BRB No. 10-0227

CARROLL GAITHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOMINO SUGAR	)	DATE ISSUED: 07/22/2010
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Administrative Law Judge, United States Department of Labor.

Mark C. Miller (William J. Blondell, Jr., Chartered), Baltimore, Maryland, for claimant.

John J. Rabalais, Janice B. Unland, Gabriel E. F. Thompson (Rabalais, Unland & Lorio), Covington, Louisiana, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2008-LHC-01112) of Administrative Law Judge Paul C. Johnson 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 was involved in a work-related accident while working for P&O Ports on July 23, 2007, while driving a fifth wheel between a top loader and a ship. He injured his shoulders, back and neck and received medical treatment. After two days, claimant returned to work full time under restrictions until August 15, 2007. On August 15, 2007, while working for Domino Sugar (employer), claimant was operating a bulldozer in the hold of a ship when he was involved in an accident with the bucket of a crane. Claimant testified that the bucket struck the bulldozer two times, causing pain in claimant's neck, back, shoulders, and arms. Claimant sought treatment with his personal physician, Dr. Kaplan, who prescribed analgesics and physical treatment. As claimant continued to complain of pain, Dr. Kaplan also recommended that an MRI be performed in order to aid diagnosis, and he referred claimant to a neurologist, Dr. Genut. Dr. Genut examined claimant on April 15, 2008, and concluded that claimant's injury was musculoskeletal without evidence of significant nerve injury. Cl. Ex. 9. Claimant returned to his former duties from November 20, 2007 to March 4, 2008, when he quit working. He sought temporary total disability benefits under the Act.

In his decision, the administrative law judge found that claimant sustained a work-related injury in August 2007 and that Domino Sugar is the responsible employer. He also found that claimant has not reached maximum medical improvement and that the evidence establishes that claimant was unable to work from August 16, 2007 to November 19, 2007, due to upper back pain, neck pain and headaches. Thus, the administrative law judge found that claimant is entitled to temporary total disability benefits for the period from August 16, 2007 to November 19, 2007. However, the administrative law judge found that claimant was able to return to his former duties as of November 20, 2007, and that he quit in March 2008 without a convincing medical reason for doing so. The administrative law judge found that claimant's continued complaints of pain are not credible and that the physicians have released him to return to full duties. Thus, the administrative law judge denied temporary total disability benefits as of March 4, 2008. The administrative law judge also found that employer is not liable for further physical therapy, as Drs. Genut and Pollack opined that it would not be beneficial. However, the administrative law judge found that employer is liable for the recommended MRIs and CT scans, as the testing is reasonable and necessary to assess the risk of further injury to claimant.

On appeal, claimant contends that the administrative law judge erred in finding that he did not establish a *prima facie* case of continuing total disability after March 4, 2008, as he contends that he has not been released for work by his treating physician, Dr. Kaplan. He contends that he returned to work in November 2007 only through great effort, and that he is currently unable to perform his usual duties. Employer responds, urging affirmance of the administrative law judge's decision denying continuing temporary total disability benefits.

To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). The administrative law judge found that all the physicians of record "concluded that Claimant was able to return to work at full duty, and none found him currently disabled." Decision and Order at 15. Thus, as he found that claimant was released for work on February 9, 2008, he found that the evidence did not establish a *prima facie* case of continuing disability.

The administrative law judge's opinion cannot be affirmed because in evaluating the medical evidence, he mischaracterized the opinions of Drs. Kaplan and Gemut. Contrary to the administrative law judge's finding, these physician did not release claimant to full duty work in an unqualified manner. Dr. Kaplan, claimant's treating physician, reported that claimant continued to have complaints of pain in his head, neck/shoulders and back. He prescribed analgesics and physical therapy, recommended an MRI of claimant's neck, head and back for diagnostic purposes, and referred claimant to a neurologist. Although claimant's range of motion improved, he continued to complain of pain. Dr. Kaplan prescribed Percocet in March 2008 and again recommended scans of claimant's head, neck and back. Dr. Kaplan released claimant for light-duty work in November 2007, and claimant attempted to return to work. However, he reported back to Dr. Kaplan in March 2008 complaining of pain and numbness, and Dr. Kaplan continued to give claimant "off-work" slips until February 2009, the date of his last appointment, because "the testing had not been done." Cl. Exs. 3, 4. Dr. Kaplan testified that he would like to make sure claimant does not have a herniated disc before he releases him for full duty and that if the scans are normal claimant is ready to return to work. Cl. Ex. 3 at 21-22. In April 2008, claimant was examined by Dr. Gemut, a neurologist. He reported a normal neurologic exam, but also recommended scans for further diagnostic purposes. Cl. Ex. 9. He opined that if the scans are normal, claimant can return to work without restrictions. Claimant was also examined by Dr. Pollack in February 2009. Dr. Pollack opined that claimant suffered a cervical strain and lumbar sprain in the work-related accident and concluded that claimant is medically able to return to work at full duty. He recommended the diagnostic scans to "put claimant at ease." Cl. Ex. 10. The administrative law judge found employer liable for the recommended MRIs and CT scans pursuant to Section 7 of the Act, 33 U.S.C. §907, but they had not been performed prior to the issuance of the administrative law judge's decision.

The Board may not interfere with the administrative law judge's weighing of the evidence or credibility determinations. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Thus, the administrative law judge could rationally

find that claimant's testimony is not credible. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). However, the Board is not bound to accept an administrative law judge's ultimate finding or inference if the decision discloses that it was reached in an invalid manner, *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988), and a decision which is not supported by substantial evidence cannot be affirmed. *Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968). As the administrative law judge's finding that claimant had been released for full duty by all of the physicians is not supported by the record and there is conflicting evidence regarding claimant's release to work, we remand the case for further consideration of the evidence addressing this issue. Two physicians conditioned the full release of claimant upon normal imaging results; these tests have not been performed. On remand, the administrative law judge may assess whether the physicians' conclusions are rationally based on their underlying documentation. *S.K.* [*Kamal*] *v. ITT Industries, Inc.*, 43 BRBS 78 (2009). The administrative law judge, however, may not substitute his judgment for that of the physicians. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). If, on remand, the administrative law judge finds that Dr. Pollack's opinion is sufficient to establish that claimant can return to his former employment without restrictions, we note that this opinion was not given until February 24, 2009, and claimant may be entitled to benefits before that date.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge denying continuing temporary total disability benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____

ROY P. SMITH
Administrative Appeals Judge

_____

REGINA C. McGRANERY
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge