

DUSAN JUKIC)
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 Claimant-Petitioner)
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 v.)
)
 AMERICAN STEVEDORING,) DATE ISSUED: Feb. 6, 2004
 INCORPORATED)
)
 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION LIMITED)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

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

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (00-LHCA-2297) 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 findings of fact and conclusions of law of the administrative law judge if they 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). This case is before the Board for the second time.

Claimant sustained a work-related injury to his right foot on January 15, 1999. Dr. Sasson diagnosed a severe right foot sprain and removed claimant from work until March 8, 1999, at which time he opined that claimant could attempt a return to work. Dr. Sasson also subsequently diagnosed tarsal tunnel syndrome which he stated was traumatic in origin and resulted from the work injury sustained in January 1999. Dr. Nelson, an orthopedic specialist, diagnosed a resolved right ankle sprain and opined, on February 16, 1999, that claimant could return to longshore work wearing a high top shoe and protective boot.

Meanwhile, claimant's attempt to return to work on March 11, 1999, was foiled by alleged right ankle pain. Claimant later returned to work for employer on June 27, 1999. Employer voluntarily paid temporary total disability benefits from January 16, 1999, through February 19, 1999, as well as all related medical benefits during that time. Claimant thereafter sought temporary total disability benefits for the period from February 20, 1999, until his return to work on June 27, 1999.

In his initial decision, the administrative law judge determined that claimant did not demonstrate that his work-related injury prevented him from returning to his regular and usual employment as of February 17, 1999. In addition, the administrative law judge found that employer fulfilled its responsibilities under Section 7(a) of the Act, 33 U.S.C. §907(a), as it voluntarily paid medical benefits from January 15, 1999, through February 19, 1999. Accordingly, the administrative law judge denied benefits. Claimant thereafter appealed the denial of benefits.

In its decision, the Board held that the administrative law judge's findings regarding claimant's entitlement to medical benefits, as well as his consideration as to whether claimant established a *prima facie* case of total disability, did not comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). *Jukic v. American Stevedoring, Inc.*, BRB No. 01-0912 (Aug. 23, 2002). Specifically, the Board held that the administrative law judge "did not discuss any medical evidence or provide a rationale for the denial of additional medical benefits," and further observed that it could not ascertain from the record the extent to which the issue of medical benefits was before the administrative law judge. *Jukic*, slip op. at 4. The Board therefore vacated the administrative law judge's denial of medical benefits and remanded the case for clarification as to the time period for which medical benefits were sought, and then for consideration of all the relevant evidence of record "to determine claimant's entitlement to medical benefits pursuant to the appropriate standard." *Id.* With regard to the issue of total disability, the Board held that the administrative law judge did not explicitly discuss relevant evidence, including: the notes of Drs. Pearl and McGee, which contradict Dr. Nelson's opinion regarding claimant's ability to return to work as of February 17, 1999; the contingency placed upon claimant's return to work by Dr. Nelson, *i.e.*, that he wear a high-top shoe; and claimant's testimony that he was unable to continue with his usual work, including his ill-fated attempts to return to work on

March 11, 1999, and June 23, 1999. Accordingly, the Board vacated the administrative law judge's denial of total disability benefits related to claimant's work-related right ankle sprain and remanded the case for a determination as to whether claimant has established a *prima facie* case of total disability for the pertinent time period.¹

On remand, the administrative law judge found that claimant is entitled to medical benefits for the period between February 17, 1999, and June 27, 1999, but that claimant is not entitled to an award of total disability benefits since he did not establish a *prima facie* case of total disability. On appeal, claimant challenges the administrative law judge's denial of total disability benefits, asserting that the administrative law judge did not adhere to the Board's remand instructions to undertake a complete and thorough review of the evidence pertinent to the issue of claimant's ability to return to his usual work. In addition, claimant contends that the administrative law judge erred in failing to remand the case to the district director, as stipulated by the parties, for consideration of claimant's need for further medical treatment from June 27, 1999, and the permanency of his work-related conditions. Employer responds, urging affirmance of the administrative law judge's decision on remand.

After consideration of claimant's arguments on appeal and the administrative law judge's decision on remand in light of the record evidence, we affirm the administrative law judge's denial of disability benefits and his award of medical benefits for the period between February 17, 1999, and June 27, 1999, as these determinations are rational, supported by substantial evidence and in accordance with law. Contrary to claimant's contentions, the administrative law judge followed the Board's remand instructions and considered all of the relevant evidence in resolving the issue of claimant's ability to return to work. *See* Decision and Order on Remand at 3-4, 6-7. Specifically, the administrative law judge, on remand, reviewed the opinions of Drs. Pearl and McGee, claimant's testimony, and Dr. Nelson's equivocal opinion, and concluded that claimant did not establish that he was unable to return to his normal work after February 17, 1999. As credibility determinations are solely within the purview of the administrative law judge, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961), and as his decision to accord determinative weight to the medical opinion of Dr. Nelson, as

¹The Board affirmed the administrative law judge's denial of total disability benefits for claimant's work-related tarsal tunnel syndrome. *Jukic*, slip op. at 7.

supported by Dr. Sasson's opinion and deposition testimony,² is neither inherently incredible nor patently unreasonable, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), the denial of disability benefits is affirmed.

The administrative law judge's delineation of the time frame for which claimant seeks medical benefits and consequent award of said benefits likewise comports with the Board's remand instructions. Relying on statements made by both counsel at the January 10, 2001, hearing, which limited consideration of the issue of medical benefits to the specific period ending at claimant's return to work on June 27, 1999, as supported by the fact that both claimant and employer discussed the issue of medical treatment for the aforementioned period in their remand briefs, the administrative law judge rationally concluded that the pertinent time period for consideration of medical benefits in this case spanned from February 17, 1999, until June 27, 1999.³ As these findings are supported by substantial evidence they are affirmed. *Calbeck*, 306 F.2d 693.

We note, however, that at the formal hearing the parties agreed, and the administrative law judge found, that he would resolve the issue as to the degree of disability up until the date of claimant's return to work, and then remand the case to the district director "concerning the need for further treatment and permanency." Hearing Transcript at 22. The administrative law judge's decisions, however, do not contain any discussion of the proposed remand agreement, and this omission, as claimant suggests, is error. Consequently, we must remand this case for the administrative law judge to address the parties' stipulation regarding these issues, *i.e.*, claimant's alleged entitlement to medical treatment from June 27, 1999, and the permanency of claimant's conditions. In addition, remand is also necessary for consideration of claimant's petition for modification. As claimant advocates, his remand

²The administrative law judge found that Dr. Sasson, by virtue of his March 8, 1999, opinion that claimant could attempt a return to work, ultimately agreed with Dr. Nelson's assessment of claimant's ability to return to work. Dr. Sasson's testimony supports, rather than contradicts, Dr. Nelson's opinion regarding claimant's ability to return to work as of February 17, 1999. Dr. Sasson examined claimant on February 1, 1999, and again on March 8, 1999. Dr. Sasson opined that claimant objectively got better between visits since, on February 1, 1999, he opined that claimant was not able to return to work but on March 8, 1999, he opined that claimant could return to work. Given this improvement, Dr. Sasson indicated that he could not tell "whether or not when Dr. Nelson saw [claimant] in between those two exams [February 1, 1999, and March 8, 1999] that perhaps [claimant] was fine then as well." Claimant's Exhibit 5 at 25-26.

³The administrative law judge's award of medical benefits for the period between February 17, 1999, and June 27, 1999, is affirmed as it is unchallenged on appeal.

brief before the administrative law judge includes “a request for modification in accordance with Section 22,” relative to the administrative law judge’s denial of benefits based on claimant’s tarsal tunnel syndrome, and the request for modification has not been addressed by the administrative law judge. Consequently, on remand, the administrative law judge must address claimant’s petition for modification.

Accordingly, the administrative law judge’s denial of temporary total disability benefits and award of medical benefits for the period between February 17, 1999, and June 27, 1999, are affirmed, and the case is remanded to the administrative law judge to address the parties’ stipulation regarding further development of record on the issues of medical benefits after June 27, 1999, and the permanency of claimant’s condition, and to consider claimant’s petition for modification pursuant to Section 22 of the Act.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge