BRB No. 02-0396

RAFAEL TORRUELLA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CADDELL DRY DOCK AND REPAIR COMPANY	)	DATE ISSUED: Feb. 21, 2003
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Norman S. Goldsmith, New York, New York, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (00-LHC-0856) of Administrative Law Judge Paul H. Teitler 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 shop welder, suffered injuries to his lower back, neck, right hip and right

knee when he fell into a hole on March 15, 1994.[1] Claimant has not returned to any work since the accident. Employer paid compensation for temporary total disability from March 16, 1994, through June 4, 1998, and permanent partial disability benefits for a 15 percent scheduled loss to the right lower extremity. Claimant sought compensation for continuing temporary total disability.

In his decision, the administrative law judge concluded that claimant's lower back and cervical injuries had resolved and that compensation for his residual knee injury is limited to the 15 percent impairment to the lower extremity for which he had already been compensated. In this regard, the administrative law judge found that employer established the availability of suitable alternate employment within its own facility, and that claimant therefore is entitled to no further benefits under the Act.

Claimant appeals, arguing that the administrative law judge erred in denying him continuing total disability benefits. Employer responds, urging affirmance.

Contrary to claimant's contention that the administrative law judge failed to take into consideration claimant's neck and back condition when determining his ability to work, the administrative law judge found that the injuries had fully resolved. Decision and Order at 20. He based his conclusion upon the opinions of Drs. Swearingen, Bercik and Rosenblum that claimant suffered no ongoing impairments to his neck and back. *See* EXs 15, 17. Dr. Swearingen examined claimant six times between January 1997 and April 1999, releasing claimant for work in June 1998. At the time of his release, Dr. Swearingen found that claimant had no residual impairments to his back and neck. EX 15. His conclusion was supported by the opinions of Drs. Bercik and Rosenblum, who examined claimant and concluded that there were no residual impairments to his back and neck. Although Drs. Post and Head noted claimant's subjective complaints of pain and stiffness to his neck and back, the administrative law judge noted that these physicians had not administered any objective tests to support their diagnosis of cervical and lumbar derangement. HT at 140. Thus, the administrative law judge did not fail to consider the injuries to claimant's neck and back but found them fully resolved and no longer a limitation on claimant's ability to work.

We reject claimant's contention that the administrative law judge erred by failing to give determinative weight to the opinions of Drs. Post and Head, who found that claimant remains incapacitated by his neck and back injuries. It is well-established that the administrative law judge determines the weight to be accorded to the medical evidence of record and that the Board may not re-weigh that evidence. *See generally Director, OWCP*

[1]Claimant subsequently underwent two surgeries for repair of his knee injury.

v. Jaffe New York Decorating, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *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); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). In the instant case, the administrative law judge rationally found that the opinions of Drs. Swearingen, Bercik, and Rosenblum were consistent with the objective evidence. Moreover, in rendering this determination, the administrative law judge did not, as claimant alleges, spuriously reject the opinions of Drs. Post and Head based on their underlying qualifications or lack thereof but because he found them unreasoned and based not only on claimant's subjective complaints, but also without full knowledge of claimant's medical and vocational history. As the administrative law judge's weighing of the evidence is rational and his finding that claimant's neck and back injuries had resolved is supported by substantial evidence, this finding is affirmed.

Claimant next argues that the administrative law judge erred in finding that he is capable of returning to work with regard to his knee injury; thus, claimant alleges he remains totally disabled. If claimant establishes his inability to perform his usual work as a result of his injury, *see Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd* 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001), the burden of proof shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Employer may tailor a job to claimant's specific restrictions so long as the work is necessary to employer's operation. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

In finding that claimant could return to work, the administrative law judge relied upon the opinions of Drs. Swearingen, Bercik, and Rosenblum, as supported by employer's evidence of both a continuing job offer and its willingness to adapt the job to any physical limitations claimant may suffer. EX 24. For the reasons discussed above, we reject claimant's contention that the administrative law judge erred in giving greater weight to the opinions of Drs. Swearingen, Bercik and Rosenblum than to those rendered by Drs. Post and Head.[2] *See* EXs 11-17. Thus, the administrative law judge rationally found that the only restriction upon claimant's ability to perform his usual job was a limitation on knee flexion imposed by Dr. Swearingen.[3] In denying total disability benefits, the administrative law

[2]Although claimant alludes to the administrative law judge's failure to consider the opinion of Dr. Vaccarino, an orthopedic surgeon who examined claimant in 1994, CX 10, *see* Appeal Brief at 15, claimant raises no specific contentions of error in the administrative law judge's failure to do so. On appeal, claimant also does not argue that the administrative law judge committed any error in failing to give weight to the opinions of Drs. Cordaro and Hamila because the medical qualifications of these physicians are absent and the administrative law judge found their reports to offer little credible insight into claimant's status. Decision and Order at 19.

[3]Drs. Bercik and Rosenblum found claimant capable of returning to his usual pre-

judge found that claimant could perform his usual employment with this restriction and that employer offered to modify the position as needed to comply with Dr. Swearingen's restriction. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986); EX 24. As the administrative law judge's weighing of the evidence is rational and his finding that claimant could return to work in his usual welder position, as modified, is supported by substantial evidence, we affirm the administrative law judge's finding that claimant is not entitled to total disability compensation. *See 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) (table).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

injury job duties. *See* EXs 11-17.