

BRB No. 96-1238

ALISA MILLER GOLLOTTE)
)
 Claimant-Petitioner)
)
 v.)
)
 INGALLS SHIPBUILDING,) DATE ISSUED:
 INCORPORATED)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Rickey J. Hembra, Ocean Springs, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIUM:

Claimant appeals the Decision and Order Awarding Compensation Benefits (95-LHC-243) of Administrative Law Judge Richard D. Mills 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).

Claimant was injured in a work-related accident on May 4, 1993, when she slipped and fell while climbing down a ladder inside a ship. The next morning claimant reported to employer's hospital with complaints of pain in her neck and back. She requested to see Dr. Zarzour, an orthopedist. Dr. Zarzour found that claimant had normal x-rays of the lumbar sacral spine but that she had sustained cervical and lumbar sprains from the accident. After treating her for the sprains, he released claimant for light duty work on August 23, 1993, with restrictions for one month, and a return to regular duty after that period. Claimant reported to employer's clinic on August 23, but did not actually perform any

duties. After she left employer's facility, claimant reported to Dr. Zarzour with complaints of pain. He again recommended that she be off work, but released her for limited hours on October 21, 1993. However, claimant did not attempt to return to work at that time, and on October 26, 1993, Dr. Zarzour referred claimant to a neurologist, Dr. Fleet, for a consulting opinion. On November 11, 1993, Dr. Zarzour reported, and Dr. Fleet concurred, that there was no objective evidence of a permanent impairment and therefore claimant was released to work with no specific restrictions. Cl. Ex. 13.

Claimant, however, did not return to work at that time. Rather, she began treatment with Dr. Turner, a chiropractor, who diagnosed muscular and neurological damage from the accident and concluded that claimant should not return to work as a painter. Cl. Ex. 15. Claimant sought continuing benefits under the Act.

In his decision, the administrative law judge found that the opinions of Drs. Zarzour and Fleet were well-reasoned and based on the reliable medical evidence. Therefore, as Drs. Zarzour and Fleet released claimant for return to her regular duties without restrictions, the administrative law judge found that claimant was entitled to temporary total disability benefits from May 4, 1993 through August 17 1993, the date claimant was originally released to work.

On appeal, claimant contends that the administrative law judge erred in terminating her benefits on August 17, 1993, as claimant continued to be treated by Dr. Zarzour until February 21, 1994, and continues treatment with Dr. Turner. Claimant also contends that the administrative law judge erred in denying Section 7, 33 U.S.C. §907, medical benefits for her chiropractic treatment, as Dr. Zarzour denied claimant further treatment, and Dr. Turner was treating her for a subluxation. Employer responds, urging affirmance of the administrative law judge's decision and order as it is supported by substantial evidence.

Initially, claimant contends that the administrative law judge erred in finding that she is not entitled to continuing permanent total disability benefits. To establish a *prima facie* case of total disability, claimant must show that she cannot return to her regular or usual employment due to her work-related injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). In the instant case, the administrative law judge rationally relied on the opinions of Dr. Zarzour and Fleet as they collectively monitored claimant for a long period of time and performed a myriad of tests, including an MRI and a bone scan, all of which were negative. Decision and Order at 5. He rejected Dr. Turner's opinion as he is a chiropractor and there is no evidence that claimant suffered an injury to her skeletal structure. Decision and Order at 6. In addition, the administrative law judge rejected the opinion of Dr. Thangada, Dr. Turner's consulting neurologist, as it was based on an EMG test, which Dr. Zarzour believed to be an unreliable test. Moreover, Dr. Thangada did not make any finding as to whether claimant could return to work. Finally, the administrative law judge found that claimant has made no attempt to work in any capacity, and thus her complaints of pain are not credible. Decision and Order at 6.

As the administrative law judge thoroughly reviewed the evidence of record, and

claimant has raised no reversible error in the administrative law judge's weighing of the medical evidence, see generally *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), we affirm the administrative law judge's finding that claimant has failed to establish a *prima facie* case of total disability and thus is not entitled to continuing benefits under the Act. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

However, we note that the administrative law judge found that claimant's temporary total disability benefits should terminate on August 17, 1993,¹ the original date Dr. Zarzour released claimant for work. On this date, Dr. Zarzour did not feel that claimant could return to her regular duties and thus released her for light duty with restrictions. Although claimant reported to employer's facility, she was not able to work that day and continued under Dr. Zarzour's care. He released her again in October, but again with restrictions against returning to her normal duties. It was not until November 11, 1993, that Dr. Zarzour first released claimant with no restrictions and concluded that there was no reason why she should not return to her regular duties. Therefore, as there is no evidence that employer provided modified duties for claimant² and the evidence establishes she could not return to her former duties until November 11, 1993, we modify the administrative law judge's decision to reflect claimant's entitlement to temporary total disability benefits until the date claimant was released for her regular duties. See generally *Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989).

¹Although the administrative law judge found that claimant was released to resume employment on August 17, 1993, as noted earlier in the decision, Dr. Zarzour found that claimant was "neurologically intact" and had a "normal" bone scan on August 17, 1993, but did not release claimant for light duty until August 23, 1993. Cl. Ex. 13.

²Although employer alleges that modified work was available upon claimant's release with restrictions, the only evidence of modified work that was offered is claimant's testimony that she believed she was supposed to sweep on the day she attempted to return to work, August 23, 1993. Emp. Ex. 12 at 24-25.

Claimant also contends on appeal that the administrative law judge erred in denying medical benefits for her chiropractic treatment with Dr. Turner. As the administrative law judge correctly noted, Section 702.404, 20 C.F.R. §702.404, of the regulations provides that the term “physician” under the Act includes chiropractors “only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings.” The administrative law judge found that in the present case the injury was diagnosed as a strain and there is no objective medical evidence that suggests a subluxation. Although Dr. Turner states he treated claimant with spinal adjustment, Cl. Ex. 15, the administrative law judge rationally determined that there is no medical evidence of a subluxation in the record in view of the diagnosis of a strain only. Therefore, we affirm the administrative law judge’s finding that Dr. Turner’s treatment is not reimbursable.³ 20 C.F.R. §702.404.

Accordingly, the administrative law judge’s decision is modified to reflect claimant’s entitlement to temporary total disability benefits from May 4, 1993, through November 11, 1993, the date she was released for work without restrictions by her treating physician. In all other respects, the administrative law judge’s decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

³Claimant does not contest the administrative law judge’s denial of reimbursement for treatment by Dr. Thangada. The administrative law judge found that Dr. Zarzour was claimant’s free choice physician and that there was no evidence that Dr. Zarzour refused claimant treatment. The administrative law judge found that the cost of Dr. Thangada’s treatment is not reimbursable as it was unauthorized. Decision and Order at 7.