

C.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MIDWEST AIR TRAFFIC CONTROL	)	DATE ISSUED: 06/30/2008
SERVICE, INCORORATED	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

John E. Dunlap and Robert D. Flynn, Memphis, Tennessee, for claimant.

Alan G. Brackett and Derek M. Mercer (Mouledoux, Bland, LeGrand & Brackett, LLC), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-LDA-00081) of Administrative Law Judge Thomas M. Burke 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 retired from the military in 1996 after serving as an air traffic controller for approximately 20 years. Thereafter, she attended college and worked part-time as an air traffic controller at Memphis International Airport. In 2003, claimant accepted a contract position as an air traffic controller with employer, which provides services to the military overseas. Claimant began her duties for employer at Bagram Air Force Base, Afghanistan, on December 6, 2003. On April 11, 2004, she was promoted to a tower chief controller. In this position, claimant oversaw all of the tower operations, including managing 16 controllers. Claimant was required to maintain her FAA certification, which includes a Class II medical certificate that precludes her from taking certain medications.

Claimant was injured at Bagram Air Force Base on March 22, 2005, in a slip and fall accident. She timely reported the unwitnessed accident to her supervisor. Claimant was prescribed anti-inflammatory and pain medications and bed rest; her Class II medical certificate was suspended apparently because of the medication prescribed. Claimant ultimately returned to Memphis for treatment of her back and left leg pain. Dr. Camillo, a board-certified neurosurgeon, diagnosed a back strain and opined that surgery was not required. EX 7 at 8, 49. When claimant continued to complain of pain, Dr. Camillo referred claimant to Dr. Rivera-Tavarez, a board-certified physiatrist within his practice who specializes in pain management. *Id.* at 8. Based on claimant's continuing complains of pain and unsuccessful nerve block injections to her spine and sacroiliac (SI) joint, Dr. Rivera-Tavarez prescribed additional medications. *Id.* at 15, 17. In November 2005, claimant underwent a functional capacity evaluation after which Dr. Rivera-Tavarez stated that claimant could return to her usual work without restrictions. *Id.* at 41.

Employer referred claimant to Dr. Sokoloff, a board-certified orthopedic surgeon, for a second opinion. Dr. Sokoloff saw claimant five times and consulted with Dr. Rivera-Tavarez regarding the protocol and efficacy of claimant's treatment regimen. In December 2005, Dr. Sokoloff stated that claimant could return to work without restrictions. EX 6 at 69, 72. On referral from her attorney, claimant saw Dr. Rizk, who diagnosed claimant with SI joint radiculopathy causally related to her March 22, 2005 work accident with employer. He imposed specific restrictions, but stated he did not know the specific duties of an air traffic controller although he assumed they must be alert.<sup>1</sup> CX 1 at 31.

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<sup>1</sup> Dr. Rizk recommended that claimant avoid lifting, pushing or pulling more than 25 pounds. He stated that claimant should avoid employment necessitating repetitive lumbar spinal movement, especially bending and twisting at the same time. CX 1 at 2.

Employer paid claimant temporary total disability benefits from April 9 to November 18, 2005. Claimant alleged that she is unable to return to her usual employment as an air traffic controller because she is unable to climb stairs to the tower and to move, turn and bend in order to locate and visually sight aircraft descending into the airspace. Claimant also contended that the medication Lyrica prescribed by her physicians precludes her from working as an air traffic controller as she is unable to maintain her Class II certification. Prior to the formal hearing on November 30, 2006, the parties agreed that claimant is presently working in alternate employment which commenced on June 16, 2006, and that claimant's March 22, 2005, injury resulted in temporary total disability from April 9, 2005 to November 18, 2005.

In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on November 18, 2005, and that she did not establish her inability to perform her usual work after that date, based on the opinions of Drs. Rivera-Tavarez and Sokoloff. The administrative law judge discredited claimant's complaints of pain, and therefore, the basis for the prescription of Lyrica. In addition, the administrative law judge credited the deposition testimony of employer's president that it has positions available world-wide for a person of claimant's qualifications. Thus, the administrative law judge found that claimant did not sustain any work-related disability subsequent to November 18, 2005, and he denied the claim for additional benefits.<sup>2</sup>

On appeal, claimant contends she is entitled to total disability benefits from November 18, 2005 through June 16, 2006, as she is unable to return to her usual work, and to partial disability benefits thereafter based on a loss in wage-earning capacity. Employer responds, urging affirmance of the administrative law judge's decision.

We reject claimant's contention that the administrative law judge erred in disregarding the April 5, 2006, recommendation of the district director following the informal conference, that employer should continue paying temporary total disability benefits. The district director's recommendation is not binding on the administrative law judge. In fact, the regulations provide that when a case is transferred to the Office of Administrative Law Judges, any recommendations or memorandum of the district director "shall not be included," 20 C.F.R. §702.317(c), and the administrative file itself is not transmitted. 20 C.F.R. §702.318. The hearing before the administrative law judge is *de novo* based on the evidence admitted into the record before him. *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

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<sup>2</sup> As claimant did not establish her inability to perform her usual work, the administrative law judge did not address claimant's claim for partial disability benefits based on her employment at Home Depot, which commenced in June 2006.

We also reject claimant's contention that the administrative law judge erred in addressing the medical evidence of record. Claimant bears the burden of establishing her inability to return to her usual work due to her injury. *See, e.g., Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4<sup>th</sup> Cir. 1984); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5<sup>th</sup> Cir. 1981). It is well established that an administrative law judge is entitled to weigh the medical evidence and is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). Dr. Rivera-Tavarez and Dr. Sokoloff opined that claimant can return to her usual work without restrictions. EX 6 at 69; EX 7 at 41. Moreover, the administrative law judge discussed claimant's complaints of pain and the medication Lyrica prescribed therefor which precludes claimant from holding Class II certification. The administrative law judge found that neither Dr. Rivera-Tavarez nor Dr. Sokoloff found any objective support for claimant's complaints of pain. In addition, Dr. Sokoloff stated that claimant was magnifying her symptoms, and he disagreed with Dr. Rizk's diagnosis of SI dysfunction with radiculopathy. EX 6 at 72. Dr. Sokoloff also stated that claimant should not be taking Lyrica because it does not treat the symptoms claimant presents and it is not helping her. *Id.* at 26-27. The administrative law judge credited Dr. Sokoloff's opinion and found that the medication is not necessary for claimant's work injury. Decision and Order at 14. Finally, the administrative law judge found, based on the testimony of employer's president, that employer has jobs available for someone of claimant's qualifications. *See generally McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988); EX 11 at 13, 21-23.

The administrative law judge acted within his discretion in crediting the opinions of Drs. Sokoloff and Rivera-Tavarez that claimant can return to work without restrictions, and in rejecting claimant's testimony concerning her pain. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge acknowledged Dr. Rizk's finding of a 10 percent impairment based on sacroiliac disfunction with radiculopathy but found it was based solely on claimant's subjective complaints which he had discredited. Moreover, as the administrative law judge stated, Dr. Rizk could not say claimant was unable to work as an air traffic controller although he was concerned that she would be unable to do so due to her prescribed medication. The opinion of Dr. Sokoloff supports the administrative law judge's finding that the medication which precludes claimant from holding a Class II certificate is not necessary for treatment of the work injury. *See generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Substantial evidence thus supports the administrative law judge's findings that claimant did not establish her inability to perform her usual work due to her injury and that such work remains available. Therefore, we

affirm the administrative law judge's determination that claimant is not entitled to additional disability benefits subsequent to November 18, 2005.<sup>3</sup>

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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<sup>3</sup> As we have affirmed the administrative law judge's finding that claimant did not establish her *prima facie* case of total disability after November 18, 2005, we need not address her contention concerning her alleged loss of wage-earning capacity after June 16, 2006.