

BRB Nos. 93-1040  
and 93-1040A

ZELLNER WARE )  
 )  
 Claimant-Petitioner )  
 Cross-Respondent )  
 )  
 v. )  
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 FEDERAL MARINE TERMINALS ) DATE ISSUED: \_\_\_\_\_  
 )  
 Self-Insured )  
 Employer-Respondent )  
 Cross-Petitioner ) DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Ernest T. Rossiello, Chicago, Illinois, for claimant.

Gregory P. Sujak (Garofalo, Hanson, Schreiber & Vandlik, Chartered), Chicago, Illinois, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits (91-LHC-1307) of Administrative Law Judge Robert G. Mahony 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 findings of fact and conclusions of law of the administrative law judge if they 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, a general longshoreman who had worked as a foreman, forklift driver, checker, and operator, sought permanent partial disability compensation under Section 8(c)(21) and 8(h) of the Act, 33 U.S.C. §908(c)(21), (h), for a November 21, 1989, left shoulder injury. Employer voluntarily paid him compensation for two periods of temporary total disability. Dr. Dwyer, claimant's treating physician, after performing left shoulder manipulation surgery on January 24, 1990 and diagnosing a rotator cuff tear, released him for full duty work without restrictions after the

second episode of temporary total disability on August 12, 1991. Claimant was also examined twice by Dr. Ludwig, an orthopedist who, based on x-rays taken on January 31, 1991, diagnosed calcific bursitis of the left shoulder and restriction of all left shoulder motion with a major loss of use of the upper extremity. In a report submitted after the hearing, Dr. Ludwig stated that claimant had moderate loss of use of the man as a whole on an industrial basis.

After considering claimant's testimony,<sup>1</sup> and crediting the September 12, 1991, opinion of Dr. Dwyer, claimant's treating physician, over the contrary opinion of Dr. Ludwig, who saw claimant only twice, the administrative law judge denied the claim for permanent partial disability compensation, finding that claimant could perform his usual work without restrictions. The administrative law judge also noted that in his January 15, 1990, report, Dr. Kovalsky reviewed claimant's x-rays and determined that there was no dislocation or fracture in claimant's left shoulder.

On appeal, claimant contends that inasmuch as Dr. Ludwig opined that claimant sustained a substantial loss of use of the man as a whole on an industrial basis,<sup>2</sup> and the record reflects that his hours have substantially decreased since the work injury, the administrative law judge erred by failing to translate that loss into a dollar figure and in failing to make a determination of claimant's loss of wage-earning capacity under Sections 8(c)(21) and 8(h), 33 U.S.C. §908(c)(21), (h). He also asserts that the administrative law judge erred in failing to consider his wage-earning capacity on the open market. Employer responds that claimant's working fewer hours reflects the fact that fewer employers were utilizing his Local after his injury, and urges that the denial of permanent partial disability compensation be affirmed. In addition, employer has filed a protective cross-appeal in which it challenges the administrative law judge's exclusion of the testimony of Brian Bahler, a private investigator, and secretly taped surveillance evidence submitted by employer which purportedly shows claimant performing the work of a dunnage man, which claimant denied doing after his injury. Claimant responds, urging that the administrative law judge's granting of claimant's motion to strike this evidence be affirmed.<sup>3</sup>

After consideration of the Decision and Order in light of the evidence of record, we affirm the administrative law judge's denial of benefits inasmuch as his finding that claimant could perform usual work without restrictions is rational, in accordance with law, and supported by the medical opinion of Dr. Dwyer, whom the administrative law judge acted within his discretion in crediting.<sup>4</sup>

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<sup>1</sup>Claimant testified that when he returned to work in August 1991, he could not lift his left arm without pain and could no longer perform the work of a laborer. Tr. at 37, 41.

<sup>2</sup>In his May 4, 1992, report, Dr. Ludwig stated that claimant had moderate, not substantial, loss of use of the man as a whole.

<sup>3</sup>Although claimant also asserts that the employer's cross-appeal should be dismissed because there is no final appealable order containing the evidentiary ruling, we note that the administrative law judge did rule on claimant's motion to strike the disputed surveillance evidence in the Decision and Order on appeal.

<sup>4</sup>Claimant asserts that Dr. Dwyer's report was not provided to his attorney prior to the hearing and came as a surprise when offered at the hearing. Although the administrative law judge did allow

*O'Keeffe*, 380 U.S. at 359. In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See, e.g., Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Claimant's contention that the administrative law judge should have translated Dr. Ludwig's opinion that claimant sustained a substantial loss of use of the man as a whole on an industrial basis into a dollar amount is without merit, inasmuch as the administrative law judge rationally found that as of August 12, 1991, claimant could return to his usual employment without restrictions based on his crediting of Dr. Dwyer's opinion. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990). In light of claimant's failure to establish a *prima facie* case of disability, the administrative law judge also did not err in failing to address either claimant's loss of hours or his earning capacity on the open market. *See 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). Because the medical opinion of Dr. Dwyer, in conjunction with Dr. Kovalsky's January 12, 1990, report, provides substantial evidence to support the administrative law judge's finding that claimant is able to perform his usual work and claimant has failed to raise any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, we affirm his denial of permanent partial disability compensation. *See generally Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

In light of our decision to affirm the administrative law judge's denial of permanent partial disability compensation, the arguments raised in employer's protective cross-appeal need not be addressed as they have been rendered moot.

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employer to submit Dr. Dwyer's report into evidence, inasmuch as he also allowed claimant time to submit rebuttal evidence post-hearing, Tr. at 10-15, and claimant submitted Dr. Ludwig's report on May 4, 1992, claimant's due process rights were not violated. *See generally Scott v. S.E.L. Maduro, Inc.*, 22 BRBS 259 (1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge