BRB No. 96-0908

EMMETT A. McNULTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
	)	DATE ISSUED: _____
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Daniel A. Sarno, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Melissa Robinson Link (Mason & Mason, P.C.), Newport News, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (95-LHC-349) of Administrative Law Judge Daniel A. Sarno 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).

On December 3, 1991, claimant, who had previously undergone back surgery and

leg surgery for varicose veins, suffered an injury to his neck during the course of his employment as a Quality Control supervisor [1] for employer when the bicycle he was riding was struck by a van. Claimant missed approximately eight weeks of work following neck surgery performed by Dr. McAdam, a Board-certified neurosurgeon, on January 22, 1992. Thereafter, in October 1992 he underwent left hip replacement surgery unrelated to his neck injury, and on February 10, 1993, underwent additional neck surgery. In April 1993, claimant returned to his prior work duties as a Quality Control supervisor until November 30, 1993, when he alleged he was forced to retire because of neck pain and difficulty in walking, climbing, and riding a bike resulting from his December 3, 1991, neck injury. Employer voluntarily paid claimant temporary total disability benefits from January 22, 1992 through March 22, 1992, and from February 10, 1993, through April 18, 1993. Claimant sought permanent total disability benefits under the Act commencing April 22, 1993.

The administrative law judge denied the claim, finding that claimant failed to establish a *prima facie* case of total disability because his usual work for employer as a Quality Control supervisor from April 1993 until his November 30, 1993, retirement was consistent with the relevant restrictions imposed by Dr. McAdam on April 19, 1993. The administrative law judge further found that as claimant's complaints of disabling neck pain were not corroborated by the testimony of Dr. McAdam, his supervisor Mr. West, or his co-workers, claimant also failed to establish a *prima facie* case based on credible complaints of pain. Finally, the administrative law judge found that the weight of the evidence showed that claimant voluntarily retired in November 1993 for reasons unrelated to his work injury. Claimant appeals, contending that the administrative law judge's finding that claimant failed to establish a *prima facie* case of total disability is based upon evidence which is inherently incredible and is neither rational nor supported by substantial evidence. Employer responds, urging affirmance.

To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to a work-related injury. *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992)*; Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1992). Claimant bears the burden of proving the nature and extent of any disability; the Section 20(a) presumption does not aid claimant in establishing the existence of a disability. *See Trask v. Lockheed Shipbuilding & Construction Co.,* 17 BRBS 56 (1985).

[1]As a Quality Control supervisor, claimant supervised 10-18 inspectors, planning and coordinating their activities to ensure that materials used by others to construct, overhaul, repair, or refuel nuclear reactors met quality requirements.

After review of the Decision and Order in light of the record evidence and claimant's arguments on appeal, we affirm the administrative law judge's denial of benefits because his finding that claimant failed to establish a *prima facie* case of total disability is rational and supported by substantial evidence. *See O'Keeffe*, 380 U.S. at 359. In determining whether claimant has established his *prima facie* case, the administrative law judge must compare claimant's medical restrictions resulting from his injury with the specific requirements of his usual job. *See Carroll* v. *Hanover Bridge Marina,* 17 BRBS 176 (1985). In the present case, the administrative law judge properly determined that for the period between April 1993 and claimant's retirement on November 30, 1993, claimant was under Dr. McAdam's April 19, 1993, restrictions of no lifting over 30 pounds, no overhead work, and limited bending and stooping. CX-1; EX-3Z.[2] He then determined that the work claimant performed prior to his retirement did not violate these restrictions, noting that claimant had conceded as much on cross-examination. Transcript at 52.[3] The administrative law judge further noted that while claimant's primary difficulties at work involved climbing, walking, and bike riding, these activities were not included within the activities proscribed by Dr. McAdam during the relevant period. Moreover, based on the testimony of claimant's supervisor, Mr. West, the administrative law judge determined that bike riding was not in any event a job requirement, as a shuttle bus and departmental truck were available to accommodate non-bike riders or individuals with long distances to walk. Transcript at 64-65. In addition, he credited Mr. West's testimony, Transcript at 65-66, that even if claimant had restrictions regarding ladder climbing, he could have accommodated these restrictions by performing inspections which required ladder climbing himself or assigning another of the examiners within the department to carry out this duty.[4]

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[2]On August 21, 1995, after claimant's retirement, Dr. McAdam imposed additional restrictions, indicating that claimant was unable to ride a bike or climb ladders and was limited to sedentary work which he defined as not involving climbing, lifting or excessive bending. He explained, however, that claimant was not limited to a sitting position, that claimant could stand all day provided he was able to take a break every two hours, and had no limitations on walking on a flat surface. EX-4,M-O; DD, EE. Moreover, he deposed that even with these additional restrictions, claimant could have continued to perform his usual work as a supervisor for employer. EX-4 at CC, DD.

[3]In addition, in his Petition for Review, claimant states that his claim was based on his assertions of pain rather than on any violation of his restrictions. Petition for Review at 14.

[4]Mr. West also testified that climbing ladders was not necessary for claimant to perform his supervisory duties although it was necessary for employer's inspectors. Tr. at 81. He further indicated that while there was a departmental requirement that once a week supervisors evaluate the performance of their inspector's job duties, Transcript at 77-80, it was up to the supervisor's discretion to determine what particular aspect of the inspector's work he wished to observe. Transcript at 78-79.

Moreover, the administrative law judge noted that both Dr. McAdam and Mr. West provided testimony which confirmed that claimant had not complained about his inability to perform any of his job duies because of his work-related injury. Transcript at 84-86; EX-4 at Z, AA, JJ, KK; Decision and Order at 14. The administrative law judge also found that the testimony of claimant's co-workers did not corroborate his assertion that he retired due to disabling pain resulting from his work-related neck injury. *See* Transcript at 121, 126-127; CX-12 at 13; CX-13 at 7-9.

Finally, the administrative law judge found that the weight of the evidence established that claimant's retirement was not due to physical problems related to his work injury, but rather to the favorable severance package employer offered in November 1993. In so concluding, he noted that claimant had inquired about the severance package as early as June 1993 and had been eligible to retire previously. Moreover, he noted that claimant had signed a voluntary retirement form in order to be eligible for the severance. EX.13. The administrative law judge found that there was no convincing evidence that notwithstanding severe pain claimant forced himself to keep working to qualify for the severance; rather the weight of the evidence established that claimant, along with many of his fellow employees, was motivated to retire by the infrequently offered severance package which resulted in his obtaining an additional $29,000. Decision and Order at 15.

Claimant argues on appeal that the administrative law judge's determination that climbing, walking and bike riding were not a required part of his supervisory duties is not rational. Contrary to claimant's assertions, the evidence credited by the administrative law judge provides substantial evidence to support this conclusion. In addition, the April 1993 work restrictions resulting from his work-related neck injury did not preclude these activities; claimant's only limitations as a result of his injury were no overhead work, no lifting over 30 pounds, and limited bending and stooping. Moreover, while claimant cites portions of his co-workers' testimony which he maintains support his assertion that he established his *prima facie* case based on credible complaints of pain which affected his ability to fully perform his work duties, after considering all of the relevant evidence the administrative law judge did not credit this testimony. Such credibility determinations are solely within his discretionary authority. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995).

In this case, the administrative law judge's finding that as of the time claimant retired in November 1993, the effects of his work-related injury did not preclude him from performing his usual work duties is supported by substantial evidence. Moreover, given the severance package available to claimant in November 1993, it was not unreasonable for the administrative law judge to find that claimant's retirement was voluntary. As claimant has failed to raise any reversible error made by the administrative law judge in evaluating the relevant evidence and making credibility determinations, his determination that claimant failed to establish his *prima facie* case is affirmed. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

Accordingly, the Decision and Order of the administrative law judge denying benefits

is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge