BRB No. 97-695

RAFFAELE ARMENIA	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
INTERNATIONAL TERMINAL OPERATING COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Daniel J. Savino, Jr. (Caruso, Spillane, Contrastano & Ulaner), New York, New York, for claimant.

Christopher J. Field (Gallagher & Field), Jersey City, New Jersey, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-617) 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).[1] We must affirm the findings of fact and conclusions of law of the administrative law judge which

---

[1]Claimant initially filed an appeal in the instant case on February 10, 1997. The appeal was dismissed as premature by Order dated April 4, 1997, pursuant to Section 802.206(f) of the Board's Rules of Practice and Procedure. 20 C.F.R. §802.206(f). Upon claimant's request for reconsideration of the dismissal, the appeal was reinstated by the Board in an Order dated July 22, 1997. 20 C.F.R. §802.409. The one-year time limit for issuing a decision on this appeal thus runs from July 22, 1997.

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).

On August 13, 1995, while performing his duties as a holdman, claimant slipped on oil and fell, injuring his head, neck, lower back and left arm. Claimant was transported to St. Lukes/Roosevelt Hospital emergency room where he was treated for the head injury as well as for generalized complaints of trauma. Emp. Ex. 2. Claimant began treatment with Dr. Cordaro, a general surgeon, on August 15, 1995, and has not returned to work. Claimant sought permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant was temporarily totally disabled from August 13, 1995 to November 16, 1995, that claimant reached maximum medical improvement on November 16, 1995, and that claimant failed to establish a continuing disability after November 16, 1995. In addition, the administrative law judge denied medical benefits because there are no outstanding bills, prior authorization was lacking, and there was no showing that any medical services were necessary and/or reasonable after the date of maximum medical improvement. Subsequently, the administrative law judge summarily denied claimant's and employer's motions for reconsideration.

Claimant contends on appeal that the administrative law judge erred in finding that the evidence does not establish that claimant has a continuing total disability. Specifically, claimant contends the administrative law judge should have credited his treating physician and that he erred in relying on Dr. Swearingen's opinion to find that claimant's disability ended as of November 16, 1995.[2] Finally, claimant contends that the administrative law judge failed to reference the evidence claimant sought to submit post-hearing. Employer responds, averring that the administrative law judge did not err in failing to address the evidence submitted by claimant post-hearing, as it was sent after the record was closed and claimant did not formally move to reopen the record. In addition, employer urges affirmance of the administrative law judge's Decision and Order as it is supported by substantial evidence.

---

[2]Claimant also states that he requires further medical care and all treatment rendered in connection with the work-related injuries has been necessary and proper. As claimant did not brief this argument, we decline to address this contention. *See Carnegie v. C&P Telephone Co.*, 19 BRBS 57 (1986).

Initially, claimant contends that the administrative law judge erred in finding that the evidence fails to establish that claimant has a continuing disability. 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. *Manigault v. Stevens Shipping Co.*, 22/332 (1989). In the instant case, the administrative law judge rationally found that claimant failed to establish disability after November 16, 1995, based on Dr. Swearingen's opinion that as of that date claimant could return to his usual work.[3] Emp. Ex. 10. He found that the objective tests had negative results, and that Drs. Swearingen, Slotwiner, Greifinger, and Flicker recorded symptom magnification, exaggeration and inconsistent complaints and symptoms. Although the MRI of the lower back indicated a bulging disc at L5-S1, the CT scans and MRI of claimant's head and the x-rays of claimant's spine were unremarkable, and the orthopedists of record credited by the administrative law judge noted that the bulging disc abutted, but did not compress, the nerve roots. *See* Emp. Exs. 18 at 33-34, 20 at 41-42. Moreover, the findings of limitation of motion made by the physicians were based on claimant's complaints of pain which the administrative law judge found were exaggerated and inconsistent, and Drs. Swearingen and Greifinger noted the crepitation in claimant's shoulders but that the shoulders had full range of motion with good rotator cuff function. *See* Emp. Exs. 14-15.

In addition, contrary to claimant's contention, Dr. Swearingen's reports are not contradictory to the administrative law judge's finding that claimant was temporarily totally disabled prior to November 16, 1995. Rather, Dr. Swearingen reported on August 17, 1995 that claimant would probably be able to return to full duty in 7-10 days from an orthopedic standpoint. Emp. Ex. 6. It was not until the report dated November 16, 1995, that Dr. Swearingen opined that claimant could return to his former duties. Emp. Ex. 14. Moreover, Dr. Swearingen's opinion that claimant was minimally partially disabled after the injury was based on orthopedic factors and he specifically deferred to a neurologist regarding the complaints with claimant's head. Emp. Ex. 6.

---

[3]In addition, the administrative law judge noted that on October 21, 1995, Dr. Magliato opined that claimant likely would be able to return to his usual work in three to four weeks. Emp. Ex. 8.

The Board is not empowered to reweigh the evidence, but must respect the administrative law judge's rational weighing of the evidence. The administrative law judge in this case reviewed the evidence of record, and claimant has raised no reversible error in the administrative law judge's weighing of the medical evidence. *See generally John W. McGrath Corp v. Hughes,* 289 F.2d 403 (2d Cir. 1961). We thus affirm the administrative law judge's finding that claimant failed to establish a *prima facie* case of total disability and thus is not entitled to continuing benefits under the Act as it is supported by substantial evidence.[4] *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

---

[4]At the hearing, the administrative law judge left the record open until mid-October 1996 for the submission of depositions by claimant's treating physician, Dr. Cordaro, and four physicians on behalf of employer. These depositions were submitted in November 1996 with the closing briefs of the parties. Claimant also moved to amend its exhibit list by letter dated October 22, 1996, and the administrative law judge did not rule on claimant's motion. In the present case, the administrative law judge left the record open specifically for the depositions of the physicians. *See generally Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989). Moreover, the evidence which claimant attempted to include consisted of a non-binding decision of the pension board awarding a disability pension and a conclusory statement by Dr. Tieng stating that claimant is totally and permanently disabled, but which fail to explain the basis for this conclusion. *See generally Jones v. Midwest Machinery Movers,* 15 BRBS 70 (1982). Under these circumstances, claimant has not demonstrated that the administrative law judge committed reversible error in failing to address this evidence.

REGINA C. McGRANERY
Administrative Appeals Judge