BRB No. 06-0422

BOB H. RAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA-LAND SERVICES, INCORPORATED	)	DATE ISSUED: 02/13/2007
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Claimant's Petition for Modification of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Richard Mark Baker, Long Beach, California, for claimant.

Frank B. Hugg, Oakland, California, for self-insured employer.

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

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Claimant's Petition for Modification (2005-LHC-00081) of Administrative Law Judge Gerald M. Etchingham 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 sustained a work-related back injury on October 3, 1983. In a Decision and Order issued in 1988, Administrative Law Judge Schneider awarded claimant ongoing permanent partial disability benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), of $158.41 per week, commencing January 31, 1985.

In 2002, claimant filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging a change in his physical and economic condition such that he was totally disabled. Alternatively, claimant sought increased partial disability compensation. In his Decision and Order, Administrative Law Judge Etchingham (the administrative law judge) found that claimant failed to establish any changes in his physical or economic condition that are causally related to his work injury. Thus, the administrative law judge found that claimant is not entitled to an award of increased compensation.

On appeal, claimant challenges the administrative law judge's denial of his Section 22 modification request. Claimant contends the denial of additional benefits is based on the administrative law judge's improper discrediting of his treating physician, Dr. Capen. Dr. Capen opined that claimant now has work-related nerve root compression in his lumbar spine, as well as work-related problems in his neck, shoulder and wrists. Claimant also contends that the opinions of employer's physicians, Drs. Lorman and Farran, do not support the administrative law judge's finding that claimant's current back complaints are caused solely by non-work-related degenerative changes due to the aging process. Claimant also alleges that, irrespective of his physical condition, he has a greater loss in wage-earning capacity than that awarded by Judge Schneider. Employer responds, urging affirmance of the administrative law judge's denial of additional benefits.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing an otherwise final decision; modification pursuant to this section is permitted based on a mistake in a determination of fact in the initial decision or on a change in the claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The party requesting modification based on a change in condition has the burden of showing the change, which may be based solely on a change in claimant's wage-earning capacity. *Id.; see also Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

Claimant's primary contention is that the administrative law judge provided invalid reasons for discrediting the opinion of his treating physician, Dr. Capen, in favor of the opinions of Drs. Farran and Lorman, which were obtained by employer. Each of these physicians testified at the hearing and the parties introduced their reports into the record. Tr. at 119 *et seq.*, 191 *et seq.*, 266 *et seq.*; Emp. Exs. 1, 2, 3, 8; Cl. Ex. 8. Drs. Capen and Lorman are Board-certified orthopedic surgeons. Tr. at 120, 191-193. Dr.

Farran, a neurologist, is Board-certified in pain management. Tr. at 267-268. The administrative law judge found that Drs. Lorman and Farran are "credible" witnesses. Decision and Order at 29. The administrative law judge found Dr. Capen "less credible" for several reasons. *Id.* at 27-28.

It is well settled that the weight to be accorded to the evidence of record and questions of witness credibility are for the administrative law judge as the trier-of-fact, and that the Board must respect his rational evaluation of all testimony, including that of medical witnesses. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). 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, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The Board, however, need not accept findings or inferences that are reached in an invalid manner. *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965); *see also Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968). In this case, we agree with claimant that the reasons the administrative law judge gave for rejecting Dr. Capen's opinion are improper, and that his weighing of the evidence on all issues concerning claimant's medical condition is tainted thereby. Therefore, we vacate the administrative law judge's denial of benefits and remand the case for the administrative law judge to re-weigh the medical evidence and to provide valid reasons for the weight he accords to the varying opinions. *See generally Cordero*, 580 F.2d 1331, 8 BRBS 744.

Claimant challenges the administrative law judge's reasons for rejecting Dr. Capen, and we will address each rationale serially. The first is that claimant's counsel corresponded with Dr. Capen in what the administrative law judge deemed an attempt to obtain a diagnosis that would allow claimant to seek increased compensation. Indeed, claimant's counsel corresponded with Dr. Capen in advance of the hearing in order to obtain his opinion concerning claimant's disability status and the work-relatedness of claimant's complaints. *See* Emp. Ex. 2 at 236-239. However, employer sought an evaluation of claimant from two physicians for the same reasons. Dr. Lorman's report is addressed to employer's counsel, and, at the end of his report, Dr. Lorman writes, "I trust this letter answers your questions regarding the patient's condition. If not, please feel free to contact my office." Emp. Ex. 1 at 38.3. Similarly, Dr. Farran's reports are addressed to employer's counsel and are entitled "defense" examinations. Emp. Ex. 8 at 437, 460.1. Thus, both parties sought opinions from medical professionals to bolster their cases, and there is no basis for impugning Dr. Capen's credibility merely because he was asked to express an opinion relevant to claimant's disability status.

Relatedly, the administrative law judge rejected Dr. Capen's opinion because he appeared to be chosen by claimant's attorney rather than by claimant. At the time of the

1988 proceeding, claimant's treating physician was Dr. Strazynski. In 1994, Dr. Strazynski transferred claimant to the care of Dr. Haddazadeh. Tr. at 76, 78. Claimant testified that he had trouble obtaining payment from employer for the latter's services, *id.* at 77, and therefore did not pursue much care for financial reasons, until 2001 when he contacted his attorney. *Id.* at 80. Claimant's attorney filed a form with employer on June 26, 2001, naming Dr. Capen as his choice of physician. Emp. Ex. 3 at 218. Claimant's first visit with Dr. Capen was on July 17, 2001. On the facts presented here, we hold that nothing nefarious can be inferred from claimant's turning to his attorney for help in seeking to obtain medical care that may be the responsibility of employer.[1] In addition, the fact that claimant's first medical appointment was three weeks after the filing of the choice of physician form suggests nothing other than that Dr. Capen's schedule was perhaps filled. *See* Decision and Order at 28.

The administrative law judge also gave less weight to Dr. Capen's opinion because 75 percent of his medical practice is devoted to workers' compensation patients, whereas Dr. Lorman's practice is three percent "forensic" and Dr. Farran's practice is less than five percent "medical/legal." *Id.* The administrative law judge did not explain the significance of this finding, and it is not a rational basis for discrediting a physician. Given the Board-certified credentials of all the physicians, we cannot affirm the rejection of Dr. Capen's opinion based on the nature of his medical practice.

The administrative law judge further discredited Dr. Capen's opinion because it was based in part on the tests and diagnoses rendered by other physicians in Dr. Capen's practice. For example, Dr. Capen's associates who specialize in various diagnostic tests provided their opinions concerning claimant's test results; Dr. Capen's opinion regarding claimant's nerve root compression is based in part on these specialists' opinions. The administrative law judge stated that all the physicians in the practice gave opinions that were "remarkably similar" to those of Dr. Capen and therefore are not creditable. *Id.*

That other physicians gave consistent opinions is not a rational basis for rejecting Dr. Capen's opinion concerning the extent and cause of claimant's condition. The fact that the opinions of various physicians are consistent generally would lend credibility to Dr. Capen's opinion rather than detract from it. The administrative law judge's reasoning implies that physicians in a practice would give false opinions, and there is no basis for such an assumption. Under the simplistic rationale employed by the administrative law judge, the opinions of employer's physicians would also have to be discredited because they are in agreement with each other.

[1] Similarly, it would not be reasonable for the administrative law judge to discredit a doctor merely because he was hired by employer.

In sum, the administrative law judge did not provide any valid reasons for giving less weight to the opinion of claimant's treating physician, Dr. Capen. Therefore, we vacate the administrative law judge's denial of benefits.[2] On remand, the administrative law judge must re-weigh the medical evidence and provide a rational basis for his findings regarding each of the conditions on which claimant based his modification claim.[3]

Claimant also contends that, irrespective of any change in his physical condition, he has a change in his economic condition because the jobs identified in employer's 2003 and 2005 labor market surveys pay less, when adjusted for inflation, than the wages used to set claimant's previous award of partial disability benefits. We reject this contention. Claimant, as the proponent of an increased award, bears the burden of establishing the basis for a change in his economic condition. The Supreme Court, while approving the grant of modification based solely on economic factors, *Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT), also stated that Section 22 is not to be used for wage-earning capacity changes due to "every variation in actual wages or transient change in the economy." *Id.*, 515 U.S. at 301, 30 BRBS at 5(CRT). Claimant's contention on appeal, based solely on inflation-adjusted wages, does not provide a basis for a finding that his personal wage-earning capacity changed. *See Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996); *Vasquez v. Continental Maritime of San Francisco, Inc*., 23 BRBS 428 (1990). If, however, on remand, the administrative law judge finds that claimant's physical condition has deteriorated due to his work injury, then the administrative law judge should consider the effects of that deterioration on claimant's wage-earning capacity.

Accordingly, the administrative law judge's Decision and Order Denying Claimant's Petition for Modification is vacated, and the case is remanded for reconsideration consistent with this decision.

SO ORDERED.

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[2] We decline claimant's request to direct that this case be assigned to a different administrative law judge on remand. *See generally Bogdis v. Marine Terminals Corp*., 23 BRBS 136 (1989).

[3] We note that claimant's claim of a deteriorating lumbar condition is based in part on EMG results interpreted as positive for nerve root impingement. *See* Cl. Ex. 8. The administrative law judge therefore incorrectly stated that there is no objective evidence of a change in claimant's low back condition. Decision and Order at 30.

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ROY P. SMITH
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring in the result:

I concur only in the result reached by my colleagues.

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REGINA C. McGRANERY
Administrative Appeals Judge