BRB No. 04-0927

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| DAVID VELASCO | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| JACINTO PORT INTERNATIONAL | ) | DATE ISSUED: 08/30/2005 |
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| and | ) | |
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| CNA CASUALTY OF CALIFORNIA | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Lewis S. Fleishman (Richard Schechter, P.C.), Houston, Texas, for claimant.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-2431) of Administrative Law Judge Ralph A. Romano 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).

Claimant was injured on September 20, 2001, when he fell off the top of a container which was being hoisted by a crane. Claimant was taken to the hospital, where he was treated for a spinal injury. After being released from the hospital, claimant continued treatment with Dr. Meyer, a specialist in spinal orthopedics. Dr. Meyer treated claimant conservatively with physical therapy, pain medication, and epidural steroid

injections. Employer paid temporary total disability benefits from October 1, 2001 to April 17, 2003. Claimant sought permanent total disability benefits under the Act.

In his decision, the administrative law judge found that claimant did not establish that he could not return to his former work. Therefore, the administrative law judge found that claimant had not established a *prima facie* case of total disability and denied benefits.

Claimant contends on appeal that the administrative law judge erred in finding that the evidence does not establish that he cannot return to his former employment. Specifically, claimant contends that the administrative law judge mischaracterized the medical evidence and did not address the vocational counselor's opinion. In addition, claimant contends that the administrative law judge should have awarded ongoing medical benefits. Employer has not responded to this appeal.

Claimant contends on appeal that the administrative law judge erred in finding that he is able to return to his former employment based on the opinions of Drs. Barnes and Dozier. To establish a *prima facie* case of total disability, the employee must show that he cannot return to his regular or usual employment due to his work-related injury. *See, e.g., Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). In order to determine whether claimant has met this burden, the administrative law judge must compare the employee's medical restrictions with the specific physical requirements of his usual employment. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); *see also Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

In the present case, the administrative law judge found that all of the doctors noted symptom magnification, and he thus concluded that claimant's testimony concerning his pain and restrictions cannot be credited. The administrative law judge also found that Drs. Dozier and Barnes opined that claimant can return to his previous job. He found that these opinions are well-documented and better reasoned than that of Dr. Meyer, who restricted claimant to lower exertional levels of work. Cl. Ex. 9; Emp. Exs. 9, 10. However, while Dr. Dozier did opine that claimant has no residual impairment from his injury and can return to his usual work, Dr. Barnes's opinion is less clear than the administrative law judge stated in his decision. Dr. Barnes reported that claimant suffered a cervical sprain and a lumbar strain with degenerative joint disease. He assigned restrictions against lifting more than 75 pounds, and he recommended intermittent sitting, walking, climbing and standing for an eight-hour day. He also recommended limiting intermittent lifting, bending, squatting, kneeling and twisting for three to four hours per day. Emp. Ex. 7. However, in his deposition, Dr. Barnes stated that he could agree with the functional capacity evaluation by MedTest, which reported that claimant was capable of duties in the medium range of exertion. Cl. Ex. 13 at 22; Cl. Ex. 16. This evaluation also reported that claimant cannot lift more than 45 pounds. Cl.

Ex. 16. Dr. Barnes also stated that it was reasonable for claimant to limit himself to work with medium exertional requirements. *Id*. at 23. While the administrative law judge found that claimant's testimony regarding the functional requirements of his job is not inconsistent with Dr. Barnes's assessment of claimant's functional abilities, the administrative law judge did not specifically delineate the requirements of claimant's usual work or address Dr. Barnes's testimony regarding the 45-pound lifting limit. *See generally Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). In addition, the administrative law judge did not address the report and testimony of the vocational counselor assigned by the United States Department of Labor, Ms. Lopez, who opined that claimant cannot return to his former duties under Dr. Barnes's original restrictions because he limited claimant's activity to intermittent periods. Cl. Ex. 10; H. Tr. at 76.

As there is evidence of record, relevant to the issue of whether claimant can return to his former employment, which the administrative law judge did not address, we must vacate the administrative law judge's finding that claimant has not established a *prima facie* case of total disability and remand the case for the administrative law judge to discuss and weigh all relevant evidence. *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *see also Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997)(Brown, J., concurring). While the administrative law judge can accept or reject any part of any testimony or opinion, *see Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 27(CRT) (5th Cir. 1995), in this case the administrative law judge did not discuss evidence "that might affect the outcome" of the case. *H.B. Zachry Co. v. Quionones*, 206 F.3d 474, 480, 34 BRBS 23, 27(CRT) (5th Cir. 2000), quoting *United States v. Arron*, 954 F.2d 249, 251 (5th Cir. 1992). On remand, the administrative law judge must specifically state the requirements of claimant's usual work and address all relevant evidence to determine if claimant as established his *prima facie* case of total disability.[1]

Claimant also contends that the administrative law judge erred in not specifically awarding medical benefits. Claimant does not dispute that employer has paid claimant's past medical expenses and costs and that the issue of future medical benefits was not raised at the hearing. The right to seek medical treatment is never time-barred. *See Marshall v. Pletz*, 317 U.S. 383 (1943); *Siler v. Dillingham Ship Repair*, 28 BRBS 28 (1994). Claimant, however, has not alleged that he needs additional medical treatment,

[1] On remand, the administrative law judge must also address claimant's contention regarding an award of interest on the difference between the stipulated average weekly wage and the rate on which the employer based its voluntary payments. *See generally Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971); *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992).

that he sought authorization for treatment which was denied by employer, or that he incurred medical expenses which have not been reimbursed. The United States Court of Appeals for the Fifth Circuit held in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993), that as claimant Buckley presented no evidence of medical expenses incurred in the past or of medical treatment necessary in the future, the administrative law judge's award of medical benefits must be vacated. *Baker*, 991 F.2d at 165, 27 BRBS at 16(CRT). The court stated that the claimant could file a claim for medical benefits if and when medical treatment became necessary. *Id*. Similarly, in the present case, there is no evidence that claimant is in need of medical treatment, or has sought treatment or authorization for treatment which was denied. Therefore, we hold that the administrative law judge did not err in not specifically awarding future medical benefits. As in *Baker*, claimant may file a claim for medical benefits if and when additional treatment is necessary for his work injury.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge