BRB No. 97-725

FRANK KEPHART	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:_____
	)	
v.	)	
	)	
	)	
PENN TERMINALS	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Brian R. Steiner, Philadelphia, Pennsylvania, for claimant.

Andrew B. Klaber (Weber, Goldstein, Greenberg & Gallagher), Pittsburgh, Pennsylvania, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (94-LHC-1168) of Administrative Law Judge Ainsworth H. Brown 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was injured on June 15, 1993, during the course of his employment as a longshoreman. He was struck by the trailer of a yard horse and the tires of the trailer ran over the lower half of his legs. He was taken to the hospital where all x-rays were negative except for a possible stress fracture in his right foot. Emp. Ex. 1. Since the incident, claimant has complained of pain in his left knee, low back and right ankle. After several months of physical therapy, in September 1993, Dr. Avart released claimant to return to work with restrictions. Emp. Exs. 2-5. Claimant attempted to drive a forklift, yard horse and

crane but could not continue due to pain. There was no light duty work for him. In October, Dr. Avart again stated that claimant could return to work with restrictions, and employer assigned claimant to use a broom and shovel to sweep the warehouse clean. Because of pain, claimant was only able to retain this position for approximately one week. Tr. at 67-69.

Claimant then was treated by Dr. Bonner. Cl. Ex. 6; Emp. Exs. 6, 13. During the course of this treatment, employer contacted Dr. Valentino, who examined claimant and could find no evidence to substantiate an on-going injury. Dr. Valentino reported that claimant had fully recovered from the June injury and could return to his usual work. Emp. Ex. 14. Therefore, employer terminated benefits. After further treatment, but finding no objective evidence to support claimant's continued complaints of pain, on February 21, 1994, Dr. Bonner also released claimant to return to light duty work. In dispute over the nature and extent of claimant's condition, the parties agreed to an independent examination conducted by Dr. Lee arranged by the Department of Labor. Dr. Lee diagnosed possible lumbar radiculopathy and ordered an MRI of the lumbar spine with subsequent treatment as necessary. He concluded that claimant was partially disabled and not able to return to work. Emp. Ex. 15. Based on Dr. Lee's evaluation, employer reinstated claimant's benefits. On August 3, 1994, Dr. Valentino again examined claimant and stated that he was fully recovered from the June 1993 work injury. As he could find no evidence of an on-going injury, and the MRI ordered by Dr. Lee was normal, Emp. Ex. 11, he believed claimant could return to his pre-injury work as a longshoreman. Emp. Ex. 16.

In September 1994, because he was unhappy with Dr. Bonner, claimant began treating with Dr. Kaplan, and he continues to do so. Tr. at 82. Dr. Kaplan, a physiatrist, diagnosed lumbosacral radiculopathy, chronic pain syndrome, and chronic myofascial pain related to the June 1993 injury. Cl. Ex. 17 at 33. He does not believe claimant can return to his usual work; however, he has released him to light/medium duty. Cl. Ex. 17 at 28, 31. According to employer, there is no work which falls within the restrictions Dr. Kaplan has established; however, claimant's pre-injury job is available. Claimant has not returned to work for employer, but instead he filed this claim for total disability benefits.

The administrative law judge determined that claimant failed to show that he cannot return to his usual work. He credited the opinion of Dr. Valentino over that of Dr. Kaplan, found there is no objective evidence to support claimant's continued complaints, and noted that the surveillance report and video, albeit just a brief accounting of claimant's activities, were sufficient to show that the activities were inconsistent with the complaints of pain.[1] Consequently, he denied benefits. Decision and Order at 5, 9-10. Claimant appeals this decision, and employer responds, urging affirmance.

[1]The surveillance report states that claimant was seen and videotaped walking, standing and bending for long periods of time. He was also seen and videotaped using a post-hole digger, garden hoe, and hammer, and catching and stacking bricks. Emp. Exs. 33-34.

Claimant contends the administrative law judge erred in placing the burden of establishing total disability on him. Specifically, he states that he presented evidence of total disability, thereby shifting the burden to employer. Contrary to claimant's argument, he has the burden of establishing the extent of his disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). To do so, he must establish a *prima facie* case of total disability by demonstrating his inability to perform his usual work. Claimant's argument that mere presentation of evidence of total disability is sufficient to establish a *prima facie* case of total disability is erroneous. There is no presumption to aid him in establishing total disability; thus, he must establish his inability to perform his usual work by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996); *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994). Only if claimant meets this burden must employer then show the availability of suitable alternate employment to defeat the claim of total disability. *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979).

In this case, there is substantial evidence to support the administrative law judge's determination that claimant failed to establish a *prima facie* case of total disability. The administrative law judge credited the negative objective evidence of record; all the x-rays, MRIs and all but one of the EMGs report negative findings. Cl. Exs. 4-5; Emp. Exs. 6-12. Further, although claimant's treating physiatrist, Dr. Kaplan, concluded claimant cannot return to work, the administrative law judge found significant that Dr. Kaplan admitted that the only positive objective evidence of injury was a portion of an EMG he conducted of claimant's lower extremities in June 1995, which translated to the lowest level of abnormality. Cl. Ex. 17 at 66-67, 73-74. Moreover, the administrative law judge rationally credited Dr. Valentino's opinion that claimant is fully recovered and can return to his usual work over Dr. Kaplan's opinion. It is within the discretionary powers of the administrative law judge to determine the credibility of witnesses and to evaluate and draw inferences from the medical evidence of record. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30 (CRT) (9th Cir. 1988); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Additionally, the administrative law judge may find that a claimant can return to his usual work despite the claimant's complaints of pain. *Peterson v. Washington Metropolitan Area Transit Authority*, 13 BRBS 891 (1981). In light of the evidence of record, including the surveillance tape and the objective findings, it was reasonable for the administrative law judge to credit Dr. Valentino's opinion over Dr. Kaplan's. Therefore, we reject claimant's contention of error, and we affirm the denial of benefits. *Chong v. Todd Pacific Shipyards Corp.,* 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP,* 909 F.2d 1488 (9th Cir. 1990).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge