BRB No. 98-1427

YUSUF AL-WAAJID	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:July 28, 1999
	)	
v.	)	
	)	
EAGLE MARINE SERVICES, LIMITED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Ronald H. Klein (Law Offices of Lyle C. Kavin, Jr., P.C.), Oakland, California, for claimant.

Laura G. Bruyneel (Law Offices of Laura G. Bruyneel), San Francisco, California, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-LHC-2488) of Administrative Law Judge Anne Beytin Torkington 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 tractor driver, was injured in a work-related accident on April 5, 1995, when a crane operator dropped a container from approximately three feet onto claimant's truck, raising the front and causing him to strike his head and neck on the ceiling. Claimant thereafter suffered from various shoulder, cervical and lumbar ailments. Employer voluntarily paid claimant temporary total disability benefits from April 5, 1995 to April 4, 1997. 33 U.S.C. §908(b). Employer also paid medical benefits pursuant to 33 U.S.C. §907 through April 4, 1997. The

parties stipulated that the date of maximum medical improvement is January 7, 1997. Claimant has not returned to his usual employment or sought alternate work since the date of the accident based on his complaints of disabling back pain resulting from the work injury. Claimant filed a claim for benefits under the Act seeking continuing compensation.

The administrative law judge found that claimant could return to his usual employment as a tractor driver, and therefore denied disability benefits after January 7, 1997, the date of claimant's maximum medical improvement. On appeal, claimant contends that the administrative law judge erred in denying him continuing disability benefits. Employer responds, urging affirmance.

Claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56, 59 (1980). In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the work injury. *See, e.g., Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). We reject claimant's contention that the administrative law judge erred in concluding that he failed to produce sufficient evidence to prove that he could not return to his pre-injury job. The administrative law judge rationally credited the opinion of Dr. Ansel that claimant can perform his usual employment based on that doctor's examination of claimant, claimant's behavior and demeanor at the examination, the MRI, EMG, nerve conduction studies, and Dr. Ansel's review of the medical reports of Drs. Meyers and Gravina. Decision and Order at 15. In support of Dr. Ansel's diagnosis, the administrative law judge also noted Dr. Ansel's negative findings on objective testing, *i.e.,* no atrophy, reflex asymmetry or muscle weakness.[1]

[1]Dr. Ansel also diagnosed claimant with peripheral neuropathy, a condition caused by diabetes, which he stated accounted for some of the symptoms claimant attributed to the work-related injury.

The administrative law judge rationally found less persuasive the contrary opinions of Drs. Meyers and Gravina, who opined claimant could not perform his pre-injury employment as a tractor driver, because they placed substantial reliance on claimant's subjective complaints of pain, which the administrative law judge found not to be credible. In this regard, the administrative law judge found that Dr. Ansel testified, after viewing the surveillance videotape of claimant, that claimant made movements inconsistent with his pain complaints. Moreover, the administrative law judge found various inconsistencies in claimant's testimony that undercut his assertion that he cannot return to his usual work.[2] *Id.* The administrative law

[2]The administrative law judge found claimant not to be credible based on his inconsistent, contradictory and evasive testimony. The administrative law judge cited the example of claimant stating that he takes pain medication regularly from prescriptions filled at Seton Pharmacy, but this pharmacy had no records of prescriptions filled since November 1995. In addition, she found that there are many instances in the record of claimant admitting that he does not take pain medication. The administrative law judge concluded, however, that if claimant were in the severe pain he claimed, he would be taking pain medication. She also noted instances from the surveillance tape that she found undermined claimant's credibility, such as his ability to drive over the potholed streets surrounding his art studio in Oakland, lack of trouble getting in and out of vehicles, climbing stairs to his house and studio, and carrying packages of unknown weight. The administrative law judge concluded that the weight of the evidence shows that claimant functions at a much higher level than he admits and she thus refused to rely on claimant's recitation of his symptoms of pain.

judge's credibility determinations are within her discretion, and claimant has raised no reversible error in the administrative law judge's weighing of the conflicting evidence. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Furthermore, the administrative law judge found that once claimant's job was accurately described by Mr. Stauber, employer's vocational rehabilitation specialist, unlike claimant's exaggerated description of the job duties of a tractor driver to Drs. Meyers and Gravina, even these doctors' restrictions would permit claimant to perform his usual work. Consequently, we affirm the administrative law judge's findings that claimant can perform his usual employment as rational and supported by substantial evidence, and in accordance with law. *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).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge