BRB No. 92-669

CURTIS LITTLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
NEWPORT NEWS SHIPBUILDING	)	
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

C. Allen Riggins (Parker, Pollard & Brown, P.C.), Virginia Beach, Virginia, for claimant.

Jonathan H. Walker (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (90-LHC-3322) of Administrative Law Judge Michael P. Lesniak 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

Claimant worked as a shipfitter for employer from May 22, 1978 until he was released in May 1990. Tr. at 27; Emp. Ex. 7 at 11. He injured his low back on or about January 18, 1990, and he was off work until January 22, 1990, when he returned to work with temporary restrictions. In

February 1990, claimant enrolled in a work hardening program, and in March 1990, Dr. Reid, a physician employed by employer, excused him from work until he completed the program. Tr. at 28-29; Emp. Ex. 8 at 19-23. The therapist discharged claimant to return to work on Friday, May 4, 1990, after he showed greater than average strength on the Cybex machine. Emp. Ex. 8 at 19-23, 20 at 7-10.

Citing continuing back pain, claimant did not return to work on Monday, May 7, 1990, or any day that week; however, he called in on Friday, May 11, 1990, and left a message stating he would not be in. Claimant also called Dr. Reid, who indicated a willingness to "cover" claimant's week off work with a medical excuse; however, on Monday, May 14, 1990, when claimant returned to work, Dr. Reid declined to cover the time out after he learned claimant had been discharged from the work hardening program on May 4, 1990, and was not under a doctor's care during this absence. Dr. Reid gave claimant permanent restrictions and sent him to his department. Tr. at 32, 34, 36. Claimant's supervisor, however, noted the uncovered week and automatically released claimant from employer's employment roll due to a rule violation. Tr. at 98-99, 104-107; Emp. Ex. 7 at 11. Dr. Schinco thereafter examined and tested claimant's back and kept him out of work under full disability from May 23, 1990 until January 9, 1991, when he released him to return to work with permanent restrictions. Tr. at 37-38; Cl. Ex. 5, 11; Emp. Ex. 21 at 1-2, 5, 8. Claimant filed a claim on July 13, 1990, seeking reinstatement under Section 49 of the Act, 33 U.S.C. §948(a) (1988), and temporary total disability benefits from May 4, 1990 and continuing, pursuant to Section 8(b) of the Act, 33 U.S.C. §908(b). Emp. Ex. 1.

A formal hearing was held on May 8, 1991. In his decision, the administrative law judge credited Drs. Foer, Reid, Schinco and Newby, and the physical therapist, and determined that claimant's injury had fully resolved by May 4, 1990 and was not the cause of his continuing complaints. He also concluded that, as work was available within claimant's restrictions, he was not totally disabled after that date. Decision and Order at 7-8. Further, the administrative law judge found that claimant failed to meet his burden of proof under Section 49, in that he failed to show evidence of a discriminatory discharge. Decision and Order at 9. The administrative law judge thus denied the instant claim for compensation and reinstatement. Claimant appeals, reiterating his arguments below. Employer responds, urging affirmance.

Initially, we reject claimant's contention that the administrative law judge erred in denying his claim for temporary total disability benefits. It is well-established that claimant bears the burden of proving the nature and extent of his work-related disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant must show that he is unable to return to his usual work. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). An administrative law judge may find a claimant capable of performing his usual work despite complaints of pain where a physician finds no functional impairment. *See Peterson v. Washington Metropolitan Area Transit Authority*, 13 BRBS 891 (1981).

In this case, the administrative law judge specifically stated that Drs. Foer, Newby, Reid, and

Schinco all of agreed that claimant's muscle strain should have resolved within four to six weeks of his injury, and that he was able to return to his regular work as of May 4, 1990. Emp. Ex. 25-26, 28-30. Further, despite the fact that Dr. Schinco treated claimant between May 23, 1990 and January 9, 1991 for mild back problems, the administrative law judge credited Dr. Schinco's 1991 summary report which confirmed the other doctors' findings and concluded that claimant's complaints are disproportionate to the objective evidence as there is no evidence of an organic impairment to his back. Decision and Order at 6; Emp. Ex. 26. The opinions of these four physicians constitute substantial medical evidence supporting the administrative law judge's finding that claimant had no compensable disability subsequent to May 4, 1990; we therefore affirm the administrative law judge's denial of temporary total disability benefits.[1] *See generally Anderson*, 22 BRBS at 20; *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982).

Claimant next contends that the administrative law judge erred in concluding that his discharge by employer was not in violation of Section 49 of the Act. We disagree. Section 49 provides in pertinent part that:

> It shall be unlawful for any employer ... to discharge or in any manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation ....

33 U.S.C. §948(a) (1988). In order to establish a *prima facie* case of a Section 49 violation, claimant must establish that employer committed a discriminatory act motivated by discriminatory animus or intent.[2] *See Holliman v. Newport News Shipbuilding and Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124 (CRT) (4th Cir. 1988), *aff'g* 20 BRBS 114 (1987); *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103 (CRT) (D.C. Cir. 1988), *aff'g* 19 BRBS 261 (1987). The administrative law judge may infer animus from circumstances demonstrated by the record. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 3 (1992), *aff'd on other grounds sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993).

In the instant case, the administrative law judge determined that employer discharged claimant because of his violation of its five day rule;[3] specifically, the administrative law judge

---

[1]In light of our holding, we need not address claimant's argument that employer failed to establish the availability of suitable alternate employment.

[2]The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, has stated that "[p]roper matters for inquiry in a section 49 claim are whether compensation claimants, individually or as a class, are treated differently from like groups or individuals, and whether the treatment is motivated, in whole or in part, by animus against the employee(s) because of compensation claims." *Holliman v. Newport News Shipbuilding and Dry Dock Co.*, 852 F.2d 759, 761, 21 BRBS 124, 128-129 (CRT) (4th Cir. 1988), *aff'g* 20 BRBS 114 (1987).

[3]Under the collective bargaining agreement covering workers at employer's facility, an employee

found that claimant had been terminated because he had been absent from work for five consecutive days without medical documentation to support that absence, and not in retaliation for filing a compensation claim. Decision and Order at 9. In support of this finding, the administrative law judge noted the testimony of Mr. Smith, employer's supervisor of personnel, who testified that the five day rule is non-discriminatory and well-known, that claimant is familiar with the rule because of his past absenteeism problems, and that claimant failed to provide the medical documentation necessary to excuse his absence from May 4 to May 14, 1990. Tr. at 98-107. On appeal, claimant concedes that, in failing to provide medical documentation for that period, he violated the five day rule. Claimant contends, however, that Dr. Reid's refusal to re-examine him on May 14, 1990, and that physician's subsequent denial of "coverage," constitutes circumstantial evidence of animus. The administrative law judge declined to infer discriminatory intent from these events, as is within his discretion. *See generally Brooks*, 26 BRBS at 3. As claimant's failure to provide the requisite medical documentation for the period May 4 to May 14, 1990 is undisputed, thus establishing a violation of employer's five day rule, we affirm the administrative law judge's conclusion that employer did not violate Section 49. *See Holliman*, 852 F.2d at 759, 21 BRBS at 124 (CRT); *Geddes*, 851 F.2d at 440, 21 BRBS at 103 (CRT); *Leon v. Todd Shipyards Corp.*, 21 BRBS 190 (1988).

---

absent without leave for five consecutive workdays or longer must call in at least once every five days. This provision does not apply to those employees who are receiving sickness and accident benefits; however, the provision applies once benefits have been terminated. Emp. Ex. 36, 39. According to Mr. Smith, the supervisor of personnel, if an employee is absent for health reasons, he must call-in *and*, when he returns to work, he must supply employer with medical documentation. Failure to satisfy either criterion results in automatic release. Tr. at 100.

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

SO ORDERED.

_____

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

_____

REGINA C. McGRANERY
Administrative Appeals Judge

_____

ROBERT J. SHEA
Administrative Law Judge