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 Claimant-Petitioner)
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 v.)
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 UMS/SEA-LAND) DATE ISSUED: 10/30/2008
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 and)
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 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION LIMITED)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order Ruling on Motion for Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Dennis L. Brown and Mike N. Cokins (Dennis L. Brown PC), Houston, Texas, for claimant.

Melinda Rich Harper (Fulbright & Jaworski L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Supplemental Decision and Order Ruling on Motion for Reconsideration (2006-LHC-1617) of Administrative Law Judge Patrick M. Rosenow 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 if they 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 has worked at various positions as a longshoreman since 1982. On March 28, 2000, claimant sustained injuries to her right shoulder, rotator cuff, and scapula when she fell while working for employer as an aft checker. Since the date of this work incident, claimant has undergone four surgical procedures,¹ and she has not returned to gainful employment. Employer voluntarily paid claimant temporary total disability compensation from March 28, 2000, through May 17, 2007. *See* 33 U.S.C. §908(b).

In his Decision and Order, the administrative law judge found that claimant failed to meet her burden of establishing that she remained incapable of resuming her usual employment duties with employer, and accordingly, he denied claimant’s claim for ongoing total disability benefits under the Act.

Claimant filed a motion for reconsideration with the administrative law judge. In denying this motion, the administrative law judge reiterated his prior findings that claimant was a less than credible witness, that the medical evidence of record establishes that claimant is capable of returning to her usual employment duties, and that consequently claimant did not establish her entitlement to ongoing benefits under the Act. Accordingly, the administrative law judge denied claimant’s motion for reconsideration.

On appeal, claimant challenges the administrative law judge’s denial of her claim for ongoing total disability benefits; specifically, claimant avers that the administrative law judge erred in his consideration of the medical and lay evidence and in concluding that she is capable of resuming her usual employment duties with employer. Employer responds, urging affirmance of the administrative law judge’s decision in its entirety.

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 she is unable to return to her usual work. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). If claimant establishes her *prima facie* case, the burden of proof shifts to employer to establish the availability of

¹ Claimant’s surgeries involved the repair of her torn rotator cuff, the removal of bone and anchoring of muscle, the installation of a plate and screws to secure a fractured scapula, and the subsequent removal of this hardware.

suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Diosdado v. Newport Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

Claimant initially contends that her usual employment duties with employer primarily involved working as an aft checker;² consequently, claimant avers that the administrative law judge erred in finding that her regular employment at the time of her injury included working as a forward, gate, and yard clerk, as well as an aft checker. At the hearing, claimant testified that, as a Class A seniority card holder, she preferred to work on ships; however, claimant stated that she worked as either a checker or a clerk for various periods of time prior to her work injury.³ Tr. at 209 – 211, 262 – 263; EX 32. As claimant's testimony establishes that she was employed in multiple positions during the course of the year preceding her work-injury, claimant has not established reversible error in the administrative law judge's decision to consider claimant's ability to return to work as either an aft checker or clerk for employer. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). Accordingly, we reject claimant's contention of error and affirm the administrative law judge's finding on this issue.

Claimant next challenges the administrative law judge's findings regarding the physical requirements necessary to perform the employment positions relied upon by the employer. Specifically, claimant contends that when the administrative law judge discussed the employment duties performed by employer's aft checkers and clerks, he erred in relying on the testimony and reports of Ms. Rapant, rather than on those of Mr. Montgomery, Mr. Steffell, Mr. Stanfill, and Ms. Anglen.

Ms. Rapant, a vocational rehabilitation counselor, was retained by employer to conduct an on-site job analysis of the aft checker and clerk positions identified by employer. In determining the employment duties required of these positions, Ms. Rapant testified that she made six visits to employer's operations, totaling approximately 30 hours, she viewed the physical requirements of the positions identified by employer, videotaped those positions, and interviewed several individuals who performed those

² In support of her contention on this issue, claimant asserts that in the year prior to her injury she worked as an aft checker 75 percent of the time, while the remaining 25 percent of her time was spent working as a clerk.

³ Claimant does not contend that the four positions identified by the administrative law judge would not be available to her as a Class A seniority card holder.

positions. Ms. Rapant then prepared multiple reports wherein she classified the job of gate clerk as sedentary duty, and the forward clerk, yard clerk, and aft checker positions as light duty; she also stated that while the aft checker position required occasional reaching overhead, the yard and gate clerk positions required no overhead reaching. EX 33. Mr. Montgomery, president of ILA Local 1351 Clerks and Checkers, acknowledged that Ms. Rapant's video was reasonably accurate in documenting the physical requirements of these four positions; Mr. Montgomery opined, however, that the aft checker position may entail more climbing than shown on the video. Mr. Steffell, employer's general manager of terminal operations, testified that Ms. Rapant's reports and videos set forth an accurate description of employer's aft checker and clerk positions. Mr. Stanfill, a vocational counselor, testified that the position of aft checker requires frequent, rather than occasional, overhead reaching. Ms. Anglen, a former co-worker of claimant, testified that she has been employed as a clerk and checker for over twenty-five years, and that the actual work required by the positions identified by employer was at a faster pace than depicted in Ms. Rapant's videos.

We affirm the administrative law judge's determination that the testimony, video and reports of Ms. Rapant, corroborated by the testimony of Mr. Steffell, accurately portray the physical requirements of the aft checker and clerk positions relied upon by employer. In addressing this issue, the administrative law judge found that Ms. Rapant compiled the information necessary to render her opinions based upon her several trips to employer's container yards, her discussions with employees, her observation of employees as they performed the duties required of the identified positions, and her discussions with employer's managers. Additionally, the administrative law judge found Ms. Rapant's opinions to be corroborated by Mr. Steffell, whose employment duties include the observation and monitoring of employer's clerks and checkers. Decision and Order at 60 – 61. On reconsideration, the administrative law judge reiterated his finding that Ms. Rapant's analysis of the checker and clerk positions was more credible since she actually visited the work site on numerous occasions and observed in detail the physical requirements of each position identified by employer. Supplemental Decision and Order at 3 – 4.

It is well-established that in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). In his decision, the administrative law judge rationally credited the opinions of Ms. Rapant and Mr. Steffell.⁴

⁴ We reject claimant's contention that the administrative law judge abused his discretion by "handpicking facts that are consistent with his opinion and disregarding those which are not, even if he credits them in other parts of his decision." *See* Clt's br.

As claimant has not established reversible error in the administrative law judge's decision to rely upon the testimony of Ms. Rapant, as supported by the testimony of Mr. Steffell, in determining the physical requirements of the positions identified by employer, we affirm the administrative law judge's findings on this issue.⁵

Next, in determining the extent of claimant's current disability, the administrative law judge reviewed the relevant evidence in order to assess claimant's physical capabilities. Specifically, in his decision, the administrative law judge credited the opinion of Dr. Masson over the opinion of Dr. Mosely and the testimony of claimant in concluding that claimant did not meet her burden of establishing that she remains incapable of resuming her usual employment duties with employer. Decision and Order at 59 – 60.

We affirm the administrative law judge's decision as he committed no error in weighing the medical evidence and concluding that claimant is capable of performing the duties of either an aft checker or clerk with employer. In making this finding, the administrative law judge credited the opinion of Dr. Masson, who examined claimant on December 10, 2003, and June 23, 2006. After reviewing the surveillance video taken of

at 38 – 39. In support of this contention, claimant asserts that the administrative law judge initially relied on Mr. Steffell's testimony in his decision, but on reconsideration, he discounted Mr. Steffell's testimony that an aft checker must reach overhead frequently. *Id.* at 38; *Compare* Decision and Order at 61; Supplemental Decision and Order at 3 – 4. Although Mr. Steffell testified that Ms. Rapant's reports and video set forth an accurate representation of employer's clerk and checker positions, *see* Tr. at 319, he did not specifically address the amount of overhead reaching involved in those positions. *Id.* at 319 - 336. Rather, it was claimant's vocational witness, Mr. Stanfill, who opined that an aft checker must frequently reach overhead. *See* Clt's Motion for Reconsideration at 4 -5. While, as claimant asserts, the administrative law judge's decision on reconsideration states that Mr. Steffell's testimony indicated the frequency of overhead reaching required by aft checkers, *see* Supplemental Decision and Order at 3 – 4, the totality of the administrative law judge's 62 page Decision and Order indicates that this sentence reflects a simple mistake in referencing Mr. Steffell rather than Mr. Stanfill.

⁵ We reject claimant's contention that, in establishing the physical requirements of her usual employment, employer was required to present evidence regarding the identified positions at every stevedoring company operating at the Port of Houston. It is claimant's burden to establish that she is unable to return to her usual work. Claimant testified that she was employed by employer for approximately 70 percent of her time on the waterfront. Claimant did not present any evidence regarding the physical requirements of jobs with other employers at the Port.

claimant and the results of claimant's functional capacities evaluation, Dr. Masson opined that claimant is capable of working light duty jobs. Specifically, Dr. Masson opined that claimant, although incapable of climbing ladders, was capable of using her right hand, arm and shoulder without restrictions for writing, carrying a clipboard, using a computer and data entry, and that claimant had no restrictions regarding walking or standing. Dr. Masson therefore approved the aft checker and clerk positions for claimant. Additionally, Dr. Masson reported that claimant did not need any narcotic medication that would affect her ability to perform her employment duties. In contrast, the administrative law judge found that claimant's inconsistent testimony, her activities as revealed in employer's video surveillance, and the testimony of witnesses who noted her preoccupation with creating a record for her claim, rendered claimant's testimony less credible and reliable.⁶ Lastly, in declining to rely upon the opinion of Dr. Mosely, who opined that claimant was incapable of returning to work, the administrative law judge found that Dr. Mosely relied in part upon claimant's subjectively reported levels of pain and fatigue. Decision and Order at 60.

Claimant's arguments on appeal regarding her ability to perform the light duty jobs at issue in effect seek a reweighing of the evidence, which the Board is not empowered to do. The administrative law judge was entitled to assess claimant's credibility, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and his decision that claimant is capable of light duty employment is supported by the credited medical evidence. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (choice from among reasonable inferences is left to the administrative law judge). Thus, as it is supported by substantial evidence, the administrative law judge's determination that claimant failed to meet her burden of proving that she is incapable of performing her former employment duties is affirmed.

Lastly, claimant alleges that the administrative law judge erred in determining that her usual employment was available to her since the positions identified by employer

⁶ Claimant deposed that she cannot grasp, carry or hold items with her right hand, and that she cannot hold up her arm against the force of gravity. Surveillance video of claimant showed her using both arms interchangeably while engaged in various activities including shopping and gardening. Decision and Order at 7 - 8, 57. Additionally, the administrative law judge found that although claimant testified that her use of medication prevents her from properly functioning on the job, the surveillance video shows claimant performing various tasks without apparent impairment from such medication. Consequently, the administrative law judge concluded that if claimant was on medication it did not impair her ability to drive, shop, reach and grasp. *Id.* at 60.

require computer qualifications and certification which she does not possess. In this regard, claimant avers that she since she lacks the ability to acquire the requisite computer skills needed to perform these jobs, they are unavailable to her. We affirm the administrative law judge's rejection of these contentions. The administrative law judge found that claimant conceded during her testimony that she had in the past taken a computer course with employer in order to become computer-qualified. Decision and Order at 61; *see* Tr. at 212 – 213. The administrative law judge further found that claimant informed a vocational counselor that she had completed a computer class, that she owned but had not yet used a laptop computer, and that she is somewhat familiar with a keyboard. The administrative law judge found that claimant scored very high and showed average academic aptitude during her vocational testing, and that the weight of the evidence establishes that employer's employment positions do not involve complex data processing or software use but, rather, require a simple knowledge of a keyboard in order to input information into data fields.⁷ Decision and Order at 61; Supplemental Decision and Order at 4. As the administrative law judge fully addressed the evidence on this issue, and as claimant has not established reversible error in this regard, we affirm the administrative law judge's determination that claimant's perceived lack of computer skills would not preclude her from returning to her usual employment duties with employer.

⁷ The administrative law judge additionally found that Mr. Steffell testified that employer offers a computer training program.

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order Ruling on Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge