

BRB No. 99-0995

GIOVANNI CUCCI	)		
	)		
Claimant-Petitioner	)		
	)		
v.	)		
	)		
GLOBAL	TERMINAL	)	DATE
		)	AND
		)	ISSUED:
CONTAINER SERVICES,		)	
INCORPORATED		)	
		)	
and	)		
	)		
SIGNAL MUTUAL INDEMNITY	)		
ASSOCIATION	)		
	)		
Employer/Carrier-	)		
Respondents	)	DECISION and ORDER	

Appeal of the Decision and Order (Upon Remand By the Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Christopher J. Field (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (Upon Remand by the Benefits Review Board) (96-LHC-0226) of Administrative Law Judge Robert D. Kaplan 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is on appeal to the Board for the second time. Claimant, a hustler driver, injured his coccyx and low back at work on May 17, 1995, when he fell down the steps of a hi-lo. Employer voluntarily paid claimant temporary total disability benefits from May 18, 1995, to June 7, 1995, and July 10, 1996, to September 17, 1996. Claimant sought temporary total disability benefits from September 24, 1995, through July 10, 1996, and after September 17, 1996. In his initial decision, the administrative law judge awarded claimant temporary total disability benefits from May 18, 1995, to September 25, 1995, and employer a credit for all compensation paid claimant from July 10, 1996, to September 17, 1996. In awarding claimant these benefits, the administrative law judge found the opinion of claimant's treating physician, Dr. Stein, flawed by the lack of a documented and thorough examination of claimant. Therefore, the administrative law judge credited the opinions of Drs. Genova and Koval with greater weight since they conducted and documented thorough examinations of claimant and possessed superior credentials.

In *Cucci v. Global Terminal & Container Services, Inc.*, BRB No. 98-0181 (Oct. 19, 1998) (unpub.), the Board vacated the administrative law judge's finding that claimant suffered no disability after September 25, 1995, and remanded the case to the administrative law judge to reconsider the relevant medical opinions and provide a rational explanation for his conclusions in weighing this evidence. The Board pointed out that the administrative law judge's weighing of the opinions of Drs. Stein, Genova, and Koval was flawed in that Dr. Stein (a Board-certified physiatrist) was not less qualified than Dr. Genova (a Board-certified general surgeon) and Dr. Koval (a Board-certified orthopedic surgeon). The Board also noted that Dr. Stein did not perform a less thorough examination of claimant than Drs. Genova and Koval and that, in fact, Dr. Koval had examined claimant only once while Dr. Stein had examined claimant numerous times as claimant's treating physician. The Board also vacated the administrative law judge's finding that employer is entitled to a credit for the compensation it paid claimant from July 19, 1996,<sup>1</sup> to September 17, 1996, and remanded the case to the administrative law judge to address claimant's contention that the parties had stipulated that he was disabled during the period of his work hardening program.

In his decision on remand, the administrative law judge again awarded claimant temporary total disability benefits from May 18,

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<sup>1</sup>On remand, the administrative law judge noted that this date should be July 10, 1996, and not July 19, 1996. Decision and Order Upon Remand at 2 n. 2.

1995, to September 25, 1995, crediting the opinions of Drs. Genova and Koval over Dr. Stein's opinion. The administrative law judge also held that the parties did not enter into a stipulation or agreement that claimant was entitled to total disability benefits for the period during which he was undergoing a work hardening program, from July 10, 1996, to September 17, 1996. Thus, the administrative law judge awarded employer credit for payments of compensation it made to claimant between July 10, 1996, to September 17, 1996.

In the instant appeal, claimant challenges the administrative law judge's decision to credit the opinions of Drs. Genova and Koval over those of Drs. Stein and Dermksian and his consequent conclusion that claimant is not entitled to benefits after September 25, 1995. Claimant also challenges the administrative law judge's finding that employer is entitled to a credit for compensation it paid claimant from July 10, 1996, to September 17, 1996, when claimant was undergoing a work hardening program. Employer responds in support of the administrative law judge's decision. Claimant's counsel also filed a fee petition for work performed before the Board in BRB No. 98-0181. Employer has not objected to the requested fee.

Claimant initially contends that the administrative law judge erred in crediting the opinions of Drs. Genova and Koval over those of Drs. Stein and Dermksian in denying claimant benefits after September 25, 1995. Claimant bears the burden of establishing the nature and extent of his disability sustained as a result of a work-related injury. See *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In arriving at a decision regarding the nature and extent of claimant's disability, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. See *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), cert. denied, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

In denying claimant temporary total disability benefits after September 25, 1995, the administrative law judge found that the opinions of Drs. Genova and Koval that claimant had no disability caused by lumbar spine problems in the summer of 1995 outweigh those of Drs. Stein and Dermksian that claimant remains totally disabled due to his lumbar spine problems. Decision and Order Upon Remand at 8-9; Cl. Exs. 1, 4, 6, 7, 9; Emp. Exs. 5, 6, 9, 16, 23, 25. The administrative law judge found that the opinions of Drs. Stein and Dermksian are solely based on subjective factors including claimant's complaints of pain and his inability or reduced ability to perform a range of motion maneuvers, while both physicians' objective findings are normal. Additionally, the administrative law judge found claimant's complaints of low back pain were exaggerated because claimant's complaints of coccygeal pain to Dr. Stein disappeared after claimant's normal September 21,

1995, CT scan of the coccyx, no physician found any objective evidence supporting claimant's complaints of lumbosacral area pain, Dr. Flax commented that claimant left his office with a healthy jaunt, and Mr. Gonzalez, a physical therapist, concluded that claimant's complaints of pain were magnified. Decision and Order Upon Remand at 9-10; Cl. Exs. 1, 3, 4, 6-9; Emp. Exs. 3, 5, 6, 8, 9, 12-14, 16, 23-25. As the administrative law judge acted within his discretion in evaluating and weighing the evidence and provided rational explanations for his conclusions, we affirm his denial of temporary total disability benefits after September 25, 1995, as it is supported by substantial evidence. See generally *Chong v. Todd Pacific Shipards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

Claimant also contends that the administrative law judge erred in awarding a credit to employer for the voluntary compensation it paid claimant between July 10, 1996, and September 17, 1996, against the temporary total disability compensation to which claimant was found to be entitled during the period from May 18, 1995, to September 25, 1995. Claimant asserts that the parties stipulated that claimant was totally disabled for this period and thus that employer should not be allowed a credit.<sup>2</sup>

The parties did not enter into any written stipulations. See

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<sup>2</sup>Claimant's counsel submitted new evidence in his appeal to the Board--a July 8, 1996 letter to claimant from the branch manager of employer's carrier arranging for claimant to enter a work hardening program beginning July 10, 1996, and advising claimant that his compensation benefits will commence following this date and will continue until the work hardening program is completed. The Board cannot consider this new evidence. 33 U.S.C. §921(b)(3); *Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985). However, if claimant wishes the administrative law judge to consider it, he may request modification pursuant to Section 22 of the Act, 33 U.S.C. §922. See *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT)(1995); *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985).

Tr. at 7-9. In finding that employer did not agree to claimant's entitlement to benefits, but merely that it paid benefits for this period, the administrative law judge set out the relevant statements of counsel for claimant and employer at the hearing. At the hearing, claimant's counsel, in addressing the parties' agreements, stated:

And the claimant underwent that program [the work hardening program which the parties agreed claimant would undergo] and the employer paid an additional period of temporary total disability from 7/10/96 to 7/23/96. . . .

The issue presented before your Honor is disability between June the 7th of 1995 and 7/10 of '96 and subsequent to 9/16 of '96. . . .

Tr. at 7-8. Employer's counsel's only comment was to correct claimant's counsel by stating that employer paid claimant temporary total disability benefits for the work hardening program period prior to September 17, 1996. Tr. at 8. The administrative law judge rejected a literal interpretation of claimant's counsel's statement as he thought it would yield the result that the parties agreed that claimant was totally disabled from July 10, 1996, to September 17, 1996, and there is no evidence that the parties reached a meeting of the minds on this subject prior to the hearing. Decision and Order Upon Remand at 2-3. The administrative law judge found that employer had no intent to enter into any stipulation about entitlement to compensation but merely intended to posit that it paid compensation for this period, pointing out that mere payment of compensation does not constitute a concession that claimant is legally entitled to that compensation. In the absence of a written stipulation and in light of the administrative law judge's rational finding that employer agreed only to its payment of compensation, but not to claimant's entitlement to compensation, from July 10, 1996, to September 17, 1996, we affirm the administrative law judge's conclusion that employer is entitled to a credit for its voluntary payment of compensation to claimant for this period. 33 U.S.C. §914(j).

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board in BRB No. 98-0181. He requests a total fee of \$1,706.25, representing 9.75 hours of work at an hourly rate of \$175. Employer did not file objections to the fee petition. The Board will award attorney's fees only upon a successful prosecution or defense of an appeal. 33 U.S.C. §928(a); 20 C.F.R. §§702.134(a), 802.203; see also *Eifler v. Peabody Coal Co.*, 13 F.3d 236, 27 BRBS 168 (CRT)(7th Cir. 1993); *Murphy v. Honeywell, Inc.*, 20 BRBS 68 (1986). In light of claimant's failure on remand to gain additional compensation over that initially awarded by the administrative law judge, we deny claimant's counsel's requested fee in its entirety.

Accordingly, the administrative law judge's Decision and Order

(Upon Remand By the Benefits Review Board) is affirmed. Claimant's counsel's request for an attorney's fee of \$1,706.25 for work performed before the Board in BRB No. 98-0181 is denied. 33 U.S.C. §928(a); 20 C.F.R. §§702.134(a), 802.203.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge