BRB No. 92-1194

MICHAEL BELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Summary Judgment of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Michael Bell, Landover, Maryland, *pro se*.

Gerald Herz and Alan D. Sundburg (Friedlander, Misler, Friedlander, Sloan & Herz), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Granting Summary Judgment (91-DCW-0026) of Administrative Law Judge Edward Terhune Miller 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*. (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (the Act).[1] As claimant appeals without legal representation, we will review the administrative law judge's findings of fact and conclusions of law to determine whether they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 F.2d 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220.

Claimant injured his right shoulder on January 23, 1979, while in the course of his employment as a track laborer with employer. Claimant underwent two surgical procedures, but

[1]Claimant's attorney filed a notice of appeal with the Board on March 5, 1992. Subsequently, by letter dated August 31, 1994, claimant's attorney informed the Board that he was withdrawing as counsel for claimant. On September 7, 1994, claimant filed a letter notifying the Board that he was now pursuing his appeal without counsel. In an Order dated September 23, 1994, the Board acknowledged claimant as a *pro se* appellant.

subsequently reinjured his shoulder when he attempted to return to his usual employment with employer. Employer voluntarily paid compensation for temporary total disability intermittently from January 24, 1979 until December 15, 1983. 33 U.S.C. §908(b). Employer also paid compensation for temporary partial disability from December 16, 1983 until January 10, 1985. 33 U.S.C. §908(e). In 1984, claimant sought alternate employment with employer, and employer initiated vocational rehabilitation in order to assist claimant in securing such employment. However, after claimant refused to complete a mechanical skills test for employer in June 1984, employer terminated its assistance. In January 1985, claimant and employer entered into a settlement of claimant's claim pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), for $12,900. In May 1985, claimant once again attempted to return to his usual employment with employer as a track laborer. Employer refused to rehire claimant in this capacity because it believed claimant was physically incapable of performing his former job duties. Thereafter, claimant filed a grievance alleging that employer was improperly prohibiting him from returning to work. The grievance resulted in a joint denial by the union and employer. Claimant additionally filed a claim pursuant to Section 49 of the Act, 33 U.S.C. §948a, alleging that employer refused to rehire him, at least in part, because of his filing of a claim under the Act for his shoulder injury. After a formal hearing, this claim was denied by the administrative law judge. The Board subsequently affirmed the administrative law judge's decision denying benefits. *Bell v. Washington Metropolitan Area Transit Authority*, BRB No. 90-995 (Dec. 28, 1992) (unpublished).

While his first claim was pending before the Board, claimant filed a second claim under the Act alleging ongoing discrimination by employer under Section 49; specifically, claimant alleged that since the formal hearing regarding his initial discrimination claim, employer had refused to rehire claimant into any position, despite the fact that he has made continued attempts to return to work. Employer filed a motion with the administrative law judge for summary judgment. Claimant responded, seeking denial of the motion and requesting that the matter be set for a formal hearing. The administrative law judge granted employer's motion for summary judgment and dismissed the claim.

On appeal, claimant, representing himself, challenges the administrative law judge's dismissal of the claim. Employer responds, urging affirmance.

The threshold issue presented by this appeal is whether the administrative law judge properly dismissed claimant's claim by virtue of a summary judgment decision. Under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges,[2] 29 C.F.R. §18.40(a), Motion for Summary Decision, any party

may move, with or without supporting affidavits, for summary decision at least twenty days before the hearing. Any party opposing the motion may serve opposing affidavits or countermove for a summary decision. If the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact, the administrative law judge may enter summary judgment for either party. 29 C.F.R. §§18.40(d), 18.41(a); *see generally Harris v. Todd Pacific Shipyards Corp.*, ___ BRBS ___, BRB Nos. 93-2227 (Oct. 25, 1994).

[2]The Rules apply unless inconsistent with a rule of special application as provided by statute or regulation. *See* 29 C.F.R. §18.1; *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

The purpose of the summary judgment procedure is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990). Not only must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding inferences to be drawn from them. *Id.* In determining if summary judgment is appropriate, the court must look at the record in the light most favorable to the party opposing the motion. *Hahan v. Sergeant*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976).

We hold that the administrative law judge committed error by granting summary judgment in favor of employer since, in the instant case, there were several issues of material fact concerning claimant's Section 49 claim which should have properly been considered by the administrative law judge in an evidentiary hearing. 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 a 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 Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103 (CRT)(D.C. Cir. 1988); *see also Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124 (CRT)(4th Cir. 1988). 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 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993); *see generally Hunt v. Newport News Shipbuilding & Dry Dock Co.*, ___ BRBS ___, BRB Nos. 90-2285/A (Nov. 25, 1994). The essence of discrimination is in treating the claimant differently than others similarly situated. *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

In the instant case, claimant made several allegations in support of his contention that employer has discriminated against him in his attempts to return to work with employer, due to employer's animus over his original claim under the Act and the ultimate settlement of that claim. Initially, claimant alleges that employer's policy regarding reinstatement of injured employees discriminates against employees who exercise their rights under the Act. That policy allegedly provides that employees who sustain work-related injuries are to be placed on the Section 124 list under the collective bargaining agreement, which allows assistance in returning the employee to the first appropriate and available position within the union district. Such employees are assisted by Ed Quick in the Department of Risk Management in their attempts to obtain another job with employer. However, once an employee settles his claim with employer, the Department of Risk Management is no longer responsible for the administration of the employee, and the employee is placed on the Personnel Section 124 list. The employee is then assisted by the Office of Personnel in attempting to obtain another job with employer. Claimant alleges that this policy discriminates against employees who settle their claims because the Office of Personnel provides less attentive treatment than the Department of Risk Management.

Next, claimant alleges that although he first learned on October 30, 1989, at the hearing held

on his first discrimination claim, that he was still considered an employee of employer, he was not placed on employer's Section 124 employment list until July 23, 1990, approximately nine months after the hearing. Claimant additionally notes that employer did not issue an identification card to him until September 1990, eight months after he commenced repeated efforts to obtain that card, as further evidence of unfair treatment.[3] Claimant also alleges that he never received notice of any vacancies, or affirmative assistance by employer in obtaining employment.

The administrative law judge rejected these allegations, finding that claimant "offered no evidence" which suggests that the Office of Personnel provides less attentive treatment than the Department of Risk Management, or that this policy, assuming the allegation was true, is motivated by animus against employees who settle their claims. The administrative law judge further found that it was undisputed that claimant was eventually placed on the Section 124 list, and that he "offered no evidence which suggests that the Employer intentionally kept him off the list." *See* Decision and Order at 4. The administrative law judge also found that the fact that claimant did not receive his employee identification card until September 1990 does not, by itself, establish that employer intentionally delayed in giving him this card.

[3]Employer has not disputed the delays asserted by claimant in placing claimant on its Section 124 list and in issuing claimant an identification card. Thus, the administrative law judge's reliance on the decision of the United States Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), to support his decision to grant employer's motion is misplaced. In *Anderson*, the Court stated that the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. In the instant case, claimant's undisputed assertions regarding the time elapsed in both placing him on employer's employment list and in issuing him an identification card support his claim pursuant to Section 49 of the Act.

The administrative law judge next found that claimant's allegation that employer never informed him of any job vacancies was "general," and unsupported by any specific facts that employer treated him differently than other injured employees. Thus, the administrative law judge found that claimant's allegations, "without more, does not support a rational inference of discrimination." Decision and Order at 4. With regard to the issue of animus, the administrative law judge found that claimant offered no evidence of retaliatory motivation to support the allegation of animus. The administrative law judge stated that simply making unsupported allegations of a general nature, without more, was not sufficient to contradict employer's "recitation of undisputed facts," or create new and material facts. *Id.* at 6. Based upon these findings, the administrative law judge granted employer's motion for summary judgment.

In the present case, claimant's allegations regarding employer's conduct are issues of material fact which directly relate to the applicability of Section 49. The administrative law judge thus erred in granting employer's motion for summary judgment. We note, for example, that a hearing could establish whether claimant received less attentive treatment in his attempts at returning to work after he was placed under the jurisdiction of the Office of Personnel, and, if so, whether that treatment was motivated by discriminatory animus. Moreover, a controversy clearly exists regarding the inferences to be drawn from employer's motivation in its undisputed delay in placing claimant on its Section 124 list and its delay in issuing claimant an identification card. Additionally, while accepting employer's "recitation of undisputed facts," the administrative law judge stated that claimant never offered evidence of his allegations of discrimination; however, since the administrative law judge failed to hold a hearing in this matter, claimant was denied the opportunity to present evidence supportive of his allegations of discrimination.

Lastly, the administrative law judge found that claimant's allegations could not rationally support an inference of discrimination or animus. While an administrative law judge *may* infer animus, he can do so only by circumstances demonstrated by the record. *See Brooks*, 26 BRBS at 3. In the instant case, however, no formal record was established. By granting employer's motion for summary judgment, the administrative law judge denied claimant the opportunity to demonstrate whether employer committed a discriminatory act motivated by discriminatory animus or intent, and thereby establish a *prima facie* case of discrimination. *See Jaros*, 21 BRBS at 30. Accordingly, we hold that the administrative law judge erred in granting employer's motion for summary judgment, and we remand the case for the administrative law judge to hold a formal hearing and accept evidence from the parties.[4]

[4]Under 20 C.F.R. §§702.336 and 702.338, the administrative law judge is empowered to resolve any issue arising at the hearing, must fully inquire into matters that are fundamental to the disposition of the issues in a case, and receive into evidence all relevant and material evidence. *See Jourdan v. Equitable Equip. Co.*, 25 BRBS 317 (1992) (Dolder, J., dissenting).

Accordingly, the administrative law judge's Decision and Order Granting Summary Judgment is vacated, and the case is remanded for consideration of the merits of claimant's claim of discrimination under Section 49.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge