

BRB No. 99-0599

ANTHONY FOCARINO)
)
 Claimant-Petitioner)
)
 v.)
)
 SELECT CARGO SERVICES,) DATE ISSUED:
 INCORPORATED)
)
 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order and Order on Motion for Reconsideration of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

James R. Campbell, Middle Island, New York, for claimant.

Christopher J. Field (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order on Motion for Reconsideration (98-LHC-0527) of Administrative Law Judge Ralph A. Romano 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a cooper,¹ was injured at work on October 30, 1995. He did not return to work. Employer voluntarily paid claimant temporary total disability benefits from October 31, 1995, until April 21, 1996. Claimant sought temporary total disability benefits from April 22, 1996, through April 4, 1998, and permanent total disability benefits from April 5, 1998, and continuing. The administrative law judge denied claimant additional disability benefits, finding that the evidence does not establish claimant's continued inability to return to his usual work. The administrative law judge denied summarily claimant's Motion for Reconsideration.

On appeal, claimant challenges the administrative law judge's denial of additional disability benefits. Employer responds in support of the administrative law judge's denial of benefits. Employer also requests that claimant's appeal be dismissed since claimant did not file a Petition for Review in addition to his brief.²

To establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual employment due to his work-related injury. *Lombardi v. Universal Maritime Service Corp.*, 32 BRBS 83 (1998); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). After consideration of claimant's contentions on appeal, employer's response, and the administrative law judge's decisions in light of the record evidence, we affirm the administrative law judge's finding that claimant did not establish a continued inability to return to his usual work, as it is supported by substantial evidence.

In the instant case, the administrative law judge acted within his discretion in relying upon the opinions of Dr. Vassallo, that claimant may return to work on November 27, 1995, and that of Dr. Swearingen, that claimant should be able to return to whatever work he was doing before the work injury, as he found they were well-reasoned, documented, detailed, and comprehensive. *See Calbeck v. Strachan*

¹A cooper is responsible for the recooping, banding, stuffing, and retaping of cargo that has been damaged or opened by United States Customs. Tr. at 152-153, see also Tr. at 23-24, 69; Cl. Ex. 11 at 16; Emp. Ex. 17 at 26.

²The Board denies employer's motion to dismiss and will address claimant's appeal. 20 C.F.R. §802.211(d).

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); Decision and Order at 5; Emp. Exs. 4, 11, 17. Contrary to claimant's contention, the administrative law judge was not required to give less weight to Dr. Vassallo's opinion because he is not Board-certified or because he sent claimant back to work before Dr. Magliato, the impartial examiner for the Department of Labor, did. As substantial evidence supports the finding that claimant did not establish his *prima facie* case of total disability, we affirm the administrative law judge's denial of additional disability benefits. See generally *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 and Order on Motion for Reconsideration denying claimant additional disability benefits are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge