BRB No. 07-0192

D.V.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JACINTO PORT INTERNATIONAL	)	DATE ISSUED: 08/24/2007
	)	
and	)	
	)	
CNA CASUALTY OF CALIFORNIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Lewis S. Fleishman (Richard Schechter, P.C.), Houston, Texas, for claimant.

Kevin A. Marks and Randy J. Hoth (Galloway, Johnson, Tompkins, Burr & Smith), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2003-LHC-2431) of Administrative Law Judge Ralph A. Romano 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). This case is before the Board for the second time.

Claimant sustained a spinal injury while working for employer on September 20, 2001. Following his hospitalization, claimant regularly visited Dr. Meyer, a specialist in spinal orthopedics, who treated claimant conservatively with physical therapy, pain medication, and epidural steroid injections. Employer voluntarily paid temporary total disability benefits from October 1, 2001 to April 17, 2003. Claimant sought permanent total disability benefits under the Act.

In his initial decision, the administrative law judge found that claimant did not establish a *prima facie* case of total disability as he did not demonstrate an inability to return to his former work. Accordingly, he denied claimant's claim for total disability benefits. On appeal, the Board vacated the administrative law judge's finding that claimant did not establish a *prima facie* case of total disability. [*D.V.*] *v. Jacinto Port International, Inc.*, BRB No. 04-0927 (Aug. 30, 2005) (unpub.). In particular, the Board stated that "there is evidence of record, relevant to the issue of whether claimant can return to his former employment, which the administrative law judge did not address." *Id.*, slip op. at 3. The Board therefore remanded the case for the administrative law judge to "to discuss and weigh all relevant evidence." *Id.* On remand, the administrative law judge again found that claimant did not "preponderantly" demonstrate an inability to return to his former work. The administrative law judge thus denied total disability benefits.

On appeal, claimant challenges the administrative law judge's denial of total disability benefits. Employer responds, urging affirmance.

Claimant first contends that the administrative law judge's decision violates the Administrative Procedure Act (APA) since he did not provide an adequate discussion and evaluation of the evidence, or the evidentiary basis for his findings. Claimant argues that, in contrast to the Board's remand instructions, the administrative law judge did not sufficiently delineate the requirements of claimant's prior job with employer, nor did he properly compare those job requirements with the testimony of Dr. Barnes or Ms. Lopez.

The APA requires an administrative law judge to adequately detail the rationale behind his decision, analyze and discuss the relevant evidence of record, and explicitly set forth the reasons for his acceptance or rejection of such evidence. 5 U.S.C. §557(c)(3)(A); *see Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). As the Board instructed, the administrative law judge discussed and considered the physical requirements of claimant's usual work for employer and essentially concluded that those requirements included occasional lifting in excess of 75 pounds and some climbing. Additionally, he reevaluated Dr. Barnes's opinion regarding claimant's residual functional capacity and found that the physician's

April 17, 2003, restrictions[1] were "not inconsistent with claimant's description of his job duties."[2] Decision and Order on Remand at 2. In addition, the administrative law judge reviewed the testimony of Ms. Lopez, as instructed by the Board, and he concluded that it was not creditable since it was too "unclear, contradictory, [and] uncertain." Decision and Order on Remand at 3.

As the administrative law judge complied with the Board's remand instructions and discussed the physical requirements of claimant's work for employer, as well as the opinions of Dr. Barnes and Ms. Lopez, and he has drawn rational inferences from this evidence, we reject claimant's contention that the administrative law judge's decision does not comport with the APA. 5 U.S.C. §557(c)(3)(A); *see Santoro*, 30 BRBS 171; *Cotton*, 23 BRBS 380; *Cairns*, 21 BRBS 252. The administrative law judge found Dr. Barnes's credited April 17, 2003, opinion establishes claimant's ability to perform his former job duties.[3] The Board is not empowered to reweigh the evidence, but must

[1] In his report dated April 17, 2003, Dr. Barnes opined that claimant was able to lift up to 75 pounds, he could sit and walk intermittently eight hours a day, lift and bend six hours a day, squat, kneel and twist three hours a day, climb intermittently up to eight hours a day, stand eight hours a day, and that claimant could work eight hours a day. EX 13.

[2] The administrative law judge also considered Dr. Barnes's testimony that he could agree with the functional capacity evaluation by MedTest, which included a lifting limitation of 45 pounds and no work beyond the medium exertional range. The administrative law judge, however, found Dr. Barnes's testing with respect to those findings, as evidenced by the physician's use of terms of advisability like "it could be reasonable," and "it would be wise" did not establish claimant's inability to perform his usual work.

[3] The record contains the reports of Drs. Dozier, Meyer, and Barnes. In his report dated September 26, 2002, Dr. Dozier opined that claimant is "able to return to work in his usual category." EX 8. In contrast, Dr. Meyer testified on April 21, 2004, that "I do not think [claimant] would be able to return to his previous employment due to back pain." EX 10, Dep. at 18. In his original decision, the administrative law judge acknowledged the opinions of Drs. Dozier and Meyer and also found that Dr. Barnes opined that claimant was capable of returning to his usual employment. He then credited the opinions of Drs. Dozier and Barnes over the contrary opinion of Dr. Meyer as they were "well-documented and better reasoned." *See [D.V.]*, slip op. at 2. The Board, however, noted that Dr. Barnes's opinion was not so clear, and thus remanded for further consideration. The administrative law judge has, on remand, addressed the inconsistencies in Dr. Barnes's opinion and has found that his April 17, 2003, opinion

accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *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). As the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, they are affirmed. *Id.* We therefore affirm the administrative law judge's finding that claimant did not establish an inability to perform his usual work, and consequent denial of total disability benefits from April 18, 2003.

Claimant next contends that the administrative law judge erred by not ordering employer to compensate claimant for an underpayment in its voluntary payment of temporary total disability benefits between October 1, 2001, and April 17, 2003, as well as interest on the amount owed. Claimant maintains that based on the stipulated average weekly wage of $426.13, claimant's weekly compensation rate for that period of total disability should have been $284.09, rather than the $233.46 which employer actually paid. Claimant thus avers that he is entitled to, and employer is liable for, an additional $50.63 in total disability benefits per week for the period between October 1, 2001, and April 17, 2003.

On remand, the administrative law judge found that claimant's argument regarding an award of interest in this case was never "elaborated upon or explained" in any of claimant's briefs. Decision and Order on Remand at 3. He thus concluded that, "I am at a loss to understand such contention, except to surmise an anticipated decision in his favor in this case, which is not the case," and thus summarily rejected claimant's request for an award of interest. *Id.* The record contains sufficient documentation to establish that claimant raised the underpayment of benefits and entitlement to interest as issues for resolution before the administrative law judge. In this regard, claimant's post-hearing brief contains an explicit reference that "there has been a clear underpayment in this case," and a request for "a favorable compensation award for the deficiency between October 1, 2001, and April 17, 2003," Claimant's Post-Hearing Brief at 4, as well as "interest on past due compensation." *Id*. at 14. Claimant added "it is agreed that claimant should have been paid weekly compensation benefits during that time period [between October 1, 2001, and April 17, 2003] based on a $426.13 average weekly wage." *Id*. Employer's post-hearing brief is silent with regard to claimant's declaration that he is entitled to additional benefits and interest. However, employer's submission of the "Agreed Stipulations" includes statements as to claimant's "average weekly wage at the time of injury: [$]426," and that "TTD was paid between October 1, 2001, to April 17, 2003," at a compensation rate of $233.46 per week." Employer's Exhibit 1.

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supports a finding, akin to the opinion of Dr. Dozier, that claimant is capable of returning to his usual work.

Moreover, the Board's prior decision specifically instructed the administrative law judge to "address claimant's contention regarding an award of interest on the difference between the stipulated average weekly wage and the rate on which the employer based its voluntary payments." *[D.V.]*, slip op. at 3, n. 1. The Board's instructions provided a sufficient description as to the basis for claimant's argument to put the administrative law judge on notice that he must make the requisite findings on this issue. Thus, the administrative law judge's rejection of claimant's contentions cannot stand. Nonetheless, we need not remand the case again as the record establishes that employer's voluntary payments of total disability benefits were below the proper compensation rate, as calculated based upon the parties' stipulation regarding claimant's average weekly wage at the time of the injury. We thus modify the administrative law judge's decision to reflect claimant's entitlement to an additional $50.63 per week in temporary total disability benefits for the period between October 1, 2001, and April 17, 2003,[4] plus interest calculated pursuant to case law. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984), *on recon.*, 17 BRBS 20 (1985); 28 U.S.C. §1961; *see also Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). The district director shall make all necessary calculations.

We lastly reject claimant's assertion that the administrative law judge erred in not specifically awarding medical benefits as the Board thoroughly considered this issue in its prior decision such that its holding "that the administrative law judge did not err in not specifically awarding future medical benefits" constitutes the law of the case. *See Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *Ravalli v. Pasha Maritime Services*, 36 BRBS 47 (2002). As the Board previously held, claimant is not presently entitled to medical benefits because "there is no evidence that claimant is in need of medical treatment, or has sought medical treatment or authorization for treatment which was denied." *[D.V.]*, slip op. at 4; *see also Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). Nonetheless, we reiterate that, "[a]s in *Baker*, claimant may file a claim for medical benefits if and when additional treatment is necessary for his work injury." *[D.V.]*, slip op. at 4.

[4] The parties stipulated to an average weekly wage of $426.13, which results in a weekly compensation rate of $284.09, and thus, a comparison with the weekly compensation rate at which benefits were paid during that 80-week period, *i.e.*, $233.46, reflects an underpayment of $50.63 per week.

Accordingly, the administrative law judge's denial of additional total disability and medical benefits is affirmed. The administrative law judge's rejection of claimant's request for interest is reversed, and his decision is modified to reflect claimant's entitlement to additional compensation of $50.63 per week plus interest for the period between October 1, 2001, to April 17, 2003.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge