BRB No. 01-0677A

ROBERT J. STEVENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GENERAL CONTAINER SERVICES	)	DATE ISSUED:APR 30, 2003
	)	
and	)	
	)	
MANAGED CARE-USA SERVICES INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Denying Claimant=s Motion to Admit New Medical Evidence and Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

T. Keith Marshall, III (Maritime Legal Resources, PC), Charleston, South Carolina, for claimant.

Stephen E. Darling (Haynsworth Sinkler Boyd P.A.), Charleston, South Carolina, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Denying Claimant=s Motion to Admit New Medical Evidence and the Decision and Order Denying Benefits (99-LHC-3333, 00-LHC-3017) of Administrative Law Judge Robert D. Kaplan 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 container repairman, suffered an injury to his head and back on November 5, 1997, when he fell from a container chassis. Employer paid claimant temporary total disability and medical benefits from November 6, 1997 to August 20, 1998. Claimant attempted to return to work in September 1998, but after an aggregate of 6.5 hours on September 23 to September 25, 1998, claimant stopped working, contending that he was physically incapable of performing his job. At the time of claimant=s injury on November 5, 1997, employer=s carrier was Managed Care-USA Services, Incorporated (Managed Care); at the time of his attempted return to work, employer=s carrier was Liberty Mutual Insurance Company (Liberty Mutual). Claimant filed claims against both carriers.

Following the hearing on August 23, 2000, the record was closed save for the submission of post-hearing briefs. The record reflects that while considering the evidence in this case, including claimant=s demeanor at the hearing, the administrative law judge found claimant=s behavior during the hearing to be erratic, and thus he served interrogatories on him designed to determine if claimant had taken any medication during the course of the proceeding which could account for his behavior. As counsel sought documentation in order to answer the court-propounded interrogatories, the existence of several medical records came to light. Subsequently, claimant moved, on January 31, 2001, for the introduction of the newly acquired records into evidence. The administrative law judge denied claimant=s motion to admit this evidence into the record. In his Decision and Order, dated March 8, 2001, the administrative law judge found that claimant suffered no disability which prevented his return to his usual job duties after August 20, 1998; accordingly, he denied disability compensation after that date but found claimant entitled to medical benefits pursuant to Section 7, 33 U.S.C.'907, based on his injuries of November 5, 1997, for which Managed Care is responsible. He further ordered employer to re-employ claimant at his request at light duty work for at least one week or to provide work-hardening physical therapy. In his Order Clarifying Decision and Order, dated April 10, 2001, the administrative law judge elucidated his order requiring employer, upon claimant=s request for reinstatement, to provide claimant either with light duty work for at least one week or with work hardening physical therapy before claimant=s return to his usual job.

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[1]The proffered documents consisted of hospital treatments on May 31 and July 13, 2000; the treatment notes of Dr. Roberts dated August 18, October 27, and December 8, 2000, and an MRI report dated January 3, 2001.

Both employer and claimant filed appeals of these decisions to the Board. BRB Nos. 01-0677, 01-0677A. There is a lengthy appellate procedural history to this claim, which is concisely set forth in the Board=s Order of October 30, 2002, reinstating claimant=s appeal, and thus it need not be repeated here. *Stevens v. General Container Services*, BRB No. 01-0677A (Oct. 30, 2002). We will now address the issues raised by claimant in his initial pleadings before the Board.

On appeal, claimant contends that the administrative law judge erred in refusing to admit into evidence the additional medical documents proffered in January 2001, and in denying him additional compensation benefits. Employer responds, urging affirmance.

Claimant first argues that the administrative law judge erred in denying his motion to admit new medical evidence following the close of the hearing. In his Order Denying Claimant=s Motion to Admit New Medical Evidence, the administrative law judge denied claimant=s motion for two reasons. First, he found that claimant failed to establish that the documents in existence prior to the closing of the record had not been available previously, and that the documents could have been discovered with the exercise of due diligence. Thus, he denied claimant=s motion pursuant to 29 C.F.R. '18.54(c). Second, addressing the medical documents which were developed after the hearing, the administrative law judge found that the evidence should be excluded in order to provide finality to the decisional process. Accordingly, he denied admission to all of the proffered documents.

While the administrative law judge has a duty to inquire fully into matters at

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[2]2Employer=s appeal of the administrative law judge=s Order Clarifying Decision and Order, BRB No. 01-0677, was addressed in the Board=s Order of April 10, 2002, and the administrative law judge=s Order was affirmed. *Stevens v. General Container Services*, BRB Nos. 01-0677/A (Apr. 10, 2002)(unpublished). In addition, claimant settled his claim against employer/Liberty Mutual, pursuant to Section 8(i), 33 U.S.C. '908(i).

[3]3Section 18.54(c) states, in pertinent part:

> (c) Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.

issue and to receive all relevant evidence, *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff=d mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993); *Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986); 20 C.F.R. '702.338, he also has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious or an abuse of discretion. *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). Section 702.338, 20 C.F.R. '702.338, states that the administrative law judge *may* reopen the record for receipt of relevant and material evidence at Aany time, prior to the filing of (a) compensation order.@

Claimant contends that the medical documents dated prior to the formal hearing should have been admitted into evidence as his counsel was unaware of their existence until the administrative law judge propounded the interrogatories. The administrative law judge, however, rationally concluded that claimant offered no reason why such documents would not have been attainable by counsel in the exercise of due diligence. Thus, the administrative law judge found that the documents are not admissible under Section 18.54(c). Claimant has not established any abuse of discretion on the administrative law judge=s part, and as the administrative law judge rationally found that claimant failed to exercise due

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[4]Section 702.338 provides that the administrative law judge has a duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents. 20 C.F.R.' 702.338.

[5]Claimant alludes that this failure to inform counsel, as well as his testimony at the hearing that he had undergone no recent medical treatment, HT at 153, was due, at least in part, to the injuries to his head which he alleges he also suffered as a result of the work injury. The administrative law judge found, however, that as of the formal hearing, claimant was only claiming an ongoing injury to his back. *See* Decision and Order at 9.

diligence in developing his claim prior to the hearing, we affirm the decision to exclude from the record the documents that pre-dated the formal hearing. *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987). Similarly, claimant has not demonstrated that the administrative law judge=s decision to deny admission to the medical documents that post-dated the formal hearing constitutes an abuse of discretion. Section 702.338 states that the administrative law judge *may* reopen the record prior to the issuance of a compensation order, and the administrative law judge rationally denied admission of this evidence based

on the need for finality in the decisional process. *See generally Ezell v. Direct Labor*, 33 BRBS 19 (1999).

Claimant lastly contends that the administrative law judge erred in denying him additional disability compensation. Claimant argues that the administrative law judge=s analysis and weighing of the evidence is irrational, and he contests the administrative law judge=s reliance on claimant=s demeanor at the hearing to discredit claimant=s testimony. It is claimant=s burden to establish his inability to return to his usual work. *Gacki v. Sea-Land Service, Inc*., 33 BRBS 127 (1998). In finding that claimant failed to establish entitlement to additional disability compensation, the administrative law judge credited the opinions of Drs. Pritchard and Thompson over those of Drs. Bryant and Buncher. In his weighing of the evidence, the administrative law judge found that Drs. Pritchard and Thompson based their opinions upon the objective evidence of record while Drs. Bryant and Buncher relied primarily on claimant=s subjective complaints. The administrative law judge found the opinions of Drs. Bryant and Buncher of lesser value because they relied heavily on the veracity of the claimant. The administrative law judge

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[6]We note that claimant may submit these medical documents with a motion for modification pursuant to Section 22, 33 U.S.C. '922, based on a mistake in a determination of fact or a change in claimant=s physical or economic condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Section 22 displaces traditional concerns about finality in the decisional process. *See Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002).

[7]Based on an examination in August 1998, Dr. Pritchard stated that claimant=s neurological examination was normal and that there was no objective basis to account for claimant=s continuing complaints of pain. CX 15. He opined that there was no Aneurological contraindication@ to claimant=s return to Afull duty,@ although he restricted claimant from lifting more than 50 to 75 pounds based on claimant=s complaints of pain. CX 30 at 39-40. In December 1998, Dr. Thompson stated that claimant=s orthopedic and neurological examinations were negative, and that claimant=s movements were less restricted when he was unaware he was being observed. CX 15.

[8]Dr. Bryant opined that claimant is permanently disabled from his longshore work, although he did not find any objective evidence to corroborate claimant=s complaints of pain. HT at 66, 69, 82; CX 4. Dr. Buncher found spasms from C5 to T2, and opined that claimant could not return to his usual work. CX 6. The administrative law judge discounted the findings of spasm, as no other physician reported this finding.

found claimant to be less than a credible witness based upon his demeanor at the hearing, *see* Decision and Order at 11 n. 5, and because Drs. Thompson and Brilliant cast doubt on the veracity of claimant=s complaints at pain. CX 11, 15.

In order to develop a better understanding of claimant=s behavior at the hearing, which affected his decision as to claimant=s credibility, the administrative law judge addressed interrogatories to claimant focusing on any medication that claimant may have taken during a recess at the hearing. Claimant=s argument that the administrative law judge=s conclusions, based on his personal observations and the interrogatory answers, are irrational is without merit. *See generally Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Whitmore v. AFIA Worldwide Ins.*, 837 F.2d 513, 20 BRBS 84(CRT) (D.C. Cir. 1988). Furthermore, the administrative law judge=s propounding interrogatories was within his discretion to fully inquire into matters at issue, *see Olsen*, 25 BRBS 40, and claimant raises no legal support for his argument that the administrative law judge erred in this regard.

Claimant=s disagreement with the administrative law judge=s weighing of the evidence is not a sufficient reason for the Board to overturn it, as it is axiomatic that the Board is not permitted to reweigh the evidence but may only ascertain whether substantial evidence supports the administrative law judge=s decision. *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999); *see also Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT)(D.C. Cir. 1994). It is well established that the administrative law judge has the authority to address questions of witness credibility and to weigh the evidence. As the administrative law judge=s determinations concerning claimant=s testimony and behavior are not inherently incredible or patently unreasonable*, Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and as the

[9]The administrative law judge stated that claimant testified on direct examination for one hour, from 4:30 to 5:30 p.m., during which time he exhibited indicia of back pain. He stated that claimant began weeping uncontrollably upon being asked the first question by employer=s counsel. The hearing recessed for one-half hour, and when the questioning resumed, claimant acted as though he were free of pain. The administrative law judge thought this could be due to medication claimant took during the recess, and thus propounded the interrogatories to ascertain this information. Claimant responded that he had not taken any medication since noon that day. The administrative law judge thus concluded that medication did not play a role in the change in claimant=s demeanor, and that he Asimply forgot to resume the demeanor he had earlier employed for the purpose of conveying that he was in severe back pain.@ Decision and Order at 12 n. 5.

opinions of Drs. Pritchard and Thompson constitute substantial evidence supporting the finding that claimant was no longer disabled after August 20, 1998, we affirm the administrative law judge=s denial of compensation subsequent to August 20, 1998. *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 Order Denying Claimant=s Motion to Admit New Medical Evidence and the Decision and Order Denying Benefits are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge