

ROGER D. BOYLES)	
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Claimant-Petitioner)	DATE ISSUED:
)	
v.)	
)	
INTERMARINE, U.S.A.)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION, LIMITED)	
)	
Employer/Carrier)	
Respondents)	DECISION and ORDER

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

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

G. Mason White (Brennan, Harris & Rominger), Savannah, Georgia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-LHC-0944) of Administrative Law Judge John C. Holmes 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).

Claimant, a paint foreman, suffered a back injury when he slipped while walking down a

gangplank on August 20, 1996, during the course of his employment but continued to perform his usual job duties until terminated on June 11, 1997, as part of a reduction in force at employer's facility. Subsequent to this date, claimant filed a claim, seeking compensation for temporary total disability from June 11 to June 14, 1997, temporary partial disability from June 15 to July 4, 1997, temporary total disability from July 5 to August 24, 1997, and permanent partial disability thereafter. Claimant also alleges he is entitled to penalties under Section 49, 33 U.S.C. 948a, for his unlawful termination.

In his decision, the administrative law judge found that claimant's termination was not in violation of Section 49 and that claimant suffers no disability preventing the performance of his usual pre-injury job. Accordingly, he denied compensation.

Claimant now appeals, contending that the administrative law judge erred in finding employer did not violate Section 49 when it terminated his employment and in denying him disability compensation. Employer responds urging affirmance.

We first address claimant's contention raised in his appeal that the administrative law judge erred in finding that employer did not violate Section 49 of the Act when it terminated him on June 11, 1997. Section 49 prohibits an employer from discharging or discriminating against an employee based on his involvement in a claim under the Act and if the employee can show he is the victim of such discrimination he is entitled to reinstatement and back wages. 33 U.S.C. §948a(1988). To establish a *prima facie* case of discrimination, a claimant must demonstrate that his employer committed a discriminatory act motivated by discriminatory animus or intent. *See Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124 (CRT)(4th Cir. 1988), *aff'g* 20 BRBS 114 (1987). The administrative law judge may infer animus from circumstances demonstrated by the record. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 3

(1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993).

The essence of discrimination is in treating the claimant differently than other employees. *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

In the instant case, the administrative law judge relied upon the deposition testimony of employer's executives that the layoffs were the direct result of employer's restructuring its operations to reflect its loss of government contract work and its new emphasis on private yacht work. C16. Moreover, the record reflects that at the time of his termination claimant had neither filed a claim for compensation under the Act nor missed any time from work due to the injury. Since claimant had not yet filed a claim, employer did not violate Section 49 by discharging him. *See generally Tibbs v. Washington Metropolitan Area Transit Authority*, 17 BRBS 92, 94 (1985), *aff'd mem.*, 784 f.2d 1132 (D.C. Cir. 1986).

In the instant case after a thorough review of the administrative law judge's decision and the parties contention, we hold that the administrative law judge committed no error in relying upon employer's witnesses, especially in light of claimant's failure to file his claim for compensation until after his termination. It is well-established that in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 402 (2d Cir. 1961). We hold that the administrative law judge's finding that claimant's termination was not a violation of Section 49 is rational and supported by substantial evidence and is hereby affirmed.

Claimant next contends that the administrative law judge erred in denying him disability compensation based on his increased impairment due to the work injury. We disagree.

It is well established that claimant has the burden of establishing the extent of any disability

sustained as a result of a work-related injury. *See Anderson v. Todd Shipyard Corp.*, 22 BRBS 20 (1989). In order to establish a *prima facie* case of total disparity, claimant bears the initial burden of establishing that he is unable to return to his usual work.¹ *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). To do so, claimant must establish that his medical restrictions preclude the performance of his former work duties. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985). In the instant case, the administrative law judge found that claimant's usual employment duties as a paint foreman were within the restrictions imposed by his treating physician for this injury as well as those imposed by his prior back and heart conditions. Claimant himself testified that his job was more of a "desk job type supervision" which involved primarily paperwork, HT at 28, and cites to no instances in which he was unable to perform his usual job duties due to the imposed restrictions or in which the job was modified to conform to those restrictions.

Moreover, contrary to claimant's contentions, a physical impairment to claimant alone is insufficient to support a finding of total disability. Rather, claimant must establish he is incapable of perform his regular or usual employment duties due to his work-related injury. In the instant case, claimant testified and the administrative law judge found that claimant continued to perform his regular job duties full time with employer at his regular salary until he was terminated for unrelated economic reasons. Based upon this finding, the administrative law judge reasonably concluded that claimant failed to establish entitlement to compensation under the Act. We hold that the administrative law judge's finding that claimant did not meet his burden of established that he is unable to perform his pre-injury employment duties is rational and supported by substantial

¹ Claimant's arguments regarding the Section 20(a), 33 U.S.C. .§920(a), presumption of causation are without merit. The administrative law judge implicitly found that claimant's back condition arose, at least in part, from the work accident; this finding of causation is not appealed. Moreover, the Section 20(a) presumption does not assist claimant in establishing the nature and/or extent of his disability.

evidence. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989) *aff'd sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

Finally, claimant contends that the administrative law judge erred in denying him a *de minimis* award by failing to properly account for his increased impairment rating. We disagree. The administrative law judge found that a discretionary *de minimis* award was inappropriate in these circumstances because claimant had failed to demonstrate a significant potential that this injury will cause diminished capacity to earn income in the future. *Citing Metropolitan Stevedore Company v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT)(1997). Based on claimant's own testimony that he successfully performed his pre-injury job following his accident until his layoff and that he performs similar job duties at present, HT at 43-45, we agree with the administrative law judge's conclusion that claimant has failed to demonstrate a potential that this injury will diminish his wage earning capacity in the future. Accordingly, the administrative law judge's decision to deny a *de minimis* award in this case is affirmed.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge