BRB No. 98-0202

BOZIDA GOBIN	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Jorden N. Pedersen, Jr. (Baker, Garber, Duffy & Pedersen, P.C.), Hoboken, New Jersey, for claimant.

Christopher J. Field (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-00743) of Administrative Law Judge Robert D. Kaplan 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).

On April 26, 1989, claimant sustained an injury to his left leg when he was struck by a container of meat during the course of his employment with employer; he has not worked since that date. Employer voluntarily paid claimant disability compensation from the date of this accident at a rate of $577.60 per week. Claimant

sought permanent total disability compensation under the Act.

In his Decision and Order, the administrative law judge found that claimant failed to establish a harm to his back, that employer established the availability of suitable alternate employment as of June 11, 1996, and that claimant had failed to refute this evidence. Accordingly, the administrative law judge awarded claimant permanent partial disability benefits for an 8 percent impairment to his left leg pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2).

Claimant now appeals, challenging the administrative law judge's denial of his claim for compensation under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), for his alleged back disability. Claimant additionally contends that the administrative law judge erred in concluding that employer established the availability of suitable alternate employment. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant initially challenges the administrative law judge's findings regarding his alleged back injury. In this regard, claimant does not contend that he injured his back at the time of the work-related injury but, rather, that his back injury was caused by his abnormal walk due to the injury to his left leg. Claimant has the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish a *prima facie* case. *See U.S. Industries/Federal Sheet Metal Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982); *Obert v. John T. Clark & Son of Maryland,* 23 BRBS 157 (1990). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43 (CRT) (1993). Once claimant establishes his *prima facie* case, Section 20(a), 33 U.S.C. §920(a), of the Act provides claimant with a presumption that his condition is causally related to his employment. *See Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991).

In the instant case, the administrative law judge, relying upon the opinion of Dr. Greifinger, determined that claimant failed to demonstrate a harm to his back. Based on the absence of objective findings to support a diagnosis of lumbar back problems as well as negative findings for such a diagnosis, Dr. Greifinger opined that claimant had no back problem.[1] EX-H at 40-41. The administrative law judge also

[1]The administrative law judge declined to rely on the contrasting opinion of Dr. Margolies, since that physician is not an orthopedist. Similarly, the administrative law judge determined that Dr. Steinway's opinion was problematic, since that physician acknowledged that his diagnosis of lumbar osteoarthritis would have to be documented by an x-ray, CAT

based his opinion on the testimony of claimant; specifically, the administrative law judge noted that claimant stated that his back pain started two to three years after the April 1989 injury, but he did not inform his physician of any back pain until February 1993 and never sought treatment for this back problem. 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 and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 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). In the instant case, the administrative law judge rationally weighed the evidence; accordingly, as Dr. Greifinger's testimony constitutes substantial evidence to support the administrative law judge's ultimate finding, we affirm the administrative law judge's determination that claimant failed to establish the existence of a back injury. *See O'Keeffe,* 380 U.S. at 359.

Claimant next contends that the administrative law judge erred in finding that he was only permanently partially disabled as of June 11, 1996; specifically, claimant challenges the administrative law judge's determination that employer established the availability of suitable alternate employment as of that date. Where, as in the instant case, a claimant has established that he is unable to perform his usual employment duties due to a work-related injury, claimant has established a *prima facie* case of total disability. The burden then shifts to employer to demonstrate within the geographic area where claimant resides, the availability of specific jobs which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing and which he can compete and reasonably secure. If employer makes a showing of suitable alternate employment, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied,* 479 U.S. 826 (1986); *Hooe v. Todd Shipyards Corp.,* 21 BRBS 258 (1988).

---

scan, or MRI.

In support of its contention that claimant's disability is partial rather than total, employer identified a number of specific employment positions via the reports and testimony of Dr. Ehrenreich which it averred were suitable for claimant. In identifying positions which he considered to be suitable for claimant, Dr. Ehrenreich relied upon the report of Dr. Magliato, which indicated that claimant could perform sedentary work for eight hours a day, could sit up to six hours, walk up to an hour, but could not kneel, climb or squat. CX-10. The administrative law judge initially found that neither the jobs referred to in Dr. Ehrenreich's October 1996 report, nor the shipping clerk position noted by Dr. Ehrenreich in his June 1996 report, satisfied employer's burden to establish the availability of jobs which claimant is capable of performing. Next, the administrative law judge found that the positions identified by Dr. Ehrenreich at PAFRA and Jungle Time established the availability of suitable alternate employment.[2] Claimant's assertions of error regarding the administrative law judge's findings on this issue are without merit.[3] Although claimant contends that Dr. Ehrenreich did not take into account claimant's back disability, the administrative law judge determined that claimant did not estabish a harm to his back. Moreover, the administrative law judge found that Dr. Magliato's 1991 evaluation of claimant provided a reasonable assessment of claimant's capabilities in 1996, as Dr. Magliato was an impartial physician whose opinion was objective and reasoned; while claimant contended that his condition became worse after 1991 based primarily on the opinions of Dr. Margolies and Steinway, the administrative law judge found that the contrary opinions of Drs. Greifinger and Lerman were

[2]The position at Jungle Time would require claimant to assemble boxes for toys. Claimant would not be required to lift over 10 pounds, and claimant could take breaks as needed. 1996 Tr. at 71. The assembler position at PAFRA was a sedentary position which would require claimant to assemble electronic components or electric components. The person could sit or stand as needed. 1996 Tr. at 66.

[3]Contrary to claimant's assertions on appeal, the administrative law judge found that the position identified with Celsis, Inc., was not in fact suitable for claimant since it was located outside of the geographic area in which claimant resides. *See* Decision and Order at 12.

entitled to greater weight. Finally, the administrative law judge acted within his discretion in crediting the vocational testimony of Dr. Ehrenreich over that of Mr. Provder, claimant's vocational expert, because Mr. Provder's opinion was based on his own assessment of claimant's physical impairments and capabilities, and not on that of a physician. Thus, as the administrative law judge's finding on this issue is supported by substantial evidence and consistent with law, it is affirmed. *See Sketoe v. Dolphin Titan Int'l,* 28 BRBS 212 (1994)(Smith, J., dissenting on other grounds); *Jones v. Genco, Inc.,* 21 BRBS 12 (1988).

Finally, claimant summarily asserts that he submitted into evidence testimony sufficient to establish that the positions at PAFRA and Jungle Time were either unavailable or not within his physical restrictions. The administrative law judge, however, fully addressed claimant's assertion in his decision. In this regard, the administrative law judge acknowledged that claimant and his friend, Miss Lukin, visted both PAFRA and Jungle Time visited and that in each instance claimant failed to obtain employment. After noting that claimant did not testify regarding his visits to these employers, the administrative law judge concluded that claimant had not made a good faith effort to secure employment. Specifically, the administrative law judge determined, based upon the testimony of Miss Lukin and his prior determination that claimant's complaints of severe back pain are not credible, that claimant's actions were "enough to discourage even the most sympathetic employer from offering claimant a position." *See* Decision and Order at 14. Thus, the administrative law judge properly recognized that it is claimant's burden to establish due diligence; in this instance, based upon his evaluation of claimant's efforts, the administrative law judge concluded that claimant did not meet this burden. Accordingly, the administrative law judge's finding that claimant did not diligently seek employment, and that claimant had thus not refuted employer's evidence that the positions at PAFRA and Jungle Time were available and suitable, is affirmed. *See, e.g., Dangerfield v. Todd Pacific Shipyards Corp.,* 22 BRBS 104 (1989).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge