

BRB No. 14-0141

MICHAEL REYNOLDS)
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 Claimant-Petitioner)
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 v.)
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 LOGISTEC USA, INCORPORATED) DATE ISSUED: Oct. 16, 2014
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 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order on Remand of Timothy J. McGrath,
Administrative Law Judge, United States Department of Labor.

David A. Kelly (Monstream & May, L.L.P.), Glastonbury, Connecticut, for
claimant.

Peter D. Quay (Law Offices of Peter D. Quay, L.L.C.), Taftville,
Connecticut, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge,
McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2011-LHC-01439) of
Administrative Law Judge Timothy J. McGrath 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 administrative law judge's findings of
fact and conclusions of law if they are rational, supported by substantial evidence, and in
accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls
Associates, Inc.*, 380 U.S. 359 (1965). This case has been before the Board previously.

Claimant injured his back on August 8, 2007, while working for employer. Claimant was diagnosed with a lumbar sprain, disc degeneration, and a lumbosacral strain. In a decision issued in May 2009, Administrative Law Judge Mosser awarded claimant continuing temporary total disability benefits beginning August 8, 2007. Judge Mosser's award of medical benefits included an evaluation by an orthopedic specialist, assuming claimant's chosen treating physician determined such a referral was necessary.

Thereafter, claimant treated with Dr. Mastroianni, an orthopedic surgeon. Based on an MRI administered in November 2009, Dr. Mastroianni diagnosed bulging discs at L3-4 and L4-5, and a herniation at L5-S1. The doctor recommended that claimant undergo a discectomy stabilization and fusion. Although the surgery was authorized and set for June 2010, claimant declined the surgery due to trepidation, and, in September 2010, claimant underwent an epidural steroid injection with Dr. Bader, after requesting that Dr. Mastroianni refer him for alternative treatment. In October 2010, at employer's request, Dr. Mastroianni completed an OWCP-5 form, indicating claimant's work restrictions. Dr. Mastroianni stated that claimant had declined surgery and was released to light-duty work. In listing claimant's restrictions, the doctor stated that claimant could sit continuously, but all other activities were to be intermittent, and lifting should be limited to 10-20 pounds. Dr. Mastroianni also stated, however, that claimant had not yet reached maximum medical improvement. Subsequently, on November 4, 2010, claimant returned to Dr. Mastroianni's office complaining of pain. He underwent another MRI on November 23, 2010 and agreed to reschedule surgery for December 2010. After claimant again cancelled the surgery, Dr. Mastroianni determined that, absent surgery, claimant's condition was at maximum medical improvement. In April 2011, claimant again scheduled and cancelled surgery. When Dr. Mastroianni was deposed, he testified that claimant's condition had worsened between June 2010 and April 2011.

On December 10, 2010, employer filed a motion for modification of Judge Mosser's award. Employer's motion sought to terminate claimant's continuing temporary total disability award on the ground that suitable alternate employment was available for claimant. Based on the restrictions listed by Dr. Mastroianni in the OWCP-5 form, employer obtained a labor market survey identifying jobs claimant could perform.

Administrative Law Judge McGrath (the administrative law judge) granted employer's motion for modification, and terminated claimant's disability award. The administrative law judge credited Dr. Mastroianni's testimony that claimant is physically capable of some employment, despite the lack of improvement in his physical condition. The administrative law judge also found that employer established the availability of suitable alternate employment, based on two entry-level cashier positions paying higher wages than claimant's average weekly wage, beginning July 6, 2011.

Claimant appealed the termination of his award to the Board. The Board affirmed the administrative law judge's crediting of Dr. Mastroianni's testimony and the administrative law judge's assessment of claimant's employability in view of his restrictions and age, and of economic conditions. Nonetheless, the Board remanded the case, as the administrative law judge had not addressed claimant's testimony regarding his degree of pain and other evidence supporting claimant's complaints, such as Dr. Zimmerman's October 27, 2011 report. As claimant's disability may be established by credible complaints of pain, the Board vacated the administrative law judge's termination of benefits and remanded the case for the administrative law judge to specifically address whether claimant's pain prevents him from returning to any work. *Reynolds v. Logistec USA, Inc.*, BRB No. 12-0498 (June 12, 2013).

On remand, the administrative law judge found that claimant's complaints of pain are not supportive of his claim of a complete lack of work capacity. Therefore, the administrative law judge granted employer's motion for modification and terminated claimant's disability benefits. On appeal, claimant contends the administrative law judge erred in finding that his pain does not prevent him from working and, thus, that the decision terminating his benefits is not supported by substantial evidence. Employer responds, urging affirmance of the administrative law judge's decision.

The administrative law judge acknowledged that claimant undoubtedly has some pain because of his back injury. The administrative law judge found that despite claimant's assertion that his pain has increased since 2008, claimant is able to function on a daily basis without any pain medication. The administrative law judge relied on claimant's testimony that the only pain relief he seeks is from an occasional Lidoderm patch. Tr. at 60. The administrative law judge also found that claimant did not testify that his pain was such that he could not work if provided the accommodation to sit and stand as needed. The administrative law judge thus concluded that claimant's testimony did not credibly support his inability to perform sedentary work. Therefore, in conjunction with the evidence on which he relied in his prior decision, the administrative law judge found that employer established the basis for modification of the prior decision awarding benefits. Accordingly, the administrative law judge terminated claimant's benefits on remand and granted employer's motion for modification.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law

judge rationally found that claimant's testimony is insufficient to establish that his pain prevents him from performing sedentary work. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Therefore, in conjunction with the Board's affirmance of the administrative law judge's findings concerning Dr. Mastroianni's opinion and employer's labor market evidence, we affirm the administrative law judge's granting of employer's motion for modification and the termination of claimant's temporary total disability benefits.

Accordingly, we affirm the administrative law judge's Decision and Order on Remand.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge