

LEONARDO IACOVIELLO)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HOWLAND HOOK CONTAINER)	DATE ISSUED: 12/14/2006
TERMINAL, INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY,)	
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Judith Mitchell (Fortunato & Fortunato, PLLC), Brooklyn, New York, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2005-LHC-1027) of Administrative Law Judge Robert D. Kaplan 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 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, a laborer, suffered a work-related injury to his left foot on May 26, 1999. Employer paid claimant temporary total disability compensation for the period from June 1, 1999, to August 8, 1999, with the exception of June 2, 1999. Claimant sought additional temporary total disability compensation for the period from August 9, 1999, to September 19, 1999, plus an award under the schedule for a permanent impairment to his left foot. 33 U.S.C. §908(c)(4).

In his Decision and Order, the administrative law judge found that claimant was capable of returning to work as of August 9, 1999, and therefore is not entitled to additional total disability benefits. Additionally, the administrative law judge found that as claimant has no permanent impairment to his left foot, he is not entitled to a schedule award. Claimant appeals, contending that the administrative law judge erred in denying additional compensation. Employer responds, urging affirmance of the denial of benefits.

Claimant bears the burden of establishing the nature and extent of his disability by initially establishing his inability to perform his usual work due to the injury. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). In this case, the administrative law judge found that claimant failed to establish that he could not return to his usual job after August 8, 1999. The administrative law judge based his conclusion primarily on the report of Dr. Bloom, a neurological surgeon, that although claimant's contusion had not fully resolved and he needed additional physical therapy, claimant could return to work on August 9, 1999. EX C. The administrative law judge also relied on the opinions of Drs. Marrone, EX J at 64-65, and Magliato, EX D at 126, that the recommendation for additional physical therapy was not inconsistent with a return to work recommendation. Moreover, on September 9, 1999, Dr. Marrone also stated claimant could return to work. CX 5. The only support for claimant's contention that he was unable to return to work until September 20, 1999, was his own testimony that he took a vacation during this period because his foot "had to heal." HT at 70. The administrative law judge, however, found that claimant was not a credible or reliable witness because he did not tell the physicians about his prior toe injury and inconsistently described the sequelae of the May 1999 injury. Decision and Order at 10-11.

We reject claimant's contention that the administrative law judge erred in finding that he failed to establish his inability to perform his usual work after August 9, 1999. Although a claimant's pain is a valid consideration in assessing the extent of the disability, *see, e.g. Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Anderson v. Todd Shipyards Corp.*, 22 BRB 20 (1989); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981), the administrative law judge in this instance rationally rejected claimant's testimony concerning his inability to work in favor of the credited medical evidence. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). It is the administrative law

judge's prerogative to weigh the evidence, draw inferences, and make credibility assessments, and we decline to disturb his findings as they are supported by substantial evidence of record. *See Pittman Mech. Contractors, Inc. v. Director, OWCP*, 35 F.2d 122, 28 BRBS 89(CRT)(4th Cir. 1994). Accordingly, the administrative law judge's findings that claimant was able to return to work as of August 9, 1999, and is not entitled to further temporary total disability compensation are affirmed.

Claimant further argues that the administrative law judge erred in denying him an award pursuant to the schedule. In the event of an injury to a scheduled member, recovery for a claimant's permanent partial disability under Section 8(c) is confined to the schedule in Section 8(c)(1)-(19), *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), and claimant is compensated based on the degree of physical impairment. *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). The administrative law judge found that the medical evidence as a whole fails to establish that claimant has any permanent impairment to his left foot due to the injury of May 26, 1999. Decision and Order at 11. Claimant contends he has a 7½ percent permanent impairment of his left foot based upon the opinion of Dr. Magliato, as supported by Dr. Post's opinion that claimant has a 20 percent permanent impairment.

Dr. Magliato based his finding of impairment on claimant's subjective complaints and stated that had he used only the American Medical Association *Guides to the Evaluation of Permanent Impairment*, he would have found a zero percent loss. EX I at 116. Dr. Magliato further opined that had he eliminated claimant's prior 40 percent loss of use of his left, fifth toe, sustained as a result of the 1979 injury, there would be no additional loss at this time. EX D at 4. Dr. Magliato's opinion that any loss was due only to subjective complaints is supported by the opinions of Drs. Bloom and Marrone who found no objective support for any impairment rating. EXs C, J. The administrative law judge rejected the opinion of Dr. Post that claimant has a 20 percent impairment due to reduced range of motion. CX 3. The administrative law judge noted that Dr. Magliato's disagreed with this assessment, EX I at 98-99, and that Dr. Post stated the rating was based on "partially subjective" factors. Tr. at 29. As the administrative law judge found that claimant was not a credible witness, he also rejected the assessments which were based on subjective factors. The administrative law judge thus discounted Dr. Post's opinion and the rating given by Dr. Magliato, and he concluded that claimant had no permanent impairment due to the work injury.

We affirm the administrative law judge's finding that claimant does not have any permanent impairment as it is based on a rational weighing of the medical evidence of record. In adjudicating a claim, it is well established that an administrative law judge is entitled to weigh the medical evidence and to draw his own inferences from it, and that he is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, the

administrative law judge discussed the four medical opinions of record regarding the extent of claimant's work-related impairment and rationally credited the opinions of Drs. Magliato, Bloom and Marrone that claimant has no objectively determined permanent impairment over the opinion of Dr. Post. As substantial evidence supports the administrative law judge's finding, we affirm the administrative law judge's determination that claimant has no permanent impairment to his left foot due to the injury of May 26, 1999. *See generally Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge