

JOSEPH BIELAK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AMERADA HESS CORPORATION	)	DATE ISSUED: <u>12/8/04</u>
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Thomas R. Uliase (Uliase & Uliase, P.C.), Haddon Heights, New Jersey, for claimant.

John E. Kawczynski (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2002-LHC-2176) of Administrative Law Judge Ralph A. Romano 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, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began his employment with employer in October 1983, as a “boat laborer,” which he described as involving heavy manual labor and climbing. On March 7, 1996, claimant was injured in a work accident. Employer voluntarily paid claimant temporary total disability benefits from March 8, 1996 through December 21, 1999, and temporary partial disability benefits from December 22, 1999 through October 30, 2001. Employer also paid medical benefits under Section 7 of the Act, 33 U.S.C. §907, for right shoulder surgeries performed in May 1996 and February 1997. Thereafter, claimant filed a claim under the Act alleging that his March 7, 1996, work accident with employer injured his right shoulder, neck and lower back. The issues to be resolved at hearing were whether claimant is entitled to continuing temporary total disability benefits from March 7, 1996, and whether claimant is entitled to medical treatment, including neck surgery. Employer contended that claimant failed to produce medical documentation to substantiate any ongoing disability after October 30, 2001, and that claimant made a full recovery as of February 13, 2002, based on Dr. Mandel’s opinion.

In his Decision and Order, the administrative law judge credited the opinions of Drs. Gainey, Leibowitz, Myers and Jaffe that claimant is totally disabled. Decision and Order at 7. The administrative law judge found that these opinions outweighed the conflicting opinion of employer’s expert, Dr. Mandel, stating that Dr. Mandel was the only physician who suggested that claimant could return to work and was exaggerating the seriousness of his injuries. *Id.*; *see also* JX 30 at 47; JX 21. In a footnote, the administrative law judge stated that he had also relied on his personal observations of claimant at the hearing in concluding that claimant was unable to return to his pre-injury work. Decision and Order at 7 n.1. Thus, the administrative law judge found that claimant established his *prima facie* case of total disability. The administrative law judge further found that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant continuing temporary total disability benefits from March 7, 1996. Additionally, the administrative law judge found that claimant is entitled to ongoing medical treatment under Section 7 of the Act, as well as reimbursement for his out-of-pocket medical expenses of \$9,257.84.

On appeal, employer contends that the administrative law judge erred in awarding claimant ongoing disability benefits, because the administrative law judge’s decision violates the Administrative Procedure Act (APA), as it does not discuss evidence supporting Dr. Mandel’s opinion that claimant is exaggerating his symptoms. Claimant responds, urging affirmance of the administrative law judge’s award.

Claimant has the burden of establishing the extent of his disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). To establish a *prima facie* case of total disability, claimant must show that he is unable to perform his usual employment due to his work-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5<sup>th</sup> Cir. 1981). The APA requires that every

adjudicatory decision be accompanied by a statement of “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record.” 5 U.S.C. §557(c)(3)(A); *see, e.g., Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has stated that the APA requires the administrative law judge to articulate the specific evidence supporting his decision as well as to discuss the evidence that he rejects and to provide reasons therefor. *See Cotter v. Harris*, 642 F.2d 700 (3<sup>d</sup> Cir. 1980).

Employer argues that the administrative law judge erred in failing to address the evidence contained in Joint Exhibits 16 and 17, which is supportive of Dr. Mandel’s opinion that claimant is malingering. Thus, employer argues that the administrative law judge erred in stating that Dr. Mandel was the only physician to suggest that claimant was exaggerating the seriousness of his injuries.<sup>1</sup>

As employer asserts, the administrative law judge did not discuss relevant evidence, and we must therefore remand the case for him to do so. *See Cotter*, 642 F.2d at 705. In support of his conclusion that claimant is unable to return to his usual work, the administrative law judge credited claimant’s testimony regarding his pre-injury job duties, the medical opinions of Drs. Gainey, Leibowitz, Myers and Jaffe that claimant is totally disabled, and his own observations of claimant at the formal hearing.<sup>2</sup> JX 29 at 11-12; JX 14; JX 23; JX 5. The administrative law judge rejected Dr. Mandel’s opinion that claimant was exaggerating the seriousness of his injuries, had fully recovered, and could return to work without restrictions. JX 30 at 47; JX 21. The administrative law judge found that Dr. Mandel was the only physician to suggest claimant was exaggerating and he found this “opinion outweighed by the contrary opinions of every other doctor of record.” Decision and Order at 7. Consequently, the administrative law judge concluded that claimant made a *prima facie* showing that he is unable to return to his usual work because of his March 7, 1996 injury.

Contrary to the administrative law judge’s statement, there is other evidence of record suggesting that claimant is exaggerating his symptoms. Claimant was admitted to

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<sup>1</sup> Employer’s expert, Dr. Mandel, is an orthopedic surgeon, who examined claimant on February 13, 2002. JX 21, 30.

<sup>2</sup> Contrary to employer’s contention, the administrative law judge may rationally rely on his personal observations of claimant’s demeanor and gait at the formal hearing in assessing the veracity of claimant’s complaints. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 131, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

the Medical Center of Princeton on April 29, 1999 with symptoms of paraparesis. After several days of tests and evaluations, claimant was discharged on May 3, 1999 with a primary diagnosis of “fictitious illness” and malingering. JX 17. Claimant also was admitted to St. Peter’s Hospital in June 2000 with similar symptoms. The discharge summary states that the “Work-up here in the hospital was negative for any organic cause of paraparesis,” but further stated that claimant’s symptoms were most likely due to a “conversion reaction (somatoform disorder).”<sup>3</sup> JX 16. The administrative law judge did not mention this evidence in his decision. Dr. Mandel discussed this evidence at his deposition and explained why it supported his opinion that claimant was malingering. JX 30. Therefore, as there is evidence arguably supportive of Dr. Mandel’s opinion, the administrative law judge erred in stating that only Dr. Mandel believed claimant to be exaggerating his symptoms. We vacate the administrative law judge’s award of ongoing total disability benefits and remand the case for reconsideration.

On remand, the administrative law judge must discuss the evidence contained in Joint Exhibits 16 and 17, and re-address the weight he accords to the medical opinions of record in light of this evidence. The administrative law judge must give reasons for crediting and rejecting the evidence, *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989), but he is entitled to weigh the evidence and to draw his own inferences from it and is not bound to accept the opinion or theory of any particular physician.<sup>4</sup> *Todd Shipyard Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). If, on remand, the administrative law judge again finds that claimant is unable to perform his usual work, the finding that employer did not establish the availability of suitable alternate employment is affirmed, as it is unchallenged on appeal.

Accordingly, the administrative law judge’s award of continuing total disability benefits is vacated, and the case remanded to the administrative law judge for reconsideration consistent with this opinion. In all other respects, the administrative law judge’s Decision and Order is affirmed.

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<sup>3</sup> Dr. Gainey opined that claimant has a conversion disorder. JX 29 at 18. He explained “that [in] malingering, one is intentionally trying to fake a symptom. A conversion reaction is where someone does not fake the symptom; that they truly believe that they’re having true symptoms.” *Id.*

<sup>4</sup> On appeal, employer generally contends that the administrative law judge erred in not addressing the cross-examination hearing and deposition testimony of claimant and the physicians. Employer, however, does not point to any specific testimony in support of its case which the administrative law judge failed to consider. Therefore, we need not further address this contention.

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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JUDITH S. BOGGS  
Administrative Appeals Judge