

BRB No. 02-0762

EARL LAWRENCE )  
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 Claimant-Petitioner )  
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 v. )  
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 STEVENS SHIPPING COMPANY ) DATE ISSUED: 07/25/2003  
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 Self-Insured )  
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 Employer-Respondent ) DECISION and ORDER

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

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Stephen E. Darling (Haynsworth Sinkler Boyd, P.A.), Charleston, South Carolina, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (1993-LHC-0213) of Administrative Law Judge John C. Holmes 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 which 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 on appeal to the Board for the fifth time. Claimant injured his neck, back, shoulders, and knees at work on January 16, 1991, after being involved in a truck accident. Employer voluntarily paid claimant temporary total disability benefits from January 29, 1991, through April 4, 1991, and temporary partial disability benefits from April 4, 1991, through April 16, 1991. Claimant returned to work in May 1991, and stopped working in March 1992 due to alleged pain. In a 1994 decision, the administrative law judge awarded

claimant temporary total disability benefits from January 16, 1991, through September 18, 1992, and a scheduled award for a 10 percent impairment to his left lower extremity for the knee injury. 33 U.S.C. '908(c)(2). He denied claimant=s back injury claim. On May 19, 1995, claimant filed a motion for modification, seeking benefits for a 17 percent impairment to his left lower extremity, and an award for a loss in wage-earning capacity due to his back injury. See 33 U.S.C. '922. The administrative law judge denied claimant=s motion for modification. Claimant appealed to the Board.

In *Lawrence v. Stevens Shipping Co.*, BRB No. 96-1574 (July 17, 1997)(unpub.), the Board vacated the administrative law judge=s decision on modification and remanded for him to reconsider claimant=s entitlement to an award for a 17 percent impairment to the left lower extremity based on Dr. Friedman=s opinion, and to an award for his back injury based on a loss in wage-earning capacity. On remand, the administrative law judge reinstated his temporary total disability award, his 10 percent scheduled permanent partial disability award, and his denial of benefits for claimant=s back injury. Claimant appealed.

In *Lawrence v. Stevens Shipping Co.*, BRB No. 98-0678 (Feb. 2, 1999)(unpub.), the Board modified the administrative law judge=s decision to award benefits for a 17 percent impairment to the left lower extremity and held that claimant established that his back injury is work-related as a matter of law. The Board remanded the case to the administrative law judge to consider the remaining issues relating to claimant=s work-related back injury. On remand, the administrative law judge did not consider the nature and extent of claimant=s disability with regard to the back injury, but merely held employer liable for medical expenses due to claimant=s work-related back injury. Claimant appealed the administrative law judge=s denial of disability benefits for his back injury.

In *Lawrence v. Stevens Shipping Co.*, BRB No. 99-0844 (May 10, 2000)(unpub.), the Board remanded the case for the administrative law judge to address whether claimant established a *prima facie* case of total disability with regard to his back injury. On remand, the administrative law judge again denied benefits for claimant=s back condition. The administrative law judge found that claimant did not establish a *prima facie* case of total disability, and alternatively, that claimant does not have a permanent work-related back condition.

In *Lawrence v. Stevens Shipping Co.*, BRB No. 01-0172 (Oct. 22, 2001)(unpub.), the Board vacated the administrative law judge=s denial of benefits with regard to claimant=s back injury and again remanded the case to the administrative law judge to determine whether claimant established his inability to return to his usual work due to his back injury. The Board instructed the administrative law judge on remand to specifically address Dr. DuBois=s 1996 opinion that claimant is unable to work as a longshoreman because of continued myofascial pain and fibromyalgia causing muscle spasms as well as his statement that based on the continuing pain complaints that claimant has had for the

past five years, it is doubtful that he was magnifying or exaggerating his symptoms. The Board further instructed the administrative law judge to explain whether he credits or discredits this opinion, giving valid and rational reasons for his assessment, and for giving it more or less weight than the opinions of Drs. Thompson and Nicholson, who opined in 1991 and 1993, respectively, that claimant could return to his usual work. The Board held that Dr. DuBois's opinion, if credited, establishes a change in claimant's condition since the entry of the initial award and/or a mistake in fact in the administrative law judge's initial decision as Dr. DuBois stated in 1992 that claimant's back problems should not be permanently disabling. The Board affirmed as rational the administrative law judge's discrediting of claimant's testimony that he cannot perform any longshore work. On remand, the administrative law judge again denied disability benefits for claimant's back injury, rejecting Dr. DuBois's opinion that claimant is unable to return to work as a longshoreman due to his back injury.

On appeal, claimant challenges the administrative law judge's denial of benefits for his back injury. Employer responds in support of the administrative law judge's decision.

As an initial matter, we reiterate that this is a modification claim in which claimant bears the burden of establishing a change in his physical or economic condition since the entry of the initial award of benefits, or a mistake in a determination of fact in the initial decision. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7<sup>th</sup> Cir. 2002). As the Board stated in its last opinion in this case, Dr. DuBois's 1996 opinion, on its face, establishes either of these elements unless the administrative law judge provides valid reasons for not crediting this opinion. *Lawrence*, BRB No. 01-0172, slip op. at 5. Dr. DuBois stated in 1996 that claimant is unable to work as a longshoreman because of continued myofascial pain and fibromyalgia causing muscle spasms, and that based on the continuing pain complaints that [claimant] has had for the past five years, I believe that it is doubtful that he was magnifying or exaggerating his symptoms. Ex. 4 to Employee's Brief in Support of His Request for Modification. Employer did not offer any contemporaneous medical evidence to refute Dr. DuBois's opinion. On appeal, claimant argues that the administrative law judge provided invalid reasons for discrediting Dr. DuBois's opinion. We agree.

Initially, the administrative law judge's finding that Dr. DuBois's 1996 opinion that claimant is totally disabled is not different from his earlier opinion is not supported by the record. Decision and Order at 3. Dr. DuBois stated in 1992 that claimant's back problems should not be permanently disabling. Cl. Ex. 17. Thus, Dr. DuBois's 1996 opinion that claimant is totally disabled is indeed different from his earlier opinion, and if credited, establishes a basis for modifying the denial of benefits on the back injury claim. *See Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000); *Ramos v.*

*Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999). Moreover, the administrative law judge erred in finding that Dr. DuBois's opinion is contradicted by the Avast majority of other physicians' opinions, in that other doctors did not diagnose significant neurological problems or significant muscle or myofascial pain syndrome. Decision and Order at 3. In fact, Dr. DuBois did not diagnose neurological conditions either, but rather the non-neurological conditions of myofascial pain syndrome and fibromyalgia. Indeed, Dr. Nicholson diagnosed possible myofascial pain syndrome in 1993, although he also stated that claimant was not disabled. Cl. Ex. 13.

Furthermore, the administrative law judge erred in speculating that Dr. DuBois's unfavorable diagnosis could be based on factors other than his direct medical evaluation such as sympathy for claimant or the payment of the medical bills. Decision and Order at 3. This statement lacks support in the evidence of record. Lastly, the administrative law judge erred in discounting Dr. DuBois's finding of an objective indication of pain, muscle spasms, because the administrative law judge stated that the spasms may not be work-related.<sup>1</sup> The Board previously held that claimant's back problems are work-related as a matter of law, *Lawrence*, BRB No. 98-0678, slip op. at 5-6; *Lawrence*, BRB No. 99-0844, slip op. at 2-3 n. 1, and the administrative law judge therefore cannot reject Dr. DuBois's disability opinion on this basis. Moreover, that muscle spasms are a common problem has no bearing on this case which must be decided on the evidence regarding claimant's condition. As the administrative law judge has not provided any valid basis for rejecting Dr. DuBois's opinion, the judge's opinion is not supported by substantial evidence and the denial of benefits must be vacated. We again remand this

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<sup>1</sup>The administrative law judge stated that occasional back spasms of unknown origin are common, and that aging and obesity could be causes of claimant's spasms. Decision and Order at 4. The administrative law judge noted that Dr. DuBois stated in his earlier reports that claimant's spasms could be due to his obesity, *see* Cl. Ex. 17; Ex. 1 to Employee's Brief in Support of His Request for Modification, but he cited no other evidence supporting his conclusion.

case to the administrative law judge to address whether claimant has established his inability to return to his usual work due to his work-related back condition, because resolution of this issue requires the weighing of competing evidence and necessitates findings of fact. *See generally Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2<sup>d</sup> Cir. 1982). The administrative law judge must provide valid and rational reasons for the weight he assigns to the relevant opinions of Drs. DuBois, Thompson and Nicholson.<sup>2</sup>

Accordingly, the administrative law judge=s denial of benefits with regard to claimant=s back injury is vacated, and the case is remanded for further findings consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief

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ROY P. SMITH

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BETTY JEAN HALL

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<sup>2</sup>If, on remand, the administrative law judge finds that claimant is unable to return to his usual employment due to his back injury, he must determine whether employer established the availability of suitable alternate employment. If the administrative law judge finds that employer established the availability of suitable alternate employment, he must determine claimant=s post-injury wage-earning capacity, 33 U.S.C. ' 908(h), and whether claimant has sustained a loss thereof, 33 U.S.C. ' 908(c)(21).