BRB No. 96-0290

FRANCISCO E. LEOS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOUTHWESTERN BARGE FLEET SERVICE	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Harry C. Arthur, Houston, Texas, for claimant.

Thomas N. Lightsey, III (Fulbright & Jaworski), Houston, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (94-LHC-2892) of Administrative Law Judge Daniel L. Leland 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a welder, injured his back while shovelling wet sand on September 7, 1993. After receiving medical treatment, claimant returned to work that same day and was assigned to light-duty work in employer's tool room until the last day he reported to work, September 16, 1993. Thereafter, employer voluntarily paid claimant temporary total disability benefits until December 20, 1993. In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on December 8, 1993, and that as of that date, claimant sustained no impairment due to the work-related incident of September 7, 1993; accordingly, he denied benefits.

On appeal, claimant challenges the administrative law judge's finding that he is not temporarily totally disabled, contending that the work which he performed in employer's tool room between September 7, 1993 to September 16, 1993, was sheltered employment and that he has yet to reach maximum medical improvement. Employer responds, urging affirmance of the administrative law judge's decision.

We first address claimant's assertion that the administrative law judge erred in determining that claimant's continued employment with employer from September 7, 1993 through September 16, 1993, was not sheltered employment, and his subsequent denial of ongoing temporary total disability compensation. 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 and Construction Co.*, 17 BRBS 56 (1985). In order 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. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Once claimant has established a *prima facie* case of total disability, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *see generally New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer may meet this burden by offering claimant a light-duty job in its facility; such a position may constitute evidence of suitable alternate employment if the job is within claimant's medical restrictions and the tasks are necessary and profitable to employer's business. *See Peele v. Newport News Shipbuilding and Dry Dock Co.*, 20 BRBS 133 (1987); *Darden v. Newport News Shipbuilding and Dry Dock Co.*, 18 BRBS 224 (1986).

In his Decision and Order, the administrative law judge concluded that there was no indication that claimant's tool room work was sheltered employment. Claimant testified that his duties in the tool room consisted of distributing tools, repairing air hoses and gauges, and fabricating gaskets. HT at 64-65, 88-89. Claimant's foreman testified that the tool room is a light-duty work assignment with no lifting requirements and that workers assigned there are instructed to repair air hoses and make gaskets. HT at 122. Employer's office manager testified that claimant worked in the tool room from September 7, 1993 to September 16, 1993 as his light-duty assignment and was paid his regular wages. Based upon this testimony, the administrative law judge's findings regarding claimant's work in employer's tool room are rational and supported by the record. *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). Accordingly, we affirm the administrative law judge's determination that claimant's employment in employer's tool room from September 7, 1993 through September 16, 1993, was not sheltered employment.

Next, after considering all of the medical evidence of record, the administrative law judge relied upon the opinions of Drs. Freeman and Pennington, over the contrary opinion of Dr. Donovan, in concluding that claimant did not sustain a compensable impairment subsequent to December 8, 1993. On December 8, 1993, Dr. Freeman examined claimant, reviewed claimant's medical reports including a September 28, 1993 x-ray interpretation demonstrating no abnormalities, and concluded that claimant had no permanent impairment. CX 10; EX 13 at 56. Dr. Pennington subsequently opined that claimant sustained a low back sprain/strain, that there is no objective data to indicate that claimant had any permanent impairment as a result of the work-related incident on September 7, 1993, and that claimant can return to work with no restrictions. CX 12; EX 13 at 35, 40, EX 25. In contrast, Dr. Donovan, on January 30, 1995 and February 23, 1995, concluded that claimant is not able to perform his regular work due to lumbar spondylosis without myelopathy, and thus, imposed physical restrictions on claimant's duties; on deposition, however, Dr. Donovan agreed that the medical assessments of Drs. Pennington and Freeman were more reliable than his own inasmuch as he did not commence treating claimant until January 1995. EX 24 at 29-30. The administrative law judge's decision to rely upon the opinions of Drs. Freeman and Pennington is rational and within his authority as factfinder. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, as these credited opinions constitute substantial evidence that claimant sustained no compensable impairment subsequent to December 8, 1993, we affirm the administrative law judge's determination that claimant sustained no impairment subsequent to December 8, 1993.

Lastly, claimant contends that the administrative law judge erred in finding that he had reached maximum medical improvement as of December 8, 1993. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1984). Thus, a finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984). In determining that claimant reached maximum medical improvement on December 8, 1993,
the administrative law judge relied upon the opinion of Dr. Freeman over the opinion of Dr. Donovan, noting that Dr. Donovan agreed that Dr. Freeman's assessment of claimant's condition in December 1993 was more reliable than his own. We hold that the administrative law judge committed no error in relying upon the opinion of Dr. Freeman; thus, as the administrative law judge rationally relied upon Dr. Freeman's opinion to find that claimant's condition reached maximum medical improvement on December 8, 1993, that finding is affirmed. *See generally Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986).

Accordingly, the Decision and Order-Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge