BRB No. 98-594

MICHAEL MATOS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BUREAU OF NAVY PERSONNEL	)	DATE ISSUED: May 7, 1999
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Gary A. Gabree (Stinson, Lupton, Weiss & Gabree, P.A.), Bath, Maine, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-397) of Administrative Law Judge Robert G. Mahony 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.,* as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 housekeeper, injured his back at work on January 17, 1995, when a door that he was holding open with his foot closed, causing the door knob to strike his back. Employer voluntarily paid claimant temporary total disability benefits from

April 20, 1995, through April 30, 1995, and May 11, 1995, through January 3, 1996. After the injury, claimant returned to regular work through April 12, 1995, when he was placed on light duty by Dr. Miller. Claimant was off work from April 20, 1995, through April 30, 1995, when his light duty jobs of cleaning windows, dusting, and stenciling linen were completed. Claimant returned to his regular job on May 1, 1995, but resigned effective May 16, 1995, asserting he could not do the work. Claimant sought temporary total disability benefits and temporary partial disability benefits from January 4, 1996, and continuing. The administrative law judge denied claimant additional disability and medical benefits after May 31, 1995, finding that claimant did not establish his *prima facie* case of total disability. The administrative law judge additionally determined that claimant's average weekly wage is $164.89, calculated under Section 10(c) of the Act, 33 U.S.C. §910(c).

On appeal, claimant challenges the administrative law judge's denial of additional disability benefits and his average weekly wage determination. Employer responds in support of the administrative law judge's Decision and Order.

Claimant initially contends that the administrative law judge erred in finding that he did not establish his *prima facie* case of total disability. To establish his *prima facie* case of total disability, claimant must establish that he is unable to perform his usual employment due to his work-related injury. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In determining that claimant did not establish his *prima facie* case of total disability, the administrative law judge gave the greatest weight to the opinion of Dr. Gordon, who stated that claimant's injury completely resolved by the end of May 1995. Emp. Ex. 50 at 11-12. The administrative law judge found that Dr. Gordon completed a thorough examination of claimant and reviewed the medical records of Drs. Totta, Fisch and Miller before concluding that claimant presented no objective evidence of injury or disability.[1] Decision and Order

[1]Dr. Totta examined claimant in June 1995, August 1996, and September 1996. *See* Cl. Exs. 15, 17; Emp. Ex. 21. Dr. Totta saw no evidence of worrisome abnormality, diagnosed claimant with a questionable lumbar facet syndrome, and noted a placebo response after medial branch blocks were performed. In February 1997, Dr. Fisch recommended that claimant undergo work hardening and vocational rehabilitation, noting that there was no objective evidence for the source of migratory pain that claimant is experiencing. Cl. Ex. 33. Dr. Miller initially diagnosed a contusion in the L1-2 region, and thereafter treated claimant for a lumbar strain in both the thoracic and lumbar regions; he imposed work restrictions on him of no heavy lifting, no repetitive twisting or turning or bending at waist level. Cl. Exs. 2-14. Claimant had a normal spine x-ray and bone scan on April 12, 1995, and July 29, 1996, respectively. Cl. Ex. 19.

at 17; Emp. Exs. 27, 51. In his review of the medical records, Dr. Gordon noted Dr. Miller's initial diagnosis, claimant's negative bone scan and x-rays, and lack of swelling or bruising to support his opinion that claimant suffered from a mere bruise. Emp. Ex. 50 at 11-12. Moreover, Dr. Gordon concluded that there is no limitation on claimant's physical capacity based on his physical examination, the history claimant gave him, the diagnosis of claimant's injury, and his review of claimant's records and tests. Emp. Ex. 50 at 31. As the administrative law judge acted within his discretion in giving the greatest weight to Dr. Gordon's opinion, and as it supports the administrative law judge's finding that claimant is not entitled to temporary total disability benefits after May 31, 1995, we hereby affirm this finding. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); Decision and Order at 17; Emp. Exs. 27, 50 at 11-12, 31, 51.

Claimant next contends that the administrative law judge erred in determining that his pre-injury average weekly wage is $164.89 under Section 10(c), as Section 10(b) of the Act, 33 U.S.C. §910(b), should have been applied. Alternatively, claimant asserts that the administrative law judge improperly calculated his pre-injury average weekly wage under Section 10(c) by including post-injury earnings. Employer responds that the average weekly wage issue is moot based on the administrative law judge's denial of benefits after May 31, 1995, as there is a substantial overpayment even if the average weekly wage is as high as $211.59 as claimant asserts, since employer voluntarily paid claimant compensation until January 1996.

In calculating claimant's average weekly wage under Section 10 of the Act, 33 U.S.C. §910, the administrative law judge properly found Sections 10(a) and (b), 33 U.S.C. §910(a), (b), inapplicable as claimant did not work substantially the whole of the year for employer prior to the injury, and as the evidence of record is insufficient to apply Section 10(b). *See Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981)(Section 10(a) or (b) calculation requires evidence of the number of days claimant or a similar employee worked in the year preceding the injury); *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1979)(33 weeks is not a substantial part of the year for Section 10(a) purposes); Decision and Order at 17-18. We, therefore, affirm the administrative law judge's use of Section 10(c) to calculate claimant's average weekly wage. With regard to the administrative law judge's application of this Section, any error committed by the administrative law judge in using claimant's post-injury earnings to calculate claimant's average weekly wage is harmless in view of our affirmance of the administrative law judge's denial of benefits after May 31, 1995. As employer correctly notes, its overpayment of compensation through

January 6, 1996, more than covers any deficiency in claimant's pre-injury average weekly wage.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge