

BRB No. 94-0265

STEVEN L. KEE)
)
 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 - Awarding Benefits of Michael P. Lesniak,
Administrative Law Judge, United States Department of Labor.

Steven L. Kee, Elizabeth City, North Carolina, *pro se*.

Before: HALL, Chief Administrative Appeals Judge, DOLDER, and McGRANERY,
Administrative Appeals Judges.

PER CURIAM:

Claimant, without the aid of counsel, appeals the Decision and Order - Awarding Benefits (91-LHC-0910) of Administrative Law Judge Michael P. Lesniak 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 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); 20 C.F.R. §§802.211(e), 802.220.

Claimant, a welder, suffered injuries to his feet as a result of his work for this employer. Specifically, after being diagnosed with tarsal tunnel syndrome, claimant underwent surgery on October 13, 1983; claimant thereafter returned to work without restrictions in November 1983. He continued to work in his usual job until his dismissal for alleged insubordination on August 1, 1984. EX 10 at 2.

In his Decision and Order, the administrative law judge found that claimant's tarsal tunnel syndrome arose out of and in the course of his employment and that claimant was thus entitled to an award of temporary total disability compensation for the period of time during which he was unable to work as a result of his surgery and its recovery period, an award under the schedule for a 5 percent

permanent impairment to his left foot, interest, and an attorney's fee. The administrative law judge also found that claimant's discharge by employer was not in violation of Section 49 of the Act, 33 U.S.C. §948a.

Claimant, appealing without representation by counsel, challenges the administrative law judge's findings. Employer has not responded to claimant's appeal.

Before the administrative law judge, claimant argued that his dismissal from this employer's facility constituted a violation of Section 49.¹ In order to establish a *prima facie* case of a Section 49 violation, claimant must establish that employer committed a discriminatory act motivated by discriminatory animus or intent. *See Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124 (CRT)(4th Cir. 1988), *aff'g* 20 BRBS 114 (1987); *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103 (CRT)(D.C. Cir. 1988), *aff'g* 19 BRBS 261 (1987). The administrative law judge may infer animus from circumstances demonstrated by the record. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd on other grounds sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993).

In the instant case, the administrative law judge credited the testimony of Mr. Tucker, claimant's supervisor, that claimant's discharge was based upon his insubordination and was unrelated to the filing of his compensation claim. The factfinder is entitled to weigh the evidence and draw his own inferences from it; such a weighing of the evidence is within the discretionary purview of the administrative law judge. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Mr. Tucker's credited testimony constitutes substantial evidence in support of the administrative law judge's finding that employer discharged claimant for insubordination. We therefore affirm the administrative law judge's determination that employer's discharge of claimant did not constitute a Section 49 violation. *See generally Holliman*, 852 F.2d at 759, 21 BRBS at 124 (CRT); *Geddes*, 851 F.2d at 440, 21 BRBS at 103 (CRT); *Leon v. Todd Shipyards Corp.*, 21 BRBS 190 (1988).

We next consider the awards of permanent partial and temporary total disability compensation entered by the administrative law judge. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). The administrative law judge, in the instant case, awarded claimant permanent partial disability compensation for a five percent permanent impairment to claimant's left foot, based upon the opinion of Dr. Morales, the sole physician of record who rendered an assessment of claimant's impairment. As the administrative law judge's

¹Section 49 provides in pertinent part that:

It shall be unlawful for any employer . . . to discharge or in any manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation

credibility determination is rational and within his authority as factfinder, and as Dr. Morales' opinion constitutes substantial evidence in support of the administrative law judge's ultimate finding, we affirm the administrative law judge's determination that claimant is entitled to compensation for a five percent impairment of his foot pursuant to Section 8(c)(4) of the Act, 33 U.S.C. §908(c)(4). *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987).

Lastly, the administrative law judge found that claimant is entitled to compensation for an undetermined period of temporary total disability. Specifically, after awarding claimant temporary total disability compensation, the administrative law judge stated that he was "not exactly certain how long [claimant] was out of work due to surgery on his left foot," *see* Decision and Order at 9; the administrative law judge subsequently directed the parties to submit a stipulation on this issue. The administrative law judge's decision to render an award without a commencement and termination date makes it impossible for the Board to apply its standard of review regarding this issue.² Accordingly, we remand this case to the administrative law judge for a determination of the period of claimant's temporary total disability for which he is entitled to compensation.

Accordingly, the case is remanded to the administrative law judge for consideration of the dates for which temporary total disability benefits are due. In all other respects, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

²We note that it is uncontroverted that claimant, following his surgery, returned to work sometime in November 1983.