BRB No. 04-0245

MARGARET STONER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNITED STATES MARINE CORPS/MCCS	)	DATE ISSUED: 11/18/2004
	)	
Self-Insured Employer-Respondent	)	
	)	
	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Daniel F. Read, Durham, North Carolina, for claimant.

James M. Mesnard (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM

Claimant appeals the Decision and Order Denying Benefits (2001-LHC-2027, 2002-LHC-2503, 2504, 2505) of Administrative Law Judge Linda S. Chapman 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 sustained injuries to her back on three separate occasions, *i.e.*, on August 13, 1998, May 19, 1999, and June 20, 2000, while working for employer primarily as a vending machine attendant. Claimant eventually returned to her regular job duties following the August 13, 1998, and May 19, 1999, incidents; however, in early 2000, persistent back pain led to a reassignment to a light-duty position in employer's money

office. On June 20, 2000, claimant was asked by her supervisor to empty a vending machine, and immediately thereafter experienced a neck spasm and pain in her left leg. Subsequent to this last injury, claimant returned to work, on light duty, "the first part of the following week," HT at 47 and at the recommendation of Carteret Urgent Care, was kept out of work "from late June to mid July," HT at 48. Apparently, claimant has not since returned to work for employer.[1]

Employer voluntarily paid claimant temporary total disability benefits from May 23 through May 31, 1999, based on an average weekly wage of $301.80. Claimant thereafter sought total disability benefits from July 15 through October 4, 1999, and from July 27, 2000, through March 14, 2002, the date of employer's labor market survey.

In her Decision and Order, the administrative law judge found that claimant's claim for the August 13, 1998, injury was time-barred, 33 U.S.C. §912(a), (d), but that the injuries sustained on May 19, 1999, and June 20, 2000, were work-related. The administrative law judge concluded, however, that claimant did not establish any disability as a result of these injuries, Decision and Order at 19-23, and alternatively found that employer established the availability of suitable alternate employment with no loss in claimant's wage-earning capacity. Decision and Order at 23-25. Lastly, the administrative law judge determined that claimant was unable to establish that her psychiatric condition of bereavement and depression disorders was work-related. Decision and Order at 23. Accordingly, benefits were denied.

On appeal, claimant asserts her condition is the result of one injury and challenges the administrative law judge's determination that she is not totally disabled. Employer responds, urging affirmance.

Claimant asserts that the administrative law judge should have concluded that claimant is disabled from performing her pre-injury job. Claimant avers that the administrative law judge erred in not considering the opinion of Dr. Cannon that claimant was unable to do even sedentary work. Claimant further argues the administrative law judge should have accorded dispositive weight to the opinion of Dr. Nunn that claimant is presently unable to work due to her work-related injuries since, contrary to the administrative law judge's determination, his opinion is premised on objective evidence and he is claimant's primary treating physician.

Once a claimant establishes that she sustained a work-related injury, as here, the burden rests with claimant to establish that she is disabled as a result. A claimant

[1] In August 2000, claimant's job was abolished as vending operations were contracted out.

establishes her *prima facie* case of total disability if she is unable to perform her usual employment duties due to her work-related injury. *See Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985).

In the instant case, the administrative law judge found that the opinions of Drs. Langley, Nelson, Delaney and Rollins establish that claimant was capable of returning to her regular duties. The administrative law judge determined that these opinions are entitled to the greatest weight due to the physicians' superior qualifications as well as the fact that their opinions are based on objective determinations. Decision and Order at 21-23. In contrast, the administrative law judge considered, but rejected, the opinion of Dr. Nunn, a psychologist and osteopath, who, the administrative law judge determined, "is the only medical person who has indicated that the claimant is unable to return to her regular duties," since there is no indication that Dr. Nunn performed any kind of testing on claimant that would have provided an objective basis for his conclusions. Decision and Order at 22. The administrative law judge further observed that while "it would be possible to infer such a conclusion [that claimant cannot perform her regular employment] from the restrictions and medications approved by Dr. Nelson in connection with the labor market survey," she rejected this conclusion as "these restrictions were based on the results of the invalid FCE, which determined only the minimum that the claimant was capable of performing." Decision and Order at 22. Accordingly, we affirm the administrative law judge's rejection of Dr. Nunn's opinion, as it is rational and supported by substantial evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

Moreover, contrary to claimant's assertion, there is no "mechanical" deference to be accorded to the opinions of treating physicians. Such physicians' opinions are to be weighed and credited along with the opinions of any other expert of record, and it is within the administrative law judge's discretionary powers to determine the weight accorded the evidence including the opinions of the medical expert. *See, e.g., Calbeck*, 306 F.2d 693. Furthermore, we reject claimant's assertion that Dr. Cannon's opinion should have been considered by the administrative law judge, as no such opinion has been admitted into evidence, nor has claimant moved for admission of such evidence. As employer notes, the only reference to an opinion by Dr. Cannon is present at Claimant's Exhibit 6, the decision of a Social Security Administration administrative law judge. Pursuant to 20 C.F.R. §702.338, evidence must formally be admitted into the record. *See Ross v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 224 (1984).

We further reject claimant's assertion that the four injuries in question should be

considered as one single injury for, as the administrative law judge stated, "it is irrelevant whether there were one or four discrete injuries, as all relate to the same type of injury or aggravation, that is, lower back pain." Decision and Order at 19 n.15. As employer notes, in considering the disability issue, the administrative law judge has done precisely what claimant asked in that she considered claimant's ability to do her usual employment in terms of her overall condition which necessarily results from each of her four alleged work injuries. Decision and Order at 19-23. We therefore affirm the administrative law judge's finding that claimant is able to return to her regular employment and thus, has not established a *prima facie* case of total disability as it is supported by substantial evidence. 33 U.S.C. §920(a); *see Padilla,* 34 BRBS 49; *Manigault*, 22 BRBS 332; *Anderson*, 22 BRBS 20; *Trask*, 17 BRBS 56. Accordingly, we affirm the administrative law judge's denial of benefits.[2]

[2] As we affirm the administrative law judge's finding that claimant has not established a *prima facie* case of disability, we need not address the availability of suitable alternate employment.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge