BRB No. 99-1256

LOTTIE BLAKE	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
TRAYLOR BROTHERS, INCORPORATED	)	
	)	
and	)	
	)	
ST. PAUL FIRE and MARINE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Award Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Leonard Cardenas III, John T. Joubert, and Henri M. Saunders (Leonard Cardenas III, A Law Corporation), Baton Rouge, Louisiana, for claimant.

Joseph B. Guilbeau and Charles W. Farr (Juge, Napolitano, Guilbeau & Ruli), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (99-LHC-0571) of Administrative Law Judge Clement J. Kennington 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 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, a carpenter, was injured on February 21, 1993, when he stepped on a piece of plywood covering a pipe, fell backwards and struck his back and neck on a steel form. Claimant performed light duty work at his full wages until March 22, 1996. Employer voluntarily paid claimant temporary total disability and medical benefits from March 22, 1996 through July 17, 1996. Thereafter, claimant worked for employer in light duty employment from July 19 to September 4,

1996, because of restrictions imposed by Dr. Doty. Employer alleged that Dr. Doty, claimant's "authorized" treating physician, found claimant able to return to his pre-injury position by September 4, 1996, but that it permitted claimant to continue performing light duty work until September 27, 1996, when claimant was terminated due to a reduction in force.

The administrative law judge credited the testimony of claimant's subsequent treating physician, Dr. Broussard, that claimant could not perform his usual employment as a carpenter, over that of Dr. Doty. The administrative law judge also found claimant's complaints of pain credible and consistent with the objective medical evidence of record, as determined by Dr. Broussard. The administrative law judge further found that employer did not meet its burden of establishing the availability of suitable alternate employment after September 26, 1996, when it discontinued claimant's light duty employment. The administrative law judge concluded that claimant is entitled to temporary total disability benefits from September 27, 1996 to October 9, 1996, when he reached maximum medical improvement, and thereafter to continuing permanent total disability benefits.

On appeal, employer contends that the administrative law judge erred in relying on the opinion of Dr. Broussard, an "unauthorized" treating physician, in finding that claimant is incapable of performing his pre-injury job. Claimant responds, urging affirmance.

Employer contends that it is irrational for the administrative law judge to rely on Dr. Broussard's opinion regarding claimant's employability, as Dr. Broussard's treatment of claimant was not authorized. Employer argues that the administrative law judge should have credited the opinion of claimant's authorized physician, Dr. Doty, who approved claimant's return to his usual employment. We reject employer's contention.

In finding claimant incapable of returning to his usual work, the administrative law judge refused to simply defer to the opinion of claimant's initial treating physician, Dr. Doty, that claimant could return to his pre-injury heavy carpentry work on September 4, 1996. In rejecting Dr. Doty's opinion, the administrative law judge noted that the doctor last examined claimant on August 8, 1996, when he opined that claimant's alleged adamant refusal to work without back discomfort meant that claimant would be best suited for clerical duties or employment other than heavy labor. The administrative law judge rationally questioned the change in Dr. Doty's opinion one month later, without an additional examination of claimant. Decision and Order at 14. The administrative law judge further inferred that Dr. Doty changed his mind about claimant's work capacity apparently upon the mistaken belief that claimant was not motivated to work and had only worked infrequently since the accident, whereas the administrative law judge found that claimant had demonstrated consistent performance of light duty work from February 21 to March 22, 1996, and from July 19 to September 24, 1997. *Id.* Finally, the administrative law judge found that Dr. Doty apparently discounted claimant's complaints of pain despite objective findings of injury; consistent and persistent pain complaints from claimant; and claimant's pre-existing degenerative back conditions which admittedly interfered with or delayed claimant's recovery. *Id.*

The administrative law judge credited the opinion of Dr. Broussard, also an orthopedist, finding he was equally qualified to diagnose, evaluate, and treat claimant. Dr. Broussard stated that

claimant had an objective basis for his complaints of pain and should not return to carpentry work which involved overhead reaching and lifting. In crediting Dr. Broussard's opinion, the administrative law judge noted the doctor's objective diagnosis of a spinous fracture from the February 21, 1993, injury.[1] Based on claimant's neck injury, Dr. Broussard opined that claimant should avoid repetitive neck motions or holding his head in fixed positions for prolonged periods of time, and he restricted claimant to light duty with avoidance of carpentry and other manual labor to avoid additional injury. The administrative law judge thus concluded, upon consideration of the entire record, including claimant's credible complaints of pain and Dr. Broussard's opinion, that claimant's work-related upper back and lower neck injuries precluded his return to his usual employment.

[1] After a review of claimant's bone scans, Dr. Broussard diagnosed a spinous fracture, consistent with claimant's complaints of pain and injury, which Dr. Doty had never diagnosed. In laymen's terms Dr. Broussard stated that claimant probably sustained a "broken neck." CX 2 at 8-11.

We affirm the administrative law judge's decision. The Board may not reweigh the evidence, and the administrative law judge's crediting of Dr. Broussard's opinion, as supported by claimant's credible complaints of pain, is within his discretion as the trier-of-fact. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991)*; Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge rationally explained his decision to credit Dr. Broussard's opinion . *See generally Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969); *see also Calbeck v. Strachan Shipping Co.*, 306 F. 2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). The authorization of a physician provided in Section 7 of the Act, 33 U.S.C. §907, establishes employer's liability for the medical expenses of that physician; it has no bearing on the weight to be given the opinion of an examining or treating physician.[2] *See generally Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999). An administrative law judge is not required to credit the opinion of any particular physician, but must weigh the evidence and rationally reach a decision supported by substantial evidence. The administrative law judge did so in this case, and his decision therefore is affirmed.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[2]We note that the administrative law judge did not make a specific finding that Dr. Broussard's treatment was unauthorized, but he did state that claimant did not contend that employer refused payment of any medical benefits. Decision and Order at 15. Thus, the administrative law judge denied claimant additional medical benefits. *Id.* This finding is not challenged on appeal.

REGINA C. McGRANERY
Administrative Appeals Judge