BRB No. 96-1409

SANFORD J. SHIMP	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Jerry L. Hutcherson, Pascagoula, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (95-LHC-960) of Administrative Law Judge Quentin P. McColgin 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 initially sustained an injury to his lower back while in the course and scope of his usual employment as a ship superintendent with employer on June 22, 1990. Claimant was treated for his injury and eventually released to return to work with restrictions by Dr. Bridges on or about March 5, 1991. At that time, claimant returned to his pre-injury position with employer subject to the imposed restrictions.

On April 2, 1991, claimant was climbing a ladder when his foot slipped and he became twisted around on the ladder. Claimant was taken to Ingalls' infirmary, where he was diagnosed with a contusion to his back, prescribed heat and rest, and advised to return for a follow-up examination in two days. On or about April 12, 1991, claimant called his supervisor's office and was informed at that time that he had been terminated for violating the company rule that required all employees to call in within five days of an unscheduled absence. Claimant subsequently filed a claim seeking temporary total disability and medical benefits for his back injury arising out of the April 2, 1991, accident.

In his Decision and Order, the administrative law judge initially determined that claimant is physically capable of performing his usual employment as a ship superintendent and thus concluded that claimant failed to establish a *prima facie* case of total disability resulting him his April 2, 1991, work injury. The administrative law judge then determined that claimant's injury of April 2, 1991, resulted in a temporary aggravation of his pre-existing condition, which resolved two days later on April 4, 1991. Pursuant to Section 6(a), 33 U.S.C. §906(a), the administrative law judge concluded that claimant was not entitled to any compensation as a result of the April 2, 1991, injury. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's determination that he did not suffer a compensable lower back injury and the consequent denial of benefits. Employer responds, urging affirmance.

Claimant argues that the administrative law judge's finding that claimant was physically capable of performing the ship superintendent position cannot be reconciled with the medical evidence of record. Specifically, claimant asserts that the medical opinions of Drs. McCloskey and Bridges conclusively prove that he is totally disabled. Moreover, claimant asserts that in the instant case, employer has not shown that any jobs have become available to claimant and thus maintains that he is entitled to either temporary or permanent total disability benefits.[1]

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[1]Claimant also argues that he is entitled to medical benefits as a result of the April 2 1991, injury. In the instant case, the administrative law judge acknowledged the parties' stipulation that "employer agreed to pay for all of claimant's additional medical expenses." Decision and Order at p. 2. In light of the parties' agreement, the issue of medical benefits was not before the administrative law judge in this case. *See* Hearing Transcript at p. 4. Consequently, claimant's contention on this issue need not be further addressed.

The administrative law judge first determined that following claimant's return to work after the June 1990 back injury, claimant was capable of working, and, in fact, had been working as a ship superintendent within the restrictions set out by Dr. Bridges.[2] In rendering this finding, the administrative law judge relied upon Dr. Bridges' statement that claimant's activities as a ship superintendent were within the restrictions that he had outlined; the administrative law judge relied as well on claimant's testimony that he was working under the restrictions set forth for the 1990 injury.

The administrative law judge next considered the medical reports submitted by Dr. McCloskey, claimant's primary treating physician following the April 2, 1991, back injury.[3] First, the administrative law judge found that in his report dated June 24, 1993,[4] Dr.

[2]Dr. Bridges stated that claimant could return to a work situation where he does not have to do constant climbing, crawling, bending or lifting over forty pounds. Employer's Exhibit 3.

[3]The record indicates that claimant first visited Dr. Bridges following the April 2, 1991, accident; however, no opinion was entered into evidence regarding that May 27, 1991 visit. Hearing Transcript at 29.

[4]In his prior opinions pertaining to claimant's April 1991 back injury, Dr. McCloskey did not address claimant's ability to perform his usual employment as a ship superintendent. Claimant's Exhibit 19. In his opinion dated February 5, 1992, Dr. McCloskey reiterated claimant's statements that he reinjured his back in April 1991, was sent home, then terminated, and has not worked since that time. *Id.* In his opinion dated February 26, 1993, Dr. McCloskey stated that claimant's evaluation at the time of his April 2, 1991, injury showed "a worsening of his condition radiographically." *Id.*

McCloskey stated that claimant had no additional impairment, disability or other work limitations from his April 2, 1991, work injury and that he agreed with Dr. Bridges' prior work restrictions. Claimant's Exhibit 19. At that time, Dr. McCloskey also opined that claimant was capable of resuming his regular duties as a ship superintendent, based upon the descriptions of that position provided by claimant and Joe Walker,[5] and based upon his own knowledge of shipyard work. *Id.* The administrative law judge also found that on November 14, 1993, Dr. McCloskey stated on a "restrictions evaluation form" that claimant could bend, squat, climb, twist, crawl and stoop "occasionally." Claimant's Exhibit 17. This is consistent with the work restrictions prior to the April 2, 1991, injury. Employer's Exhibit 3.

[5]The record establishes that Joe Walker is a certified vocational rehabilitation counselor retained by the Department of Labor. Employer's Exhibit 20.

The administrative law judge then credited Dr. McCloskey's opinion over claimant's contrary statements that he is physically unable to perform the duties of the ship superintendent position.[6] Based upon this medical evidence, the administrative law judge rationally determined that claimant is physically capable of performing the ship superintendent position and thus, concluded that claimant has failed to meet his burden of establishing a *prima facie* case of total disability. As the administrative law judge's conclusions are supported by substantial evidence, they are affirmed.[7] *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (CRT)(5th Cir. 1991)*; 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).

The administrative law judge next determined that the credible evidence of record supports a determination that claimant was able to return to work on April 4, 1991, based on the notation of the infirmary doctor, Dr. Warfield, that claimant should rest for two days and then return for a follow-up examination. The administrative law judge rationally construed this as a prognosis that claimant would probably be fit to return to work at that time, and that claimant's failure to return to the infirmary on that date indicates that he was fit to return to work. Employer's Exhibits 3, 8 and 20. Moreover, the administrative law judge determined that claimant failed to proffer any medical evidence showing that he continued to be temporarily totally disabled after April 4, 1991. As the administrative law judge is entitled to evaluate the credibility of all witnesses, and may draw his own

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[6]Claimant alleges that he is unable work as a ship superintendent because of the climbing, crawling, bending and stooping and due to the amount of work that the position requires.

[7]In light of our affirmance of the administrative law judge's determination that claimant has not met his burden of establishing a *prima facie* case of total disability, we need not address claimant's contentions regarding suitable alternate employment. *See generally New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (CRT)(5th Cir. 1991).

inferences and conclusions from the evidence, *see, e.g., Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963), and as the credibility determinations made by the administrative law judge in resolving the instant issue are rational and within his authority as factfinder, *see generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), we affirm the administrative law judge's conclusions that claimant's condition resolved as of April 4, 1991, and thus, is not entitled to any compensation pursuant to Section 6(a).[8]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[8]Moreover, inasmuch as claimant has been unsuccessful in the prosecution of his claim for benefits, claimant's counsel is not entitled to any attorney's fee. *See* 33 U.S.C. §928; *West v. Port of Portland*, 20 BRBS 162, *aff'd on recon.*, 21 BRBS 87 (1988).