

BRB No. 03-0801

KENNETH DAWSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS,	)	DATE ISSUED: <u>Aug. 25, 2004</u>
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Fletcher E. Campbell, Jr.,  
Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Rutter Mills), Norfolk, Virginia, for claimant.

Robert A. Rapaport (Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C.),  
Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2000-LHC-2729) of Administrative Law Judge Fletcher E. Campbell, Jr., awarding benefits 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). This case is before the Board for a second time.

Claimant sustained a work-related injury to his lower back on August 1, 1999, and has not worked since that date. Employer voluntarily paid temporary total disability benefits for one week, *i.e.*, from August 5 through August 11, 1999. Claimant thereafter sought compensation for temporary total disability from the date of his injury and continuing, and for treatment of a foot condition and psychiatric problems that, he alleged, were caused and/or aggravated by his work injury.

In his Decision and Order, the administrative law judge determined that claimant was not disabled as a result of his work injury and thus denied all compensation. The administrative law judge also found that claimant's comments during the hearing regarding his foot surgery were insufficient to raise the issue of the compensability of that surgery. Claimant appealed, challenging the administrative law judge's denial of all benefits for his back injury.

On appeal, the Board initially affirmed the administrative law judge's finding that claimant is not currently disabled. *Dawson v. Ceres Marine Terminals*, BRB No. 02-0347 (Jan. 15, 2003) (unpub.). The Board, however, vacated the administrative law judge's conclusions that claimant did not sustain any period of disability following the injury, and that claimant is not entitled to any medical benefits as the record contains evidence conflicting with those findings, which the administrative law judge had not discussed. Accordingly, the Board remanded the case for further consideration of those issues in light of the relevant evidence of record.

On remand, the administrative law judge determined that claimant was temporarily and totally disabled due to his work-related injury from August 2, 1999, through August 12, 1999. Accordingly, he awarded temporary total disability benefits for this ten-day period. The administrative law judge also found that claimant is entitled to medical benefits for the reasonable and necessary treatment of his work-related lumbosacral sprain for the period between August 2, 1999, and August 12, 1999. The administrative law judge, however, further determined that the record does not support a finding that the medical expenses incurred after August 12, 1999, are reasonable and necessary, and thus he denied medical benefits related to the treatment for claimant's disc disease and for treatment provided subsequent to that date by Drs. Morales and Fatehi.

On appeal, claimant challenges the administrative law judge's denial of temporary total disability and medical benefits after August 12, 1999. Employer responds, urging affirmance. In addition, claimant's counsel seeks an attorney's fee totaling \$2,112.50, for work performed before the Board in claimant's prior appeal, BRB No. 02-0347. Employer has filed objections to counsel's fee petition.

Claimant asserts that the administrative law judge erred in denying total disability benefits after August 12, 1999, since, as indicated by the Board in its prior decision, Dr. Holden did not release claimant to return to work until September 13, 1999, and not beforehand, as determined by the administrative law judge on remand. In this regard, claimant maintains that the administrative law judge erroneously interpreted Dr. Holden's September 13, 1999, letter as indicating that claimant was capable of returning to full duty as of August 12, 1999, for while Dr. Holden therein states that his recommendation for a full duty return to work "still stands," he makes no reference to when he may or may not have previously rendered that opinion. Moreover, claimant asserts that as Drs.

Morales and Fatehi physically examined claimant on a consistent basis they are in a better position to render opinions regarding claimant's ability to return to work.

In its decision, the Board initially affirmed the administrative law judge's weighing of the evidence and his finding that claimant is not currently disabled. In particular, the Board acknowledged that the record contained the opinions of Drs. Holden, Foer and Irby, who each opined that claimant was capable of returning to his usual job, Employer's Exhibits (EX) 1-3, 37, and the contrary opinions of Drs. Fatehi and Morales, who opined that claimant continued to suffer from varying degrees of disability. EXs 2, 25. The Board observed that in weighing this evidence, the administrative law judge rationally found that the opinions of Drs. Holden, Foer, and Irby were consistent with the objective evidence and claimant's prior medical history, while in contrast, the opinions of Drs. Fatehi and Morales were unreasoned and based not only on claimant's subjective complaints, which the administrative law judge found suspect, but also on an incomplete knowledge of claimant's medical and psychological history. Thus, the Board affirmed the administrative law judge's decision to credit the opinions of Drs. Holden, Foer, and Irby over the opposing opinions of Drs. Fatehi and Morales.

The Board's decision on this issue, *i.e.*, most pertinent to the instant appeal, the administrative law judge's weighing of the medical opinion evidence, constitutes the law of the case, and, as claimant has not established a basis for departure from the law of the case doctrine, *see, e.g., Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992), the administrative law judge's decision to accord greatest weight to the opinions of Drs. Holden, Foer, and Irby in determining claimant's ability to perform his usual work and in resolving the issue regarding claimant's entitlement to medical benefits, therefore stands. *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *Ravalli v. Pasha Maritime Services*, 36 BRBS 91, *denying recon. in* 36 BRBS 47 (2002). Consequently, we reject claimant's contentions that the administrative law judge erred by not relying on the opinions of Drs. Morales and Fatehi in rendering his conclusions regarding claimant's entitlement to benefits.

The Board next vacated the administrative law judge's finding that claimant did not sustain any period of disability following the injury as "none of the doctors of record, including those credited by the administrative law judge, stated that claimant suffered no period of disability." *Dawson*, slip op. at 3. The Board specifically observed that of the physicians credited by the administrative law judge, "Dr. Holden did not release claimant to return to work until September 13, 1999," and Drs. Irby and Foer each opined, following examinations of claimant respectively on December 1, 1999, and July 5, 2000, that claimant was capable of returning to full duty work. *Id.* From this evidence, the Board surmised that "claimant remained totally disabled at least until September 13, 1999, when his then treating physician, Dr. Holden, released him to return to work."

*Dawson*, slip op. at 3-4. The Board therefore remanded the case for further consideration regarding the period of claimant's disability following his work injury.

After reviewing the Board's instructions on remand in conjunction with the record before him, the administrative law judge concluded that the credible medical evidence supports a finding that claimant was temporarily totally disabled from August 2, 1999, through August 12, 1999. In this regard, the administrative law judge found that the work restrictions form completed by Dr. Holden shows a period of "full disability" from August 3, 1999, through August 12, 1999, EX 1 at 3, and that Dr. Holden's letter dated September 13, 1999, merely confirms that assessment, *i.e.*, that claimant's total disability as a result of the work-related lumbosacral sprain ended on August 12, 1999. EX 1 at 4-5. The administrative law judge explicitly observed that Dr. Holden, in the September 13, 1999, letter, stated that "I see nothing in these records to cause me to deviate from the letter of August 19, 1999," EX 1 at 4, and that "I see no need for any other physical therapy and my recommendation that the patient return to full duty still stands." EX 1 at 5. The administrative law judge found that nothing in the September 13, 1999, letter indicated that the period of total disability extended past August 12, 1999.<sup>1</sup> Moreover, the administrative law judge found that this period of disability, *i.e.*, August 2 through August 12, 1999, is bolstered by the August 4, 1999, office notes from Norfolk Physical Therapy, which listed claimant as "not working; disabled from working," gave a long-term goal of returning claimant to work without restrictions, and scheduled therapy for one week, which would have ended on August 11, 1999. EX 5. The administrative law judge further rejected claimant's assertion that his disability extended beyond August 12, 1999, as he credited Dr. Holden's opinion over the contrary opinions of Drs. Morales and Fatehi.

As the administrative law judge found, Dr. Holden's statements regarding claimant's ability to perform work are limited to his August 3, 1999, assessment of "full disability" until August 12, 1999, and the September 13, 1999, statement that his "recommendation that the patient return to full duty still stands." EX 1-5. In the September 13, 1999, letter, Dr. Holden states that, "I see nothing in these records to cause me to deviate from my opinion from the letter of August 19, 1999," EX 1-4, and further stated that "my recommendations that the patient return to full duty still stands." EX 1-5. The referenced August 19, 1999, letter is not, however, a part of the administrative record, nor is there any documentation of a follow-up examination. Nevertheless, Dr. Holden's statements on this issue lead to a number of competing inferences, *i.e.*, that

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<sup>1</sup>In making this determination, the administrative law judge further acknowledged that he did not agree with the Board's suggestion that he "read the [September 13, 1999] letter as releasing Claimant on September 13, 1999," for it instead confirms the opinion previously given by Dr. Holden that claimant's disability extended only through August 12, 1999. Decision and Order on Remand at 3 n. 6.

claimant was capable of returning to full duty work as of August 12, 1999, or August 19, 1999, or September 13, 1999.

It is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses, and has considerable discretion in evaluating the evidence of record. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5<sup>th</sup> Cir. 2000); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). Moreover, the administrative law judge is entitled to draw his own inferences from the evidence, and his selection among competing inferences must be affirmed if supported by substantial evidence and in accordance with law. *See Gallagher*, 219 F.3d at 430, 34 BRBS at 37(CRT); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5<sup>th</sup> Cir. 1995). As the administrative law judge's inference regarding Dr. Holden's opinion as to claimant's ability to return to full duty work is rational, it is affirmed. *Id.* We therefore affirm the administrative law judge's finding that claimant was able to return to full duty work as of August 12, 1999, and thus that his entitlement to total disability benefits ceased as of that date.

Claimant next argues that the administrative law judge's denial of any and all medical benefits after August 12, 1999, is likewise erroneous. Claimant maintains that as his capacity to return to work remained limited, employer continued to be responsible for all reasonable and necessary medical benefits corresponding to the treatment of his work-related back injury.

In its prior decision, the Board vacated the administrative law judge's denial of all medical expenses, as it did not account for Dr. Holden's diagnosis of a low back sprain, as well as claimant's treatment and therapy following his accident. On remand, the administrative law judge, as instructed, determined which medical services were reasonable and necessary for the treatment of claimant's work injury and thus are compensable pursuant to Section 7 of the Act. 33 U.S.C. §907. Specifically, the administrative law judge concluded that claimant is entitled to benefits for costs related to his August 1, 1999, trip to the emergency room at Maryview Medical Center, save the costs of unnecessary x-rays, as well as costs related to Dr. Holden's August 3, 1999, examination, and those incurred at Norfolk Physical Therapy until August 6, 1999, the date upon which claimant discharged himself from such treatment. In rejecting the x-rays taken at Maryview Medical Center, the administrative law judges rationally relied on the credible testimony of the attending physician, Dr. David Shulmister, that the x-rays were not necessary and were taken merely to avoid a confrontation with claimant. *See generally Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4<sup>th</sup> Cir. 1995).

In rejecting any post-August 12, 1999, medical expenses, the administrative law judge credited the opinion of Dr. Holden, that there was no need for treatment of claimant's work-related injury after August 12, 1999, over the contrary opinions of Dr. Morales and Fatehi. In this regard, the administrative law judge observed that the opinions of Drs. Morales and Fatehi are the only evidence to support the alleged reasonableness or necessity of the treatments they provided or prescribed, but reiterated his earlier finding, previously affirmed by the Board, that their overall opinions regarding claimant's work-related injury are poorly reasoned and thus entitled to little weight. The administrative law judge's findings regarding claimant's entitlement to medical benefits, and more specifically, that claimant is entitled to medical benefits for necessary treatment rendered up until August 12, 1999, are affirmed as they are rational, supported by substantial evidence and in accordance with law. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed. Appx. 126 (5<sup>th</sup> Cir. 2002).

Lastly, we reject claimant's counsel's request for an attorney's fee for work performed before the Board with respect to his initial appeal, BRB No. 02-0347, in this case. An employer is liable for an attorney's fee under Section 28(b) if employer voluntarily pays or tenders benefits, and claimant thereafter obtains greater compensation than employer paid or tendered. *See, e.g., Bolton v. Halter Marine, Inc.*, 35 BRBS 161 (2001); *see also Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT); *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9<sup>th</sup> Cir. 1991); *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000). Thus, employer's liability for an attorney's fee in this case hinges on whether claimant obtained "greater compensation" than that paid by employer. *See Barker v. U.S. Dept. of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1<sup>st</sup> Cir. 1998). In the instant case, it is undisputed that employer voluntarily paid temporary total disability benefits for the period of one week between August 5, 1999, and August 11, 1999, and medical expenses, as later awarded by the administrative law judge, related to the emergency room visit at Maryview Medical Center, the examination by Dr. Holden and the physical therapy sessions at Norfolk Physical Therapy. Claimant thus has not, on remand, obtained any additional compensation beyond that which employer has already paid.<sup>2</sup> As such, we hold that employer cannot be liable for an attorney's fee for work performed in the prior appeal to the Board. *Id.*

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<sup>2</sup> Although the administrative law judge found that claimant's period of disability commenced August 2, rather than August 5, no benefits are due for the first three days as claimant's disability did not exceed 14 days. 33 U.S.C. §906(a).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed. In addition, claimant's counsel's request for an attorney's fee for work performed before the Board in the prior appeal in this case is denied.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge