

BRB No. 10-0323

GREGORY POND )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 LAKE SUPERIOR AND ISHPEMING ) DATE ISSUED: 10/27/2010  
 RAILROAD )  
 )  
 and )  
 )  
 AMERICAN HOME INSURANCE )  
 COMPANY )  
 )  
 Employer/Carrier- )  
 Respondents ) DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Robert B. Rae,  
Administrative Law Judge, United States Department of Labor.

Steven T. Moe (Petersen, Sage, Graves, Layman & Moe), Duluth,  
Minnesota, for claimant.

Andrew Z. Schreck (Downs & Stanford, P.C.), Sugar Land, Texas, for  
employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2007-LHC-2090) of  
Administrative Law Judge Robert B. Rae 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. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls  
Associates, Inc.*, 380 U.S. 359 (1965).

On October 26, 2005, claimant sustained a work-related injury to his back while working for employer as an ore dock laborer. Claimant subsequently treated with numerous physicians, complaining of back and right leg pain. Claimant's medical treatment has included physical therapy, an MRI, an EMG, steroid injections, and a psychological evaluation. In addition to filing a claim for benefits under the Act, claimant filed for and was awarded retirement benefits by the Railroad Retirement Board. Employer voluntarily paid claimant temporary total disability benefits during the period November 2, 2005, through February 2, 2006.

In his Decision and Order, the administrative law judge found that claimant's condition reached maximum medical improvement as of February 2, 2006, and that claimant failed to meet his burden of establishing that he remained disabled subsequent to that date. Accordingly, the administrative law judge denied claimant's claim for additional disability and medical benefits subsequent to February 2, 2006.

On appeal, claimant challenges the administrative law judge's denial of his claim for additional benefits under the Act. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant initially contends that the administrative law judge erred in determining that claimant's condition reached a state of permanency on February 2, 2006. The Act provides two basis for determining whether and when a disability has become permanent: 1) a residual disability may be found to have reached permanency when a claimant's condition reaches the point of maximum medical improvement, or 2) a residual disability may be considered permanent if it has continued for a lengthy period, and appears to be of lasting or indefinite duration. *See Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 474 F.3d 253, 40 BRBS 73(CRT) (6<sup>th</sup> Cir. 2007), *citing Watson v. Gulf Stevedore Co.*, 400 F.2d 649 (5<sup>th</sup> Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

In support of his allegation of error, claimant asserts that the opinion of his primary physician, Dr. Gerold, establishes that claimant reached maximum medical improvement in January 2007.<sup>1</sup> While an administrative law judge may give greater

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<sup>1</sup> Claimant summarily states that Dr. Gerold set a date of maximum medical improvement "at January 2007," and that the "overwhelming weight of the evidence supports a finding [that] petitioner's condition did not stabilize until January or February 2007." Cl. br. at 6 – 9. A medical assessment form filled out by Dr. Gerold on February 22, 2007, placed restrictions on claimant's pushing, pulling and lifting activities. CX 41.

weight to the opinion of a treating physician, *see Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6<sup>th</sup> Cir. 1998), he is not required to do so simply because the witness is claimant's primary physician. *See generally Avondale Shipyards v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5<sup>th</sup> Cir. 1990). Rather the administrative law judge should independently evaluate the quality of the medical evidence. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). In this case, in concluding that claimant reached maximum medical improvement on February 2, 2006, the administrative law judge relied upon the opinions of Drs. Mayer, Carlson, and Rose, stating that Dr. Mayer's qualifications and experience as a spinal surgeon are both vast and specific to claimant's condition, and that Drs. Carlson and Rose formed their respective opinions almost entirely on objective criteria.<sup>2</sup> Decision and Order at 38 – 39. The testimony of these physicians supports the administrative law judge's conclusion that claimant's condition was permanent by February 2, 2006. Therefore, we affirm the administrative law judge's finding as it is rational and supported by substantial evidence. *See Beumer*, 39 BRBS 98; *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

The administrative law judge next addressed the extent of claimant's alleged work-related disability. In order to establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual work due to the injury. *See Washnock*, 135 F.3d 366, 32 BRBS 8(CRT); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Delay*, 31 BRBS 197. In this case, the administrative law judge credited the opinions of Drs. Mayer, Carlson and Rose, in part based upon their superior credentials, rather than the opinions of Drs. Gerold, Lehtinen and Fleeson and the testimony of claimant, in concluding that claimant did not sustain a compensable disability subsequent to February 2, 2006. In challenging the administrative law judge's denial of his claim for ongoing disability benefits, claimant avers that his testimony regarding his physical limitations is sufficient to meet his burden of establishing his inability to resume his usual employment duties with employer.

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In a letter to claimant's counsel dated September 22, 2008, Dr. Gerold, without elaboration, states that claimant "reached maximum medical improvement by January 22, 2007." CX 37 at 4.

<sup>2</sup> Dr. Rose released claimant to return to work as of November 16, 2005. EX 15 at 5, 11. Dr. Carlson released claimant to return to his regular employment duties on February 2, 2006. CX 15 at 4; EX 17 at 25 – 26. Dr. Mayer, a Board-certified orthopedic surgeon, evaluated claimant on September 29, 2006, concluded that claimant exhibited no ongoing disability associated with his work-related condition, and agreed with Dr. Carlson's conclusion that claimant was capable returning to his regular employment duties as of February 2, 2006. EXs 9, 11, 12.

We affirm the administrative law judge's decision as he rationally weighed the conflicting medical and lay evidence and concluded that claimant sustained no compensable impairment subsequent to February 2, 2006. In making this finding, the administrative law judge credited the opinions of Drs. Carlson, Mayer, and Rose. Dr. Carlson, based upon his examination of claimant and his review of claimant's medical records, x-rays, and MRI, opined that claimant was capable of returning to his regular employment duties as of February 2, 2006. CX 15 at 4. Dr. Mayer, a spinal surgeon, reviewed claimant's prior test results and records and concurred with the opinion of Dr. Carlson that claimant was capable of returning to his usual employment duties as of February 2, 2006. EX 11. Dr. Rose, examined claimant on November 16, 2005, and released him to return to work. CX 13; EX 15. In contrast, the administrative law judge found the testimony of claimant to be inconsistent, and he consequently declined to credit it as it relates to his present physical abilities.<sup>3</sup> Decision and Order at 14. While a claimant's credible complaints of pain may be sufficient to establish his inability to return to his usual work, *see Eller & Co. v. Golden*, 620 F.2d 71, 8 BRBS 846 (5<sup>th</sup> Cir. 1980), 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 witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). The administrative law judge's weighing of the evidence and credibility determinations in this case are rational and within his authority as the factfinder.<sup>4</sup> *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As the administrative law judge acted within his discretion in crediting the opinions of Drs.

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<sup>3</sup> We reject claimant's assertion that the administrative law judge erred in his consideration of video evidence depicting claimant engaged in various activities. This evidence was introduced by employer to impeach claimant's testimony regarding the level of physical activity that he is capable of performing. The administrative law judge rationally compared this evidence to claimant's testimony, and these videos were but one factor relied upon by the administrative law judge in addressing claimant's credibility. Decision and Order 11 - 14.

<sup>4</sup> Claimant's attachment and incorporation of his post-hearing brief, filed with the administrative law judge, to his appellate brief on appeal is tantamount to a request that the Board reweigh the totality of the evidence of record, a role that is outside of the Board's scope of review. *See generally Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Nevertheless, we note that the administrative law judge in his decision set forth at length the totality of the evidence presented by the parties, *see* Decision and Order at 7 – 35, and he addressed the weight to be accorded that evidence in addressing the issues raised by the parties. *See* Decision and Order at 36 – 42.

Carlson, Mayer, and Rose, and as these opinions constitute substantial evidence to support the administrative law judge's finding, we affirm the administrative law judge's determination that claimant was able to return to his usual work on February 2, 2006. Therefore, we affirm the denial of benefits as of that date.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits 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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JUDITH S. BOGGS  
Administrative Appeals Judge