

RAFAEL TRIGUERO)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: _____
UNIVERSAL MARITIME SERVICE)	
CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Following Remand of Julius A. Johnson, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney and Angelo C. Gucciardo (Israel, Adler, Ronca, & Gucciardo), New York, New York, for claimant.

Celestino Tesoriero (Grainger & Tesoriero), New York, New York, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Following Remand (83-LHC-2782) of Administrative Law Judge Julius A. Johnson 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has come before the Board. To briefly reiterate the facts of this case, claimant was injured during the course of his employment as a hustler-driver on January 5, 1982, when the container his truck was pulling toppled, rocking the cab of the truck. Claimant suffered a cut to his eyebrow/forehead, and a compressed disc at L1. Cl. Exs. 1, 3-4; Tr. at 42-43. Employer paid temporary total disability benefits from January 6 through November 1, 1982, when claimant attempted to return to work. Tr. at 4, 28. Upon the cessation of benefits, claimant filed a claim for permanent total disability and disfigurement benefits. 33 U.S.C. §908(a), (c)(20).

The administrative law judge discussed all of the evidence of record and credited the opinion

of Dr. Kapland. He determined that claimant does not have a disability resulting from his 1982 back injury; however, he awarded claimant medical benefits and \$1,000 in disfigurement benefits because of the resulting ptosis (drooping eyelid) and scar over his eyebrow. Decision and Order at 8, 10-11. The administrative law judge then denied claimant's motion for reconsideration. Order dated June 11, 1985.

Claimant appealed these decisions to the Board. The Board determined that the administrative law judge erred in analyzing the medical evidence and it remanded the case for further evaluation regarding the extent of claimant's disability.¹ *Triguero v. Universal Maritime Service Corp.*, BRB No. 85-1752 (Oct. 31, 1988) (unpublished). On remand, the administrative law judge reaffirmed Dr. Kapland's credibility and found that claimant is not permanently totally disabled from his 1982 back injury but that some partial impairment remains. Decision and Order Following Remand at 5. Thus, the administrative law judge concluded that claimant can presently return to his usual work but that the remaining partial impairment may affect his future earnings, and he awarded claimant permanent partial disability benefits for a 25 percent loss in wage-earning capacity. *Id.* at 8.

Claimant appeals the administrative law judge's decision on remand, contending he erred in denying the claim for permanent total disability benefits. In support of his argument, claimant incorporates his previous brief before the Board and relies on the findings of a 1983 CT scan and on the opinion of his treating physician, Dr. Farber. He argues that he cannot return to his usual work and that employer has not established the availability of suitable alternate employment. Employer responds, urging affirmance of the administrative law judge's decision.

To establish a *prima facie* case of total disability under the Act, a claimant must show that he is unable to return to his usual employment due to his work-related disability. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). Once a claimant makes such a showing, an employer may prove that the claimant is only partially disabled by establishing the availability of other jobs the claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the claimant fails to establish a *prima facie* case of total disability, or if the employer establishes the availability of suitable alternate employment, the claimant may be, at most, partially disabled. *See, e.g., Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

In this case, claimant testified that he cannot return to his usual longshore work. Dr. Farber, relying on a June 1983 CT scan interpreted by Dr. Sibley, reported that claimant's united fracture at L1 had separated and that there was some slight encroachment upon the spinal canal. Based on claimant's statements concerning his inability to lift heavy items and on these findings, Dr. Farber

¹The administrative law judge's award of disfigurement benefits was not challenged on appeal.

concluded that claimant should consider another occupation. Cl. Exs. 1, 6. To the contrary, employer presented the opinions of Drs. Kapland and Rosenblum, specialists in orthopedics and neurology, respectively. Dr. Rosenblum, in July 1982, found that claimant had no neurological dysfunction and released claimant to return to his usual work when he was cleared by an orthopedic surgeon. Emp. Ex. 5. Dr. Kapland, in September 1982, and again in February 1983 based on a September 1982 CT scan, found that claimant has a healing united fracture at L1 with no muscle spasm, no atrophy, and no intrusion into the spinal canal. Emp. Exs. 1-3. Although he stated that claimant has a residual partial disability, he concluded that claimant has a high earning capacity and can return to longshore work. Emp. Exs. 1-2. Further, at the hearing, Dr. Kapland testified that claimant's November 1982 attempt to return to work would not cause a united fracture to separate; therefore, he refused to accept the validity of the 1983 CT scan findings because the discrepancies between the 1982 and the 1983 scans were inexplicable. Tr. at 80.

The administrative law judge credited Dr. Kapland's opinion, which he noted was bolstered by Dr. Rosenblum's opinion, over those of Drs. Farber and Sibley and determined that claimant can return to his usual work. Additionally, he questioned the reliability of the 1983 CT scan because of its inconsistency with the 1982 scan and because the report was written in indefinite terms. The administrative law judge also discredited Dr. Farber's opinion because, as of July 1983, Dr. Farber still wanted further consultations. Decision and Order Following Remand at 3-6. Questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and the administrative law judge rationally credited the opinions of Dr. Kapland and determined that claimant is not totally disabled. *See Chong*, 22 BRBS at 245. As claimant failed to establish a *prima facie* case of total disability, the burden of showing the availability of suitable alternate employment did not shift to employer, and, contrary to claimant's contention, employer did not fail to satisfy its burden. *See Peterson v. Washington Metropolitan Area Transit Authority*, 13 BRBS 891, 897 (1981). Therefore, we reject claimant's contention that he is permanently totally disabled, and, because neither claimant nor employer challenges the award of permanent partial disability benefits, we affirm the administrative law judge's award of permanent partial disability benefits. *See generally LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989); *see also Crawford v. Director, OWCP*, 932 F.2d 152, 24 BRBS 123 (CRT) (2d Cir. 1991).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge