

BRB No. 93-1643

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| ANGEL FERNANDEZ |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| MAHER TERMINALS, |) | DATE ISSUED: _____ |
| INCORPORATED |) | |
| |) | |
| Self-Insured |) | |
| Employer-Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

James J. Gallo, Jersey City, New Jersey, for claimant.

Richard P. Stanton (William M. Broderick), New York, New York, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (92-LHC-00777) of Administrative Law Judge Robert D. Kaplan 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).

Claimant, a longshoreman, sought benefits for a work-related injury he sustained while in the scope and course of his employment with employer on September 26, 1990. Claimant returned to work the following day but was unable to work because of pain. Hearing Transcript at 20-22. Employer voluntarily paid claimant temporary total disability benefits and medical expenses from September 27, 1990 to January 20, 1991. 33 U.S.C. §§908(b), 907.

In his Decision and Order, the administrative law judge found that claimant failed to establish that he was disabled to any extent after January 20, 1991; accordingly, the administrative

law judge denied the instant claim for compensation and medical benefits subsequent to January 20, 1991.

On appeal, claimant challenges the denial of his claim for compensation and medical benefits. Specifically, claimant argues that the administrative law judge erroneously failed to shift the burden of establishing suitable alternate employment to employer. Moreover, claimant avers that the administrative law judge erred in crediting the opinions of Drs. Greifinger, D'Agostino and Koval over that of Dr. Birotte, his treating physician. Employer responds, urging affirmance.

It is well established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). 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. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Once claimant has established his inability to return to his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See generally New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In the instant case, the administrative law judge, in concluding that claimant sustained no residual disability subsequent to January 20, 1991, credited the opinions of Drs. Greifinger, D'Agostino and Koval, over the opinion of Dr. Birotte, noting that the opinions of the credited physicians are better supported by the objective findings.

In a report dated January 17, 1991, Dr. Greifinger opined that claimant would be capable of resuming his usual work responsibilities on January 21, 1991, inasmuch as claimant had significant improvement in his shoulder function. Employer's Exhibit 12. Thereafter, in a report dated January 24, 1991, Dr. Greifinger advised claimant to return to daily activities, including work duties. Employer's Exhibit 13. Likewise, Dr. D'Agostino concluded in two separate reports dated January 23, 1991 and February 6, 1991, that claimant is able to recommence work "on January 21, 1991 per Dr. Greifinger" since rehabilitative efforts and medical treatment had terminated. Claimant's Exhibit 14. Based upon an examination and objective tests performed on March 4, 1991, Dr. Koval opined that he could find no objective finding to account for claimant's continued complaints, that claimant had received the maximum benefit from treatment, and therefore, that claimant need not undergo further diagnostic testing or surgery. Employer's Exhibit 14. In contrast, Dr. Birotte, in reports dated April 19, 1991, October 21, 1991, and December 2, 1991, opined that claimant is unable to perform his work and gainful activities due to his inability to use his left shoulder. Claimant's Exhibits 4, 6, 7.

We hold that the administrative law judge committed no error in relying upon the opinions of Drs. Greifinger, D'Agostino and Koval, rather than the opinion of Dr. Birotte, in concluding that claimant sustained no residual disability subsequent to January 20, 1991. The administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, *see Wheeler v.*

Interocean Stevedoring, Inc., 21 BRBS 33 (1988), and he is not required to accord controlling weight to the opinion of a treating physician. *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). Thus, as the administrative law judge's credibility determinations are rational and within his authority as fact-finder, and as these credited opinions constitute substantial evidence to support the administrative law judge's ultimate findings, we affirm the administrative law judge's determination that claimant sustained no permanent disability after January 20, 1991.¹ See generally *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979). As claimant thus has not established an inability to return to his usual employment duties, we hold that the administrative law judge committed no error in not requiring employer to establish the availability of suitable alternate employment.²

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

¹Although claimant also asserts that the administrative law judge erred in failing to resolve all factual doubt in his favor, the United States Supreme Court recently determined that the "true doubt rule" is invalid because it conflicts with Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d). *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994).

²Given that claimants possess no cognizable interest in dispositions of requests for Section 8(f), 33 U.S.C. §908(f), relief, we need not address claimant's contention that the administrative law judge erred by failing to discuss employer's request for relief under that subsection. See *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988).