BRB No. 98-1575

REGINALD HENDERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	DATE ISSUED: 8/18/99
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order, Order Denying Motion for Reconsideration, Supplemental Order Awarding Attorney Fees, and Order Awarding Attorney Fees of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Barry W. Ponticello (England, Trovillion & Inveiss), San Diego, California, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order, Order Denying Motion for Reconsideration, Supplemental Order Awarding Attorney Fees, and Order Awarding Attorney Fees (97-LHC-1668) of Administrative Law Judge Alexander Karst 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g.*,

Muscella v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980).

Claimant, a pipe fitter, sustained injuries to his lower back on May 19, 1995, while assisting in the moving of heavy pipe during the course of his employment. Claimant returned to his usual job duties on June 10, 1995, but due to continuing back pain was able to work only intermittently from June 20, 1995, until September 1995, when he was assigned light duty work in employer's facility. In July 1996, employer required claimant to return to his usual job as a pipe fitter; claimant declined to do so and was thereafter terminated by employer.

In his decision, the administrative law judge found that claimant was unable to return to his pre-injury employment duties with employer and that employer had established the availability of suitable alternate employment as of the date claimant reached maximum medical improvement, May 26, 1996. Accordingly, the administrative law judge awarded claimant temporary total disability benefits for various periods of time through May 26, 1996, permanent partial disability benefits thereafter, and medical benefits. Employer's subsequent request for reconsideration was denied by the administrative law judge. In his supplemental decision, the administrative law judge awarded claimant's attorney a fee of $14,044.50. In a subsequent order, the administrative law judge denied employer's motion for reconsideration of the fee award and reiterated his prior award.

Employer now appeals, challenging the administrative law judge's award of benefits to claimant as well as the fee awarded to claimant's counsel. Claimant responds, urging affirmance.

Employer initially challenges the administrative law judge's determination that claimant cannot return to his usual employment. 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 & Const. Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

In finding that claimant was unable to return to his usual employment, the administrative law judge relied upon the opinions of Drs. Ford, Larson, and Dodge, that claimant is disabled from performing his previous regular work as a shipfitter. Employer argues that the administrative law judge erred in finding claimant entitled to continuing compensation after July 1996 when, it contends, claimant was capable of returning to his usual job. In raising this argument, employer asserts that the administrative law judge erred in rejecting the opinion of Dr. Averill, in misinterpreting the opinion of Dr. Dodge, and in relying on the opinions of those physicians who based their diagnoses on the questionable

testimony of claimant. For the reasons which ensue, we reject employer's arguments.

As the administrative law judge noted, Dr. Averill testified that claimant was capable of performing his usual job as of June 10, 1995, and that his subsequent disability, if any, is unrelated to the job incident. HT at 165. In a written report dated March 4, 1996, however, he stated that claimant's current back condition was related to his industrial accident and that claimant was restricted to lifting less than 50 pounds, a restriction which effectively prevents claimant from performing his pre-injury job. RX C; Decision at 5-6. The administrative law judge rejected employer's contentions that such discrepancies were merely semantics or irrelevant and concluded that such diametrically opposed opinions required the total rejection of Dr. Averill's opinions. Decision at 6. It is well-established that the administrative law judge is entitled to weigh the evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Based upon our review of the testimony of Dr. Averill and his written opinions, we can find no error in the administrative law judge's decision to reject Dr. Averill's opinions *in toto* as contradictory.

The administrative law judge also rejected employer's argument that Dr. Dodge's opinion supported its contention that claimant is capable of returning to his usual employment. Although Dr. Dodge did opine on September 14, 1995, that he "**anticipated** that claimant would require no more than approximately six weeks of physical therapy and he **should** be able to resume unrestricted work within that period of time," RX D (emphasis added), Dr. Dodge did not examine claimant again. As the administrative law judge properly noted, Dr. Dodge's supposition and anticipation of claimant's possible progress does not represent a factual finding that claimant can indeed return to his usual employment at the anticipated time. Therefore, Dr. Dodge's opinion does not support employer's contention that claimant was capable of returning to his usual employment on or about the end of October 1995. As the administrative law judge properly noted, no physician of record stated that claimant can return to his usual employment.

Next, employer contends that the administrative law judge erred in crediting those physicians who relied on claimant's testimony in reaching their diagnoses. It is employer's argument that the inherent inconsistencies in claimant's testimony renders both it and the opinions based upon it suspect and unreliable. In his decision, the administrative law judge addressed each of employer's concerns, finding that claimant's failure to report automobile accidents in 1990 and 1996 did not affect his evaluation of the evidence based upon Dr. Ford's conclusion that claimant's return to hard labor for five years following the 1990 accident rendered its effects, if any, irrelevant, and that the 1996 accident was very minor resulting in no impact on claimant's current condition. HT at 38. The administrative law judge also credited the opinion of Dr. Larson that claimant's ability to lift weights while

lying on his back is irrelevant to the existence of claimant's lower back condition. HT at 106. Moreover, the administrative law judge found that the medical opinions of Drs. Ford, Larson, and Dodge were supported by objective findings as well as well as claimant's subjective complaints. *See, e.g.*, HT at 50 (Dr. Ford); RX D (Dr. Dodge); Decision at 9. Based upon our review of the evidence before us, we can find no error in the administrative law judge's conclusions. In the instant case, the administrative law judge addressed each of employer's objections and his determinations, including his evaluation of claimant's credibility, are rational and within his authority as a fact finder. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied* 440 U.S. 911 (1979). As it is supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant is unable to return to his usual work.

Where, as in the instant case, claimant is unable to perform his usual employment, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988); *Anderson v. Lockheed Shipbuilding & Const. Co.*, 28 BRBS 290 (1994). Employer contends that the administrative law judge erred in failing to consider all of the positions found by its vocational consultant. We disagree. The administrative law judge concluded that employer failed to establish that the positions of combination welder and retail manager trainee constituted suitable alternate employment based upon the medical opinions of record and claimant's vocational history.

Initially, the administrative law judge eliminated the combination welder positions as exceeding claimant's physical restrictions regarding lifting less than fifty pounds. Employer argues that the administrative law judge erroneously relied on this restriction as claimant is capable of lifting more than that amount. Although employer contends that claimant's pre-injury ability to lift several hundred pounds, *see, e.g.*, RX F; HT at 68, combined with Dr. Ford's statement that claimant has suffered a fifty percent loss of lifting capacity, HT at 21, equates to a post-injury capacity to lift well over fifty pounds, the administrative law judge could rationally rely on Dr. Ford's testimony that claimant would have difficulty lifting more than twenty-five pounds, HT at 27, which is supported by the opinion of Dr. Dodge which held that claimant should avoid lifting more than fifteen to twenty pounds.[1] RX C. As the administrative law judge's findings that claimant could not lift fifty pounds and accordingly could not perform the combination welder positions are rational and based on substantial

[1]Moreover, the administrative law judge's finding is also supported by Dr. Averill, who wrote in his March 4, 1996, report that claimant should not lift more than fifty pounds. RX C.

evidence of record, we decline to disturb them. *See Chong v. Todd Pacific Shipyard Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

Employer also objects to the administrative law judge's rejection of the retail manager trainee positions as suitable alternate employment. The administrative law judge rejected these positions because employer failed to demonstrate that claimant possessed the necessary vocational skills, *i.e.*, scheduling, inventory control or customer service, to fill these jobs. Employer contends that claimant could have been trained to perform these tasks and possesses the necessary abilities transferable from his prior work as a union member and work foreman. It is within the administrative law judge's discretion to conclude that claimant's ability to perform these jobs is speculative and that employer failed to carry its burden to establish that claimant could perform the necessary office skills. *See Wilson v. Dravo Co.*, 22 BRBS 468 (1989)(Lawrence, J., dissenting). Accordingly, we decline to disturb it on appeal.

Alternatively, employer argues that the administrative law judge erred in determining that claimant has suffered a post-injury loss of wage-earning capacity by finding that claimant's post-injury wage-earning capacity is $229.60. Employer contends, based on the combination welder position, that claimant's post-injury wage earning capacity is $632 per week, which exceeds his stipulated pre-injury average weekly wage of $580.

Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), provides for an award for partial disability benefits based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Wage-earning capacity is determined under Section 8(h), 33 U.S.C. §908(h), which provides that claimant's wage-earning capacity shall be his actual post-injury wage earnings if these earnings fairly and reasonably represent his wage-earning capacity. If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must consider the relevant factors and calculate a dollar amount which reasonably represents claimant's wage-earning capacity. The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wages to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988).

We reject employer's contention that the administrative law judge erred in averaging the wages paid in those positions which he found constituted suitable alternate employment.[2] In reaching his finding that claimant retains a wage-earning capacity of $229.60, the administrative law judge averaged the wages paid in those positions which he found constituted suitable alternate employment, arriving at a figure near that of claimant's actual earnings of $214.40 per forty hours[3] work. The Board will affirm a determination that is reasonable and rational under the specific circumstances of the case. In the case at bar, the administrative law judge's decision to rely upon an average of the amounts paid in the relevant positions regarding claimant's residual wage earning capacity is rational. Accordingly, the administrative law judge's finding that claimant retains a residual wage-earning capacity of $229.60 is affirmed.

Lastly, we address employer's challenge to the administrative law judge's award of an attorney's fee to claimant's counsel. Employer initially asserts that because the administrative law judge erred in awarding claimant disability benefits and the fee award was premised on that award, the administrative law judge's determination that employer is liable for claimant's counsel's fee should be reversed. Inasmuch, however, as we affirm the administrative law judge's award of benefits to claimant, we reject employer's argument and we affirm the administrative law judge's finding that employer is liable for claimant's counsel's fee. *See* 33 U.S.C. §928; *see generally Kinlaw v. Stevens Shipping & Terminal Co.,* 33 BRBS 68 (1999).

We additionally affirm the $14,044.50 attorney's fee awarded to claimant's counsel by the administrative law judge. In the instant case, employer filed various objections to the hourly rate and the number of hours requested by claimant's counsel in his fee petition. On

[2]As we hold that the administrative law judge rationally and properly excluded the welder position in his consideration of suitable alternate employment, we need not address employer's contentions regarding claimant's post-injury wage earning capacity based on that job.

[3]The record reflects that claimant's current position is part-time, so the administrative law judge took claimant's hourly wage and multiplied it by forty hours to determine claimant's average weekly wage. Decision at 11.

reconsideration, in his Order Awarding Attorney Fees, the administrative law judge specifically stated that he considered each of employer's itemized objections to counsel's fee petition and, for the reasons and grounds "set forth in Claimant's Reply to Objections," overruled those objections. We decline to disturb the administrative law judge's award, as employer has not shown that the administrative law judge abused his discretion in this regard. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1991).

Accordingly the administrative law judge's Decision and Order awarding compensation, and his Order Awarding Attorney Fees, are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge