BRB No. 00-0442

GLENN WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE NAVY/ MWR	)	DATE ISSUED: Jan. 10, 2001
	)	
and	)	
	)	
CONTRACT CLAIMS SERVICES, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits and Decision on Motion for Reconsideration of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum (Law Offices of Steven M. Birnbaum), San Francisco, California, for claimant.

Kitty K. Kamaka, Honolulu, Hawaii, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits and Decision on Motion for Reconsideration (98-LHC-1742) of Administrative Law Judge Michael P. Lesniak 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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, while working as a maintenance helper for employer, sustained an injury to his neck on July 3, 1995. Dr. Smith initially diagnosed a muscle strain and disc disease, and temporarily removed claimant from work. Employer voluntarily paid temporary total disability benefits from July 5, 1995, until claimant returned to light duty work on November 13, 1995. In addition, employer voluntarily paid medical benefits. Meanwhile, claimant continued to seek treatment with Dr. Takai, an orthopedic surgeon, who ultimately diagnosed a cervical strain and cervical disc syndrome. Dr. Takai opined that the July 3, 1995, work injury aggravated a pre-existing condition, determined that claimant reached maximum medical improvement as of July 23, 1997, and thereafter placed claimant on permanent restrictions.

Dr. Hendrickson, who examined claimant on October 23, 1995, and October 28, 1996, agreed with Dr. Takai's diagnosis that claimant sustained a muscle strain on July 3, 1995, and that claimant suffers from a pre-existing degenerative disorder. He however opined that claimant reached maximum medical improvement as of August 15, 1995, did not believe that the work injury aggravated a pre-existing degenerative cervical disorder, and disagreed with Dr. Takai's lifting restriction.

Dr. Ma, who examined claimant on September 26, 1997, diagnosed a cervical strain as a result of the July 3, 1995, work injury, opined that claimant should have fully recovered within 3 or 4 months from the date of his visit, and stated that he would be able to return to his regular employment at that time. Additionally, he stated that claimant's present condition was not solely the result of the July 3, 1995, injury, as claimant had a longstanding degenerative cervical disc condition, but he felt that claimant had reached pre-injury status long before the date of his examination. Lastly, Dr. Rinker, who examined claimant on June 25, 1998, diagnosed cervical spondylosis, myofacial pain disorder, and thoracic outlet syndrome, all related to the July 3, 1995, work injury, and opined that claimant had not yet reached maximum medical improvement and that with treatment claimant might be able to return to modified work in a month or so.

Claimant performed light duty work for over two years and was eventually told to go back to regular duty. He stated that he was unable to return to work and was thereafter terminated by employer on March 20, 1998. Claimant subsequently filed a claim for benefits.

In his decision, the administrative law judge determined that claimant was,

---

[1]Dr. Takai initially imposed a restriction of no lifting more than 20 pounds, and recommended avoidance of any duties involving the climbing of ladders. On July 23, 1997, he stated that claimant was restricted insofar as he could lift only between 10 to 20 pounds, with no bending or climbing.

according to Dr. Ma's opinion, capable of returning to his usual employment as of January 1, 1998, and thus, is not entitled to any additional medical care or compensation as a result of his July 3, 1995, accident. In addition, the administrative law judge found that there was no evidence of discriminatory animus in employer's termination of claimant, and thus, he rejected claimant's contention that employer violated Section 49 of the Act, 33 U.S.C. §948a. The administrative law judge thereafter denied claimant's motion for reconsideration.

On appeal, claimant challenges the administrative law judge's denial of disability benefits. In addition, claimant argues that the administrative law judge erred by not considering his timely request for modification. Employer responds, urging affirmance.

Claimant first argues that the administrative law judge's credibility determinations regarding the evidence of record are patently unreasonable. Claimant asserts that the administrative law judge erred in according greatest weight to the medical opinions of Drs. Hendrickson and Ma over the contrary opinions of Drs. Takai and Rinzler. Moreover, claimant asserts that the administrative law judge erred by disregarding the medical opinion of his treating physician, Dr. Takai, particularly in light of the Ninth Circuit's decision in *Amos v. Director, OWCP,* 153 F.3d 1051 (1998), *amended,* 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied,* 120 S.Ct. 40 (2000).

It is well-established that an administrative law judge is entitled to weigh the evidence and evaluate the credibility of all witnesses, including doctors, and may draw his own conclusions from the evidence. *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). Moreover, the Board may not re-weigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981).

In his decision, the administrative law judge initially reviewed all of the relevant evidence of record, concluding that there are four highly qualified physicians giving opinions in this case, Drs. Rinzler, Takai, Hendrickson and Ma. The administrative law judge determined that the opinions of Drs. Rinzler and Takai were entitled to less weight. He stated that Dr. Rinzler was unaware of claimant's relevant medical history in the ten years prior to claimant's injury and thus, was not aware that claimant had sustained injuries to his neck and had, in fact, experienced intermittent neck pain of a similar type for several months. The administrative law judge found that Dr. Takai's opinion that claimant aggravated a pre-existing cervical condition was entitled to less weight despite his status as claimant's treating physician, because in recounting his symptoms to that doctor, claimant strongly denied any significant pain in the neck area prior to his work-

related neck injury on July 3, 1995.

In contrast, the administrative law judge found Dr. Hendrickson's opinion to be reasonable and entitled to more weight than the opinions of Drs. Rinzler and Takai, as Dr. Hendrickson's statement that claimant was exaggerating his complaints of pain was supported by the results of the "distraction test" which he performed on claimant. The administrative law judge also found that Dr. Ma's opinion, that claimant sustained a cervical strain as a result of the July 3, 1995, accident and that claimant's condition had reached pre-injury status long before September 26, 1997, was entitled to the greatest weight, since his belief that claimant's pre-existing condition of degenerative C3-4, C4-5, C5-6 and C6-7 disc disease would have caused neck symptoms even prior to the July 3, 1995, injury is supported by the other evidence of record, and since his conclusion, based on Waddell testing that claimant seemed to be moving his neck apparently without limitation or pain, is corroborated by Dr. Hendrickson's opinion.

Contrary to claimant's assertion, the decision in *Amos v. Director, OWCP*, 164 F.3d 480, 32 BRBS 144(CRT)(9th Cir. 1999), *cert. denied*, 120 S.Ct. 40 (2000), does not "mandate" that Dr. Takai be given determinative weight as claimant's treating physician. While *Amos* does hold that a treating physician's opinion is entitled to special weight, it does not overturn the administrative law judge's well-settled authority to weigh the medical evidence and evaluate the credibility of all witnesses. The administrative law

---

[2]The administrative law judge noted that several physicians were unaware of claimant's history of neck pain, and found claimant's memory would have been best on July 3, 1995, when he told Dr. Smith about his pre-existing pain than at any time thereafter.

[3]Contrary to claimant's contention, the listing of physical limitations by Dr. Ma in his report dated September 26, 1997, is not inconsistent with his overall opinion that claimant reached pre-injury status long before the date of his visit, as Dr. Ma noted that these temporary restrictions were imposed so that claimant would develop endurance prior to resuming his regular duty. Additionally, there is no evidence that Dr. Ma exhibited bias against claimant in rendering his medical opinion in this case. While Dr. Ma was not overly receptive to answering the questions posed by claimant's counsel, he nevertheless explicitly stated that he is an impartial, independent medical examiner who has no reason to express an opinion based solely upon what the referring party wants to hear. Deposition at 12. Moreover, the administrative law judge explicitly noted in his decision on reconsideration, that "I have reviewed the transcript of Dr. Ma's deposition and although he became indignant at some [of] plaintiff's counsel's questions, he convinced me that he believed his testimony to be true." Decision on Reconsideration at 2, n. 2. Lastly, while Drs. Hendrickson and Ma are not in complete agreement regarding the involvement, if any, of claimant's pre-existing degenerative disc disease in his July 3, 1995, work injury, they do agree that claimant's neck injury of July 3, 1995, diagnosed as a cervical sprain/strain, has completely resolved and that claimant is capable of returning to his regular work.

judge here recognized the special consideration afforded treating physicians, but nonetheless found the opinions of Drs. Hendrickson and Ma more persuasive. As the administrative law judge's weighing of the medical evidence is within his discretion, he could properly credit Drs. Hendrickson and Ma, and he provided valid reasons for doing so. As Drs. Hendrickson and Ma agree that claimant's work injury on July 3, 1995, had completely resolved by January 1, 1998, and thus that claimant was able to return to his regular work, we affirm the administrative law judge's finding that claimant is not entitled to additional benefits as it is rational, supported by substantial evidence, and in accordance with law. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (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).

Claimant also argues that the administrative law judge was in error on the facts as evidenced by the decision denying reconsideration wherein the administrative law judge alluded to a "surgery" which claimant never had and incorrectly noted that Dr. Hendrickson found that claimant could return to his usual work as of January 1, 1998. On reconsideration, the administrative law judge did, in fact, state that claimant "had intermittent pain in his cervical spine before the surgery (CX 3)." Decision on Motion for Reconsideration at 1. We agree with employer that in context, the use of the word "surgery" is merely a clerical error. That the administrative law judge intended to say that claimant experienced pain "before the injury" is evidenced by the surrounding statements in the decision and by the citation to CX 3, which is the emergency room report from the day of the accident. In his Decision and Order, the administrative law judge explicitly cited to this exhibit in support of his finding that "claimant had experienced intermittent pain of a similar type for a number of months prior to the injury. (CX 3)." Decision and Order at 8, 17. Moreover, as claimant points out, he has not had any relevant surgery in this case.

Claimant's contention that the administrative law judge mischaracterized Dr. Hendrickson's opinion on reconsideration is also rejected. While it is true that Dr. Hendrickson did not explicitly state that claimant would be able to return to work as of January 1, 1998, the record reflects that Dr. Hendrickson examined claimant on October 23, 1995, and based on that examination, opined that claimant was capable of returning to work on a graduated basis as soon as possible and that he should be progressed to full duty within 3 or 4 weeks. Clearly, Dr. Hendrickson felt that claimant was capable of returning to work long before January 1, 1998, and this opinion thus supports the administrative law judge's conclusion on reconsideration that most certainly by January 1, 1998, claimant should have been able to return to his usual work.

Claimant further argues that the administrative law judge was prejudiced against claimant in this case by the fact that he personally conducted post-trial settlement negotiations on his own motion. Claimant argues that this highly unusual course of events casts doubt on the process of coming to a decision by the administrative law judge.

Section 8(i)(3) of the Act provides that settlements may be agreed upon at any stage of the proceeding, including after entry of a final compensation order. 33 U.S.C. §908(i)(3). While the administrative law judge may have encouraged settlement discussions in this case, there is no evidence whatsoever that he favored or disfavored either side. Thus, claimant's allegation that the administrative law judge demonstrated prejudicial bias is rejected; adverse rulings alone are insufficient to demonstrate bias. *See Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

Claimant also contends that the administrative law judge erred in not reviewing his request for modification and the new evidence which was submitted. Specifically, claimant asserts that attached to his motion for reconsideration was the medical opinion of Dr. Lee, alluding to shoulder problems as well as neck problems, which conclusively establishes a change in conditions warranting modification of the denial of benefits. Claimant therefore requests that the Board remand this case to another administrative law judge for consideration of his petition for modification.

Claimant's contention lacks merit. It is apparent from the record that claimant submitted a motion for reconsideration rather than a petition for modification to the administrative law judge. This is supported by the following facts: claimant refers to his submission as a "Motion for Reconsideration;" the content of claimant's motion involves a request for reconsideration of the administrative law judge's decision based on the existing record; and his motion for reconsideration makes absolutely no reference to a change in condition or mistake in fact, or for that matter that he seeks modification. *See generally Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102(CRT) (4th Cir. 1998); *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996), *cert. denied*, 117 S.Ct. 49 (1996). Claimant does state that he "would also raise that there is new medical evidence . . . which indicates that even after all this time he is seeking medical attention for his problems," and urges that, "in the interest of developing all the evidence," the administrative law judge "accept this exhibit as further proof of claimant's continuing disability." This statement, however, falls short of exhibiting the requisite intent for requesting modification. If claimant wishes to have his new evidence considered, he may file a request for modification pursuant to Section 22, 33 U.S.C. §922, at any time prior to one year after the final denial of his claim.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits and Decision on Motion for Reconsideration are affirmed.

---

[4]Essentially, claimant argues that the administrative law judge improperly weighed the evidence before him in coming to the conclusion that claimant is not disabled and thus not entitled to additional benefits.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge