BRB No. 04-0776

BARRY J. OUBRE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: 06/27/2005
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

William R. Mustian, III (Stanga & Mustian, P.L.C.), Metairie, Louisiana, for claimant.

Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order on Remand (2002-LHC-1733) of Administrative Law Judge C. Richard Avery 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). This is the second time this case is before the Board.

Claimant, a pipe welder, injured his back at work on June 28, 2001, and returned to light-duty work in November 2001. Claimant sought to hold employer liable for a weight-reduction program recommended by his treating physician. In his first Decision and Order, the administrative law judge denied claimant's claim for this treatment,

concluding that claimant's obesity is not work-related and that the weight- reduction program is not reasonable and necessary for the treatment of his work-related back condition.

On appeal, the Board held that the administrative law judge erred in framing the issue as whether claimant's obesity is work-related, and in finding that claimant had returned to his pre-accident condition as claimant returned only to light-duty work. Accordingly, the case was remanded to the administrative law judge to address whether claimant's obesity slowed his recovery from his work-related back injury and, if so, the reasonableness and necessity of a weight reduction program. The Board also held that the administrative law judge should address whether claimant's work-related back injury combined with his pre-existing obesity under the aggravation rule, such that employer is liable for medical benefits for a weight-reduction program. *Oubre v. Avondale Industries, Inc.*, BRB No. 03-0379 (Feb. 18, 2004)(unpub.).

On remand, the administrative law judge found that claimant's obesity is not a pre-existing impairment to which the aggravation/combination rule applies, and that the weight-reduction program is not necessary to insure claimant's recovery from the back injury. Accordingly, he again denied medical benefits for the requested weight-reduction program.

Claimant again appeals, arguing that the administrative law judge on remand failed to follow the Board's instructions. Employer responds, urging affirmance of the denial of medical benefits.

We need not address the administrative law judge's findings regarding the aggravation/combination rule, as the administrative law judge's finding that the requested treatment is not necessary for the treatment of claimant's condition is rational and supported by substantial evidence. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment, . . . for such period as the nature of the injury or the process of recovery may require." Claimant must establish that treatment is reasonable and necessary for his injury in order to be entitled to such treatment at employer's expense. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.32d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed.Appx. 126 (5th Cir. 2002).

Claimant's initial treating physician, Dr. Rauchwerk, referred claimant to Dr. Martin, a bariatric surgeon and specialist in the area of weight reduction, for "some type of weight reduction." CX 2 at 10. Dr. Rauchwerk stated claimant might benefit from endoscopic placement of gastric bands. *Id.* at 10. There is no opinion from Dr. Martin as to any type of recommended treatment. *Id.* at 22. Dr. Adatto, who took over claimant's

care when Dr. Rauchwerk retired, stated that obesity can delay recovery from a back injury, and he supported the referral to Dr. Martin. *Id.* at 8; EX 10 at 16. Dr. Katz, who examined claimant on employer's behalf, stated that claimant's weight was not altering his recovery and that a weight-reduction program is not necessary for claimant's recovery from the back injury. EX 11; EX 12 at 16-17.

The administrative law judge found Dr. Rauchwerk's opinion unpersuasive concerning the need for a weight-reduction program, because it was based on an incorrect perception of claimant's physical condition and recovery. At one time, Dr. Rauchwerk believed claimant incapable of any work at his present weight, but, in fact, Dr. Rauchwerk released claimant to work within a month, and claimant has performed light-duty welding since that time. CX 2; HT at 22, 32-35. The administrative law judge found Dr. Katz's opinion to be more reflective of the reality of the situation. Dr. Katz opined that claimant's excess weight did not impede his recovery. EX 11; EX 12 at 14-15. Dr. Katz stated that claimant's weight has been stable for most of his adult life and that he returned to work, albeit in a light-duty category. Indeed, claimant testified he has not lost time from work for back problems. HT at 35. Dr. Katz concluded that claimant's back had returned to its "baseline," pre-injury state,[1] and that a weight loss program was not necessary for his recovery from the injury. EX 12 at 16-17, 23.

In adjudicating a claim, it is well established that an administrative law judge is entitled to weigh the evidence, and is not bound to accept the opinion or theory of any particular medical examiner; rather the administrative law judge may draw his own inferences and conclusions from the evidence. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995)*; Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). We hold that the administrative law judge acted within his discretion in crediting the opinion of Dr. Katz as he found it more consistent with the factual situation surrounding this claim. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Claimant, therefore, failed to establish the need for a weight-reduction program, *see Arnold*, 35 BRBS at 16-17, and the administrative law judge's denial of medical benefits for this claim therefore is affirmed. *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003).

[1] Claimant had back problems prior to the work injury in 2001. CX 2.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge