, the administrative law judge's conclusion that, after claimant's left foot reached maximum medical improvement, he was not physically disabled by chronic pain caused by his left foot injury or psychologically disabled by depression related to the work injury is supported by substantial evidence of record. The administrative law judge rationally found the claimant's psychological condition is not totally disabling because: claimant first complained of depression over 30 months after the work injury; this complaint coincided with his being evaluated as capable of returning to work;³ and, there are inconsistencies in the psychological records of Mr. Della Pesca, Dr. Wong and Dr. Finkelstein.⁴ CXs 4, 8, 9, 11, 17; EXs C, H. The administrative law judge rationally

³Claimant asserts that there is no basis to support the administrative law judge's finding that claimant sought psychological treatment after his examination by Dr. Magliato on October 27, 2007, since Dr. Shah referred claimant to Mr. Della Pesca on October 4, 2007. See Cl. Br. at 18. The administrative law judge, however, did not find that claimant saw Dr. Magliato prior to Dr. Shah's referral. Instead, she accurately stated that the examinations were in the same month and that claimant did not mention depression to Dr. Magliato. Decision and Order at 41. Claimant also asserts that the administrative law judge's maximum medical improvement finding is erroneous based on the diagnoses of psychological disability of Mr. Della Pesca and Dr. Finkelstein. Cl. Br. at 17. We reject this assertion, as the administrative law judge also rationally credited the opinion of Dr. Carnevale that claimant's depression is not work-related. See generally *Hice v. Director, OWCP*, 48 F. Supp. 2d 501 (D.Md. 1999); EX 5 at 5.

⁴The administrative law judge noted inconsistencies in the psychological evaluations that detract from claimant's credibility. Decision and Order at 41. Claimant told Mr. Della Pesca in February 2008 that he no longer engages in hunting and fishing; however, claimant maintained hunting and fishing licenses throughout 2007 and 2008, and he testified to having fished during this period. Tr. I at 76-79; CX 20; EX K.

noted that the onset of claimant's claim of depression coincided with employer's termination of compensation payments in September 2007, that claimant reported his psychological condition had improved when he became eligible for Social Security disability payments, and that Mr. Della Pesca noted that claimant did not want to return to work. CXs 15, 20. When, in April 2009, Dr. Finkelstein reviewed surveillance videos of claimant he stated he could no longer affirm that claimant had been disabled in 2008. Tr. at 85.

The administrative law judge also rationally found that claimant's assertion of disabling left foot pain is not credible based on the surveillance videos that demonstrate his ability to walk unassisted, notwithstanding his repeatedly reporting to doctors that he requires a cane, and the observations of Drs. Khan, Ferrer, Oppenheim and Dennis that claimant magnified his pain symptomatology. CXs 17, 18, 24; EXs B, C, H. Moreover, Drs. Oppenheim and Dennis opined that claimant's left foot condition does not prevent his returning to work. Tr. II at 102, 122-124, 134-135; CX 26 at 36-37, 60; EXs C (Aug. 2, 2007 report at 7, April 8, 2009 report at 3), H (June 2, 2009 report at 4).

The administrative law judge's rejection of claimant's subjective complaints is neither inherently incredible nor patently unreasonable as it is based on a rational evaluation of the evidence detracting from his complaints. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge summarized the medical reports and opinions that claimant asserts establish his inability to return to work. Decision and Order at 20-28, 31. As it is claimant's burden to establish he cannot return to his usual work, and the administrative law judge rationally discredited claimant's claim of disabling depression and chronic foot pain based on substantial evidence of record, she was not required to the further address the evidence claimant asserts establishes his inability to return to work.⁵ *See Marinelli v.*

Claimant also reported a suicide attempt to Dr. Finkelstein. EX D at 2. However, the notes of Mr. Della Pesca and Dr. Wong do not mention a suicide attempt. CXs 15, 16, 18, 20, 25.

⁵In this regard, we reject claimant's contention that the administrative law judge's decision does not comport with the Administrative Procedure Act, 5 U.S.C. §557, because the administrative law judge did not compare his work restrictions with the physical requirements of his usual employment as a holdman and there is no factual basis for her conclusion that claimant's psychological condition is not totally disabling. The administrative law judge found that claimant did not have any physical or psychological restrictions that prevent his return to work. She extensively detailed her rationale for finding not credible claimant's assertion of restrictions related to disabling depression and chronic left foot pain and, by implication, the medical reports that rely on claimant's subjective complaints. By fully stating the evidence supporting her findings that claimant

American Stevedoring, Ltd., 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001). Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant was not disabled by his work injury after his left foot condition reached maximum medical improvement in November 2007.⁶

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

does not have chronic foot pain or disabling depression, the administrative law judge implicitly rejected the evidence of disability that was based, at least in part, on claimant's subjective assertions of chronic foot pain and depression. *See generally Cotter v. Harris*, 642 F.2d 700 (3^d Cir. 1981); *see also Gacki v. Sea-Land Services, Inc.*, 33 BRBS 127 (1998).

⁶Claimant also asserts that he is entitled to total disability compensation since employer did not establish the availability of suitable alternate employment. As claimant did not show he is unable to return to his usual employment, employer was not required to establish the availability of suitable alternate employment. *See generally Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2^d Cir. 1991). Moreover, the administrative law judge took the neurological component of claimant's injury into account in assessing his degree of permanent impairment. Decision and Order at 44-45.