

BRB No. 99-0119

BIAGGIO CALDARERA)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
INTERNATIONAL TERMINAL)	DATE ISSUED: <u>10/7/99</u>
OPERATING COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Phillip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

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

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-1785) of Administrative Law Judge Ralph A. Romano 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).

The parties stipulated that claimant was injured in a work-related accident on February 14, 1996. Employer voluntarily paid claimant temporary total disability benefits from February 15, 1996 until December 18, 1996 . 33 U.S.C. §908(b). Employer also paid medical benefits through December 18, 1996. Claimant has not returned to his usual employment or sought alternate employment since the date of the accident. Claimant filed a claim for benefits under the Act seeking continuing total disability and medical benefits for injuries to his left shoulder, knees and back.

The administrative law judge awarded claimant additional permanent total disability and medical benefits until December 15, 1997, but found that claimant could return to his usual employment as of that date; thus, benefits were denied thereafter. On appeal, claimant contends that the administrative law judge erred in denying him continuing permanent total disability benefits. Employer responds, urging affirmance.

Claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 59 (1980). In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. *See, e.g., Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). We reject claimant's contention that the administrative law judge erred in concluding that he failed to produce sufficient evidence that he could not return to his usual pre-injury job as of December 15, 1997.

Initially, we hold that the administrative law judge rationally credited the testimony of Mr. Abbate, employer's pier superintendent, the video tape of claimant's actual job duties as a checker, timekeeper and clerk, and the job duty analyses contained in Employer's Exhibits 9-12, with regard to the requirements of claimant's pre-injury employment.¹ In rejecting claimant's testimony that he is unable to perform this work, the administrative law judge rationally concluded that claimant was engaged in some activities that he was not required to do. Decision and Order at 6; EX 16 at 22, 55.

¹The record reflects that claimant's last pre-injury position with employer was as a checker working 220 hours in 1996 preceded by 436 hours as a timekeeper, 101 hours as a hatch checker, and 1,611 hours as a checker in 1995. EX 15.

With regard to the medical evidence of record, the administrative law judge rationally found the opinion of Dr. Post, that claimant was permanently totally disabled by his work injuries, CX 8, outweighed by the opinion of Dr. Zaretsky, an independent medical examiner.² Dr. Zaretsky examined claimant, reviewed his job duties, and opined that claimant could return to his usual employment as a checker. EX 10, 11. The administrative law judge found Dr. Zaretsky's opinion supported by that of Dr. Greifinger, as he also found, after reviewing the video tape and job analyses, that claimant was capable of returning to his work as a checker on a full-time basis as of December 15, 1997.³ EX 8, 19 at 33, 36.

The administrative law judge's credibility determinations are within his discretion, and claimant has raised no reversible error in the administrative law judge's weighing of the conflicting evidence. Consequently, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant can perform his usual employment as of December 15, 1997, and the denial of additional benefits thereafter. *See generally 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 is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

²The administrative law judge noted that Dr. Post is not claimant's treating physician, but is only a consulting physician.

³Dr. Greifinger found no residual disability to claimant's low back or knees, and stated that claimant's only limitation was reaching and lifting overhead due to the shoulder impairment. EX 19 at 31. He nevertheless opined that claimant could return to his usual work. *Id.* at 33.

REGINA C. McGRANERY
Administrative Appeals Judge