BRB No. 92-0144

ISMAEL GAYTAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Jeffrey Winter (Law Offices of Preston Easley), National City, California, for claimant.

William C. Wright and Roy D. Axelrod (Littler, Mendelson, Fastiff & Tichy), San Diego, California, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (90-LHC-2077, 90-LHC-2078) of Administrative Law Judge Edward C. Burch 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant, on October 8, 1987, while working for employer as a waysman, sustained an injury to his back while moving a trash can. Thereafter, claimant sought medical treatment for his back.[1] On February 29, 1988 claimant returned to light duty work monitoring employer's parking lot. On March 28, 1988 claimant requested that his physician, Dr. Adler, release him to return to full duty work. Dr. Adler did so, while noting that claimant's prognosis was guarded and that claimant should be restricted from heavy lifting. Empl. Ex. 25. On April 27, 1988 claimant sustained an injury to his left groin and shoulder while handing pipes to a co-worker aboard a ship. Employer voluntarily paid claimant temporary total disability compensation for the periods October 16, 1987 to February 24, 1988, July 27, 1988 to September 14, 1988, and June 6, 1989 to August 14, 1989. 33 U.S.C. §908(b). Claimant subsequently filed a claim for various periods of temporary total disability compensation which employer refused to pay and for permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant is incapable of performing his previous employment duties with employer, that claimant reached maximum medical improvement, and that employer established the availability of suitable alternate employment. The administrative law judge thereafter awarded claimant temporary total disability compensation for various periods of time between October 9, 1987 and September 18, 1989, and permanent partial disability compensation commencing May 23, 1988. 33 U.S.C. §908(b), (c)(21).

On appeal, employer asserts that the administrative law judge erred in evaluating the evidence and finding claimant unable to return to his previous employment duties with employer. Claimant responds that the administrative law judge's decision is supported by substantial evidence and should be affirmed.

The administrative law judge found that claimant is incapable of resuming his usual employment duties as a waysman with employer because of his low back condition.[2] Employer argues that the administrative law judge erred in his evaluation of the medical evidence of record regarding claimant's ability to return to this work. We disagree. It is well-established that claimant has the burden of establishing the nature and extent of his disability. *See Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). To establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In the instant case, the administrative law judge discussed the medical evidence of record and concluded, based upon the medical opinions of Drs. Adler and Dickinson, as well as the testimony and observation of claimant at the formal

[1]Dr. Lurie noted that claimant's medical history included two prior back strains: the first caused him to miss several days of work three years earlier and to be placed on light duty for two weeks, the second occurred approximately ten months earlier with no loss of time from work. Decision and Order at 2; Empl. Ex. 24 at 1.

[2]The administrative law judge concluded that claimant had no permanent impairment of his shoulder or groin. Decision and Order at 8.

hearing, that claimant was incapable of returning to his former heavy work as a waysman due to his low back condition. Decision and Order at 8. In so concluding, the administrative law judge noted that both of claimant's treating physicians, Dr. Adler and Dr. Dickinson, are board-certified orthopedists who recommended light duty work for claimant because of his back condition. Decision and Order at 8. Although Dr. Adler initially released claimant for regular duty work, his prognosis for claimant's successful return to work was guarded; subsequently, Dr. Adler stated that claimant should receive vocational rehabilitation to lighter work. Cl. Exs. 18 at 29; 19 at 33; 21 at 41. Similarly, Dr. Dickinson opined that claimant's low back pain was aggravated by his attempts to perform his waysman duties and that claimant should be permanently restricted from lifting over 25 pounds and repetitive bending. Cl. Exs. 7 at 8; 18 at 29.[3] The administrative law judge further concluded that the medical opinions of Drs. Adler and Dickinson concerning claimant's inability to return to his former job as a waysman based on the heavy duties required by the work were confirmed by claimant's post-injury history of light duty work.[4] Decision and Order at 8.

It is well-established that the administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, and that he is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Rather, the administrative law judge is entitled to weigh the credibility of all witnesses, including doctors, and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, the administrative law judge is not bound by any particular standard or formula in assessing claimant's disability, but may consider a variety of medical opinions and observations of symptoms and physical effects of his injury in assessing the extent of claimant's disability. *See generally Pimpinella v. Universal Maritime Services, Inc.*, 27 BRBS 154 (1993). In the instant case, employer asks that the Board reweigh the evidence in its favor, which we are not empowered to do. 33 U.S.C. §921(b)(3). As the evidence relied on by the administrative law judge, particularly the opinions of Drs. Adler and Dickinson, constitutes substantial evidence to support his finding that claimant cannot perform his usual duties with employer, it must be affirmed. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We therefore affirm the administrative law judge's determination that claimant is permanently disabled from his former employment as a waysman. As the administrative law judge's finding of suitable alternate employment is unchallenged on appeal, claimant's award of permanent partial disability compensation is also affirmed. *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

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

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[3]Although the administrative law judge found that claimant was malingering in exaggerating his low back condition, contrary to employer's contention the administrative law judge did not totally discredit claimant's testimony, but simply found that claimant was exaggerating his low back pain. Moreover, the physicians relied on objective tests in addition to claimant's recitation of symptoms in reaching their diagnoses.

[4]Claimant's post-injury employment history reflects that he apparently performed light duty work for employer through December 1989. Thereafter, claimant worked as a parking lot attendant in December 1990. Tr. at 11.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge