BRB No. 91-1392

PAUL G. GONZALES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:_____
	)	
GENERAL DYNAMICS CORPORATION	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Frederick A. Costello (Lynch, Costello & Friel), Warwick, Rhode Island, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-1587) of Administrative Law Judge David W. Di Nardi 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 June 1, 1988, claimant sustained an injury to his lower back when he attempted to pick up an x-ray camera while employed as an x-ray inspector for employer. Thereafter, claimant sought medical treatment for his back from Dr. Michael T. Judge, who diagnosed a lumbar disk injury based on the results of a CT scan performed on October 19, 1988, and an MRI performed on July 1, 1989. Claimant unsuccessfully attempted to return to work on June 13, 1988. In September 1989, Dr. Judge released claimant for light duty with restrictions against prolonged sitting or standing, frequent bending, and lifting over 20 pounds. Via a letter dated November 3, 1989, employer offered claimant employment within its facility "walking the line," a job which involved setting up directional cones in the area where radioactive x-rays were being taken. Employer also informed claimant that he would be assigned to other light duty work within the restrictions imposed by Dr. Judge as the need arose and that he would earn the same wages as he had previously earned.

When claimant returned to work on November 16, 1989, he was not allowed to perform the job "walking the lines" because he had not taken a state required radiation safety refresher course. Consequently, he was assigned the tasks of painting small numbers and developing x-ray film.

Claimant alleges that this work aggravated his back and caused him pain; consequently, he returned to Dr. Judge on November 17, 1989. Although Dr. Judge found claimant's physical findings to be essentially the same, he opined that claimant was totally disabled at that time. On September 11, 1990, Dr. Judge again informed claimant that he could return to light duty work within the restrictions previously imposed. Claimant returned to work for employer "walking the lines" on February 10, 1991. Employer voluntarily paid claimant temporary total compensation from June 2, 1988 through June 12, 1988, and from June 17, 1988 through November 15, 1989. Claimant sought temporary total compensation from November 17, 1989 through September 11, 1990, and permanent partial disability benefits from September 12, 1990 to February 10, 1991.

The administrative law judge denied the claim, finding that although claimant was unable to perform his usual work, employer had established the availability of suitable light duty work painting numbers and "walking the lines" within its facility. Because the alternate work available at employer's facility paid the same wage as claimant had previously earned in his pre-injury job, the administrative law judge determined that claimant had not sustained any loss in his wage-earning capacity and denied the claim for additional compensation.

Claimant appeals the denial of additional benefits, arguing that the administrative law judge erred in failing to accord determinative weight to the opinion of his treating physician, Dr. Judge. Claimant further asserts that the administrative law judge erred in finding that the job painting numbers at employer's facility constitutes suitable alternate employment inasmuch as it involved prolonged sitting and standing. Employer does not respond.

Once claimant establishes that he is unable to perform his usual work, he has established a *prima facie* case of total disability, and the burden shifts to employer to establish the existence of realistically available job opportunities within the geographic area where claimant resides, which he is capable of performing considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). After careful review of the record, we affirm the administrative law judge's denial of additional disability compensation because it is rational and supported by substantial evidence in the record. *O'Keeffe*, *supra*. In denying benefits in this case, the administrative law judge rejected the opinion of Dr. Judge, claimant's treating physician, that claimant was totally disabled from November 17, 1989 until September 11, 1990, because it was based on claimant's subjective complaints of pain which he found to be incredible. The administrative law judge further determined that Dr. Judge's opinion was contradicted by the testimony of claimant's co-worker, Brian Gailey, by the results of surveillance investigation conducted by Patrick Volpe, and by the medical opinion of Dr. Hayes, who examined claimant in January 1991, and reviewed his medical records.

Claimant argues on appeal that the self-serving testimony of Brian Gailey was given in exchange for favors from his supervisor and does not provide a proper basis for rejecting Dr. Judge's total disability assessment. Claimant further avers that even if Mr. Gailey's testimony is accepted as credible, the conversation in question was no more than idle chatter. Brian Gailey testified that on

November 16, 1989, he had a conversation with claimant in which claimant indicated that he probably would be "out of there" in a couple of days. As claimant has not established that the administrative law judge's decision to credit this testimony was either inherently incredible or patently unreasonable, we affirm this credibility determination. *See Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *aff'g* 4 BRBS 284 (1976), *cert. denied*, 440 U.S. 911 (1979).

Claimant also asserts that the administrative law judge erred in relying on the testimony of Mr. Volpe in rejecting Dr. Judge's opinion that claimant was totally disabled from November 17, 1989 to September 11, 1990, because this testimony was based primarily on surveillance conducted in December 1990 and January 1991. We disagree. Mr. Volpe, a surveillance investigator for employer, testified that on December 14, 1990, and January 11 and 12, 1991, he observed claimant carrying plastic garbage bags out of a bar, the Narragansett Cafe, and tossing the bags into a dumpster. Moreover, Mr. Volpe testified that on one occasion in January 1991, he called the bar asking when claimant would be in for work and was told by a waitress that claimant was running late and that he would be in later. In relying on Mr. Volpe's testimony, the administrative law judge specifically referenced his report dated July 19, 1989, and surveillance conducted in July and August 1989. In this report, claimant was described as "sitting at the end of the bar making several trips into a room which is used for employees only." See Decision and Order at 20. The administrative law judge also found that claimant's statement that "we don't serve bottles" made in response to a question by his attorney regarding the type of empty beverage containers in the plastic bags he carried out to the dumpster to be noteworthy and of considerable interest. The administrative law judge concluded that claimant's so-called "Freudian slip" in conjunction with all of the other evidence in the record demonstrated that claimant has a residual capacity far in excess of that to which he testified and that he could perform the light duty work offered by employer which was within the restrictions imposed by Dr. Judge. Inasmuch as the July and August 1989 surveillance evidence is contemporaneous with the period of disability at issue, we reject claimant's assertion that the administrative law judge improperly relied on Mr. Volpe's testimony in rejecting Dr. Judge's total disability assessment.

Claimant's assertion that the administrative law judge erred in placing substantial weight on Dr. Hayes' January 1991 report similarly must fail. In evaluating the evidence, the administrative law judge is entitled to weigh the medical evidence, to evaluate the credibility of all witnesses, and to draw his own inferences from them; he is not bound to accept the opinion or theory of any particular examiner. *See Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). After examining claimant on January 15, 1991, Dr. Hayes, an orthopedic surgeon, found claimant's neurological examination normal. Reviewing the MRI and CT scan which formed the basis for Dr. Judge's disability assessment, Dr. Hayes found no evidence of disk herniation.[1] Dr. Hayes further determined that claimant's continued subjective

[1]Claimant also argues on appeal that the administrative law judge erred in concluding that Dr. Judge's opinion was based mainly on claimant's subjective complaints inasmuch as he had also relied on the results of the 1988 CT scan and 1989 MRI in rendering his opinion. The administrative law judge's finding in this regard, however, is reasonable given Dr. Hayes' subsequent interpretation

complaints were unsubstantiated by any valid objective medical findings, and that claimant appeared capable of resuming all of the duties of his usual occupation without restrictions. As a practical matter, however, Dr. Hayes believed that an intensive work hardening program would avoid any undue hazard to claimant's health that might result from his returning to his former employment without a transitional period. Inasmuch as Dr. Hayes' opinion, as corroborated by the testimony of Brian Gailey and Patrick Volpe, provides substantial evidence from which the administrative law judge could rationally conclude that claimant was not totally disabled during the period in question and as claimant has failed to demonstrate any reversible error made by the administrative law judge in evaluating the evidence and making credibility determinations, we affirm this determination.[2] *See Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

Claimant's contention that the administrative law judge erred in finding that employer met its burden of establishing the availability of suitable alternate employment is also rejected. Claimant argues that the job painting numbers was outside of the restrictions imposed by Dr. Judge because it involved prolonged sitting or standing. We note, however, that claimant conceded at the hearing that he was able to alternate sitting and standing while performing this job. Moreover, although claimant avers that there is no medical evidence in the record which indicates that he could do this type of work, the administrative law judge acted within his discretion in determining claimant's physical restrictions based on the medical evidence in the record and properly applied these restrictions to the alternate work identified in determining that the work was suitable. *See Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, *reconsideration denied*, 17 BRBS 160 (1985). Moreover, claimant does not contest that the job "walking the lines" is suitable. The administrative law judge reasonably found that such work was available to claimant as of November 15, 1989, based on employer's November 3, 1989 offer of employment.[3] As it is undisputed that the suitable alternate light duty work available at employer's facility paid the same wages as claimant had

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of these tests as normal.

[2]Claimant also asserts that the administrative law judge erred in failing to resolve all factual doubts in his favor. We note that the "true doubt rule" is inapplicable in this case inasmuch as the administrative law judge did not find the evidence to be in equipoise. *See generally Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Claimant's assertion that the administrative law judge erred in using the fact that he missed two appointments for impartial medical examinations in April and September 1990 as a basis for discrediting his testimony, and improperly speculated that the results of the examinations would have been the same as those found by Dr. Hayes in January 1991 is also rejected. The administrative law judge acted reasonably in questioning claimant's motives in this regard based on the evidence as a whole, and claimant's assertion that he lacked transportation fails in view of the finding that claimant was able to find transportation to the bar, to his mother's house and to other places. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53, 56-57 (1992); *Cotton v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 380 (1990).

[3]The 40-hour radiation safety refresher course which claimant needed to perform this work was given on an ongoing, as needed, basis.

previously earned in his pre-injury job, and as claimant does not assert that these wages are not representative of his post-injury wage-earning capacity, the administrative law judge's finding, that claimant sustained no compensable disability subsequent to November 15, 1989, is affirmed. *See generally Wayland v. Moore Dry Dock*, 25 BRBS 53, 57-58 (1991)

Accordingly, the administrative law judge's Decision and Order denying claimant additional disability compensation is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge