

RAPHAEL CASSIMERE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
P&O PORTS LOUISIANA,	)	DATE ISSUED: <u>JUL 8, 2005</u>
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order, Decision and Order in Part Denying and in Part Granting Claimant’s Motion for Reconsideration and Opening the Record for Clarification, and Second Decision and Order on Claimant’s Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr., W. Jared Vincent and V. Jacob Garbin (Law Offices of William S. Vincent, Jr.), New Orleans, Louisiana, for claimant.

William C. Cruse and Jennifer Cortes (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order, Decision and Order In Part Denying and in Part Granting Claimant’s Motion for Reconsideration and Opening the Record for Clarification, and Second Decision and Order on Claimant’s Motion for Reconsideration (2003-LHC-0464) of Administrative Law Judge C. Richard Avery 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 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, a longshoreman, suffered a crush injury to his hand when he was trapped between the barge he was unloading and a metal ladder on January 24, 2002. Surgery was performed to repair a fracture of claimant's fifth metacarpal and a laceration of the medial aspect of his left middle finger; subsequently, claimant was treated for Reflex Sympathetic Dystrophy (RSD) and back pain.

In his Decision and Order, the administrative law judge accepted the parties' stipulations that claimant's left hand injury and resultant RSD are work-related but found that claimant is not entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption with regard to his alleged back injury. The administrative law judge then found that claimant's hand injury and RSD reached maximum medical improvement by May 7, 2003. He found that employer established the availability of suitable alternate employment between August 12 and December 11, 2002, within its own facility,<sup>1</sup> and on the open job market from May 7 to July 8, 2003, and from November 28, 2003, onward. The administrative law judge found claimant sustained an additional period of total disability from July 8, 2003, to November 28, 2003, during which time he was unable to work due to somnolence arising out of the medication he took for his work injury. Accordingly, the administrative law judge awarded claimant compensation for temporary total disability from January 25 to August 12, 2002, for temporary partial disability from August 12 to December 11, 2002, for temporary total disability from December 11, 2002 to May 7, 2003, and for temporary total disability from July 8 to November 28, 2003. In addition, the administrative law judge awarded claimant benefits for 40 percent permanent left hand impairment pursuant to 33 U.S.C. §908(c)(3).

Claimant moved for reconsideration alleging, *inter alia*, that the administrative law judge prematurely ended payments for temporary total disability resulting from his excessive somnolence on November 28, 2003. Due to his misunderstanding of the parties' positions on this issue, the administrative law judge reopened the record for 30 days during which time the parties could offer evidence clarifying the date claimant's excessive somnolence ended and he was able to work.

On second reconsideration, the administrative law judge addressed claimant's contention that he was temporarily totally disabled until June 2, 2004, when the effects of his taking Provigil alleviated the somnolence caused by the pain medication. Based on evidence submitted by both parties, the administrative law judge again concluded that claimant's somnolence had resolved in November 2003 such that he was capable of working. Accordingly, he denied claimant's motion for reconsideration and found that claimant's temporary total disability ended on November 28, 2003.

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<sup>1</sup> Between December 11, 2002 and May 7, 2003, employer conceded that its in-house light duty program was not in operation.

Claimant appeals, arguing that the administrative law judge erred in finding that his disability ended on November 28, 2003, rather than on June 2, 2004. Specifically, claimant contends that the administrative law judge erred in relying upon the date employer authorized payment for medication to relieve claimant's somnolence rather than on the subsequent medical reports documenting the actual use and effects of the medication on claimant's employability. Employer responds, urging affirmance.

Claimant bears the burden of establishing that he remained totally disabled from November 28, 2003 to June 2, 2004 due to his excessive somnolence from his pain medication. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). In September 2003, Dr. Shawa prescribed Provigil, a medication to alleviate claimant's impairing drowsiness which resulted from the prescribed pain medication. EX 11. At the time of that office visit, Dr. Shawa gave claimant a sample bottle of the medication as well as a prescription, instructed claimant to test the drug and, if it worked for him, to have the prescription filled. At Dr. Shawa's post-hearing deposition on November 3, 2003, claimant stated that he had taken the samples and that the medication relieved his drowsiness. CX 11 at 45. Employer's adjuster approved the prescription on November 21, 2003. EX 16. Dr. Shawa affirmed that upon taking Provigil, claimant would have positive effects within 30 to 60 minutes and that there was no contra-indication to claimant's performing any of the jobs previously identified as suitable alternate employment by employer and approved by him in May 2003. EX 16, Letter dated May 21, 2004. Claimant contends that it was not until May 4, 2004, when Dr. Shawa examined claimant and found him fully awake and responsive, that his total disability ended. EX 16, Letter dated June 7, 2004.

Despite claimant's contention that his somnolence did not resolve until Dr. Shawa's May 2004, report, the administrative law judge's conclusion that claimant was able to work by November 28, 2003, is rational and supported by substantial evidence. The administrative law judge credited Dr. Shawa's reports and opinion which state that medication was first prescribed in September 2003 and that it takes effect shortly after it is ingested. Employer authorized the medication by November 21, 2003, removing any impediment from claimant's taking the drug. The administrative law judge observed that Dr. Shawa did not comment on this condition at claimant's March 2, 2004, examination. Moreover, despite claimant's allegation that there is no evidence to support a finding that the medication was not only taken but also effective, CX 11 at 45-46, claimant himself stated at Dr. Shawa's deposition that he had taken the medication and that it was effective. CX 11 at 45. Dr. Shawa agreed that the medication, if effective, would remove any impediment from claimant's returning to work. EX 16. Claimant submitted no evidence to establish the medication's ineffectiveness.

In adjudicating a claim, it is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to weigh the evidence and draw his own inferences and conclusions therefrom. *See generally Hall v. Consolidated*

*Employment System, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5<sup>th</sup> Cir. 1998); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2<sup>d</sup> Cir. 1961). We hold that the administrative law judge acted within his discretion in finding that claimant's somnolence had resolved as of November 28, 2003, as he found that date consistent with the medical evidence and factual situation of this claim. As substantial evidence supports the administrative law judge's determination that claimant's total disability ended as of November 28, 2003, and that claimant thereafter was able to work,<sup>2</sup> we affirm that finding. *See O'Keeffe*, 380 U.S. 359.

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<sup>2</sup> Claimant does not appeal the administrative law judge's finding that employer had established the availability of suitable alternate employment as of this date.

Accordingly, the administrative law judge's Decision and Order, Decision and Order in Part Denying and in Part Granting Claimant's Motion for Reconsideration and Opening the Record for Clarification, and Second Decision and Order on Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge