



BRB No. 16-0550

DAVID G. KELLER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
LOCKHEED MARTIN CORPORATION)	DATE ISSUED: <u>Apr. 12, 2017</u>
)	
and)	
)	
ACE AMERICAN INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Paul M. Doolittle (Paul M. Doolittle, P.A.), Jacksonville, Florida, for claimant.

Robert N. Dengler and Timothy Pedernana (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-LDA-00239) of Administrative Law Judge Scott R. Morris rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

In 2009, claimant was hired by employer to install Gyrocamera systems on vehicles in Afghanistan. On or about July 31, 2011, claimant experienced back pain while unloading a vehicle; two weeks later, claimant reported similar symptoms while unloading a truck. After claimant underwent an MRI and x-rays in Dubai, he was sent back to the United States where he received medical care for his back symptoms from a number of physicians. Claimant filed a claim for benefits under the Act, alleging that his present back conditions, including disc fractures, bulging and degeneration, are related to the injury he sustained in Afghanistan. Claimant has not returned to gainful employment since his return to the United States.

In his Decision and Order, the administrative law judge accepted the parties' stipulations that claimant injured his back on July 31, 2011 while working for employer, and that his back condition reached maximum medical improvement on March 14, 2013.¹ Decision and Order at 2. The administrative law judge found that claimant's back restrictions render him incapable of returning to his usual work for employer. *Id.* at 26-30. The administrative law judge awarded claimant permanent total disability benefits from the date of maximum medical improvement, March 14, 2013, to October 29, 2014, the date of employer's labor market survey, and permanent partial disability benefits from October 29, 2014 and continuing, based upon claimant's concession that he has a retained earning capacity of \$11 per hour. *Id.* at 30-33, 36; *see* 33 U.S.C. §908(a), (c)(21), (h).

Employer appeals the award of benefits, contending the administrative law judge erred in finding claimant has physical restrictions related to the work injury that prevent his return to his usual work. Claimant responds, urging affirmance of the administrative law judge's decision.

It is claimant's burden to establish that his work injury renders him incapable of returning to his usual work. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer contends the administrative law judge erred in relying on the opinions of Drs. Dillon and Hearndon, as supported by that of Dr. Orender, over the contrary opinion of Dr. Smith, to conclude that the physical restrictions resulting from claimant's work-related back condition prohibit his returning to work for employer.

¹ The administrative law judge also accepted the parties' stipulations that employer voluntarily paid claimant temporary total disability benefits from October 25, 2011 through March 14, 2013, and that claimant's average weekly wage entitled claimant to compensation at the maximum compensation rate. Decision and Order at 2.

Dr. Dillon, a Board-certified orthopedic surgeon, treated claimant between October 27 and December 15, 2011. During this period, Dr. Dillon examined claimant, ordered studies including an MRI, and prescribed conservative treatment. Dr. Dillon diagnosed a work-related thoracic sprain superimposed on pre-existing thoracic compression fractures, and he opined that claimant cannot return to his usual employment duties. CXs 8 at 15; 10 at 52-53. As he does not perform surgery at the thoracic spine levels, Dr. Dillon referred claimant to Dr. Smith. CX 8. Between May 14 and November 12, 2012, claimant was treated by Dr. Hearndon, who is Board-certified in physical medicine and rehabilitation. Dr. Hearndon administered epidural injections and branch blocks. He opined that claimant's pre-existing asymptomatic spinal condition was aggravated by his work-related incidents, and that claimant is incapable of resuming his usual employment duties. CXs 9, 11. Dr. Orender, who is Board-certified in family medicine, has been claimant's primary care physician since 2007. Dr. Orender examined claimant several times, beginning on March 14, 2013, for his spinal symptoms. Dr. Orender opined that claimant's pain and loss of motion are related to his work injuries and that claimant is restricted from returning to work for employer. CXs 10, 12. In contrast, Dr. Smith, an orthopedic spine surgeon who initially evaluated claimant on December 27, 2011 on the referral of Dr. Dillon, opined that while claimant's MRI revealed pre-existing compression fractures, claimant's July 2011 work injury resulted in only a thoracic sprain. After subsequently examining claimant on several occasions, Dr. Smith opined that claimant is not a candidate for surgery and that he would place no permanent restrictions on claimant's activities. CX 11; EX 19.

The administrative law judge found that Drs. Dillon, Hearndon, Orender and Smith each demonstrated a sufficiently accurate understanding of claimant's job duties with employer. Decision and Order at 29. In determining claimant's physical restrictions, the administrative law judge relied on the opinions of Dr. Dillon and Dr. Hearndon, as supported by Dr. Orender's opinion. The administrative law judge noted Dr. Dillon's superior credentials as a Board-certified orthopedic surgeon and his more extensive treatment relationship with claimant. *Id.* The administrative law judge found that Dr. Hearndon's opinion has "significant probative value in light of his . . . relevant Board-certifications and the facts that he examined claimant approximately ten times and had the benefit of reviewing [claimant's Functional Capacity Evaluation] and Dr. Smith's treatment records." *Id.* at 29-30. The administrative law judge found that Dr. Orender has an extensive treatment relationship with claimant and reviewed many of his records. *Id.* at 30. The administrative law judge concluded that these three opinions are entitled to determinative weight and establish that claimant has physical restrictions resulting from his work-related back condition that prohibit him from returning to work for employer. *Id.*

It is well established that an administrative law judge has considerable discretion in evaluating and weighing the evidence of record. *See Avondale Industries, Inc. v.*

Director, OWCP [Cuevas], 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The Board is not empowered to reweigh the evidence but must accept the administrative law judge's conclusions if they are rational and supported by substantial evidence. See *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, the administrative law judge discussed all of the relevant medical evidence and rationally concluded that the opinions of Drs. Dillon, Hearndon and Orender establish that claimant's work-related thoracic spine condition precludes his return to his usual employment duties with employer. See *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). As employer has not established error in the administrative law judge's weighing of the medical evidence, we affirm the administrative law judge's conclusion that claimant established his prima facie case of total disability.² See *J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010).

Employer also contends the administrative law judge erred in not specifically addressing the credibility of claimant's testimony because claimant's claim for benefits is predicated entirely on his subjective complaints of pain. See Emp. Br. at 35-36. In this respect, employer contends claimant's post-injury activities, particularly hunting, belie his complaints of disabling pain.

Although the administrative law judge did not specifically address the credibility of claimant's subjective complaints,³ the premise on which employer's contention is

² We reject employer's contention that, pursuant to *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999), the administrative law judge erred in declining to give "special weight" to the opinion of Dr. Smith, who was one of claimant's treating physicians. In *Amos*, the court stated the administrative law judge was obligated to accept the opinion of the employee's surgeon as to a treatment option which was not shown by other doctors to be unreasonable. *Id.*, 153 F.3d at 1054, 32 BRBS at 147-148(CRT). In this case, the administrative law judge was required to determine the weight to be accorded to conflicting medical opinions on the issue of claimant's physical restrictions; more than one of these physicians was rationally characterized as claimant's "treating" physician. Under these circumstances, the administrative law judge was not required to credit any particular opinion on the basis of status as a treating physician. See generally *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

³ The administrative law judge questioned claimant about his post-injury hunting activities, see Tr. at 89-91, but did not reference this testimony in his decision.

based is faulty. Contrary to employer's contention, claimant's medical providers relied on both claimant's subjective complaints and their objective findings. With regard to claimant's complaints, Dr. Dillon specifically testified at his deposition that his diagnosis would not change even if claimant were exaggerating since his diagnosis was supported by his objective findings. CX 8 at 19. Dr. Hearndon testified at his deposition that claimant's pain made pathologic sense and that his opinion regarding claimant's present condition was based on both claimant's subjective complaints and his objective findings. CX 9 at 18, 33. Dr. Orender opined that claimant was not exaggerating his symptoms. CX 10 at 32-33. Dr. Smith did not specifically address claimant's veracity, but he did state that he needed more than a patient's subjective complaints to diagnose a disability. EX 19 at 18, 22, 30, 49-50. As none of the physicians questioned the truthfulness of claimant's complaints of pain, employer has not established reversible error in the administrative law judge's failure to specifically address claimant's post-injury activities or the credibility of claimant's testimony concerning his physical limitations. *See generally Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT). Therefore, we reject employer's contention.

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

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

GREG J. BUZZARD

Administrative Appeals Judge

RYAN GILLIGAN

Administrative Appeals Judge