

NIKOLAI D. DONCEV)
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 Claimant-Petitioner) DATE ISSUED:
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 v.)
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 NATIONAL STEEL & SHIPBUILDING)
 COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Donald G. Cline (Cline & Fox), San Diego, California, for claimant.

Roy D. Axelrod, San Diego, California, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (90-LHC-1387, 1388) of Administrative Law Judge Daniel L. Stewart 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).

This case is before the Board for a second time. Claimant, a marine electrician, sustained a right shoulder injury on August 3, 1983, and a back injury on October 13, 1986, while working for employer. Initially, employer voluntarily paid benefits to claimant, but ceased its payments on the basis that claimant is no longer

disabled. Before the administrative law judge, claimant alleged that he is permanently totally disabled due to his right shoulder and back injuries, and that, as a result of those injuries, he suffers from a memory loss, a psychiatric impairment, and mild adult diabetes.

In his original Decision and Order, the administrative law judge found that claimant sustained right shoulder and back injuries, but that the evidence is insufficient to establish that either injury has resulted in a memory loss, a psychiatric impairment, or diabetes. The administrative law judge also found that claimant was capable of performing the suitable alternate employment positions listed in a labor market survey dated February 28, 1989, that claimant reached maximum medical improvement on October 27, 1989, and that, as of that date, claimant could have returned to his former employment without restrictions. Accordingly, the administrative law judge awarded temporary total disability benefits from November 18, 1986 to February 27, 1989, and temporary partial disability benefits from February 28, 1989 to October 26, 1989, but denied continuing disability benefits after that date.¹

Claimant appealed the administrative law judge's decision, contending that the administrative law judge erred in failing to inform the parties of his intention to reject their stipulation regarding claimant's inability to return to his usual employment; alternatively, claimant argued that the administrative law judge's findings on this issue were not supported by substantial evidence. The Board agreed that the administrative law judge erred in rejecting the parties' stipulation that claimant was unable to return to his former employment without giving the parties prior notice and thus remanded the case for the administrative law judge to allow the parties the opportunity to present additional evidence in support of their positions regarding this issue. *Doncev v. National Steel & Shipbuilding Co.*, BRB Nos. 93-2467/A (Sept. 11, 1996)(unpub.).²

After weighing the evidence presented at the original hearing as supplemented by the additional evidence presented on remand, the administrative

¹The administrative law judge also found claimant entitled to future medical treatment, if necessary, for his right shoulder and lower back conditions, and that claimant's counsel is entitled to an attorney's fee in the amount of \$7,750 to be paid by employer. See Decision and Order Awarding Benefits; Supplemental Decision and Order.

²The Board affirmed the fee awards of the administrative law judge and the district director.

law judge found that claimant failed to carry his burden of proving that as a result of either the right shoulder injury or the low back injury, or a combination of both, he was incapable of returning to his pre-injury duties as a marine electrician as of October 27, 1989. Thus, further benefits were denied. The administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant contends that the administrative law judge erred in finding that he could return to his former employment. Employer responds, urging affirmance of the administrative law judge's decision.

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). In the instant case, the administrative law judge considered the physicians' opinions of record and gave greater weight to the testimony of Dr. Freeman, after he viewed the surveillance film, that claimant has no back impairment, Tr. I at 205, and to Dr. Schwab's opinion that claimant was capable of returning to his usual work in October 1989. EX 4 at 11. In addition, the administrative law judge rejected the opinions of Drs. Dodge and Levine that as of 1994 and 1997, respectively, claimant was unable to perform his usual work, as neither doctor gave a medical explanation as to why claimant cannot return to his work as a marine electrician. Moreover, the administrative law judge noted that Dr. Levine based his opinion on the totality of claimant's medical condition, some of which are not work-related, and both doctors relied on claimant's subjective complaints, which the administrative law judge found are not credible. The administrative law judge also rejected the opinion of Mr. Warnemuende, a vocational counselor, that claimant cannot perform his usual work, as the administrative law judge found that he had based his opinion regarding claimant's ability to return to work on his own crediting of the medical reports, which he did not have the authority to do. Finally, the administrative law judge found that claimant lacked credibility, both in his hearing testimony and in his complaints to the treating physicians.

As the administrative law judge thoroughly reviewed the evidence of record, and claimant has raised no reversible error in the administrative law judge's weighing of the evidence and in making credibility determinations, *see generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *John W. McGrath v. Hughes*, 289 F.2d 403 (2d Cir. 1961), we affirm the administrative law judge's finding that claimant has failed to establish a *prima facie* case of total disability as it is supported by substantial evidence, and thus that claimant is not entitled

to additional benefits under the Act. *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 on Remand Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON
Acting Administrative Appeals Judge