BRB No. 00-0796

MARK MITCHELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CENTOFANTI MARINE SERVICES, INCORPORATED	)	DATE ISSUED: March 29, 2001
	)	
and	)	
	)	
LEGION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and the Decision on Motion for Reconsideration of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Joseph P. Moschetta and Stephen P. Moschetta (Joseph P. Moschetta and Associates), Washington, Pennsylvania, for claimant.

John E. Kawczynski (Weber Goldstein Greenberg & Gallagher, LLP), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and the Decision on Motion for Reconsideration (1999-LHC-1183) of Administrative Law Judge Michael P. Lesniak 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).

On April 7, 1998, while working for employer as a welder trainee, claimant was struck

on the head by a broken chain. Claimant, who lost consciousness as a result of this blow, was treated at employer's facility but upon the conclusion of his shift, went to the hospital where he received stitches. Subsequently, claimant, who has not worked since the time of his injury, received treatment for alleged seizures, blackouts, dizziness and memory loss. Employer voluntarily paid claimant compensation under the Act for temporary total disability from April 8, 1998 through November 3, 1998. 33 U.S.C. §908(b). Claimant thereafter sought total disability benefits under the Act.

At the formal hearing, the parties stipulated that claimant sustained a work-related injury on April 7, 1998; employer disputed, however, whether claimant was incapable of resuming his usual employment duties and its liability for claimant's ongoing medical expenses. *See* Tr. at 8; Decision and Order at 2-3. In his Decision and Order, the administrative law judge evaluated the medical and lay evidence of record and concluded that claimant cannot return to work as a welder due to the injuries that he sustained as a result of the April 7, 1998, work-incident. As none of the physicians of record addressed the issue of whether claimant reached maximum medical improvement, and as employer presented no evidence of suitable alternate employment, the administrative law judge awarded claimant ongoing temporary total disability and medical benefits. Employer thereafter moved for reconsideration, requesting that the administrative law judge reconsider the evidence of record regarding claimant's alleged post-injury seizures. The administrative law judge considered each of employer's arguments in his Decision on Motion for Reconsideration, but denied the relief requested by employer.

On appeal, employer challenges the administrative law judge's credibility determinations and his ultimate finding that claimant remains totally disabled as a result of the April 7, 1998, work-incident. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer contends that the administrative law judge erred in concluding that the blow claimant sustained to his head on April 7, 1998, resulted in total disability. Specifically, employer argues that there is no credible evidence of record which supports a finding that claimant suffers from seizures which render him incapable of resuming his usual employment duties. Rather, employer points out that a 72 hour video monitoring/ EEG performed on claimant failed to reveal the presence of the seizures which claimant asserts that he experiences on a regular, daily basis. Thus, employer avers that the administrative law judge erred in crediting the testimony of claimant, his wife and father, as well as the opinions of Drs. Kant and Talbot, over the opinions of Drs. Bernstein and Valeriano, in finding that claimant in fact suffers from seizures. Claimant responds that there is substantial evidence to support the administrative law judge's decision: claimant points out that he was prescribed anti-convulsive medication at the time of the disputed EEG, and he asserts that the administrative law judge rationally addressed all of evidence of record in rendering his

decision.

The parties are in agreement that some harm came to claimant as a result of his having been struck on the head by a broken chain on April 7, 1998; specifically, it is uncontroverted that claimant sought medical care immediately following this work incident, that claimant did not return to work, and that employer thereafter voluntarily paid benefits for a limited period of time. Thus, there is no question in the instant case that claimant sustained a work-related injury to his head on April 7, 1998. *See Conoco, Inc. v. Director, OWCP [Prewitt],* 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000). Therefore, the issue raised and addressed by the parties both below and on appeal relates to the nature and extent of any disability arising from that injury. In this regard, 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 & Constr. 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. *See McCabe v. Sun Shipbuilding & Dry Dock Co.,* 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979); *Blake v. Bethlehem Steel Corp.,* 21 BRBS 49 (1988).

In finding that claimant had established a *prima facie* case of total disability, the administrative law judge credited the opinion of Dr. Kant, as supported by Dr. Talbot, claimant's wife, claimant's father, and claimant, over the opinion of Drs. Bernstein and Valeriano. Specifically, the administrative law judge found that the medical evidence of record, while revealing that claimant did not experience seizures, memory loss, or dizzy spells before his work injury, documents the chronic nature of claimant's symptoms occurring after his April 7, 1998, work-incident. *See* Decision and Order at 17. In the instant case, claimant, his wife, and his father each testified that claimant continues to experience seizures, memory loss, and blackouts, none of which claimant had experienced prior to his work-injury. In this regard, claimant's wife testified that claimant's seizures began to occur approximately three days after his work injury, *see* Tr. at 50-52; claimant's father testified that on one occasion the onset of a seizure resulted in claimant being taken to the hospital via ambulance. *See id.* at 121-122; Clt. Ex. 11. Dr. Kant diagnosed claimant as exhibiting, *inter alia*, post-concussion syndrome and partial post-traumatic seizure disorder, each of which is secondary to claimant's work-related head injury. Moreover, Dr. Kant opined that it was not unusual for partial seizures to show no EEG activity, and that the absence of EEG activity should not be used to rule out the presence of such seizures. *See* Clt. Exs. 20, 31. Dr. Talbot similarly opined that it was possible for claimant to experience partial seizures even in view of a non-confirmatory EEG and MRI; moreover, Dr. Talbot advised claimant not to return to work until his spells were under control. *See* Clt. Ex. 8. In contrast, Dr. Bernstein concluded that claimant does not suffer from work-related seizures, that claimant had recovered from his April 7, 1998, injury, and that claimant was therefore

capable of working without restrictions. *See* Emp. Exs. 17, 28. Dr. Valeriano, who conducted the video monitoring/EEG of claimant in September 1998, opined that claimant exhibited psychogenic seizures and not true epilepsy; Dr. Valeriano concluded, however, that claimant continues to exhibit symptoms typical of a traumatic brain injury, specifically anxiety, headaches, loss of memory and some degree of depression, and that to a reasonable degree of medical certainty the proximate cause of these symptoms is claimant's April 7, 1998, work-injury. *See* Clt. Exs. 12, 13, 26; Emp. Ex. 6.

In his decision, the administrative law judge initially addressed employer's assertion that the testimony of claimant's wife and father was obviously biased; the administrative law judge concluded, however, after having had the opportunity to evaluate the credibility of these witnesses on both direct and cross examination, that both of these witnesses were credible. Next, addressing the medical evidence of record, the administrative law judge specifically found Dr. Kant's opinion to be well-reasoned and, thus, he accorded it greater weight; in contrast, the administrative law judge found Dr. Berstein's opinion to be inconsistent and equivocal based upon that physician's testimony that claimant was not experiencing true seizures, but that based upon claimant's prior substance abuse problems it was logical for him to have, *inter alia*, pseudoseizures. Additionally, the administrative law judge accorded less weight to the opinion of Dr. Valeriano since that physician did not reference claimant's substance abuse history in his reports.[1]

We affirm the administrative law judge's finding that claimant post-injury continues to experience injury-related symptoms, including seizures, which preclude him from returning to work, as it is rational and supported by substantial evidence. As the administrative law judge has the authority to address questions of witness credibility and to

[1]We agree with employer that Dr. Valeriano's failure to mention claimant's history of substance abuse does not detract from his opinion that claimant's video monitoring/EEG revealed questionable seizures. Any error committed by the administrative law judge in this regard, however, is harmless, as the totality of Dr. Valeriano's reports indicate his belief that claimant has experienced symptoms post-injury which are typical of a traumatic brain injury and that claimant's present condition can be causally related to his April 7, 1998 work-injury.

weigh the evidence, *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); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), we hold that the administrative law judge committed no error in relying on the opinions of Dr. Kant and Dr. Talbot, as well as the testimony of claimant, his wife and father, rather than the testimony of Drs. Bernstein and Valeriano, to find that claimant established a *prima facie* case of total disability. *See Padilla*, 34 BRBS 49; *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Moreover, as the administrative law judge's finding that employer submitted no evidence of suitable alternate employment is not challenged on appeal by employer, claimant's award of temporary total disability benefits is affirmed.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge