BRB No. 92-399

TIMOTHY F. JOUBERT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JOHN T. CLARK & SON OF NEW HAMPSHIRE	)	DATE ISSUED: _____
	)	
and	)	
	)	
AMERICAN POLICYHOLDERS FOR AMERICAN MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION AND ORDER

Appeal of the Decision and Order-Awarding Benefits of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Timothy F. Joubert, Auburn, New Hampshire, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order-Awarding Benefits (91-LHC-797) of Administrative Law Judge David W. DiNardi 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). In reviewing this *pro se* appeal, the Board 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 law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220.

[1]We note that claimant was represented by counsel before the administrative law judge.

Claimant, on May 5, 1988, sustained an injury to his back while in the course of his employment as a longshoreman with employer. Claimant continued working for approximately the next four days, however claimant then left work, complaining of back pain. Claimant subsequently remained unemployed at least through the April 29, 1991 hearing. Employer voluntarily paid claimant temporary total disability compensation for the period May 6, 1988 through August 5, 1990. 33 U.S.C. §908(b). Claimant thereafter filed a claim for permanent total disability benefits under the Act. In his Decision and Order, the administrative law judge, after evaluating the medical evidence of record, found that claimant was capable of resuming his usual employment duties with employer; the administrative law judge thus denied claimant's claim for permanent total disability compensation, but awarded claimant temporary total disability benefits from May 6, 1988 through August 5, 1990, medical benefits, and a Section 14(e), 33 U.S.C. §914(e), penalty.

On appeal, claimant, appearing *pro se*, contends that the administrative law judge erred in finding that he is capable of resuming his usual employment duties with employer. Employer has not responded to this appeal.

In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to perform his usual employment due to his work-related injury. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom Sea Tac Alaska Shipbuilding v. Director, OWCP*, No. 91-70743 (9th Cir. Sept. 17, 1993); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In the instant case, the administrative law judge, after setting forth the testimony of Drs. Emond, Joseph, Faille, Kilgus, and Berkowitz, determined that claimant reached maximum medical improvement and, crediting the opinion of Dr. Berkowitz, which he found to be well-reasoned and well-documented, concluded that claimant was capable of resuming his usual employment duties with employer. Specifically, in crediting Dr. Berkowitz's opinion that "[claimant] should be capable of carrying on his regular work without restriction," *see* RX 17 at 11, the administrative law judge noted that Dr. Berkowitz has been a board-certified orthopedic surgeon since 1964, that he is an impartial physician with no prior dealings with the parties, and that his opinion was based upon a physical examination of claimant, a thorough history report, and review of claimant's records.[2] *See* Decision and Order at 18-19.

It is well-established that an administrative law judge is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Rather, the administrative law judge is entitled to evaluate 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). In the instant case, the administrative law judge, after determining that Dr. Berkowitz's opinion is well-reasoned and well-documented, set forth specific and comprehensive reasons for his decision to credit the testimony of Dr. Berkowitz; thus, the administrative law judge's decision to credit the testimony of Dr. Berkowitz is rational, and as this opinion constitutes substantial evidence to support the administrative law judge's finding that

[2]The record indicates that Dr. Berkowitz examined claimant as an independent medical examiner. *See* RX 17.

claimant can return to his former employment with employer, we affirm the administrative law judge's determination that claimant can return to his former employment with employer.[3] *See generally Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____

JAMES F. BROWN
Administrative Appeals Judge

_____

REGINA C. McGRANERY
Administrative Appeals Judge

[3]We note that claimant has submitted additional evidence to the Board in support of his appeal. As the Board cannot consider evidence that was not admitted into the record by the administrative law judge, these documents cannot be a basis for our decision. *See Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992); 20 C.F.R. §802.301. Should claimant seek consideration of this new evidence, he may submit this evidence in a modification proceeding. *See* 33 U.S.C. §922.