BRB No. 96-1133

DANIEL SULLIVAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOLT CARGO SYSTEMS, INCORPORATED	)	DATE ISSUED:
	)	
	)	
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.

Aloysius J. Staud (Fine and Staud), Philadelphia, Pennsylvania, for claimant.

Stephen J. Harlen (Swartz, Campbell & Detweiler), Philadelphia, Pennsylvania, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2582) 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 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 injured on January 12, 1992, when the fork of a forklift truck was lowered onto his left foot. Employer voluntarily paid claimant temporary total disability compensation from January 12, 1992, until June 6, 1995. Claimant sought continuing temporary total disability compensation under the Act.

Based on the May 25, 1995, report and deposition testimony of Dr. Maloney-Katz, the administrative law judge denied the claim for continuing temporary total disability

compensation, and found that as claimant was capable of performing his usual work as of December 6, 1994, his entitlement to temporary total disability benefits ceased as of that date. On appeal, claimant challenges the administrative law judge's denial of his claim for continuing temporary total disability compensation on various grounds. In the alternative, claimant contends that, based on the parties' stipulation, he is entitled to temporary total disability benefits until May 26, 1995, rather than until December 6, 1994, as was determined by the administrative law judge. Employer responds, urging affirmance.

Claimant initially argues that the administrative law judge erred in denying his request to present testimony permitting the inference that one of the investigators conducting the surveillance of claimant slashed claimant's tire. Claimant contends that employer therefore should be estopped from using the videotape of him changing a flat tire and that all evidence derived from the videotape, including Dr. Maloney-Katz's opinion, should be stricken from the record. Contrary to claimant's assertions, the administrative law judge did not abuse his discretion in disallowing this testimony. Rather, he rationally found that even if one of the investigators did puncture claimant's tire, such evidence is irrelevant to the dispositive question of any limitation in claimant's physical functioning. Tr. at 67. Inasmuch as the administrative law judge has considerable discretion concerning the admission of evidence and may properly limit evidence introduced on the basis of relevancy, claimant's estoppel argument must fail. *See Olsen v. Triple A Machine Shop,* Inc., 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP,* 996 F.2d 1226 (9th Cir. 1993); *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988).

Claimant next contends that his own credible testimony regarding his pain is sufficient to justify a finding of total disability. Moreover, claimant avers that in denying his claim for continuing temporary total disability compensation the administrative law judge erred in crediting the opinion of Dr. Maloney-Katz.

Claimant's arguments are rejected. While claimant correctly asserts that an administrative law judge may find that claimant is unable to perform his usual work based on claimant's credible complaints of pain, *see, e.g., Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981), in the present case the administrative law judge acted within his discretion in declining to credit claimant's testimony in this regard in light of Dr. Maloney-Katz's contrary testimony that claimant is capable of full employment.[1] Moreover, as the

[1]After examining claimant on behalf of employer on January 4, 1993 and June 7, 1993, Dr. Maloney-Katz opined that claimant was unable to perform his longshore job. The parties subsequently selected Dr. Maloney-Katz as an impartial physician to examine claimant on behalf of the Department of Labor. After examining claimant on January 10, 1994, and on March 20, 1995, she again stated that claimant was disabled from performing his longshore job and was only able to work in sedentary to light jobs where he could sit down as needed. Cl. Ex. 3. In her report dated May 25, 1995, however, Dr. Maloney-Katz reversed her prior opinion and stated that claimant was "capable of full employment" after viewing three surveillance videotapes which, in her opinion, depicted claimant engaged in activities inconsistent with his complaints. Emp. Ex. 10.

administrative law judge is free to accept or reject all or part of a medical expert's testimony according to his judgment, he also did not err in according greater weight to the opinion of Dr. Maloney-Katz than to the contrary opinions of claimant's treating physicians, Drs. Hecht, Tahmoush, and Bracchia. *See Mendoza v. Marine Personnel Co., Inc.,* 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995). Rather, his decision to accord determinative weight to Dr. Maloney-Katz's opinion in light of her apparent objectivity is a rational credibility determination. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991). Contrary to claimant's assertions, the fact that Dr. Maloney-Katz based her change of opinion on her observation of claimant on employer's surveillance tapes does not negate the fact that she was rendering a medical rather than a "lay" opinion. In stating why claimant's actions and demeanor on the surveillance tapes were inconsistent with his subjective complaints of pain, Dr. Maloney-Katz testified that claimant was observed performing numerous activities including taking out the trash, climbing up and down steps, as well as changing a tire without a limp or appearance of discomfort, that he was able to wear sandals as well as sneakers and that he appeared to perform all the activities of daily life here viewed without the least bit of restriction.[2] Emp. Ex. 2 at 66, 69-70. Inasmuch as the May 20, 1995, medical report and deposition testimony of Dr. Maloney-Katz that claimant is capable of full employment provide substantial evidence to support the administrative law judge's finding that claimant failed to establish his *prima facie* case of total disability and claimant has not raised any reversible error, we affirm the administrative law judge's denial of continuing temporary total disability benefits in this case.[3] *See 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).

We also reject claimant's alternate argument that based on the parties' stipulations prior to the hearing he is entitled to temporary total disability benefits until May 26, 1995, rather than until December 6, 1994, as was awarded by the administrative law judge. The

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[2]The significance of wearing sandals, according to Dr. Maloney-Katz, is that she felt that if someone's foot hurts he would try to wear protective footwear rather than open shoes. Emp. Ex. 2 at 70.

[3]As claimant failed to establish his *prima facie* case, we need not address claimant's argument that employer failed to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

administrative law judge may not reject stipulations without giving the parties notice that he will not automatically accept their stipulations. *Dodd v. Newport News Shipbuilding & Dry Dock* Co., 22 BRBS 245, 250 (1989); *Beltran v. California Shipbuilding & Dry Dock*, 17 BRBS 225 (1985). Such notice, however, was provided by the administrative law judge in this case. At the beginning of the hearing, consistent with the parties' stipulations, employer's counsel stated that it appeared that claimant was no longer disabled after May 25 or 26, 1995. Later in the hearing, however, after employer's attorney said the date should be retrospective to the date of the last examination, March 20, 1995, Tr. at 18-19, the administrative law judge responded: "I'm confused . . . but you can answer these questions in your briefs. If Dr. Maloney-Katz changed her opinion based on the surveillance video that was taken on December 6, 1994, it seems to me that . . . I would say disability ended December 6, 1994, or earlier or at the latest December 6, 1994. So it's a little ambiguous to me at this point." Tr. at 19. Inasmuch as the aforementioned exchange was sufficient to put the parties on notice that the administrative law judge was not going to automatically accept their stipulation and the parties were provided with an opportunity to litigate the contested issue of the temporary total disability termination date, the administrative law judge did not err in declining to accept the parties' stipulation. *See Misho v. Dillingham Marine & Manufacturing,* 17 BRBS 188, 191 (1985). After rejecting the parties' stipulation, the administrative law judge ultimately concluded that claimant's temporary total disability ceased as of December 6, 1994, because Dr. Maloney-Katz stated in her May 25, 1995, report that in finding that claimant had no restrictions and was capable of performing his usual work she had given particular weight to the surveillance video of claimant taken on that date. Inasmuch as Dr. Maloney-Katz's statement provides substantial evidence to support the administrative law judge's finding that claimant was able to perform his usual work as of December 6, 1994, and claimant has failed to establish that the administrative law judge erred in crediting this evidence, his determination that claimant's entitlement to temporary total disability compensation ceased as of that date is affirmed. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). As all of claimant's arguments have been rejected, the administrative law judge's Decision and Order is affirmed.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER

Administrative Appeals Judge