BRB No. 03-0426

WINSTON HAMILTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CADDELL DRYDOCK AND REPAIR COMPANY	)	DATE ISSUED:Feb. 26, 2004
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Michael L. Varone (Sher Herman Bellone & Tipograph, P.C.), New York, New York, for claimant.

Christopher J. Field (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 (02-LHC-1437) of Administrative Law Judge Ralph A. Romano denying benefits 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries to his left rib cage and left ankle on September 13, 2000, while in the course of his employment as a welder-fitter with employer. Claimant has not worked since his injuries. Employer voluntarily paid claimant temporary total disability benefits from September 24, 2000 through January 10, 2001. 33 U.S.C. §908(b). In correspondence dated January 9, 2001, employer advised claimant of the availability of a light duty position with employer consistent with the physical restrictions set forth by Dr. Morgan, and directed claimant to report to work on January 11, 2001, to begin this job. This correspondence additionally informed claimant that his compensation benefits would terminate after January 10, 2001. EX 13. Claimant did not report for work nor did he respond to employer's correspondence, which he subsequently acknowledged that he had received. *See* Tr. at 14-16.

At the formal hearing before the administrative law judge, claimant offered his own testimony in support of his contention that he remained entitled to continuing temporary total disability benefits from the January 11, 2001, date of cessation of employer's voluntary payment of benefits. Claimant did not submit documentary evidence at the hearing or in the ninety-day period following the hearing during which time the record was held open for the submission of additional evidence.[1] In contrast, employer submitted into the record evidence in support of its position that its offer of light duty employment to commence on January 11, 2001, consistent with claimant's physical restrictions as of that time, terminated its further liability for the payment of disability compensation. Employer also presented evidence that claimant subsequently was released to return to full duty work, and, thus, that claimant is presently capable of performing his usual employment duties.

In his Decision and Order, the administrative law judge determined that claimant's hearing testimony failed to provide a sufficient rationale for his assertion that he remained unable to work subsequent to January 9, 2001, and he thus found that claimant failed to meet his burden of showing an inability to return to his usual work beyond that date. The administrative law judge further found that, assuming that claimant had demonstrated an inability to perform his usual work, employer established the availability of suitable alternate employment with its offer to claimant of a light duty position on January 11, 2001, with no wage loss. Accordingly, the administrative law judge denied claimant's claim for continuing temporary total disability benefits subsequent to January 10, 2001.

On appeal, claimant challenges the administrative law judge's determination that claimant is not entitled to continuing temporary total disability benefits subsequent to

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[1] In his post-hearing brief to the administrative law judge, claimant argued only that employer failed to offer sufficient evidence to discredit claimant's testimony regarding his physical limitations.

January 10, 2001. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant has the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1041, 31 BRBS 84, 88(CRT)(2d Cir. 1997); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). To establish a *prima facie* case of total disability, claimant must demonstrate that he cannot return to his usual employment duties due to his work-related injury. Should claimant establish his *prima facie* case, the burden shifts to employer to establish the availability of suitable alternate employment. *See Pietrunti*, 119 F.3d at 1041, 31 BRBS at 88(CRT). Employer may meet this burden by offering claimant a job which is necessary and which claimant is capable of performing. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT)(5th Cir. 1996).

In the instant case, claimant elected not to submit any medical reports or the testimony of his treating physicians into evidence before the administrative law judge; rather claimant based his claim for ongoing disability compensation solely on his hearing testimony. Thus, the administrative law judge was constrained to base his findings concerning the nature and extent of claimant's disability on claimant's testimony and the medical evidence submitted by employer, which includes the medical reports of Dr. Morgan, an orthopedic surgeon who conducted multiple examinations of claimant on behalf of employer, *see* EXS 7-12, 18, and Dr. Magliato, an orthopedic surgeon who conducted an impartial medical examination of claimant, *see* EXS 14-17. *See* Decision and Order at 2-3.

In support of his appeal to the Board, claimant has submitted a brief which is identical to his post-hearing brief to the administrative law judge with the addition of a two-sentence, concluding paragraph averring that the administrative law judge failed to properly assess the credibility of claimant's testimony regarding his physical limitations and ability to work in light of the other evidence of record. Thus, claimant essentially argues on appeal that his credible testimony is sufficient to establish his entitlement to ongoing disability benefits.

We affirm the administrative law judge's denial of disability benefits after January 11, 2001. Claimant does not aver on appeal that the light duty position as shop welder offered by employer as of January 11, 2001, exceeded the physical restrictions imposed by Dr. Morgan on January 3, 2001, *see* EXS 11, 13, 19, or by Dr. Magliato thereafter. EX 14. Moreover, claimant does not address Dr. Morgan's subsequent opinion, based on his re-examination of claimant on February 8, 2001, that claimant was capable as of that date of returning to work as a welder and of performing all of his usual employment duties. *See* EX 12. Rather, claimant simply avers that the administrative law judge failed to properly assess the credibility of claimant's testimony regarding his ability to return to work. We disagree.

In adjudicating a claim, it is well-established that an 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 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). Thus, the administrative law judge, as factfinder, has "the discretion to evaluate the credibility of a claimant and to arrive at an independent judgment, in light of medical findings and other evidence." *Pietrunti*, 119 F.3d at 1042, 31 BRBS at 89(CRT)(internal citations omitted). The administrative law judge's "credibility findings are entitled to great deference and therefore can be reversed only if they are 'patently unreasonable.'" *Id.*

Contrary to claimant's allegation on appeal, the administrative law judge fully considered the weight to be given to claimant's testimony. Initially, in evaluating claimant's testimony, the administrative law judge found it noteworthy that claimant had never discussed with any doctor the issue of returning to work. *See* Decision and Order at 2; Tr. at 16, 23. Additionally, the administrative law judge implicitly found a contradiction between claimant's testimony that his physical condition worsened between January 2001 and the September 18, 2002 date of the hearing and his testimony that his pain prevented him from attempting to return to work in January 2001, but that he was willing to attempt to return to work as of the hearing date. *See* Decision and Order at 2-3; Tr. at 14, 25-26, 29-32, 34. The administrative law judge determined that claimant provided no rational explanation in his hearing testimony to support his position that he was unable to perform work duties at the time employer's light duty position was offered. *See* Decision and Order at 3. Based on the record before us, the administrative law judge's decision not to credit claimant's testimony regarding his inability to return to work is neither inherently incredible nor patently unreasonable. *See generally Pietrunti*, 119 F.3d at 1042, 31 BRBS at 89(CRT); *Wheeler*, 21 BRBS 33. We therefore hold that the administrative law judge acted within his discretion in declining to credit claimant's testimony that his pain precluded him from attempting to perform the light duty job offered by employer. *See Pietrunti*, 119 F.3d at 1042, 31 BRBS at 89(CRT). As claimant does not specifically challenge the administrative law judge's finding that employer's offer of a modified light duty job established the availability of suitable alternate employment with no wage loss as of January 11, 2001, we affirm the administrative law judge's denial of disability compensation as of that date.[2]

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[2] Claimant does not challenge on appeal the administrative law judge's finding that the light duty position offered by employer as of January 11, 2001, entailed no loss of wage-earning capacity; thus, claimant is not entitled to compensation for temporary partial disability subsequent to January 10, 2001. *See generally Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

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

REGINA C. McGRANERY
Administrative Appeals Judge