BRB No. 01-0516

DONALD L. SAILES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HALTER MARINE	)	DATE ISSUED: March 4, 2002
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY	)	
	)	
Employer/Carrier-Respondents	)	) DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Mager A. Varnado, Jr., Gulfport, Mississippi, for claimant.

Donald P. Moore (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-LHC-0886) of Lee J. Romero, Jr., 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 if they 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).

Claimant suffered a hernia in a work-related accident on January 29, 1998. Claimant had surgery to repair the hernia, and employer paid claimant temporary total disability benefits from February 3 through February 22, 1998. Claimant was released for full duty work on March 12, 1998, but was removed from work by Dr. Smith on April 15, 1998 and has not returned to work since that date. Employer paid total disability benefits from April 15, 1998 through February 17, 1999, and from April 7, 1999 through June 4, 1999. Claimant sought continuing total disability

benefits, alleging he is unable to work due to ilioinguinal nerve neuralgia resulting from the hernia surgery.

The administrative law judge credited Dr. Overmyer's opinion that claimant reached maximum medical improvement on May 3, 1999, and could return to full duty work. Consequently, the administrative law judge found that claimant is entitled to temporary total disability benefits from February 3, 1998 through February 22, 1998, and from April 15, 1998, through May 3, 1999. The administrative law judge denied claimant's request that employer be held liable for payment of claimant's recommended treatment at the Tulane Pain Clinic, to which claimant was referred by Dr. Chen, an authorized physician. The administrative law judge found that claimant did not establish the necessity of treatment at a third pain clinic, having already been treated by two pain specialists, Drs. Overmyer and Chen. The administrative law judge found, however, that as claimant continues to suffer from some pain from nerve entrapment, employer is liable for claimant's pain treatment with either Dr. Overmyer or Dr. Chen.

On appeal, claimant contends that the administrative law judge erred by finding that claimant is able to return to his usual work, and that employer is not liable for recommended treatment at the Tulane Pain Clinic. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). To establish a *prima facie* case of total disability, claimant must show that he is unable to perform his usual employment due to his work-related injury. *See, e.g., Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). Claimant contends that his testimony regarding the incapacitating nature of his pain is sufficient to establish his entitlement to total disability benefits. The administrative law judge found that several inconsistencies among claimant's hearing testimony, deposition testimony, and other evidence of record undermine claimant's credibility concerning the extent of his pain.[1] The administrative law judge credited the opinion of Dr. Overmyer that claimant reached maximum medical improvement on May 3, 1999, and could return to his usual employment without restrictions. EX 12 at 1. In adjudicating a claim, it is well-established that an administrative law judge is entitled to determine the weight to be accorded the evidence of record. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962); *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir.1961). Additionally, the administrative law judge is entitled to evaluate the credibility of all witnesses. The Board must affirm these credibility determinations unless

[1]For example, claimant gave conflicting testimony concerning the number of work-related injuries he had sustained, the number of children he has, and the reason for a gunshot wound sustained in 1981. *See* Decision and Order at 12-13.

they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As the administrative law judge's decision to accord less weight to claimant's testimony in favor of Dr. Overmyer's opinion is rational, and as the administrative law judge's finding that claimant could return to work without restrictions is supported by substantial evidence, we affirm the administrative law judge's denial of disability benefits after May 3, 1999. *See, e.g., Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem.*, 909 F.2d 1488 (9th Cir. 1990).

Claimant next contends the administrative law judge erred in finding employer is not liable for treatment at the Tulane Pain Clinic. After referral by his surgeon, Dr. Smith, claimant was treated by Dr. Overmyer of the Coastal Chronic Pain Clinic between November 11, 1998 and May 3, 1999. CX 9. Although claimant received temporary pain relief from ilioinguinal nerve blocks, he refused to continue this treatment because of a fear of needles and his displeasure at the numbness caused by the nerve blocks. Believing that claimant had exhausted his treatment options, Dr. Overmyer referred claimant back to Dr. Smith on May 3, 1999, although he agreed to continue to provide pain medication. *Id.* Claimant began seeing Dr. Chen of the Sun Coast Pain Management Center on July 16, 1999, with increased complaints of pain in his groin. On April 4, 2000, after an unsuccessful nerve block and medication regimens, Dr. Chen also stated that he had exhausted his treatment options, and Dr. Chen referred claimant to the Tulane Pain Clinic for an evaluation and treatment.[2] CX 8, 14. The administrative law judge found that claimant did not establish good cause for a change in physicians to the Tulane Pain Clinic, as he already had been treated by two specialists appropriate for his injury and has self-limited his treatment by refusing further nerve blocks. The administrative law judge concluded, however, that claimant is entitled to continuing treatment by either Dr. Overmyer or Dr. Chen.

We reverse the administrative law judge's finding that claimant is not entitled to treatment at employer's expense at the Tulane Pain Clinic. A claimant is entitled to necessary medical treatment even if his injury is not economically disabling. 33 U.S.C. §907(a); *see Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). Section 7(c)(2) of the Act, 33 U.S.C. §907(c)(2), states that consent to change physicians must be given in cases where the employee's initial choice was not of a specialist appropriate for his injury. "In all other cases, consent [for a change in physician] may be given upon a showing of good cause for change." *See also* 20 C.F.R. §702.406(a). Although claimant was treated by two specialists appropriate for his injury, *see Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988), the administrative law judge's finding that claimant did not establish good cause

[2]Claimant explicitly requested that employer authorize this treatment. *See* CX 13, 14.

for a change to the Tulane Pain Clinic cannot be sustained. Both Dr. Overmyer and Dr. Chen stated they had exhausted their options for treating claimant. Moreover, although claimant refused additional nerve blocks while treating with Dr. Overmyer, he ultimately consented to an additional nerve block performed by Dr. Chen. Dr. Chen reported, however, that this block was not successful in treating claimant's pain, nor was the medication he provided successful in alleviating claimant's pain. CX 14 at 2. Dr. Chen then referred claimant to the Tulane Pain Clinic for further evaluation, as he had "nothing else to offer this patient." *Id.* Therefore, the administrative law judge's denial of treatment by the Tulane Pain Clinic in favor of continuing treatment by either Dr. Overmyer or Dr. Chen is not supported by substantial evidence, as these physicians stated they have no treatment to offer. If the denial of treatment by the Tulane Pain Clinic were to stand, claimant would be left without any treatment for his work injury, yet it is clear from the evidence and the judge's decision that claimant continues to suffer pain for which treatment is necessary. In view of the referral of Dr. Chen and the statements of Drs. Overmyer and Chen that they had no further treatment options to offer claimant, claimant is entitled to seek treatment from the Tulane Pain Clinic, and the administrative law judge's finding to the contrary is reversed. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).

Accordingly, the administrative law judge's denial of additional disability benefits is affirmed. The administrative law judge's denial of treatment at the Tulane Pain Clinic is reversed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge