BRB No. 00-1204

ARTHUR L. VINSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Sept. 19, 2001
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Chanda L. Wilson (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (99-LHC-2315) of Administrative Law Judge Fletcher E. Campbell, Jr., 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).

Claimant was working as a welder aboard a ship when, on February 24, 1999, he injured his knee by hitting it on the edge of the ship. He experienced pain but did not immediately seek medical treatment. However, on March 5, 1999, he visited the shipyard clinic because his knee did not improve. He was released for work with restrictions, which

included minimal stair climbing.[1] Claimant was assigned duties which still required climbing stairs from six to eight times a day. Claimant went out on strike with the union in April 1999, and returned to light duty at the end of the strike in August 1999. Claimant sought temporary total disability benefits under the Act from the date of injury to August 1999.

In his Decision and Order, the administrative law judge found that claimant was not entitled to disability benefits for the period before he sought treatment because he did not establish that he was working with extraordinary effort during that period. However, the administrative law judge found that claimant established that he was working with excruciating pain from March 5, 1999 to April 4, 1999, and thus is entitled to total disability benefits for this period, and since employer did not establish any suitable alternate employment from March 5, 1999 through August 1999, claimant is entitled to temporary total disability benefits during the period he was on strike from April 5, 1999 to August 9, 1999.

Employer contends on appeal that the administrative law judge erred in awarding claimant temporary total disability benefits for the period he was working under restrictions. In addition, employer contends that the administrative law judge violated the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A) (the APA), because he did not fully discuss claimant's or his supervisor's testimony that claimant was not working outside his restrictions.

Specifically, employer contends that the administrative law judge erred in finding that claimant is entitled to total disability benefits for the period he worked at light duty based on the finding that claimant worked through excruciating pain, as employer notes that the pain was intermittent and claimant never worked outside his restrictions. The fact that a claimant works after an injury will not forestall a finding of total disability if the claimant works only with extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). The Board has cautioned against a broad application of these cases and has emphasized that circumstances which warrant an award of total disability concurrent with a period where claimant is working are the exception and not the rule.

[1]Initially, claimant's was restricted from any stair or ladder climbing, but he was told there was no work within those restrictions. The restrictions were changed to minimal stair and ladder climbing.

In the instant case, in spite of the testimony that claimant was not ordered to work outside his restrictions, the administrative law judge found that claimant actually did work outside his restrictions in that he was required to use the stairs and ladders more than minimally. In addition, he found that claimant worked with pain that ranged from a five, on a scale of one to ten, to an eight, and that claimant's testimony regarding the pain was corroborated by contemporaneous medical reports. He concluded that this level of pain was "excruciating," when a ten is unbearable.

Contrary to employer's contention, employer's clinic notes indicate that claimant sought treatment on March 5, March 12, March 19, April 9, and May 7, 1999. In addition, during this period claimant was undergoing physical therapy, where he reported pain which ranged from five on a scale of ten to a high of eight, and began treatment with his own physician, Dr. Stiles, on May 6, 1999. Employer also contends that the administrative law judge violated the APA as he did not address the supervisor's, and claimant's, testimony that he was not worked outside his restrictions.[2] However, the administrative law judge found the uncontradicted testimony that claimant was required to climb stairs or ladders more than minimally to be compelling evidence that claimant did work outside his restrictions. The administrative law judge considered the evidence of record and found claimant's testimony was credible and supported by the medical evidence. We affirm this finding as it is a proper exercise of his discretion, and employer has raised no reversible error on appeal. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Although the Board has cautioned against a broad application of the cases awarding total disability concurrent with a period when claimant worked, we affirm the administrative law judge's finding that claimant worked with excruciating pain and thus is entitled to concurrent temporary total disability benefits in this case as it is supported by substantial evidence.[3] *See*

[2]Claimant testified that he was not "ordered" to work outside his restrictions, but the administrative law judge credited claimant's testimony that on a number of occasions, claimant was asked to do things that were outside his restrictions. H. Tr. at 48, 50, 74.

[3]The case cited by employer, *Burch v. Superior Oil Co.*, 15 BRBS 423 (1983), is

generally Ramirez v. Sea-Land Services, Inc., 33 BRBS 41 (1999).

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inapposite as it holds that working while in pain is not enough unless the pain rises to the level of excruciating, which is what the administrative law judge found in the instant case. Moreover, the administrative law judge rejected employer's contention that the pain was only intermittent, as he found that claimant's work activity, specifically climbing stairs and ladders, is what caused the pain to become excruciating. Decision and Order at 7, n.2.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge