BRB No. 00-0730

STANLEY W. BARTLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: April 12, 2001
	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

David B. Condon (Welch & Condon), Tacoma, Washington, for claimant.

Richard M. Slagle (Slagle, Morgan & Ellsworth LLP), Seattle, Washington, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Awarding Benefits (99-LHC-1884) of Administrative Law Judge Edward C. Burch 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, a superintendent for employer, was walking on the deck of a ship on June

5, 1998, when he slipped and fell onto the steel deck. He testified that he immediately experienced pain in his neck and lower back, and tingling in his arms and legs. Claimant was terminated by employer on June 8, 1998. Although claimant did not file a report of injury with employer until June 9, 1998, and did not file a claim under the Act until June 13, 1998, claimant testified that he thought employer knew of his injury prior to his termination. Claimant is receiving ongoing treatment by Dr. Patterson for cervical and lumbar dysfunction. He sought disability compensation and medical benefits under the Act.

In his decision, after reviewing the evidence pursuant to Section 20(a), 33 U.S.C. §920(a), the administrative law judge found the evidence as a whole establishes that claimant suffered a work-related injury to his back, neck and shoulders on June 5, 1998. The administrative law judge also found that claimant was unable to work from June 6 to July 18, 1998. However, he concluded that claimant does not suffer from any residual disability resulting from the injury on June 5, 1998, and thus is not entitled to benefits after July 18, 1998. Moreover, the administrative law judge found that employer's termination of claimant was not motivated by discriminatory animus or intent against claimant.

Claimant contends on appeal that the administrative law judge erred in finding that claimant could have returned to work on July 18, 1998, and thus erred in denying continuing benefits. In addition, claimant contends that the administrative law judge erred in finding that claimant was not fired in violation of Section 49 of the Act, 33 U.S.C. §948a. Employer responds, urging affirmance of the administrative law judge's decision.

Specifically, claimant contends that the administrative law judge erred in finding that he could have returned to work on July 18, 1998, as Dr. Patterson has not released claimant for return to work and Dr. Reif, the independent medical examiner, could not offer an opinion of claimant's condition prior to her examination in March 1999. To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *See, e.g., Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). In adjudicating a claim an administrative law judge is not bound to accept the opinion or theory of an particular witness; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

In the instant case, the administrative law judge based his finding that claimant was able to return to work after July 18, 1998, on: Dr. Patterson's opinion that the regular recovery period for this type of injury would be six weeks, *see* Cl. Ex. 27 at 239, the fact that the objective tests were all negative, the videotaped surveillance of claimant, *see* Emp. Ex. 14, which the administrative law judge found indicates that claimant is consciously trying to

influence the appearance of his disability, the opinion of Dr. Patterson that there is nothing that would physically limit claimant from being able to return to work, *see* Cl. Ex. 27, and Dr. Reif's opinion that claimant is capable of returning to his usual work, *see* Emp. Ex. 13. Although Dr. Patterson has not released claimant to return to work, he testified that claimant's inability to work is based on his symptoms, rather than on physical restrictions placed on him by his physicians. *See* Cl. Ex. 27 at 244-246. The administrative law judge thoroughly reviewed all of the evidence of record, rejected claimant's complaints of pain, and concluded that any disability due to the work-related injury on June 5, 1998 had resolved as of July 19, 1998. We affirm this finding as it is rational and supported by substantial evidence. *See generally Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem*., 909 F.2d 1488 (9th Cir. 1990)(table).

Claimant also contends that the administrative law judge erred in finding that he was not fired in violation of Section 49 of the Act. Section 49 of the Act prohibits an employer from discharging or discriminating against an employee based on his involvement in a claim under the Act, and if the employee can show he is the victim of such discrimination, he is entitled to reinstatement and back wages. 33 U.S.C. §948a. To establish a *prima facie* case of discrimination, a claimant must demonstrate that his employer committed a discriminatory act motivated by discriminatory animus or intent. *Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124(CRT) (4th Cir. 1988); *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103(CRT) (D.C. Cir. 1988), *aff'g Geddes v. Washington Metropolitan Area Transit Authority*, 19 BRBS 261 (1987); *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

Specifically, claimant contends that "there is a lack of rational evidence to support the conclusion that claimant's termination on June 8, 1998 was not related to his injury on the previous Friday." Claimant's brief at 7. Contrary to claimant's contention, it is claimant's burden to demonstrate discriminatory animus by employer. *See Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996). The administrative law judge found that the credible evidence suggests that the managers who fired claimant did not know about his injury or intent to file a claim until after he was terminated, and that employer was considering the possibility of terminating claimant prior to the injury. The evidence of record indicates that claimant began having problems with his job when he went through a difficult divorce. In 1997, employer sent claimant to counseling during a paid six month leave of absence in order to improve his performance. H. Tr. at 68; Cl. Ex. 25. The record also includes a recent job evaluation in which claimant's job performance was reported to be unacceptable. Emp. Ex. 9. In addition, the record includes correspondence between management and employer's counsel regarding potentially terminating claimant's employment, and what steps should be taken. Emp. Ex. 9. A management official testified that there was a confrontation with

claimant on June 8 regarding his bonus, and that claimant was offered a severance package at that time, which he refused. H. Tr at 176. He was terminated at that time. It was not until the next day, June 9, that claimant filed a report of injury and later a claim for benefits. Cl. Ex. 1a. As the administrative law judge's finding that claimant did not establish discriminatory animus or intent by employer in terminating claimant's employment is supported by substantial evidence and claimant has raised no reversible error on appeal, we affirm the administrative law judge's finding that claimant's termination did not violate Section 49 of the Act. *See generally Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge