BRB No. 87-2704

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| CARLTON FOXWORTH | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| ELLER & COMPANY | ) | DATE ISSUED: |
| | ) | |
| and | ) | |
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| MIDLAND INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Henry G. Terhoeve (Mathews, Atkinson, Guglielmo, Marks & Day), Baton Rouge, Louisiana, for employer/carrier.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (85-LHC-2246) of Administrative Law Judge James W. Kerr, Jr., 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, on September 16, 1983, while working for employer as a forklift driver, sustained an injury to his back when he attempted to carry a sack of coffee weighing approximately 200 pounds. Thereafter, claimant sought medical treatment for his back. Claimant unsuccessfully attempted to return to work during the week of December 11, 1983, but has subsequently not worked since December 17, 1983. Employer voluntarily paid claimant temporary total disability compensation from September 17, 1983 through May 13, 1985. 33 U.S.C. §908(b). Claimant subsequently filed a claim for permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant is incapable of performing his previous employment duties with employer, that claimant reached maximum medical improvement on April 30, 1985, and that employer failed to establish the availability of suitable

alternate employment; thus, the administrative law judge awarded claimant temporary total disability compensation from September 17, 1983 through December 10, 1983, and from December 18, 1983 through April 30, 1985, and permanent total disability compensation thereafter. 33 U.S.C. §908(a), (b).

On appeal, employer asserts that the administrative law judge erred in evaluating the evidence and finding claimant unable to return to his previous employment duties with employer. Claimant has not responded to this appeal.

The administrative law judge found that claimant is incapable of resuming his usual employment duties as a forklift driver/longshoreman with employer. Employer argues that the administrative law judge erred in his evaluation of the medical evidence of record regarding claimant's ability to return to this work. We disagree. It is well-established that claimant has the burden of establishing the nature and extent of his disability. *See Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). 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. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In the instant case, the administrative law judge, after setting forth and discussing the medical evidence of record, concluded, based upon the medical opinions of Drs. Jarrott and Maumus, as well as the testimony and observation of claimant at the formal hearing, that claimant was incapable of safely returning to his former employment with employer due to the effects of the medications prescribed for treatment of his psychological injury. The administrative law judge further found that even if claimant could return to his former work from a psychiatric standpoint, the physical restrictions imposed by Dr. Jarrott would also preclude his return.

Dr. Jarrott testified that the medications prescribed for claimant, specifically Elavil and Loxitane, produce varying degrees of tranquilization and sedation, and that these medications slow claimant's reaction time, blunt claimant's awareness and concentration, and interfere with diligency. *See* Hearing Transcript at 28-29. Dr. Jarrott additionally opined that claimant restrict his activities to those which would not produce pain, that claimant alternatively sit, stand and lift, and that claimant not lift more than 50 pounds and not repetitively lift more than 25 pounds. *Id.* at 24-26; CX 1. Similarly, Dr. Maumus stated that the medications prescribed for claimant were most likely causing claimant's delayed physical and mental responses, and lack of spontaneity and alertness. *See* CX 8 at 3-4. The administrative law judge, citing the Physicians Desk Reference (41st ed. 1987), noted that claimant's medication causes tranquilizing and sedating effects. Decision and Order at 7. Additionally, the administrative law judge, in commenting upon claimant's demeanor at the formal hearing, noted the slowness in claimant's speech and physical movements, as well as claimant's general tranquilized state. *Id.*

It is well-established that the administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, and that he is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In the instant case, employer asks that the Board reweigh the evidence in its favor, which we are not empowered to do. 33 U.S.C. §921(b)(3). As the evidence relied on by the administrative law judge, particularly the opinions of Drs. Jarrott and Maumus, constitutes substantial evidence to support his finding that claimant cannot perform his usual employment duties with employer, it must be affirmed.[1] *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We therefore affirm the administrative law judge's determination that claimant established a *prima facie* case of total disability. As employer has failed to present evidence regarding the availability of suitable alternate employment, claimant's award of permanent total disability compensation is also affirmed. *See Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[1] The administrative law judge specifically noted that although claimant worked as a forklift driver for employer, claimant was additionally required to perform other work, as evidenced by the 200 pound sacks of coffee which claimant was in the process of lifting at the time of his work-related injury. *See* Decision and Order at 7.