BRB No. 12-0320

SAMUEL H. PROVISERO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEEKS MARINE, INCORPORATED	)	DATE ISSUED: 01/10/2013
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Dario Anthony Chinigo (Hofmann & Schweitzer), 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 on Remand (2007-LHC-1158) of Administrative Law Judge Theresa C. Timlin 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 if they 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).

This is the second time this case has come before the Board. To reiterate the facts, 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 at construction sites 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 a Decision and Order dated November 25, 2008, Administrative Law Judge Kaplan invoked the Section 20(a) presumption that claimant's current respiratory condition is due to his work injury, 33 U.S.C. §920(a), and found that employer did not rebut the Section 20(a) presumption; thus, Judge Kaplan found that claimant's respiratory condition is work-related. Judge Kaplan found, however, that claimant failed to establish his prima facie case of total disability and accordingly he denied disability compensation.

On claimant's appeal, the Board determined that Judge Kaplan did not address all of the evidence relevant to the issue of claimant's ability to return to his usual work. Dr. Rabinowitz restricted claimant from exposure to pulmonary irritants and dramatic changes in temperature, humidity and moisture due to his work-related respiratory condition. The Board held that Judge Kaplan acted within his discretion in finding that claimant's employment as a crane operator at construction sites did not expose him to airborne pulmonary irritants. However, Judge Kaplan did not address the evidence regarding weather exposure, claimant's testimony that his pulmonary condition prevents him from performing aspects of his crane operator position, or Dr. Karetzky's opinion that claimant has no demonstrable pulmonary disability. The Board therefore vacated the denial of disability compensation and remanded the case for the evaluation of the evidence relevant to the issue of whether claimant met his burden of establishing that his work-related pulmonary condition prevents his return to his crane operator work. *Provisero v. Weeks Marine, Inc.*, BRB No. 09-0292 (Dec. 22, 2009) (unpub.).

On remand, the case was reassigned to Administrative Law Judge Timlin (the administrative law judge). In her Decision and Order on Remand, the administrative law judge found that while claimant's work "certainly took place outdoors at construction sites," claimant did not present any evidence that he was subjected to dramatic changes in

[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.

temperature, humidity and moisture. Decision and Order on Remand at 12. The administrative law judge also found that Dr. Rabinowitz did not state that exercise or exertion was contraindicated due to claimant's respiratory condition. Thus, the administrative law judge found that claimant did not establish that his work-related respiratory condition prevents his return to his usual employment duties as a crane operator.[2] *Id.* Accordingly, as claimant failed to establish his prima facie case of total disability, the administrative law judge denied claimant's claim for disability benefits.

On appeal, claimant challenges the denial of his claim for disability compensation. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

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); *Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). We affirm the administrative law judge's rational finding that claimant failed to make his prima facie showing.

We reject claimant's assertion that the record is "replete" with evidence that his usual occupational duties as a crane operator exposed him to pollutants, and we decline claimant's request that the Board take judicial notice that all construction sites are polluted with fumes, dust and other contaminants. *See* Cl. Br. at 11. In this case, both the administrative law judge and Judge Kaplan rationally found, based on claimant's testimony that his usual employment duties as a crane operator did not expose him to dust, fumes or debris, that claimant's usual employment did not expose him to pulmonary irritants. *See* Decision and Order on Remand at 11; Decision and Order at 13; Tr. at 18-19; *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, the administrative law judge did not err in rejecting Dr. Rabinowitz's opinion that such exposure renders claimant disabled. Moreover, claimant has cited no evidence in the record to support his contention that he was exposed to dramatic changes in temperature, humidity or moisture. Therefore, the administrative law judge rationally rejected this basis for Dr. Rabinowitz's opinion as well. Finally, the administrative law judge acknowledged claimant's testimony concerning the physical exertion required of a crane operator, Tr. at 22, but found that Dr. Rabinowitz did not state claimant was physically prevented by his respiratory impairment from performing this work. This finding is

[2]The administrative law judge also rejected Dr. Karetzky's opinion because he did not address claimant's pulmonary condition dating back to 2006 or understand the requirements of claimant's job. Decision and Order on Remand at 12.

supported by substantial evidence. *See, e.g., Peterson v. Washington Metro. Area Transit Auth.*, 13 RRBS 891 (1981). The Board is not empowered to reweigh the evidence, and as the administrative law judge has made rational findings and inferences from the record, we affirm her finding that claimant failed to establish his inability to perform his usual work as it is supported by substantial evidence. *See, e.g., American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *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). Therefore, we affirm the denial of disability benefits.[3]

Accordingly, the administrative law judge's Decision and Order on Remand 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

[3]Throughout his brief, claimant cites new evidence which, he avers, supports his claim for disability benefits. This evidence was returned to claimant's counsel by Board Order dated August 29, 2012, as the Board is not authorized to review evidence that was not admitted into the record by the administrative law judge. *See* 20 C.F.R. §802.301. Should claimant seek to present new evidence in support of allegations that a mistake in fact was made in the prior decisions or that his condition has changed, he must file a request for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, prior to one year after issuance of this decision affirming the rejection of his claim. *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); 20 C.F.R. §702.373.