BRB No. 91-1488

ROGELIO F. ANARIO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLEANING DYNAMICS CORPORATION	)	DATE ISSUED:_____
	)	
and	)	
	)	
PACIFIC MARINE INSURANCE COMPANY/CALIFORNIA INSURANCE GUARANTEE ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Reconsideration of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Phillip J. Myles (Myles & Hanauer), San Diego, California, for claimant.

Robert J. LaBerge (Heggeness & Sweet, A.P.C.), San Diego, California, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order on Reconsideration (90-LHC-1366) of Administrative Law Judge Thomas Schneider awarding 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 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his low back on May 7, 1984 when he slipped, fell and hit his back against a boiler. After time off work, he returned for approximately three weeks but was unable to continue due to the pain, and he has not worked since. Tr. at 14-16. Dr. Fernandez, claimant's treating physician, determined claimant sustained a lumbar strain. Later evaluations by Dr. Fernandez and other orthopedic and neurological surgeons indicate claimant suffers from chronic pain. However, the doctors emphasized the absence of any pathological or organic cause of claimant's pain, and they agreed that further treatments would be futile. Emp. Exs. 13, 16, 18-19. Dr. Fernandez determined claimant has a two percent permanent impairment of the whole person and limited him to lifting fewer than 50 pounds and standing fewer than six hours per workday. Subsequently, he released claimant to light duty work. Cl. Ex. 4 at 5.

Because the orthopedic and neurological surgeons could not find an organic cause of claimant's pain, claimant underwent a battery of psychological tests. Dr. Shandell, claimant's psychiatrist, diagnosed psychogenic pain disorder with features associated with somatoform/conversion dysfunction and depression.[1] Cl. Ex. 2 at 10. Dr. Morris, a psychiatrist who interviewed claimant at employer's request, diagnosed mixed personality disorder with narcissistic and dependent features and a secondary analysis of possible malingering. Tr. at 127-129. The doctors agreed that claimant's complaints are subjective and manifestation of his symptoms is the result of both conscious and unconscious factors. Claimant is convinced he is totally disabled and cannot return to any work.

Employer paid claimant benefits at his full compensation rate from the date of the injury through May 4, 1990, excluding the time claimant actually worked. On May 4, 1990, employer reduced claimant's benefits because it determined work within claimant's restrictions was available. Emp. Exs. 9-11. After his benefits were reduced, claimant filed a claim for permanent total disability compensation, and employer controverted the claim. Emp. Ex. 11.

A hearing was held on December 12, 1990, wherein the parties stipulated to an average weekly wage of $459.60, which results in a compensation rate of $306.40, and disputed the nature and extent of claimant's injury. Decision and Order at 2. Based on evidence which indicates that "virtually all" the doctors and vocational specialists considered claimant's symptoms to be exaggerated, the administrative law judge found that claimant's "capabilities are greater than he claims." Decision and Order at 10. However, he found that claimant's limitations are not entirely the product of malingering because there are unconscious factors involved in claimant's perceived disability. Decision and Order at 11. The administrative law judge adopted Dr. Fernandez's conclusions regarding claimant's limitations resulting from his orthopedic injury. He concluded that claimant sustained a low back strain with no residuals except subjective complaints of pain and a slight limitation in range of motion. Further he determined that claimant's orthopedic condition reached maximum medical improvement on May 21, 1985 and that claimant is restricted from lifting more than 50 pounds and standing more than six hours. Based on these physical limitations, the

[1]Somatization is the conversion of mental experiences into bodily symptoms. *Dorland's Illustrated Medical Dictionary* (26th ed. 1981).

administrative law judge found that claimant cannot return to his usual work. Decision and Order at 11.

The administrative law judge also found that claimant sustained a psychological injury as a result of the work-related accident. Decision and Order at 12. Although the administrative law judge determined claimant was not as incapacitated as he purported to be, he was "persuaded that claimant genuinely believes he is totally disabled." *Id.* Therefore, based on the opinions of Dr. Shandell and Dr. Fair, he found that claimant is totally disabled from employment because of his work-related psychological condition. The administrative law judge determined that claimant's psychological condition reached maximum medical improvement on October 27, 1988, and he denied further orthopedic or psychiatric treatment because its effectiveness was doubtful. *Id.* Employer moved for reconsideration. Except for modifying one sentence of his Order, the administrative law judge denied employer's motion.[2] Employer appeals both decisions, and claimant responds, urging affirmance.

Employer contends the administrative law judge erred in finding claimant permanently totally disabled. Specifically, employer argues that the majority of the medical evidence supports the fact that claimant's complaints are subjective and exaggerated, and that the jobs it identified as alternate employment are within claimant's limitations as set by Dr. Fernandez and should be considered suitable. We reject employer's contentions, as a review of the record as a whole indicates substantial evidence supports the administrative law judge's award of permanent total disability benefits.

It is uncontested that claimant cannot return to his usual work. The burden thus shifts to employer to establish the availability of suitable alternate employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). If the administrative law judge finds that claimant cannot perform any work, employer has not established the availability of suitable alternate employment. *Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom., Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). In this case, the administrative law judge credited the testimony of Dr. Shandell over that of Dr. Morris in determining the extent of claimant's psychological impairment. Dr. Shandell determined that claimant's "psychiatric disability is significant" and prevents him from returning to productive work. Cl. Ex. 2 at 10. Further, he concluded claimant is subjectively totally disabled as a result of his psychological condition and is an unlikely candidate for vocational rehabilitation. *Id.* at 10-11. The determination to credit Dr. Shandell's opinion is within the administrative law judge's discretion as the trier-of-fact and is neither inherently incredible nor patently unreasonable.[3] *Cordero v. Triple A Machine Shop*, 580

[2]The administrative law judge amended paragraph one of his Order to reflect claimant's entitlement to temporary total disability benefits from May 8, 1984 through October 27, 1988, except for those periods when he actually worked. Decision and Order on Recon. at 1.

[3]Dr. Fair, a vocational specialist whose testimony was credited by the administrative law judge, also concluded it is unlikely claimant will benefit from vocational rehabilitation. Based on the

F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *aff'g* 4 BRBS 284 (1976), *cert. denied*, 440 U.S. 911 (1979). Thus, the testimony of Dr. Shandell constitutes substantial evidence supporting the administrative law judge's decision that claimant is totally disabled. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991), *rev'g in part* 19 BRBS 15 (1986); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968) (The court upheld a finding of temporary total disability when claimant suffered "conversion reaction" and was convinced he was unable to perform any work.); *Lostaunau*, 13 BRBS at 229. As the administrative law judge's decision is supported by substantial evidence of record, we reject employer's contentions and affirm the award of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

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degree to which claimant complains of pain, his lack of training and education, his deficiency with English, and his diminished physical capacity, Dr. Fair concluded claimant is "competitively unemployable." Cl. Ex. 1; Tr. at 57.