BRB No. 93-0640

WILLIE E. MORRIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Employer's Motion for Reconsideration of Aaron Silverman, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

Shannon T. Mason, Jr. (Mason & Mason), Newport News, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Employer's Motion for Reconsideration (91-LHC-1133) of Administrative Law Judge Aaron Silverman 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 findings of fact and conclusions of law of the administrative law judge which 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).

Claimant injured her lower right side and lower back moving a set of weights while working for employer's cleaning services department on December 7, 1986. Claimant worked until January 17, 1990 and received temporary total disability benefits from January 17, 1990 through September 23, 1990, based on an average weekly wage of $426.95. Claimant had surgery for a herniated disc on February 12, 1990, and continued to complain

of pain. Claimant filed a request for early retirement on August 22, 1990, effective on September 1, 1990.

In his Decision and Order, the administrative law judge found that claimant was unable to perform her usual employment and that employer failed to establish the availability of suitable alternate employment. Accordingly, claimant was awarded temporary total disability benefits from October 8, 1990 and continuing. Employer filed a motion for reconsideration, which was summarily denied. On appeal, employer contends that claimant failed to establish a *prima facie* case of total disability and is, thus, not entitled to temporary total disability benefits. Claimant responds, urging affirmance of the award of benefits.

Employer contends that the administrative law judge erred in weighing the evidence and that Dr. McAdams' opinion is sufficient to establish that claimant was released to return to her regular duties. To establish a *prima facie* case of total disability, claimant bears the burden of establishing that she is unable to return to her usual work. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In the instant case, the administrative law judge, relying on the opinions of Drs. McAdams and Umstott, concluded that claimant was not released for regular duty and thus, was unable to return to her usual work.[1] Dr. McAdams never specified whether he released claimant to light or regular duty, with or without restrictions, and there is no evidence that Dr. Umstott ever lifted his restrictions on claimant's activities.[2] It is well-established that the administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, and that he is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As the evidence relied on by the administrative law judge constitutes substantial evidence to support his finding that claimant was never released for regular duty and therefore is unable to perform her usual duties, it must be affirmed. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). As claimant established a *prima facie* case of total disability, and as employer has failed to present any evidence regarding the availability of suitable alternate employment, claimant's award of temporary total disability is affirmed.[3] *See Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

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[1]Claimant testified that her duties required her to be on her feet and to walk all day. When cleaning office buildings and bathrooms, she did a lot of bending and stooping, scrubbed floors, washed windows, and moved and lifted trash. The most weight claimant lifted at one time was about 50 pounds. Transcript at 12-16.

[2]On August 14, 1990, Dr. McAdams found that claimant could return to light duty effective September 1, 1990. On September 12, 1990, Dr. McAdams concluded claimant must be off from September 12 through 21 and that claimant could return to work on September 24, 1990. However, on September 24, 1990, Dr. McAdams found claimant unable to work at that time and set a return to work date on October 8, 1990. Employer's Exhibits F, F-1-F-5. On April 24, 1990, Dr. Umstott restricted claimant's lifting to 5 pounds with no excessive pulling or pushing. In June 1990, claimant's examination was unchanged. Employer's Exhibits G, G-1.

[3]As the evidence of record establishes that claimant was totally disabled prior to her retirement, the reasons for claimant's retirement are irrelevant and there is no need to address employer's contentions in this regard.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge