BRB No. 14-0079

RYAN COURVILLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PETRON INDUSTRIES, INCORPORATED	)	DATE ISSUED: Aug. 11, 2014
	)	
and	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Granting Employer/Carrier's Motion for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Lawrence N. Curtis, Lafayette, Louisiana, for claimant.

Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order Granting Employer/Carrier's Motion for Reconsideration (2013-LHC-00784) 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 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).

The parties stipulated to the following facts: claimant suffered a work-related thoracic-level back injury on February 24, 2007, on Coastal Drilling Rig #21, in Intercoastal City, Louisiana; employer paid claimant temporary total disability benefits from March 13, 2007, through January 3, 2011, and permanent partial disability benefits commencing January 4, 2011; employer paid some medical benefits; claimant has not returned to any employment. Decision and Order at 2. Disputes arose over the nature and extent of claimant's disability, his post-injury wage-earning capacity, and his entitlement to the medical treatment recommended by Dr. Sledge.[1]

The administrative law judge found that claimant's condition had not reached maximum medical improvement and that, as a result of the work injury, claimant cannot return to his usual work. Decision and Order at 8-9. However, as he found that employer established the availability of suitable alternate employment and claimant did not demonstrate diligence in pursuing alternate employment, the administrative law judge determined that, as of January 4, 2011, claimant is partially disabled. *Id.* at 10-11. The administrative law judge awarded claimant temporary total disability benefits from March 13, 2007 through January 3, 2011,[2] and ongoing temporary partial disability benefits from January 4, 2011. 33 U.S.C. §908(b), (e). The administrative law judge also awarded claimant medical benefits, including the surgical treatment recommended by Dr. Sledge.[3] *Id.* at 12. Employer appeals the administrative law judge's finding that surgery is a reasonable and necessary treatment for claimant's back condition. Claimant responds, urging affirmance. Employer filed a reply brief.

Employer asserts that, in light of the record as a whole, the administrative law judge erred in relying on Dr. Sledge's opinion to find that back surgery is reasonable and necessary treatment. The administrative law judge discussed the medical opinions of record in his recitation of the evidence. Decision and Order at 4-6. In holding employer liable for the back surgery recommended by Dr. Sledge, the administrative law judge

[1] Following the death in December 2011 of claimant's treating orthopedist, Dr. Cobb, Dr. Sledge became claimant's treating orthopedic surgeon. Decision and Order at 6 n.5.

[2] In his Order Granting Employer/Carrier's Motion for Reconsideration, the administrative law judge corrected the date temporary total disability benefits were to commence to March 13, 2007.

[3] The administrative law judge noted that, post-hearing, employer authorized Dr. Sledge to administer the epidural steroid injections it had denied previously. Decision and Order at 3 n.2.

acknowledged the conflicting medical opinions as to the necessity of the surgery. Decision and Order at 12. Nonetheless, based on Dr. Sledge's opinion, he found that claimant established the necessity of additional treatment, including surgery, for which employer is liable. *Id.*

Section 7 of the Act, 33 U.S.C. §907, provides that an employer is liable for medical expenses that are reasonable and necessary to treat a work-related injury. A claimant establishes a prima facie case for compensable medical treatment where a qualified physician states that the treatment is necessary for a work-related condition. *See Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); 20 C.F.R. §702.402. The administrative law judge has the authority to determine the reasonableness and necessity of medical treatment based on the evidence of record. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002). The administrative law judge is not bound by the opinion of any particular medical provider; he has the authority to determine the weight to be accorded to the evidence of record. *See, e.g., Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As the administrative law judge properly acknowledged, the opinion of a treating physician may be entitled to greater weight. Decision and Order at 7 (citing *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830 n.3 (2003)); *see also Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).

Claimant's injury occurred in February 2007. An MRI of claimant's thoracic spine dated March 8, 2007 showed L5-S1 and T1-12 disc pathology with no stenosis noted. EX 9 at 3. In January 2009, after claimant had undergone two years of unsuccessful conservative treatment, Dr. Cobb recommended surgery involving discs between levels T5-6 and T8-12. CX 3 at 14. Employer referred claimant to Dr. Lindemann in February 2009 for a second opinion. Dr. Lindemann noted that claimant had undergone extensive conservative treatment, which had failed. Because of claimant's "intractable" pain, Dr. Lindemann recommended claimant return to Dr. Cobb "to further evaluate surgical intervention for his thoracic herniations." CX 2 at 7. Dr. Lindemann continued:

> He may require extensive surgery at the thoracic level, with possible fusion. . . . If he has surgery, more likely than not, he would be limited to light duty. . . . I feel that conservative therapy has been appropriate, but at this time has failed. [Claimant] will more likely than not require surgical intervention on the thoracic spine.

Id.[4] In April 2009, Dr. Foster examined claimant at employer's behest. Dr. Foster concluded that claimant did not need a thoracic fusion and could be released to medium-duty work, based on his functional capacity evaluation. EX 12 at 3-4. Due to this conflicting evidence, the district director arranged an independent medical examination with Dr. Fenn in February 2010. Dr. Fenn diagnosed claimant with thoracic disc degeneration and recommended exercise and physical therapy. He stated, "I do not recommend surgery . . . at all." EX 11.

In April 2012, Dr. Sledge ordered a second MRI. A radiologist interpreted this MRI as revealing a "trivial T11-12 right paracentral disc protrusion" and was otherwise unremarkable.[5] CX 1 at 20. Notwithstanding the MRI, Dr. Sledge testified that claimant's symptoms were on the left side and that "disc herniations on the right will frequently cause symptoms on the left." CX 4 at 61, 64, 66; *see also* CX 1 at 11. Dr. Sledge recommended epidural steroid injections, stating they would assist him in determining the extent of any surgical procedure. CX 1 at 9-11; CX 4 at 36. In September 2012, Dr. Sledge again recommended thoracic epidural steroid injections. In November 2012, Dr. Sledge noted that the request for authorization for the injections had been denied, *but see* n. 3, *supra*, and he stated it did not make sense for claimant to repeat the same conservative treatment that had been unsuccessful.[6] However, he opined that claimant was not a surgical candidate at that time; consequently, he recommended that claimant continue with pain management treatment. CX 1 at 9-11. At his deposition in July 2013, Dr. Sledge explained that, because he had been unable to identify the specific location from which claimant's pain came, for purposes of determining the site of surgery, claimant was not a surgical candidate in November 2012. Dr. Sledge stated he would not recommend surgery at the time because he needed to identify the level for surgery. CX 4 at 28-29, 35-36, 70-71. Dr. Sledge also testified that he next saw claimant in February 2013. With the addition of updated information from a psychiatrist, plus documentation of the unsuccessful conservative treatment, Dr. Sledge stated that he

[4] Contrary to employer's contention, the administrative law judge's statement that Dr. Lindemann "recommended" surgery is not an unreasonable interpretation of his opinion. Decision and Order at 12.

[5] Dr. Sledge testified on deposition that "trivial" is not a term usually used by radiologists in reading MRIs. He stated that terms such as "mild, moderate or severe" are usually utilized. CX 4 at 60.

[6] Dr. Staires provided the conservative treatment which consisted of facet injections, rhizotomies, and radiofrequency ablations. CX 1 at 10.

hoped to "petition [employer] one more time for definitive treatment[,]" i.e., surgery. CX 4 at 37-39.

Contrary to employer's contention, the administrative law judge addressed the conflicting medical opinions of record. *See* Decision and Order at 12 & n. 9. Nevertheless, on the record as a whole, he gave determinative weight to the 2013 opinion of claimant's treating physician, Dr. Sledge, as supported by the earlier opinions of Drs. Cobb and Lindemann, in finding that surgery is a reasonable course of treatment. Decision and Order at 12. This finding is rational and within the administrative law judge's discretion as the fact-finder. The Board is not empowered to reweigh the evidence. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Dr. Sledge's opinion, based on a newer MRI and physical examinations, is the most recent opinion by three years; the medical opinions opposing surgery preceded claimant's treatment with steroid injections, his psychiatric evaluation, and the most recent MRI. As of 2013, claimant had undergone conservative treatment for six years, which, Dr. Sledge stated, had been unsuccessful. Under the facts of this case, the administrative law judge was entitled to rely on the judgment of the treating physician that surgery is the best course of treatment for claimant's work injury. *Amos*, 164 F.3d 480, 32 BRBS 144(CRT); *see also Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Therefore, as substantial evidence of record supports the administrative law judge's finding that surgery is reasonable and necessary treatment for claimant's work injury, we affirm the award of medical benefits, to include surgery.[7] *Monta v. Navy Exchange Serv. Command*, 39 BRBS 104 (2005).

[7] Employer objects to the administrative law judge's statement that "Any doubt as to whether the employee has recovered should be resolved in favor of the claimant's entitlement to benefits." Decision and Order at 12. Employer argues that the administrative law judge thereby indicated he was applying the "true doubt rule" to relieve claimant of his burden of showing that the recommended surgery is reasonable and necessary. Emp. Brief at 12. We disagree. The administrative law judge explicitly acknowledged that the true doubt rule does not apply. *See* Decision and Order at 6. Moreover, on the facts of this case, the administrative law judge's statement is an implicit acknowledgement that when both sides offer credible medical opinions, deference may be given to the claimant's treating physicians. 33 U.S.C. §907(b). The administrative law judge plainly held that claimant had carried his burden of persuasion when he stated: "Based on this medical evidence [Drs. Cobb, Lindemann and Sledge], further medical treatment, including the recommended ESI and surgery, by Dr. Sledge is reasonable and necessary." Decision and Order at 12. Thus, the administrative law judge gave greater weight to the opinions of claimant's treating physicians, as supported by Dr. Lindemann, than to those supportive of employer's position.

Accordingly, the administrative law judge's Decision and Order and Order Granting Employer/Carrier's Motion for Reconsideration are 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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JUDITH S. BOGGS
Administrative Appeals Judge