BRB No. 04-0704

KEITH KENDRICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FIRST WAVE MARINE, INCORPORATED/ NEWPARK SHIPBUILDING & REPAIR, INCORPORATED	)	DATE ISSUED: May 11, 2005
	)	
and	)	
	)	
TEXAS WORKERS' COMPENSATION INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Stephen M. Vaughan (Tucker, Vaughn, Gardner & Barnes, P.C.), Houston, Texas, for claimant.

Timothy W. Strickland (Fowler, Rodriguez & Chalos, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2000-LHC-2056) of Administrative Law Judge Larry W. Price 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 before the Board for the second time. To briefly recapitulate, claimant, a welder/fitter, injured his back at work on February 2, 1999. Employer voluntarily paid claimant temporary total disability benefits from February 3 through May 9, 1999. Claimant returned to work with employer on July 6, 1999, in a clerical position, but was laid off in December 1999. Later in December 1999, claimant returned to work with employer in a modified welder position. On January 2, 2000, claimant stated that he was unable to perform this job. Claimant again attempted to return to work with employer in the modified welder position on February 4 and 24, 2000, but left because he asserted he was unable to perform the work. Claimant did not return to work with employer after February 2000. Subsequently, claimant worked as a driver for Southeast Texas Auto Paint and Equipment and Galveston Limousine Service. At the time of the hearing, claimant was employed as a welding supervisor for Plant Processing Equipment.

In the initial decision by Administrative Law Judge Kerr, claimant was awarded temporary total disability benefits from February 2 through July 5, 1999. Judge Kerr denied claimant partial disability benefits thereafter because claimant earned the same wage rate in the clerical position as he had earned prior to the injury. The administrative law judge found that claimant reached maximum medical improvement on October 19, 1999, and that as of that date claimant could return to his usual work as a welder/fitter. The administrative law judge also found that claimant was not entitled to a referral to a spine specialist recommended by his treating orthopedist.

Claimant appealed the administrative law judge's finding that he was not entitled to a referral to a spine specialist and asserted that the administrative law judge, therefore, erred by denying him additional disability and medical benefits after October 19, 1999. In its decision, the Board reversed the administrative law judge's finding that claimant was not entitled to a referral to a spine specialist, as requested by his treating orthopedist, Dr. Allen. *See Kendrick v. First Wave Marine, Inc./ Newpark Shipbuilding & Repair, Inc.*, BRB No. 02-0252 (Dec. 16, 2002) (unpub.) (Dolder, C.J., dissenting). The Board remanded the case for the administrative law judge to reconsider claimant's entitlement to compensation and medical care after October 19, 1999, in light of the opinion of the specialist and the other medical evidence of record.

On remand the case was re-assigned to Administrative Law Judge Price (the administrative law judge). A hearing was conducted on March 1, 2004, at which claimant testified and the parties submitted exhibits. The evidence included the medical records and deposition testimony of Dr. Westmark, the spine specialist who examined claimant after the case was remanded by the Board. In his decision, the administrative law judge found that claimant sustained only a soft tissue injury, which temporarily

aggravated a pre-existing back condition. The administrative law judge found that claimant's injury reached maximum medical improvement on October 19, 1999, and that, thereafter, claimant was able to return to his former employment as a welder. The administrative law judge also found that any further back problems or permanent work restrictions after October 19, 1999, are due to claimant's pre-existing back condition, and that he did not sustain any loss of wage-earning capacity due to the work injury. The administrative law judge concluded that employer is not responsible for any medical treatment rendered after October 19, 1999, except for the post-remand evaluation by the spine specialist, Dr. Westmark.

On appeal, claimant challenges the administrative law judge's denial of additional benefits. In this regard, claimant contends that the administrative law judge's analysis does not comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). Employer responds, urging affirmance

We affirm the administrative law judge's denial of additional benefits, as his findings are rational, supported by substantial evidence, and in accordance with law. The administrative law judge rationally credited the opinions of Drs. Pennington and Hanson over that of Dr. Westmark on the extent of claimant's disability due to the work injury.[1] Dr. Pennington found no objective evidence of ongoing trauma, and stated that claimant's work accident resulted in a temporarily disabling soft tissue injury to the lower back. EXs 10; 12 at 19-22, 53-59, 68. The administrative law judge found that Dr. Hanson agreed with Dr. Pennington's opinion. EXs 9; 11 at 16-18, 28-29, 32-35. The administrative law judge found that Dr. Westmark also agreed with Dr. Pennington's findings of no objective evidence of radiculopathy, that surgery was not required, and that claimant exhibited some symptom magnification and psychosocial issues. CX 5 at 21, 23-24. The administrative law judge found that Dr. Westmark's diagnosis of lumbar radiculitis and sacroiliitis is largely based on claimant's subjective complaints, CX 5 at 10-11, 16, 24-25, which the administrative law judge found belied by the surveillance videotape. *See* CX 5 at 24; EXs 10 at 5; 12 at 18-19, 40-44, 53-54; 26; 27. The administrative law judge thus concluded that claimant's work injury had healed as of the date of Dr. Pennington's October 19, 1999, examination, and that claimant has no loss of wage-earning capacity after October 19, 1999, attributable to his February 2, 1999, work injury. The administrative law judge's weighing of the medical evidence is within his purview as fact-finder, and the Board is not empowered to re-weigh it. *See generally James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *see also Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

[1]The deposition testimony and reports of Drs. Pennington and Hanson were submitted into evidence at the initial hearing before Judge Kerr and re-submitted by employer at the second hearing before Judge Price.

Claimant's contention that the administrative law judge's analysis does not comport with the APA is without merit.[2] In his decision, the administrative law judge summarized claimant's testimony at the March 1, 2004, hearing, and the deposition testimony of Dr. Westmark. Decision and Order at 4-6. The administrative law judge stated on which evidence he relied, and which evidence he rejected and why; this analysis comports with the APA. *Id*. at 8; *see H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000). Claimant has not established reversible error in the administrative law judge's denial of compensation and medical benefits after October 19, 1999, and the administrative law judge's decision is supported by substantial evidence. We therefore affirm the administrative law judge's decision. *See James J. Flanagan Stevedores, Inc.*, 219 F.3d 426, 34 BRBS 35(CRT).

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Law Judge

[2]The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A).