BRB No. 13-0590

ANTONIO GONZALEZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LONG BEACH CONTAINER TERMINAL	)	
	)	DATE ISSUED: Sept. 25, 2014
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation and Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Patrick A. Carreon (Mower, Carreon & Desai, LLP), Long Beach, California, for claimant.

James P. Aleccia and Marcy K. Mitani (Aleccia & Mitani), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Compensation and Benefits (2012-LHC-01328) of Administrative Law Judge Richard M. Clark 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 supported by substantial evidence, rational, 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 February 25, 2011, claimant experienced back and neck pain after the UTR he was driving was lifted into the air and dropped to the ground by a top handler.[1] As a result of this incident, claimant sought medical treatment for his complaints of ongoing pain. Employer voluntarily paid claimant temporary total disability benefits from February 26 through July 11, 2011. 33 U.S.C. §908(b); *see* EX 4. Claimant sought ongoing temporary total disability benefits as well as an order holding employer liable for cervical spine decompression surgery recommended by his physicians.

In his Decision and Order, the administrative law judge found that claimant's injury reached maximum medical improvement as of June 27, 2011, and that claimant failed to establish that he remained disabled after that date. Additionally, after finding that claimant did not establish he has cervical myelopathy, compression or impingement, the administrative law judge found, based on the opinions of employer's examining physicians, that cervical decompression surgery is not necessary for the treatment of claimant's work-related neck injury. Accordingly, the administrative law judge awarded claimant temporary total disability benefits, and medical expenses, only for the period of February 26 through June 27, 2011. 33 U.S.C. §§908(b), 907.

On appeal, claimant challenges the administrative law judge's denial of his claim for additional benefits under the Act, specifically contending that the administrative law judge erred in concluding that cervical surgery is not necessary to treat his work injury and that he remains disabled by the February 2011 injury. Employer responds, urging affirmance of the administrative law judge's decision in its entirety. Claimant has filed a reply brief.

Claimant contends the administrative law judge erred in finding that cervical decompression spinal surgery, prescribed by his chosen physicians, is not necessary for the treatment of his work injury. Specifically, claimant asserts the administrative law judge committed reversible error in relying on the opinions of employer's medical experts rather than the opinions of claimant's treating physicians.

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." Medical care must be appropriate for the injury, *see* 20 C.F.R. §702.402, and claimant must establish that the requested treatment is necessary for the treatment of the work injury; the presumption at 33 U.S.C. §920(a) does not apply to the issue of whether any particular treatment is necessary for the injury. *See generally Maryland Shipbuilding & Dry Dock Co. v.*

[1] Claimant had previously been treated for back and neck pain between 2004 and 2010. Decision and Order at 6-7.

Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *Schoen v. U.S. Chamber of Commerce,* 30 BRBS 112 (1996). While a claimant may establish his prima facie case for compensable medical treatment when a qualified physician indicates treatment is necessary for a work-related condition, *see Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker],* 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993), whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See M. Cutter Co., Inc. v. Carroll*, 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006).

In *Amos v. Director, OWCP*, 153 F.3d 1051 (1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, addressed the degree of deference due a treating physician's recommendation for particular treatment. The claimant in *Amos* had injured his shoulder in a work-related accident. His treating orthopedic surgeon recommended surgery. Two other orthopedic surgeons recommended against surgery, but neither stated that surgery was an unreasonable option; however, they favored a more conservative course of treatment. The court held that "when an injured employee is faced with competing medical opinions about the best way to treat his work-related injury, each of them medically reasonable, it is for the patient – not the employer or the ALJ – to decide what is best for him." *Id.*, 153 F.3d at 1052, 32 BRBS at 145(CRT). The court held that the opinion of the claimant's treating surgeon was entitled to "special deference" because a treating doctor is "employed to cure and has a greater opportunity to know and observe the patient as an individual;" as the treating surgeon's opinion "was not shown by the testimony of the other doctors to be unreasonable," the administrative law judge was not permitted to find that surgery was not warranted. The court remanded the case with instructions that the administrative law judge grant the claimant's request for surgery. *Id.,* 153 F.3d at 1054, 32 BRBS at 147-148(CRT).

In this case, the administrative law judge first determined that claimant's credibility is suspect because: (1) he failed to inform the doctors of his prior treatment for neck and back pain; (2) he gave inconsistent effort on various objective medical tests and reports of symptoms, and; (3) he wore a cervical collar to the medical examinations requested by employer and to the formal hearing, although it had not been prescribed for his condition. Decision and Order at 24-26. This credibility determination is well within the administrative law judge's authority. *Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

The administrative law judge next reviewed the deference due to the various medical professionals pursuant to *Amos*. With respect to claimant's doctors, the administrative law judge found that claimant's treating physician, Dr. Miller, is entitled to deference; Dr. Miller opined that claimant's February 2011 MRI showed an impingement of the spinal cord and he referred claimant to Dr. Obukhoff, a

neurosurgeon, for a surgical consultation. CX 8 at 2-3. Dr. Obukhoff opined that claimant's MRI and clinical presentation demonstrate compression of the spinal cord and he recommended that claimant undergo an anterior cervical discectomy and fusion decompression at C5-6. CX 22 at 3-4. The administrative law judge found that Dr. Obukhoff's opinion is not entitled to special deference due to the conclusory medical reports he prepared and his unwillingness to address the opinions of other physicians. Decision and Order at 27-28. Dr. Miller recommended that claimant undergo surgery, based on Dr. Obukhoff's opinion. Dr. Payne also recommended that claimant undergo surgery, due to a slight impingement of the spinal cord; he personally reviewed the MRI results and examined claimant. CX 42 at 4, 16. The administrative law judge found Dr. Payne's opinion credible and entitled to "significant weight." Decision and Order at 28. Similarly, the administrative law judge found Dr. Lanman's opinion, that claimant needs surgery at C5-6 and C6-7 due to clear evidence of myelopathy, entitled to significant weight because his opinion and testimony were well-explained, Tr. at 425-426; the administrative law judge noted, however, that Dr. Lanman is not a "treating" physician as defined in the *Amos* decision as he first examined claimant the day before the formal hearing. Decision and Order at 28.

The administrative law judge also addressed the opinions of each of the physicians retained by employer to examine claimant. The administrative law judge rationally found, contrary to the contention claimant raises on appeal, that each is "extremely well-qualified" to render an opinion concerning spinal injuries, even though none is a neurosurgeon. Decision and Order at 29. Dr. London examined claimant on May 5 and June 27, 2011, and on May 10, 2012, and opined that claimant sustained a soft tissue injury that did not aggravate his pre-existing cervical and thoracic disc disease and did not require surgery. CX 6 at 8; CX 9 at 10; CX 35 at 7; CX 40 at 5; EX 8 at 110. Dr. Farran examined claimant on November 11, 2011; he found no documented signs of myelopathy, and opined that spinal surgery for claimant would be ill-advised. Tr. at 348; CX 32 at 10. In an October 18, 2012 report written following his review of claimant's CT scans, MRIs and x-rays, Dr. Rothman opined that claimant exhibited no signs of abnormality, impingement, or myelopathy in his spinal cord, nor did he observe significant spinal cord compression; Dr. Rothman thus concluded that there is no reason for claimant to undergo decompression surgery. Tr. at 466-467. The administrative law judge found that the opinions of these three physicians are entitled to "significant weight," specifically finding that Dr. Rothman was "highly credible." Decision and Order at 29.

The administrative law judge proceeded to weigh the "credible" medical evidence at length. Drs. Miller, Payne and Lanman each found that claimant has mild spinal cord impingement resulting from the February 2011 work accident. Drs. London, Farran and Rothman found that claimant does not have any cervical abnormality for which surgery is warranted; specifically, they found claimant does not have compression, impingement, a

bulging cervical disc or myelopathy for which surgery would be recommended. Ultimately crediting the latter three physicians, and especially Dr. Rothman, the administrative law judge concluded that surgery is not necessary for claimant's cervical condition. Decision and Order at 33-34. Thus, the administrative law judge declined to hold employer liable for this medical expense.

We affirm the administrative law judge's finding as he rationally weighed the conflicting evidence and his conclusion is supported by substantial evidence of record. It is well-established that an administrative law judge is entitled to weigh the medical evidence and is not bound to accept the opinion or theory of any particular witness or medical professional. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988). Claimant's brief on appeal largely reiterates the objections he raised below regarding employer's experts. The administrative law judge fully considered the positions of the parties and claimant has not established reversible error in the administrative law judge's decision.[2] Moreover, unlike *Amos*, this is not a case where there is a disagreement about how best to treat an acknowledged injury; in this case, there is a disagreement concerning the extent of claimant's injury. The administrative law judge acknowledged the deference due Dr. Miller as claimant's treating physician, but rationally found that Dr. Rothman's opinion is entitled to greater weight on the basis of his superior credentials as a neuroradiologist and more persuasive testimony at the hearing.[3] Decision and Order at 33. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that employer is not liable for cervical spine surgery. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

[2] Claimant specifically asserts that the administrative law judge's decision cannot be affirmed in light of what he alleges are the inferior credentials of employer's medical experts and those experts' consideration of claimant's pre-injury thoracic condition to conclude that claimant's "condition" before and after the work incident is the same. Although the administrative law judge did not always differentiate between claimant's thoracic and cervical spine in discussing the MRIs, it is clear that the administrative law judge's conclusion is based on the absence of acute pathology in cliamant's cervical spine.

[3] The administrative law judge observed that Dr. Miller's curriculum vitae was not provided, and that he appears to be a pain management physician. CX 2 at 1.

We additionally affirm the administrative law judge's denial of disability benefits subsequent to June 27, 2011. Contrary to claimant's contention, the presumption at Section 20(a) of the Act does not aid claimant in establishing he is disabled by his work injury. *See Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998). The administrative law judge rationally discredited claimant's subjective complaints of pain as a basis for finding ongoing disability. *Cordero*, 580 F.2d 1331, 8 BRBS 744. Drs. London and Farran opined that claimant had sustained only a soft-tissue injury that resulted in a temporary exacerbation of his pre-existing condition. CX 9 at 9-10; CX 32 at 10; Tr. at 349. Dr. London stated on June 27, 2011 that claimant could return to his usual work without restrictions, *see* CX 9 at 10; Dr. Farran concurred on November 11, 2011. CX 32 at 10.

The administrative law judge acknowledged the contrary opinions of Drs. Miller, Lanman and Obukhoff, but was persuaded by the opinions of Drs. London and Farran, as is within his discretion. Decision and Order at 35-38; *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). The administrative law judge's conclusion that claimant did not establish his inability to perform his usual work is supported by substantial evidence of record. Therefore, we affirm the denial of benefits after June 27, 2011.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

_____

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

_____

REGINA C. McGRANERY
Administrative Appeals Judge

_____

JUDITH S. BOGGS
Administrative Appeals Judge