BRB No. 02-0331

DUSAN JUKIC	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOWLAND HOOK CONTAINER TERMINALS	)	DATE ISSUED: Sept. 27, 2002
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

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

John F. Karpousis (Freehill, Hogan & Mahar, LLP), New York, New York, for employer/carrier.

Before: SMITH, HALL, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (00-LHCA-2536) 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 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, while working for employer as a hustler driver on March 26, 2000, sustained injuries to his right knee and back. On March 27, 2000, Dr. Shek diagnosed a right knee contusion and back pain causally related to the work accident, and opined that claimant was totally disabled for a period of three days since no

light duty work with employer was available. Claimant's treating physician, Dr. Eisenstein, first examined claimant on March 30, 2000, at which time he diagnosed a lower back derangement and synovitis of the right knee. In addition, he opined that claimant was disabled at that time.

On April 10, 2000, Dr. Eisenstein found that claimant's right knee problem had resolved. Claimant, however, continued to see Dr. Eisenstein with complaints of recurrent back pain. An MRI performed on August 15, 2000, revealed three bulging discs in claimant's back, and Dr. Eisenstein requested authorization for epidural injections on September 21, 2000. At his deposition, Dr. Eisenstein initially stated that claimant was totally disabled until the end of the year 2000, but later added that he was unsure as to whether claimant has, as yet, recovered to the point where he could work an 8-hour day.

On April 12, 2000, Dr. Miller found that claimant's right knee and back injuries had resolved, noting the absence of any objective findings or clinical evidence of a herniated disc in the lumbo-sacral spine to support claimant's subjective complaints. Dr. Miller further opined that there was no orthopedic disability noted upon physical examination which would preclude claimant from working on a full-time basis. At his deposition, Dr. Miller again stated that he felt there was nothing wrong with claimant's right knee. As for claimant's back, Dr. Miller stated that there was nothing to change his diagnosis that placed no physical restrictions upon claimant. He further added that claimant did not need epidural injections and that the bulging discs were, in essence, a normal finding as they are not necessarily trauma related and recent studies have shown that they exist in almost half of all Americans. Based on his examination of claimant on May 25, 2000, Dr. Magliato stated that he believed that claimant sustained a contusion to the right knee but that there were presently no objective findings indicative of an impairment of the right knee. Dr. Magliato also concluded that claimant appeared to have a chronic lumbo-sacral syndrome with no neurological deficits in the lower extremities, and he opined that as a result of this claimant had a moderate partial disability. At his deposition dated May10, 2001, Dr. Magliato echoed Dr. Miller's opinion that the bulging discs were not a significant finding and that claimant was not a candidate for epidural injections. Dr. Magliato further stated that at the time of his May 25, 2000, examination of claimant, he would have recommended no excessive lifting, bending, carrying, stooping, or climbing, but that he would currently place no physical restrictions on claimant. Lastly, Dr. Rosenblum examined claimant on December 14, 2000, and stated that claimant's objective clinical neurological examination was normal and that there was no need for any causally related neurological treatment.

Employer voluntarily paid temporary total disability benefits

from March 27, 2000, through April 12, 2000. Claimant thereafter filed a claim seeking temporary total disability benefits from April 12, 2000, until November 20, 2000, and permanent total disability thereafter. In his decision, the administrative law judge determined that claimant did not demonstrate that his work-related injuries prevented him from returning to his regular and usual employment after April 12, 2000. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's decision. Claimant specifically argues that the administrative law judge erroneously interpreted the opinions provided by Drs. Shek and Magliato as indicating that claimant was no longer disabled as of April 12, 2000. Claimant also challenges the administrative law judge's analysis of Dr. Eisenstein's opinion.

Claimant bears the burden of establishing his inability to perform his usual work due to the injury. *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). If the claimant meets his burden, then the employer has the burden of coming forth with evidence of the availability of suitable alternate employment, thereby establishing that the claimant's disability is, at most, partial. *Id.*

In his decision, the administrative law judge credited the opinions of Drs. Miller and Shek to find that claimant suffered short-term work-related injuries to his right knee and lower back which completely resolved in a brief period of time. In particular, the administrative law judge chiefly relied upon the opinion of Dr. Miller, that as of April 12, 2000, claimant's injuries resolved to the point where there was no orthopedic disability to preclude claimant from returning to full-time work.[1] In contrast, the administrative law judge rejected the opinion of Dr. Eisenstein that claimant's total disability continued beyond April

[1]The administrative law judge also found that Dr. Shek's report supports Dr. Miller's opinion regarding claimant's ability to return to work as of April 12, 2000. With regard to disability, Dr. Shek stated that "since no light duty [work is] available, [claimant] is totally disabled for three days." Employer's Exhibit (EX) E. The record contains no other statements from Dr. Shek. Absent further comment by Dr. Shek, his opinion, which sets a specific time period for total disability of three days, cannot support a finding that claimant remained totally disabled beyond the time limitation imposed in his opinion, *i.e.*, three days from his March 27, 2000, examination. Thus, we hold that Dr. Shek's opinion does not support claimant's contention that he remains totally disabled as a result of his work-related injuries.

12, 2000, since "he fails to adequately explain the underlying basis for his prognosis of total disability beyond April 12, 2000." Decision and Order at 7

Although Dr. Eisenstein based his opinion on claimant's symptomatology coupled with his opinion that the bulging discs revealed by the MRI may explain claimant's complaints of pain, *see* Claimant's Exhibit (CX) 4 Dep. at 23, 38, 64, the administrative law judge rationally discounted claimant's subjective complaints of pain. The administrative law judge rejected claimant's statements that he is in constant pain, that his pain is getting worse with time, and that he can only drive for twenty minutes and stand for ten to fifteen minutes, because the numerous medical reports in the record tend to refute claimant's complaints. The administrative law judge specifically observed that "even claimant's treating physician, Dr. Eisenstein, stated that he thought claimant could return to work in a limited capacity." Decision and Order at 7. The medical evidence thus contradicts claimant's testimony that he is unable to perform any work because of his work-related injuries. As the administrative law judge rationally found claimant's complaints of pain were not credible, he also reasonably accorded diminished weight to Dr. Eisenstein's opinion regarding disability. *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). Moreover, we hold that substantial evidence, primarily the opinion of Dr. Miller, as documented by the objective evidence of record, supports the administrative law judge's finding that claimant did not establish that his work injuries prevented him from performing his usual employment after April 12, 2000. *O'Keeffe*, 380 U.S. 359; *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). Consequently, the resulting denial of benefits is affirmed.[2]

[2]With regard to Dr. Magliato's opinion, while the administrative law judge observed that Dr. Magliato placed certain restrictions on claimant's activities as of May 25, 2000, he did not compare those limitations to the physical requirements of claimant's usual work as a hustler driver to discern whether claimant was capable of returning to that employment at that time. Any error in this regard is harmless, as the administrative law judge was fully aware of Dr. Magliato's entire opinion on disability, *see* Decision and Order at 6, and relied instead, in finding that claimant was capable of returning to his usual employment and thus

not totally disabled as of April 12, 2000, on the opinion of Dr. Miller, which, as noted above, is supported by the objective evidence of record.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge