BRB No. 93-0827

LUBY RAY NORVILLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter and Montagna), Norfolk, Virginia, for claimant.

Shannon T. Mason, Jr. (Mason & Mason), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (88-LHC-2575) of Administrative Law Judge Daniel A. Sarno, Jr., 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 began his work with employer as an electrician in 1968 and was hired for work in the X-31 department. He suffered an injury to his left ankle on November 21, 1978, resulting in a fracture and dislocation, and eventually causing a lower extremity disability. Claimant was treated by Dr. Tornberg, who operated on the leg, and placed claimant on restrictions. Tr. 14-16. The injury caused claimant to miss over two years of work. After this interval, claimant returned to light-duty work with employer and was transferred to a position as a tool clerk in the X-32 sheet metal department.

Claimant continued to work in the X-32 department for nine years, after which he returned to

the X-31 department as a drawing clerk. Tr. at 29, 94-104; *see* Decision and Order at 6-9. The move back to the X-31 department was prompted by organizational changes which required the consolidation of overlapping duties in the X-31 and X-32 departments. *See* Tr. at 94-104; Decision and Order at 6. While claimant was working in the X-31 department, it became clear to Dr. Reid that claimant was working outside his restrictions. *See* Cl. Ex. 11, pp. 25-7. Claimant was then transferred to the shipyard's MRA (Materials Reclamation and Assembly) Shop, pending a search for suitable alternate employment. Er. Ex. 2. Claimant reached maximum medical improvement (MMI), and no suitable positions were located within the shipyard. *See* Er. Exs. 2-6, 10. Claimant was then released from the shipyard under its MMI program.

Claimant filed a claim for compensation benefits under the Longshore Act. After lengthy informal proceedings before the district director, the parties settled numerous issues and claimant was voluntarily paid, as of March 31, 1988, a total of $38,256.75 in disability benefits. This claim was referred to the Office of Administrative Law Judges for a formal hearing on April 24, 1991, with the sole issue being whether employer violated Section 49 of the Act, 33 U.S.C. §948a, by discharging claimant pursuant to its MMI (maximum medical improvement) program. Claimant asserted that his discharge, which consisted of the shipyard "passing [claimant] out" under its MMI program, constituted retaliation for his assertion of compensation benefits, in violation of Section 49. The administrative law judge found that, while employer "demonstrated a discriminatory act" by terminating claimant's employment, claimant nonetheless failed to establish that this discharge was motivated by discriminatory animus. The administrative law judge denied the claim and this appeal followed.

In order to establish that an employer violated Section 49, claimant must demonstrate that employer committed a discriminatory act which was motivated by discriminatory animus. *Nance v. Norfolk Shipbuilding & Dry Dock Corp.*, 20 BRBS 109, 112 (1987), *aff'd*, 858 F.2d 759, 21 BRBS 166 (CRT)(4th Cir. 1988), *cert. denied*, 492 U.S. 911 (1989); *Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 114, 117 (1987), *aff'd*, 852 F.2d 759, 21 BRBS 124 (CRT)(4th Cir. 1988). The trier-of-fact may infer discriminatory animus from circumstances demonstrated by the record, accounting for witness credibility and any disparity in the employee's treatment. *Id.*; *see Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 3 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993). Harsh discharge practices are alone not a sufficient basis upon which to find a Section 49 violation. *Holliman*, 20 BRBS at 117.

The administrative law judge reasonably found that claimant's discharge was prompted by the shipyard's view that claimant was working outside of his restrictions when assigned to either the X-31 or X-32 departments, that suitable alternate work was unavailable to claimant within employer's shipyard, and that the shipyard had no discriminatory animus against claimant because he had filed a claim or further sought benefits. The administrative law judge rationally found that the documents cited by claimant as evidence of discriminatory animus, *see* Cl. Exs. 6b, 7, were simply intended to address the problems involved with finding suitable alternate work and whether claimant was physically able to perform the lightest work available with employer. The 1980 inter-office

memorandum from Dr. Harmon to a Mr. R. H. Walker requested that the latter "exert all the influence of [his] department in trying to find suitable employment for Mr. Norville." Alternate work with employer was identified at this time. The 1988 memorandum indicated that if claimant could no longer do his present job, then the shipyard would "invoke MMI precedent and demonstrate alternate employment outside the yard." Cl. Exs. 6b, 7. In both instances, the memoranda appear to outline legitimate business concerns with an employee whose restrictions preclude work with employer. Under these circumstances, the administrative law judge, within his discretion as the trier-of-fact and after considering the documentary and testimonial evidence as a whole, *see generally Burns v. Director, OWCP*, 41 F.3d 1555, 1563, 29 BRBS 28, 39 (CRT)(D.C. Cir. 1994), could rationally find that the shipyard was entitled to explore ways to place claimant in suitable work, a legitimate way to reduce its potential compensation liability or preclude further injury, and that its actions were not taken in violation of Section 49.

Moreover, the administrative law judge's findings are supported by substantial evidence based on the record as a whole. Employer enlisted the services of a rehabilitation firm which found a number of possible jobs within claimant's restrictions as outlined by Dr. Tornberg. Medical reports from Dr. Nelson Hall, Cl. Ex. 8, and Dr. Loxley, Cl. Ex. 9a, assess claimant as totally disabled. At the hearing, claimant's counsel said that claimant is limited to "essentially sedentary work." Tr. at 9. Further, it is clear that the reorganization of some shipyard departments and what amounts to a reduction in some duplicate positions were factors that played a role in claimant's numerous reassignments, transfer to the MRA shop, and eventual discharge under the shipyard's MMI program. *See* Tr. at 94-104. Mr. Fox, one of claimant's supervisors, testified that in 1987 the shipyard was directed by the Navy to construct ships using a different method. Tr. at 95. Because of this, claimant was transferred from one location -- Shipway #6 -- to Drydock #4, and then, after 14 months, to Pier #6. Tr. at 97-98. At the latter facility were drawing clerks who already performed claimant's tasks. Tr. at 101-103, 110. In view of this, because the administrative law judge's finding of no discriminatory purpose is supported by substantial evidence, and the inference of no discriminatory animus which was drawn by him from the record as a whole is neither inherently incredible nor patently unreasonable, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1335, 8 BRBS 744 (9th Cir. 1978), *cert. denied* 440 U.S. 911 (1979), we affirm the administrative law judge's Decision and Order denying benefits. *See generally Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995).

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

SO ORDERED.

ROY P. SMITH

Administrative Appeals Judge

JAMES F. BROWN

Administrative Appeals Judge

NANCY S. DOLDER

Administrative Appeals Judge