BRB No. 00-1011

MARIE VAN DYKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAERSK PACIFIC, LIMITED	)	DATE ISSUED: June 20, 2001
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Additional Benefits of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Thomas J. Pierry, III (Pierry & Moorhead, L.L.P.), Wilmington, California, for claimant.

William N. Brooks, II (Law Offices of James P. Aleccia), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Additional Benefits (99-LHC-2196, 2197) of Administrative Law Judge Paul A. Mapes 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).

On April 16, 1997, claimant injured her lower back when she fell backwards off a

stool during the course of her employment for employer as a gate clerk. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from April 17 to May 16, 1997, from May 19 to June 8, 1997, and from July 30 to October 1, 1997. Claimant thereafter returned to work for employer as a gate clerk until November 21, 1997, when she tripped and fell, injuring her knees and neck. Employer voluntarily paid compensation for temporary total disability from December 17, 1997, to May 14, 1998. Employer terminated compensation payments based on medical evidence that claimant could return to her usual employment as a gate clerk. Claimant sought additional compensation for temporary total disability from May 15 to May 26, 1998, when the parties stipulated that claimant's neck condition reached maximum medical improvement. Claimant sought continuing compensation for permanent total disability from May 26, 1998. 33 U.S.C. §908(a).

In his decision, the administrative law judge found that claimant's lower back condition from her April 16, 1997, injury reached maximum medical improvement on February 19, 1998. Moreover, the administrative law judge found that claimant's work injuries permanently aggravated claimant's pre-existing degenerative disc disease of the cervical and lumbar spine. Finally, the administrative law judge found that, notwithstanding her neck and back conditions, claimant can return to her usual employment as a gate clerk as of May 14, 1998. Accordingly, the administrative law judge denied the claim for additional compensation under the Act.

On appeal, claimant challenges the administrative law judge's finding that she is able to return to her usual employment. Employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding that her job duties as a gate clerk do not require repetitive overhead reaching, from which she is permanently restricted by her treating physician, Dr. O'Hara. Specifically, claimant contends that the administrative law judge erred by addressing only whether repetitive overhead reaching was necessary to install seals; claimant asserts that overhead reaching also was required to check seals. 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 & Constr. Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant must show that she is unable to perform her usual work due to her work-related injury by comparing claimant's restrictions with her usual job duties. *See Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985).

In his decision, the administrative law judge initially determined the duties of a gate clerk. Specifically, he rejected claimant's testimony that she is required to carry printer

paper weighing as much as 30 pounds at least once a day and to reach overhead approximately 150 times a day to check or install container seals. The administrative law judge credited the testimony and report of Malcolm Howard, a vocational consultant, that a gate clerk must reach above shoulder level to attach seals, but that such reaching is optional or performed 99 percent of the time by the truck driver transporting the container. *Compare* Tr. at 239 *with* EX 15 at 321-322.[1] In support of his decision to credit Mr. Howard, the administrative law judge noted claimant's pre-hearing testimony that she usually would not leave her booth when there were numerous containers arriving. EX 14 at 233. The administrative law judge also noted claimant's inconsistent hearing testimony that she would sometimes have the driver place the container seal when the installation site was beyond her reach; however, she denied on cross-examination having drivers affix container seals. *Compare* Tr. at 50 *with* Tr. at 125-126. The administrative law judge concluded that claimant failed to establish that she is unable to return to her usual employment as a gate clerk, crediting, *inter alia*, the opinions of Drs. London and Haldeman that claimant is able to work as a gate clerk. Tr. at 179-180; EX 7 at 137a; EX 8 at 153. The administrative law judge rejected the opinion of Dr. O'Hara, claimant's treating physician, finding Dr. O'Hara's opinion to be based on claimant's description of her job, which the administrative law judge rejected.[2] CX 24 at 68-69, 84-87.

[1]Specifically, the administrative law judge credited Mr. Howard's testimony that the truck driver attaches the seal "99 percent of the time." Tr. at 239. The administrative law judge also credited Mr. Howard's report that a gate clerk may be required to reach above shoulder level up to approximately 65 times per shift to install seals. EX 15 at 321-322. Any error in the administrative law judge's characterization of the report as stating that claimant must reach overhead 65 times per hour is harmless, as the mistake does not lead to the conclusion that the administrative law judge erred in concluding that claimant is able to return to her usual employment.

[2]The administrative law judge also stated there is "strong circumstantial evidence" that

Contrary to claimant's contention on appeal, her testimony does not unequivocally establish that checking and installing seals are distinct activities, each requiring overhead reaching. In claimant's testimony, that she would look up to check seal numbers and "Gen Set" numbers located on the front end of the container, there is no description of these activities as entailing overhead reaching separate from her reaching to install seals. Tr. at 46, 51-52. In response to direct questioning as to whether her job required overhead reaching, claimant testified, "[W]e always had to check for seal numbers and also put on our own seal." Tr. at 49. In response to claimant's counsel's question regarding what claimant would do when checking a seal, she testified, "so I had to reach up and look at their seal . . .[W]e would generally have to put our own seal on there. . . ." Tr. at 49-50. Moreover, the testimony of Mr. Howard addresses overhead reaching solely as a function of installing seals. Tr. at 239, 248-249. Inasmuch as the credited testimony of Mr. Howard states that claimant is required to reach overhead only to install seals and claimant's testimony in this regard does not unequivocally establish that checking seals is a separate duty requiring overhead reaching, we hold that the administrative law judge rationally found that claimant failed to establish that her job duties as a gate clerk include repetitive overhead reaching. *See generally Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994).

Claimant next contends that the administrative law judge erred in relying on hearsay evidence to find that claimant's job duties as a gate clerk do not require repetitive, overhead reaching. Specifically, claimant contends that the administrative law judge erred by crediting Mr. Howard's testimony regarding the job duties because Mr. Howard did not personally observe the job duties of a gate clerk but instead relied on the job description provided by employer's Safety Manager, Mr. Blackman. Moreover, claimant contends that she was denied due process because she was not afforded an opportunity to cross-examine Mr. Blackman in this regard.

The Board will not interfere with credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978). The administrative law judge has great discretion concerning the admission of evidence, and he is not bound by any formal rules in making

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claimant would have stopped working at the end of December 1997, even if she had not been injured. Claimant's husband had decided to retire, and they were to move to a house they owned three and one-half hours away from Long Beach. Decision and Order at 4, 13.

evidentiary determinations. *See* 33 U.S.C. §923; 20 C.F.R. §702.339. Hearsay evidence is generally admissible and may be credited by the administrative law judge if it is considered reliable. *See Richardson v. Perales*, 402 U.S. 389 (1971); *Powell v. Nacirema Operating Co., Inc*., 19 BRBS 124 (1986). Inasmuch as hearings before the administrative law judge follow relaxed standards of admissibility, the admissibility and credibility of evidence depends only on whether it is such evidence as a reasonable mind might accept as probative. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968); *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). The relaxed admissibility standard for hearsay evidence does not dispense with the right of cross-examination. *Southern Stevedoring Co. v. Voris*, 190 F.2d 275 (1951).

It is well-established that the administrative law judge has the discretion to credit the opinion of a vocational expert which is based in part on interviews and information gathered from third parties. *See, e.g., Lacy v. Raley's Emergency Road Service*, 23 BRBS 432 (1990), *aff'd mem.*, 946 F.2d 1565 (D.C. Cir. 1991). Moreover, the record establishes that Mr. Blackman was present at the formal hearing. Tr. at 69-73. Claimant moved that Mr. Blackman be excluded from the hearing room, whereupon employer stated that he would not be called as a witness, preferring to have him remain in the hearing room to offer counsel assistance. Tr. at 70, 73. Claimant did not object to employer's decision or request that Mr. Blackman testify, thereby foregoing any opportunity to cross-examine Mr. Blackman at the hearing and waiving her right to object on appeal. We therefore reject claimant's contention that she did not have an opportunity to question Mr. Blackman as to his description of her job duties as a gate clerk.[3] *See Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990); *Longo v. Bethlehem Steel Corp.*, 11 BRBS 654 (1979). Accordingly, the administrative law judge acted within his discretion in crediting the testimony and report of Mr. Howard, based in part on information obtained from Mr. Blackman.

Finally, we reject claimant's challenge to the administrative law judge's reliance on the opinions of Drs. London and Haldeman. Both physicians stated that claimant is capable of performing her usual work as a gate clerk, Tr. at 180, EX 7 at 137, and Dr. Haldeman stated his opinion in this regard after considering Mr. Howard's description of the gate clerk position. EX 8 at 155. Contrary to claimant's contention, the administrative law judge is not required to credit the opinion of her treating physician, Dr. O'Hara, having found the basis for his opinion to be claimant's inaccurate description of her job duties. Thus, we affirm the administrative law judge's weighing of the medical evidence as it is rational, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954

[3]Moreover, during claimant's cross-examination of Mr. Howard at the formal hearing, claimant had ample opportunity to question Mr. Howard as to his reliance on Mr. Blackman's description of the job duties of a gate clerk. *See* Tr. at 252.

(1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), and his conclusion that claimant is able to return to her usual employment as a gate clerk as it is supported by substantial evidence.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge