BRB No. 09-0292

SAMUEL H. PROVISERO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEEKS MARINE, INCORPORATED	)	DATE ISSUED: 12/22/2009
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

James G. Fitzsimons (Hoffman & Associates), New York, New York, for claimant.

John E. Kawczynski (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2007-LHC-1158) 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 crane operator, worked from September 28, 2001, to May 17, 2002, at Pier 25 on the Hudson River in New York removing debris generated from the collapse of the World Trade Center (WTC) onto barges for dumping elsewhere. EX 16 at 9-10. After May 2002, claimant continued to work as a crane operator elsewhere until May 2006. Claimant alleged that his exposure to the airborne debris at the WTC site caused "World Trade Center Syndrome" from which he has been totally disabled since May 2006.[1]

In his Decision and Order, the administrative law judge found that claimant's notice of injury and claim were timely. 33 U.S.C. §§912, 913. The administrative law judge invoked the Section 20(a) presumption that claimant's current respiratory condition is due his work injury, 33 U.S.C. §920(a), and found that employer did not rebut the Section 20(a) presumption. Thus, the administrative law judge found that claimant's respiratory condition is work-related. The administrative law judge found, however, that claimant failed to establish his *prima facie* case of total disability and accordingly denied disability compensation. The administrative law judge awarded claimant medical benefits for his work-related respiratory condition.

Claimant appeals, contending that the administrative law judge erred in finding that he is not totally disabled. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Claimant bears the burden of establishing the nature and extent of his disability. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In order to establish a *prima facie* case of total disability, claimant must demonstrate that he cannot return to his regular or usual employment due to his work related injury. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). Due to the unique circumstances under which claimant's injury occurred, the administrative law judge evaluated claimant's ability to return to work by assessing his capacity to perform his usual duties as a crane operator at normal business sites. Decision and Order at 13.

The administrative law judge appropriately recognized that a claimant may be disabled if a return to work would expose him to substances that would aggravate his work injury. *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978);

[1] According to Dr. Rabinowitz, who is Board-certified in internal medical and pulmonary disease, "World Trade Center Syndrome" is a constellation of diseases consisting of pulmonary, gastrointestinal and upper airway components and is often associated with post-traumatic stress syndrome and depression. CX 20 at 8.

Preziosi v. Controlled Industries, Inc., 22 BRBS 468 (1989) (Brown, J., dissenting on other grounds). Dr. Rabinowitz, claimant's treating physician, opined that claimant is totally disabled from performing his usual and customary job duties in the construction industry. EX 20 at 23. This opinion is based on claimant's pulmonary disease, which, Dr. Rabinowitz stated, could be exacerbated if claimant were exposed to inhaled pulmonary irritants, fumes, smoke, dusts, dramatic changes in temperature, humidity, and moisture. *Id.* at 27. The administrative law judge rejected this opinion because Dr. Rabinowitz also stated that drug treatment has "normalized" claimant's respiratory capacity and because claimant testified that he was not exposed to pulmonary irritants, fumes, smoke and dusts during the course of his usual job duties. HT at 18-19; EX 20 at 16-18. Thus, the administrative law judge concluded that Dr. Rabinowitz's opinion does not support a finding that claimant is incapable of performing his usual job duties due to his respiratory impairment.

Claimant contends the administrative law judge erred in rejecting Dr. Rabinowitz's opinion because, assuming the absence of airborne pulmonary irritants, the doctor also stated that exposure to dramatic changes in temperature, humidity and moisture are contraindicated, noting that claimant's crane work is performed outdoors. In addition, claimant contends the administrative law judge did not discuss his testimony concerning the limitations caused by his pulmonary condition. Claimant testified that due to his pulmonary condition he cannot climb on the crane to: check the cables, inspect the crane, check the oil, and grease the crane. Claimant testified the height of the cranes is two flights of stairs or less. He also stated that running the crane takes physical activity that he has trouble performing. Claimant stated he becomes "winded" when he walks. HT at 22-24.

We must remand this case for further consideration as the administrative law judge did not address all of the evidence relevant to the issue of claimant's ability to return to his usual work. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). The administrative law judge acted within his discretion in finding that claimant's employment does not expose him to airborne pulmonary irritants and that this is not a valid basis for Dr. Rabinowitz's assessment that claimant is disabled from returning to work as a crane operator. *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). However, the administrative law judge did not separately address Dr. Rabinowitz's opinion regarding weather exposure which claimant should avoid in order to prevent the exacerbation of his condition. Nor did the administrative law judge address claimant's testimony that his pulmonary condition prevents him from performing aspects of his crane operator position. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In addition, the administrative law judge did not discuss the opinion of Dr. Karetzky that claimant has no demonstrable pulmonary disability. He stated that

claimant's pulmonary function studies are within normal limits because of the treatment he has received and his cessation of smoking. EXs 14 at 1, 4; 15; 18 at 8-10.[2] The administrative law judge should also discuss Dr. Rabinowitz's testimony that even though claimant's most recent pulmonary function studies reflected normal results, he has a chronic lung condition which is susceptible to exacerbation and that claimant is disabled from his usual work due to his underlying pulmonary condition. EX 20 at 34, 39.

Therefore, we vacate the denial of disability compensation. On remand, the administrative law judge should evaluate all the evidence relevant to the issue of whether claimant has met his burden of establishing that his work-related pulmonary condition prevents his return to his crane operator work. *Wheeler*, 39 BRBS 49; *Peterson v. Washington Metro. Area Transit Auth.*, 13 RRBS 891 (1981). The administrative law judge is entitled to determine the weight to be accorded to the conflicting evidence of record, *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and his decisions as to the credibility of witnesses are entitled to deference. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

[2] The administrative law judge accorded no weight to Dr. Karetzky's opinion that claimant's pulmonary condition was not related to his exposures on the pier, finding the doctor was mistaken as to the extent of claimant's exposure. This determination does not necessarily negate Dr. Karetzky's findings on the extent of that condition.

Accordingly, the administrative law judge's denial of disability compensation is vacated, and the case is remanded for further findings in accordance with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge