

THOMAS GOODMAN )  
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 Claimant-Petitioner )  
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 v. )  
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 SSA GULF TERMINALS, ) DATE ISSUED: April 7, 2004  
 INCORPORATED )  
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 and )  
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 HOMEPORT INSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Respondents ) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Robert B. Wiygul (Waltzer & Associates), Biloxi, Mississippi, for claimant.

Richard P. Salloum (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2002-LHC-2301) of Administrative Law Judge Clement J. Kennington 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a yard hustler operator, was injured at work on October 1, 2001, and was diagnosed with a left inguinal hernia and lumbar problems. Employer voluntarily paid claimant temporary total disability benefits from October 2 through December 10, 2001, and medical benefits. Claimant had left inguinal hernia repair surgery on October 18, 2001.

In his decision, the administrative law judge excluded from the record Dr. Barrocas's report which claimant attempted to admit at the hearing. The administrative law judge also refused to consider claimant's claim for psychological injuries, and to admit its accompanying documentation, as this claim was raised for the first time post-hearing. Considering the merits of claimant's physical injury claim only, the administrative law judge found, based on Dr. Moses's opinion, that claimant could return to work without restrictions on November 26, 2001, and accordingly denied claimant additional disability benefits.<sup>1</sup>

On appeal, claimant challenges the administrative law judge's decision denying additional disability benefits for claimant's physical injury, as well as the administrative law judge's exclusion of Dr. Barrocas's report and his refusal to address claimant's psychological injury claim. Employer responds in support of the administrative law judge's decision, to which claimant replies.

Claimant first argues that the administrative law judge abused his discretion in excluding from the record Dr. Barrocas's report which claimant attempted to admit at the formal hearing. Claimant hoped to prove by Dr. Barrocas's report that claimant's pain originates from scar tissue which formed after his hernia repair surgeries and interferes with the ilioinguinal nerve. Cl. Ex. 12 (excluded). Claimant asserts that, contrary to the administrative law judge's conclusion, claimant did not wait too long to submit Dr. Barrocas's report because claimant did not know the source of his alleged pain until he received Dr. Barrocas's report on the day before the hearing. Claimant also argues that the administrative law judge abused his discretion in denying claimant's request for a continuance because employer did not oppose it.

An administrative law judge's determinations concerning the admission or exclusion of evidence are discretionary, and any decision regarding the admission or exclusion of evidence is reversible only if it is arbitrary, capricious, or an abuse of discretion. *See Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). Moreover, an administrative law judge has the discretion to exclude even relevant and material evidence for failure to comply with the terms of his pre-hearing order. *Id.* The

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<sup>1</sup> The administrative law judge left for a decision on reconsideration whether claimant was entitled to reimbursement for his medical expenses from October 1 through November 26, 2001. Claimant did not file a motion for reconsideration, and thus no decision was made with respect to claimant's entitlement to reimbursement for medical expenses.

administrative law judge excluded Dr. Barrocas's report from the record because its admission was prejudicial to employer and because it was not submitted in compliance with his pre-hearing order.

We affirm the administrative law judge's exclusion of Dr. Barrocas's report, as claimant has not established that the administrative law judge abused his discretion in this regard. *See Burley*, 35 BRBS 185; *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 29 (1999), *citing Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989)(party seeking to admit evidence must exercise due diligence in developing its claim prior to the hearing); Decision and Order at 2-4 and n.3; Tr. at 171-178. The administrative law judge's pre-hearing order required all discovery to be concluded on December 27, 2002, 20 days prior to the formal hearing on January 16, 2003. The administrative law judge observed that claimant should have sought Dr. Barrocas's opinion earlier, because claimant knew that the other physicians of record, Drs. Carter, Moses, and Winters, could not reach a conclusion as to the cause of claimant's pain.<sup>2</sup> *See Burley*, 35 BRBS 185. Although claimant's treating physician, Dr. Faison, suggested a referral to another physician in October 2002, the administrative law judge found that claimant did not arrange for a timely appointment with another physician or request a timely continuance of the hearing. *See Pimpinella v. Universal Maritime Serv., Inc.*, 27 BRBS 154 (1993); *Smith*, 22 BRBS 46. Additionally, the administrative law judge rationally found that the admission of Dr. Barrocas's report was prejudicial to employer as employer was unaware of the contents of Dr. Barrocas's report. As the administrative law judge permissibly rejected the proffer at the hearing, we reject claimant's contention of error. *Durham v. Embassy Dairy*, 19 BRBS 105 (1986).

Moreover, we affirm the administrative law judge's denial of claimant's unopposed motion for a continuance. 20 C.F.R. §702.337; Tr. at 5-12; Decision and Order at 3 n. 3, 4. Claimant's motion for continuance was filed less than 10 days before the formal hearing. Claimant sought the continuance in order to develop Dr. Barrocas's theory regarding the etiology of claimant's pain. The administrative law judge found, in essence, that claimant did not establish sufficient grounds for his continuance request, again due to his lack of diligence in developing his evidence earlier. The fact that employer did not oppose the motion does not require the administrative law judge to grant a continuance where, as here, he reasonably finds the request unwarranted.

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<sup>2</sup> On February 20, 2002, Dr. Winters, an orthopedist, stated there was no basis for claimant to have referred pain from his back. Emp. Ex. 15 at 1; Cl. Ex. 4 at 2, 4. On March 12, 2002, Dr. Moses, a general surgeon, opined that claimant could return to work after his hernia repair surgery. Emp. Ex. 6 at 8-9; Cl. Ex. 5 at 4. Dr. Carter, an urologist, opined on March 13, 2002, that testing did not reveal any urological problems and any pain claimant experienced was likely referred from his back. Emp. Ex. 12 at 2-3; Cl. Ex. 3 at 2-3. Lastly, Dr. Winters reconfirmed his prior opinion, that there was no basis for claimant to have referred pain from his back, after reviewing an MRI scan on August 23, 2002. Emp. Ex. 15 at 1; Cl. Ex. 4 at 2, 4.

Claimant next argues that the administrative law judge erred in refusing to consider his psychological injury claim and to admit his post-hearing evidence concerning this claim. On December 11, 2002, prior to the formal hearing, claimant reported to Dr. Faison that he felt depressed, and Dr. Faison consequently assessed claimant as depressed. Cl. Ex. 2 at 6. On February 10, 2003, after the hearing, Dr. Faison reported that claimant had severe work-related depression. Ex. 1 to Claimant's Motion to Supplement the Record. Subsequently, claimant was hospitalized from February 19 through 23, 2003, for psychiatric reasons. Ex. 2 to Claimant's Motion to Supplement the Record. Claimant attempted to allege post-hearing that he suffered from work-related depression as a result of his physical work injury on October 1, 2001.

Under Section 702.336(b) of the regulations, at any time prior to the filing of a compensation order, an administrative law judge may, in his discretion, consider a new issue raised by one of the parties. 20 C.F.R. §702.336(b). The regulation does not require him to do so, and we affirm the administrative law judge's refusal to consider claimant's post-hearing assertion of a psychological injury in this case. The administrative law judge committed no abuse of discretion in declining to address this claim, as the record had already closed, Tr. at 179, and he rationally concluded that the development of this claim had the potential to be a lengthy process. See 20 C.F.R. §702.336(b); *Burley*, 35 BRBS 185; *Milam v. Mason Tech.*, 34 BRBS 168 (2000) (McGranery, J., dissenting on other grounds); *Ezell*, 33 BRBS 19; *Lewis v. Todd Pac. Shipyards Corp.*, 30 BRBS 154, 157-159 (1996); *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90, 94-95 (1996); *Pimpinella*, 27 BRBS 154; Decision and Order at 3-6. Claimant may request modification pursuant to Section 22 of the Act, 33 U.S.C. §922, in order to pursue benefits for his alleged psychological condition, as well as any change in condition or mistake in fact due to his physical condition, as both allegedly arise from the original work injury. See *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7<sup>th</sup> Cir. 2002); *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985).

Claimant lastly argues that the administrative law judge erred in finding that he can return to his usual work and in failing to fully consider his back injury claim. Claimant asserts that the administrative law judge erred in rejecting Dr. Faison's opinion that claimant cannot return to his usual work and claimant's testimony to the same effect. Moreover, claimant asserts that the administrative law judge failed to address hospital records dated in 2002 documenting claimant's continuing complaints of pain from the work injury. Claimant also asserts that while his physicians diagnosed a back injury, none of them ever returned him to work with respect to this injury. A claimant establishes his *prima facie* case of total disability where he establishes that he is unable to perform his usual employment duties due to a work-related injury. See *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998). In arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. See *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693

(5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962).

We affirm the administrative law judge's denial of additional disability benefits for claimant's physical injury claim as the administrative law judge acted within his discretion in crediting the opinions of Drs. Carter, Moses, and Winters, over that of Dr. Faison, and in rejecting claimant's testimony. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2<sup>d</sup> Cir. 1997); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9<sup>th</sup> Cir. 1988); *Calbeck*, 306 F.2d 693; *Donovan*, 300 F.2d 741; Decision and Order at 16-18; Cl. Exs. 2 at 2, 19, 26, 30; 3 at 1; 4 at 2, 4; 5 at 4; Emp. Exs. 6 at 8-9; 15 at 1; 22; Tr. at 84-85, 128. The administrative law judge discussed and weighed the relevant opinions of Dr. Faison, claimant's treating doctor who is a family practitioner, Dr. Carter, an urologist, Dr. Moses, a general surgeon, and Dr. Winters, an orthopedist. First, the administrative law judge credited the opinions of Drs. Carter, Moses, and Winters, based on their specialized knowledge, over the opinion of Dr. Faison that claimant is totally disabled. The administrative law judge noted that Drs. Carter and Moses thought that claimant was clear of urological problems but that he might have back problems, while Dr. Winters thought that claimant was free of back problems but might have urological problems. Based on the opinions of these doctors that claimant has no medical problems in their respective specialties, the administrative law judge concluded that claimant has no discernable etiology for his chronic pain complaints.

Next, the administrative law judge found that claimant's testimony was insufficient to establish that his subjective pain prohibits him from returning to work. No objective findings support claimant's pain complaints, and the administrative law judge was not impressed with claimant's demeanor at trial. Decision and Order at 17. Moreover, the administrative law judge noted that claimant submitted false information to obtain employment at Grand Casino in June 1993.<sup>3</sup> The administrative law judge did not credit claimant's testimony that his subjective pain is disabling, and thus did not credit Dr. Faison's opinion that claimant was totally disabled because it was based on claimant's discredited subjective reports of pain. Consequently, based on Dr. Moses's opinion that claimant could return to work without restriction after his hernia repair as of November 26, 2001, the administrative law judge concluded that claimant was not disabled after this date. Any error in the administrative law judge's failure to weigh claimant's 2002 hospital records with the opinions of Drs. Faison, Carter, Moses, and Winters is harmless, as the hospital records merely report claimant's complaints of pain. As none of the credited evidence supports claimant's claim of disabling back pain, and as substantial evidence supports the administrative law judge's finding that claimant could

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<sup>3</sup> In his application to the Grand Casino, claimant indicated that he graduated from high school. Tr. at 128. In fact, claimant attended school in a special education program through the twelfth grade but did not graduate or obtain a General Equivalency Degree. Tr. at 84-85, 128.

have returned to work without restrictions as of November 26, 2001, we affirm the administrative law judge's denial of additional disability benefits. *Gacki*, 33 BRBS 127; *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9<sup>th</sup> Cir. 1990).

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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BETTY JEAN HALL  
Administrative Appeals Judge