BRB No. 08-0737

J.Z.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VESSEL REPAIR, INCORPORATED	)	DATE ISSUED: 04/16/2009
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

J.Z., Port Arthur, Texas, *pro se.*

C. Douglas Wheat (Wheat, Oppermann & Meeks, P.C.), Houston, Texas, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2008-LHC-00231) of Administrative Law Judge C. Richard Avery 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they 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).

Claimant sustained a work-related injury to his back on May 11, 2005, while working for employer as a welder. Claimant sought treatment with Dr. Montet the following day; Dr. Montet diagnosed claimant with a lumbar strain and released claimant to return to light duty work with restrictions on climbing, pushing, pulling, stooping and squatting. Claimant immediately returned to work and was assigned to employer's tool room. Claimant continued to work for employer until mid-July 2005, at which time he terminated his employment relationship with employer. Claimant has not been gainfully employed since that time.

In his Decision and Order, the administrative law judge determined that claimant's May 11, 2005, soft tissue injury neither aggravated nor contributed to his underlying degenerative disc disease, that claimant reached maximum medical improvement and his soft tissue injury resolved on April 5, 2006, and that employer established the availability of suitable alternate employment when it made a light duty position available for claimant at the claimant's usual rate of pay on the day following claimant's work-injury. Accordingly, the administrative law judge denied claimant's claim for disability benefits under the Act. Lastly, the administrative law judge denied claimant's request for medical benefits subsequent to April 5, 2006.

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

In addressing the nature and extent of any work-related disability, the administrative law judge first discussed whether claimant's May 11, 2005, soft tissue injury contributed to his underlying degenerative disc disease. The administrative law judge found that claimant's soft tissue injury was superimposed on his degenerative disc disease and did not aggravate or contribute to it. In so finding, the administrative law judge discussed the medical evidence and found it supported this conclusion. Decision and Order at 17 – 18.

Dr. Vanderweide, who examined claimant on three occasions, opined following his April 5, 2006, evaluation of claimant that claimant's residual symptoms were no longer related to his May 11, 2005, work-incident which resulted in a soft tissue injury, that claimant was in no need of further medical treatment as a result of that work-injury, and that claimant's present symptoms were related to his degenerative disc disease. EX 6 at 6 – 7. Dr. Brownhill, who on August 9, 2006 performed an independent medical evaluation of claimant at the behest of the Department of Labor, opined that claimant's May 11, 2005, soft tissue injury had long since resolved, and that any disability experienced by claimant was due to claimant's degenerative disc disease. EX 5 at 6 – 8. The administrative law judge stated that Drs. Francis and Montet concluded that

claimant's May 2005 injury aggravated his degenerative disc disease, but found Dr. Montet opined that claimant's residual pain was not due to the work injury but to his degenerative disc disease, and Dr. Francis could not say whether claimant's pain was related to the work injury or the disc disease.

Relying on this evidence together with claimant's testimony of back pain prior to the work injury, the administrative law judge concluded that the sole work-related injury at issue before him was a soft tissue injury sustained by claimant on May 11, 2005. We affirm the administrative law judge's finding as it is rational, supported by substantial evidence, and in accordance with law. *See O'Keeffe*, 380 U.S. 359. The credited evidence is substantial, sufficient to establish that claimant's degenerative disc disease was not aggravated by his employment.[1] It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom. *See Todd Shipyards Corp. v.* Donovan, 300 F.2d 741 (5th Cir. 1962). Thus, we affirm the administrative law judge's determination that claimant's May 11, 2005, work-incident resulted in only a soft tissue injury.

The administrative law judge next rejected claimant's argument that he had not yet reached maximum medical improvement and concluded that claimant's soft tissue injury did so on April 5, 2006. The administrative law judge relied upon the opinion of Dr. Vanderweide. Specifically, after acknowledging that Drs. Montet and Brownhill opined that claimant's soft tissue injury reached maximum medical improvement on July 6, 2005 and August 9, 2006 respectively, *see* EXs 4, 5, the administrative law judge determined that Dr. Vanderweide's April 5, 2006, opinion took into consideration claimant's physical therapy.[2] Decision and Order at 18. The determination of when

[1] Under the aggravation rule, where a claimant's employment aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986). The administrative law judge addressed this issue in discussing the nature and extent of disability. As it involves a determination of the cause of claimant's disabling condition, however, the aggravation issue is one of causation, to which the presumption of Section 20(a) of the Act, 33 U.S.C. §920(a), would apply. Any error in this regard is harmless, since the administrative law judge fully weighed the medical evidence of record, and the credited evidence is sufficient to rebut Section 20(a). *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

[2] In a report following his evaluation of claimant on November 7, 2005, Dr. Vanderweide wrote that claimant should undergo physical therapy, and that he would assess the question of whether claimant reached maximum medical improvement after that therapy had been completed. *See* EX 6 at 3. On April 5, 2006, following claimant's physical therapy treatments, Dr. Vanderweide opined that claimant's condition had

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). Thus, a finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Accordingly, as the record contains substantial evidence to support the administrative law judge's determination on this issue, we affirm the administrative law judge's finding that claimant's soft tissue injury reached maximum medical improvement as of April 5, 2006. *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. It is well-established that claimant bears the burden of establishing the extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). 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 Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). In this case, the administrative law judge relied on the opinions of Drs. Montet, Vanderweide and Brownhill in concluding that claimant's soft tissue injury resolved as of April 5, 2006, and that any impairment sustained by claimant subsequent to that date is due solely to claimant's longstanding non-work-related degenerative disc disease. Decision and Order at 19 – 20.

We affirm the administrative law judge's decision as he committed no error in weighing the medical evidence and concluding that claimant's soft tissue injury had resolved as of April 5, 2006. Dr. Montet, who treated claimant on multiple occasions between May 12 and June 27, 2005, opined in a report dated July 5, 2005, that the back pain which claimant was experiencing was in all probability a result of his underlying degenerative joint disease. EX 4 at 1. During his subsequent deposition testimony, Dr. Montet stated that, while the majority of persons who have sustained a soft tissue injury considerably improve over a period of two to four weeks, it is difficult to determine when pain from an original injury ceases, and when it results solely from the degenerative disc disease, and that he had not treated claimant long enough to resolve that question. *Id*. at 25 – 27. Dr. Vanderweide, in his report dated April 5, 2006, opined that claimant's residual difficulties are related to his baseline degenerative disc disease and are not related to his May 11, 2005, work-injury. EX 6 at 7. Lastly, based upon his

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reached maximum medical improvement, noting that claimant has "shown no significant change in his condition since my previous evaluation four months ago." *See id.* at 7.

independent medical evaluation of claimant, conducted on August 9, 2006, at the request of the Department of Labor, Dr. Brownhill opined that claimant's soft tissue injury had long since resolved, that claimant has no residual impairment as a result of his May 11, 2005, work-injury, and that the pain and difficulty that claimant experiences are related to the degenerative changes to his spine. EX 5 at 6 - 7. As the administrative law judge rationally credited the opinions of Drs. Montet, Vanderweide and Brownhill, and as they constitute substantial evidence to support the administrative law judge's findings, we affirm the conclusion that claimant sustained no work-related disability after April 5, 2006. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962); *Donovan*, 300 F.2d 741.

We cannot affirm, however, the administrative law judge's decision to deny claimant disability benefits during the period from the date of injury, May 11, 2005, to April 5, 2006. The administrative law judge found that claimant established that he was unable to perform his usual work as a welder from the date of his work-related, soft tissue injury through the date when this condition resolved, thus shifting the burden to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet this burden by offering claimant a job in its facility, including a light duty job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Larson v. Golten Marine Co.*, 19 BRBS 54 (1986). The fact that a claimant works after an injury will not forestall a finding of total disability if the claimant works only with extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence, although an award of total disability while working is the exception, rather than the rule. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978); *Ramirez v. Sea-Land Serv., Inc.*, 33 BRBS 41 (1999).

The administrative law judge found that employer made a light-duty position available to claimant at his usual rate of pay immediately following claimant's May 11, 2005, work-injury, that claimant remained employed in that position for approximately six weeks, and that consequently, employer met its burden of demonstrating the availability of suitable alternate employment. Decision and Order at 20 - 21. Claimant testified, however, that upon his return to work following the May 11, 2005, work-incident, he was informed by employer that he "could do some things in the tool room," Tr. at 22, 41 – 42, but thereafter he was informed by one of employer's owners that he "couldn't do anything,

just sit there."[3] *Id.* Claimant further testified that he subsequently stopped working since he wasn't feeling well, *id.* at 22; specifically, claimant stated that on occasion he was unable to go to work due to his pain.[4] *Id.* at 43 – 44, 51 - 52. This testimony, if credited by the administrative law judge, could support a finding that claimant's post-injury employment in employer's tool room constituted sheltered employment; additionally, whether or not claimant's post-injury employment with employer was sheltered, that employment may have become unavailable to claimant due to claimant's inability to drive an hour and a half to work due to his pain. While the administrative law judge in his Statement of the Evidence acknowledged claimant's testimony regarding the light-duty nature of his post-injury tool room employment with employer and claimant's testimony that he ceased working due to his pain, Decision and Order at 3 – 4, the administrative law judge did not address the credibility of this testimony when discussing the extent of claimant's disability during the period of time immediately following claimant's work-injury. *Id.* at 19 – 21. Since claimant's testimony could, if credited, establish his entitlement to disability benefits under the Act during the period of May 12, 2005, to April 5, 2006, we vacate the administrative law judge's denial of disability benefits for this period of time and remand the case for the administrative law judge to address the totality of the evidence on this issue in light of the relevant law.

Lastly, the administrative law judge denied claimant's request for reimbursement of the cost of a back brace purchased on August 3, 2005, the cost of a copy of a lumbar spine x-ray purchased on September 7, 2005, various medical expenses incurred subsequent to April 5, 2006, and future medical expenses. 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." *See Ballesteros*, 20 BRBS 184. Medical care must be appropriate for the injury, *see* 20 C.F.R. §702.402, and claimant must establish that the requested services are reasonable and necessary for the treatment of the work injury. *See Wheeler v.*

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[3] Additionally, the following exchange occurred during claimant's hearing testimony:

> Q: Did the company keep paying you while you were sitting around doing nothing, as you said?
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> A: Paid for a small period of time, yes.

Tr. at 42.

[4] Employer's payroll records indicate that claimant worked through July 22, 2005. *See* EX 3.

Interocean Stevedoring, Inc., 21 BRBS 33 (1988). Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Weikert v. Universal Mar. Serv. Corp*., 36 BRBS 38 (2002*)*.

We affirm the administrative law judge's decision that claimant is not entitled to medical benefits subsequent to April 5, 2006, or reimbursement for the purchase of a copy of a lumbar x-ray. As we have discussed, the administrative law judge credited medical evidence that claimant's soft tissue injury had resolved as of April 5, 2006. *See* EXs 5, 6. Thus, claimant is not entitled to medical benefits after that time. Moreover, as found by the administrative law judge, while the record contains a receipt for the purchase of two lumbar x-rays, *see* CX 11 at 2, claimant has provided no explanation for this purchase. We cannot affirm, however, the administrative law judge's decision to deny claimant reimbursement for a back brace purchased on August 3, 2005, *see* CX 11 at 1, based upon his finding that the record contains no documentation that this back brace was actually prescribed to claimant at that time. Decision and Order at 22 – 23. It is undisputed that Dr. Francis, claimant's treating orthopedic surgeon, did prescribe a back brace for claimant on September 15, 2005, *see* CX 7 at 12, prior to the date on which claimant's soft tissue injury resolved. Thus, that medical appliance was reasonably necessary for the treatment claimant's condition. Accordingly, we reverse the administrative law judge's determination that claimant is not entitled to reimbursement for the cost of his back brace and hold employer liable for the $90 charge associated with that purchase.

Accordingly, the administrative law judge's decision denying claimant reimbursement for the cost of a prescribed back brace is reversed. The administrative law judge's denial of compensation for the period of May 12, 2005, to April 5, 2006, is vacated, and the case is remanded for further consideration of the extent of claimant's disability during this period of time in accordance with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge