BRB No. 12-0618

MICHAEL AZPEITIA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
YUSEN TERMINALS, INCORPORATED	)	DATE ISSUED: Feb. 20, 2014
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Reconsideration of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Jessica M. Neal (Hitzke & Associates, Inc.), Long Beach, California, for claimant.

William N. Brooks II (Law Offices of William N. Brooks), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Order Denying Reconsideration (2009-LHC-01905) of Administrative Law Judge Steven B. Berlin 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, who had a history of cervical injuries, sustained a traumatic injury to his neck during the course of his employment for employer on April 5, 2005.[1] As a result of this work incident, claimant filed a claim under the Act seeking temporary total disability benefits for the period of April 5 through August 26, 2005, and ongoing temporary partial disability benefits thereafter, as well as medical benefits. Employer voluntarily paid claimant temporary total disability benefits from April 6 through April 21, 2005. 33 U.S.C. §908(b). On August 26, 2005, claimant returned to work.

In his Decision and Order, the administrative law judge found that claimant sustained no work-related disability subsequent to April 26, 2005. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from April 6 through April 26, 2005. 33 U.S.C. §908(b). The administrative law judge denied claimant's request for reimbursement for the cost of two hydrotherapy units and for the payment of future surgery to his neck. 33 U.S.C. §907. The administrative law judge summarily denied claimant's motion for reconsideration.

On appeal, claimant challenges the administrative law judge's denial of his claim for compensation benefits after April 26, 2005, as well as the denial of future medical benefits. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant contends the administrative law judge erred in failing to award him temporary total disability benefits through July 26, 2005, the day on which his treating physician released him to return to work. We disagree. In order to establish a prima facie case of total disability, claimant must demonstrate that he is unable to return to his usual work due to the work injury. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). In this case, the administrative law judge credited the opinion of Dr. London over the opinions of Drs. Alexander and Capen and the testimony of claimant, in concluding that claimant did not sustain a compensable impairment subsequent to April 26, 2005.

We affirm the administrative law judge's decision as he rationally weighed the medical evidence and concluded that claimant sustained no compensable impairment subsequent to April 26, 2005. In making this finding, the administrative law judge

[1] Claimant sustained, inter alia, work-related injuries to his neck in 2000 and 2001. As a result of these incidents and claimant's degenerative disk disease, claimant, as of 2004, was limited to working light-duty positions, averaging four days a week, on the casualty board. On February 15, 2005, claimant requested that, pursuant to the Americans with Disabilities Act, he be limited to performing clerical work. *See* EX 11 at 194.

initially gave little weigh to claimant's testimony because he was evasive and gave inconsistent reports to his examining physicians. Decision and Order at 22-23. The administrative law judge credited the testimony of Dr. London, a Board-certified orthopedic surgeon. Based upon his April 26, 2005, examination of claimant which revealed normal neurological results and reflexes, claimant's description of his work injury, and the results of prior MRIs and x-rays, Dr. London diagnosed claimant with a resolved soft tissue cervical strain and concluded that claimant had fully recovered, that he did not require further treatment, and was capable of returning to his customary employment. EX 7 at 78-79; Decision and Order at 26-27. In contrast, in declining to credit the opinion of Dr. Alexander, the administrative law judge found that Dr. Alexander relied on claimant's unverified reports of subjective symptoms and that he was unaware of claimant's history of prior accidents.[2] Decision and Order at 27-28. Similarly, the administrative law judge found that Dr. Capen conceded that his finding that claimant's April 5, 2005 work injury resulted in a permanent injury was based solely on claimant's self-reported history and symptoms. *See* EX 17 at 307; Decision and Order at 16, 29.

The administrative law judge is entitled to weigh the evidence and to draw his own inferences and conclusions therefrom. The Board is not empowered to reweigh the evidence, but must affirm the administrative law judge's weighing of the evidence if it is rational. *See generally Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, the administrative law judge's extensively reviewed the evidence of record, and his finding that claimant had no work-related impairment after April 26, 2005, is rational and within his authority as factfinder.[3] *See Cordero*, 580 F.2d 1331, 8 BRBS 744. Therefore, as the administrative law judge rationally credited the opinion of

[2] Dr. Alexander released claimant to return to work on July 26, 2005 with restrictions of no overhead work and no lifting greater than 25 pounds. *See* CX 2 at 166. Claimant returned to work on August 26, 2005. *See* EX 10 at 167.

[3] We reject claimant's assertion that the administrative law judge erred in relying on Dr. London's opinion because Dr. London is not a treating physician. The administrative law judge addressed the decision of the United States Court of Appeals for the Ninth Circuit in *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), in discussing the medical evidence of record. Given that Dr. London fully evaluated claimant and considered claimant's medical tests, the administrative law judge was not required to discredit his opinion on the basis that he was not a "treating physician" or to give the opinion of Dr. Alexander greater weight because he is a "treating physician." *See id.*; *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

Dr. London over the contrary opinions of Drs. Alexander and Capen and the testimony of claimant, and as this credited opinion constitutes substantial evidence to support the administrative law judge's finding, we affirm the administrative law judge's determination that claimant sustained no impairment as a result of his April 5, 2005, work incident subsequent to April 26, 2005.[4] *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962).

We additionally affirm the administrative law judge's finding that claimant is not entitled to medical benefits subsequent to April 26, 2005. 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 M. Cutter Co., Inc. v. Carroll*, 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006). Where, as in this case, claimant is not entitled to disability benefits, employer remains liable for necessary medical benefits for the work injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). 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. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

In this case, claimant contends the administrative law judge erred in failing to find employer liable for medical expenses that claimant may incur subsequent to April 26, 2005, including the cervical surgery that has been recommended by Drs. Alexander and Capen.[5] We disagree. As previously set forth, the administrative law judge acted within his discretion in crediting the opinion of Dr. London who, following his examination of claimant, stated that claimant's work injury had resolved and that he did not require further medical care for the injury. *See* EX 7 at 79. As the administrative law judge's

[4] In this respect, it must be stated that claimant sought disability benefits under the Act solely for the consequences of his April 5, 2005, work injury. *See* Tr. at 7-9; Decision and Order at 2-3. Hence, claimant's assertions that he is entitled to benefits pursuant to the aggravation rule is misplaced, as he did not state a claim that the April 2005 injury aggravated his underlying condition to result in disability. In any event, Dr. London opined that the April 2005 work incident did not cause a permanent aggravation of claimant's pre-existing cervical condition. *See* Tr. at 40-41.

[5] Following his evaluation of claimant on May 31, 2005, Dr. Alexander opined that claimant "will probably do quite well with surgical intervention involving an anterior cervical discectomy and fusion." *See* CX 2 at 178. On June 29, 2006, Dr. Capen opined that "[s]urgical treatment in the form of anterior cervical discectomy is also indicated for this patient." *See* CX 1 at 35.

finding on this issue is supported by substantial evidence, it is affirmed. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order and Order Denying Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge