BRB Nos. 03-0579
and 03-0579A

LLOYD J. LECOMPTE, JR.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NORTH AMERICAN FABRICATORS	)	DATE ISSUED: May 25, 2004
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Limited Benefits and Decision and Order on Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

David B. Allen, Houma, Louisiana, for claimant.

Robert P. McCleskey, Jr., and Anne Derbes Keller (Phelps Dunbar, Ln.Ln.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Limited Benefits and subsequent Decision and Order on Reconsideration (2002-LHC-1826) of Administrative Law Judge Clement J. Kennington on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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 back injury while working for employer as a carpenter on April 17, 2001. Claimant initially saw Dr. Davis at Terrebonne General Medical Center; he diagnosed a lumbar contusion and a possible deviated coccyx, prescribed pain medication, and referred claimant to an orthopedic surgeon, Dr Sweeney. On May 3, 2001, Dr. Sweeney diagnosed subjective back pain, recommended further physical therapy, and limited claimant to light duty work. In a follow-up opinion in September 2002, Dr. Sweeney opined that, as of August 2001, claimant did not suffer from any permanent injury due to his April 17, 2001, workplace accident and was able to return to his previous employment. Claimant sought additional treatment from Dr. Kinnard, an orthopedist who had treated claimant for back and neck complaints in 1996. Dr. Kinnard saw claimant on June 13, 2001, and diagnosed a nerve root irritation, as well as an aggravation of claimant's pre-existing back condition, *i.e.*, one bulging disc and one protruding disc as demonstrated by an MRI conducted in 1996, and recommended that claimant not engage in any work. Dr. Kinnard later opined, on May 1, 2002, that claimant reached maximum medical improvement with regard to his back condition with a five percent permanent impairment, and was thereafter capable of performing sedentary/light work.

The administrative law judge found that claimant sustained a work-related injury to his back and that the April 17, 2001, work accident aggravated a pre-existing lumbar condition. The administrative law judge further found that following the injury, claimant could return to sedentary duty on April 20, 2001, he could return to light duty on April 26, 2001, and he was capable of returning to his usual work for employer as a carpenter on August 27, 2001. The administrative law judge found that employer offered light duty employment on April 27, 2001, at his pre-injury wage and thus claimant was unable to demonstrate a loss of wage-earning capacity. Accordingly, the administrative law judge awarded claimant temporary total disability benefits for the period of April 18, 2001 to April 26, 2001, and all relevant medical benefits including those relating to Dr. Kinnard's treatment.[1]

[1] In his Decision and Order on Reconsideration issued on May 28, 2003, the administrative law judge amended this temporary total disability award. The administrative law judge found, pursuant to employer's assertion, that under Section 6(a) of the Act, no compensation was payable for the first three days of disability. Accordingly, the administrative law judge amended his award of temporary total disability benefits to a period from April 21, 2001 through April 26, 2001. Decision and Order on Reconsideration at 1-2; 33 U.S.C. §906(a).

On appeal, claimant challenges the administrative law judge's findings regarding claimant's credibility and the extent of his disability. Employer responds and urges affirmance of those findings, as well as the administrative law judge's determinations regarding the date of maximum medical improvement, the date of the temporary total disability award and the determination that claimant could return to his usual employment. On cross-appeal, employer argues that the administrative law judge erred in failing to find that claimant knowingly and willfully chose Dr. Davis and, subsequently, Dr. Sweeney as his treating physicians. Employer further asserts the administrative law judge erred in determining that claimant's pre-existing back condition was aggravated by his work-related accident.

Claimant's Appeal

Claimant asserts that he is permanently partially disabled as a result of his workplace accident and continuing leg pain as a result of that accident. Claimant challenges the administrative law judge's bases for concluding that his testimony was not believable and raises myriad contentions challenging the administrative law judge's credibility determination. Claimant further argues that notwithstanding the administrative law judge's itemized points regarding the inconsistency of claimant's testimony, Decision and Order at 17-18, the evidence of record and in particular the opinion of treating physician Dr. Kinnard supports a finding of permanent partial disability.

In concluding that claimant was unable to establish permanent partial disability based on subjective complaints of ongoing pain, the administrative law judge found that claimant was not a credible witness. In so doing, the administrative law judge concluded that claimant failed to provide "satisfactory" testimony as to why he discontinued physical therapy with Dr. Sweeney despite previously indicating that such therapy had resolved twenty percent of his pain. The administrative law judge further found that Dr. Davis noted that claimant's ability to move from the chair to examining table was "odd" when other patients with complaints and symptoms of similar pain could not do the same. The administrative law judge observed that Dr. Sweeney found no objective pathological support for such pain and that even Dr. Kinnard opined that claimant's complaints were out of proportion with his objective findings. Decision and Order at 18. Finally, the administrative law judge noted Dr. Kinnard's testimony that given claimant's condition, improvement should have been seen, but was not. The administrative law judge thus concluded that in the absence of objective support for claimant's ongoing pain and given the testimony of the physicians, claimant's subjective complaints of pain were not credible. The administrative law judge is entitled to evaluate the credibility of all witnesses and has considerable discretion in evaluating the record evidence. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5th Cir. 2000); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT)(11th Cir. 1988). As the administrative law judge rationally evaluated the evidence, we affirm his determination that claimant's subjective complaints of pain were not credible.

Claimant further asserts that the administrative law judge should have accorded dispositive weight to the conclusions of Dr. Kinnard based on the doctor's status as treating physician. Citing the opinion of the United States Court of Appeals for the Ninth Circuit in *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999), claimant argues that Dr. Kinnard found claimant to be suffering from legitimate disabling pain caused by his workplace accident and that because no other physician of record treated claimant for as lengthy a time, his determination should be accorded greater weight. Contrary to claimant's assertion, the administrative law judge was not required to give dispositive weight to Dr. Kinnard's opinion; rather, the administrative law judge must weigh the relevant medical opinions, which he did in this case.[2] *See Mendoza v. Marine Pers. Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

The administrative law judge rationally determined that Dr. Kinnard's finding of nerve irritation causing lower extremity pain was insufficient to preclude claimant from returning to his usual employment as of August 27, 2001, and thus, was not supportive of a finding of permanent disability. Specifically, the administrative law judge observed that under Dr. Kinnard's care, claimant underwent a series of epidural steroid blocks, and a course of physical therapy, including a four week program commencing on July 26, 2001, which was aimed at rehabilitating and reconditioning claimant's muscles so that he could return to work. The administrative law judge thus concluded, based in part on Dr. Kinnard's treatment and predominantly upon the restrictions imposed by Drs. Davis, Kinnard and Sweeney, that claimant was capable of performing the light duty work offered by employer within its facility as of April 27, 2001, and that claimant was, as of August 27, 2001, capable of performing medium level work, and therefore was, at that time, capable of returning to his usual work as a carpenter. Moreover, the administrative

[2] There is no "mechanical" deference accorded to the opinions of treating physicians. Their opinions are to be weighed and credited along with the opinions of any other expert of record. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997)(quoting *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1097, 17 BLR 2-123 2-128-129 (4th Cir. 1993)). The decision in *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999), is not contrary to this rule. Although stating that a treating physician's opinion may be entitled to "special" consideration, in *Amos*, the issue concerned claimant's choice of treatment options, and the court held that where no physician opined the treating physician's recommended course was unreasonable, claimant was entitled to pursue the treatment prescribed by his treating physician. The case thus does not alter the administrative law judge's authority to weigh conflicting evidence regarding disability.

law judge questioned Dr. Kinnard's diagnosis of nerve root irritation given the lack of pathological support for such pain by Drs. Davis and Sweeney, as well as Dr. Kinnard's own statements that claimant's complaints of pain were out of proportion with his objective findings.[3] The administrative law judge's credibility determinations regarding the physicians of record and consequent findings regarding claimant's ability to return to work are affirmed as they are supported by substantial evidence. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*); *see also H.B. Zachery Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

Furthermore, we reject claimant's assertion that as maximum medical improvement was reached on May 1, 2002, claimant was entitled to temporary total disability benefits from the date of the workplace accident, April 17, 2001, until the May 1, 2002, date. Claimant's argument confuses the issues presented by findings regarding maximum medical improvement and claimant's ability to return to work, which are separate and distinct. Specifically, maximum medical improvement is an indication of the permanency of disability and the availability of suitable alternate employment is an indication of the degree of disability. *See generally Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *see also Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990). As such, a finding of maximum medical improvement has no bearing on the determination as to claimant's ability to return to work.

EMPLOYER'S CROSS- APPEAL

On cross-appeal, employer contends that the administrative law judge erred in concluding that claimant selected Dr. Kinnard as his choice of physician. Employer asserts that the record evidence supports a conclusion that claimant chose to see Dr. Davis and, subsequently, Dr. Sweeney, as recommended by Dr. Davis. Employer argues that the record demonstrates that claimant executed a Choice of Physician form in which he selected Dr. Davis as his treating physician. Employer's Brief at 25; Joint Exhibit 4. Employer asserts that the record clearly shows that the Choice of Physician form was executed knowingly by claimant and that claimant's "complete lack of credibility" as

[3] As the administrative law judge determined that employer established the availability of suitable alternate employment by offering claimant a light duty job within its facility, the labor market survey is not pertinent to the disability issue. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*). Consequently, we reject claimant's contention that the labor market survey presents several jobs which establish a post-injury wage-earning capacity less than claimant's pre-injury average weekly wage, thereby establishing entitlement to permanent partial disability. *Id.*

established throughout the case demonstrates that the administrative law judge's finding that claimant was "confused" regarding his selection of his treating physician was erroneous. Pursuant to Section 7(b), 33 U.S.C. §907(b), an injured worker has a right to choose a treating/attending physician authorized by the Secretary to provide medical treatment subsequent to that injury. If claimant has made his initial free choice and seeks to change physicians, he must request approval. 20 C.F.R. §702.406. Employer is required to consent to a change in physicians when the claimant's initial physician is not a specialist whose services are appropriate for the care of claimant's injury. *Id.; see Armfield v. Shell Offshore, Inc*., 25 BRBS 303 (1992)(Smith, J., dissenting on other grounds). In all other cases, an employer must give consent if good cause is shown for the requested change. 33 U.S.C. §907(c)(2).

In the instant case, the administrative law judge found that Dr. Davis treated claimant on April 20, 26 and May 1, 2001, after his workplace accident. On April 20, 2001, claimant met with representatives for employer at which time he signed an accident report, a medical authorization form and a Choice of Physician form listing Dr. Davis as his choice. The administrative law judge found that based on claimant's testimony, claimant was unaware that he had specifically designated Dr. Davis as his treating physician. He also relied on claimant's wife's testimony that she asked Mr. Fortenberry, employer's representative, what would happen if they did not want to see Dr. Davis and chose their own doctor, and he replied that claimant could choose another physician if he wished. Claimant returned to Dr Davis for treatment on April 26, 2001, and May 1, 2001, and saw Dr. Sweeney on referral from Dr. Davis. Nonetheless, the administrative law judge found that, subsequently, claimant decided that he was not comfortable seeing either Dr. Davis or Dr. Sweeney and thus decided to see Dr. Kinnard, a physician who had treated him previously.

The administrative law judge concluded that claimant never selected Dr. Davis as his physician. The administrative law judge found claimant had a "limited education," that neither claimant nor his wife realized that he was signing a choice of physician form, and that employer told claimant simultaneously that he had the right to go to a physician of his choice. The administrative law judge thus found that claimant was "lulled into a false sense of security" by the statement of employer's representative which deprived of his legal right to exercise his choice of physician. As substantial evidence supports the administrative law judge's determination that claimant did not knowingly select Dr. Davis as his choice of physician under Section 7(b), we affirm his finding that Dr. Kinnard is claimant's initial free choice and that employer is liable for his treatment.[4]

[4] In concluding that claimant's complaints of pain were not credible, the administrative law judge explicitly found that claimant's confusion about the form he signed and circumstances surrounding the choice of physician issue did not adversely affect his credibility. Decision and Order at 15.

Lastly, employer argues that the administrative law judge erred in concluding, based on the evidence as a whole, that claimant's April 17, 2001, work accident caused an increase in claimant's pre-existing disc protrusion, as the opinions of Drs. Sweeney, Davis and Donner establish that there was no increase in disc protrusion or that any increase was unrelated to the workplace accident. Employer argues that the only evidence demonstrating that claimant's pre-existing disc bulge was worsened by claimant's workplace accident is the "ambiguous testimony" of Dr. Kinnard. Employer notes that Dr. Kinnard acknowledged that the enlargement of claimant's bulging disc could be due to natural progression and also noted that there actually may have be have been no increase at all.

In the instant case, the administrative law judge determined, based on the record as a whole,[5] that claimant's workplace accident aggravated his underlying condition as claimant's protruding disc was larger in May 2001 subsequent to the workplace accident than it was in August 1996,[6] claimant was asymptomatic prior to the workplace accident, claimant suffered a lumbar contusion when he suffered the workplace accident, and the physicians of record all agreed that claimant's bulging and protruding disc were a legitimate source of claimant's complaints about back pain which originated at the time of the April 17, 2001, accident. Decision and Order at 34. In light of these findings, which are supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant's pre-existing disc protrusion was aggravated by his April 17, 2001, work accident. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990). The administrative law judge's award of benefits is thus affirmed.[7]

[5] The administrative law judge found the Section 20(a) presumption was invoked, but that employer produced substantial evidence to rebut it. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). He thus weighed the evidence on the record as a whole. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

[6] In August 1996, claimant underwent an MRI which demonstrated a degenerative disc with protrusion and an annular bulge. Claimant had another MRI in May 2001.

[7] In light of our affirmance of the administrative law judge's award of benefits, we need not remand this case for further consideration of claimant's assertions regarding the administrative law judge's award of an attorney's fee.

Accordingly, the administrative law judge's Decision and Order Awarding Limited Benefits and subsequent Decision and Order on Reconsideration are 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