BRB No. 01-0842

JOHN RANCIC	)	
	)	
Claimant-Respondent	)	DATE ISSUED: July 29, 2002
	)	
v.	)	
	)	
MATSON TERMINALS, INCORPORATED	)	
	)	
and	)	
	)	
COMMERCIAL INSURANCE SERVICE	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Granting Benefits and the Decision and Order Granting Attorney's Fees of William Dorsey, Administrative Law Judge, United States Department of Labor.

William Patrick Muldoon (Pranin & Muldoon), Wilmington, California, for claimant.

William N. Brooks (Aleccia & Brooks), Long Beach, California, for carrier/employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits and the Decision and Order Granting Attorney's Fees (00-LHC-2515, 00-LHC-2516, 00-LHC-2517) of Administrative Law Judge William Dorsey 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). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a marine clerk, suffered a traumatic injury during the course of his employment on February 20, 1996, when he slipped and fell, injuring his shoulder, neck, right arm, back and head.[1] Although claimant continued to perform his usual job, he alleged that his continuous and repetitive work duties aggravated the February 1996 injury, totally disabling him and causing him to cease work on May 10, 1999. Employer controverted claimant's subsequent claim for benefits under the Act, asserting that although claimant sustained a compensable injury arising from his fall on February 20, 1996, that incident resulted in only a temporary and now fully resolved exacerbation of his pre-existing and longstanding cervical disc degeneration, claimant is fully capable of performing his usual and customary job duties as a marine clerk with employer and, therefore, claimant is not entitled to ongoing disability benefits.

In his Decision and Order, the administrative law judge awarded claimant, *inter alia*, compensation for a permanent partial disability based on his finding that while claimant is unable to perform his usual job duties due to his work injury, employer has demonstrated the availability of suitable alternate employment.[2] Subsequent to this decision, claimant's attorney filed a fee petition seeking a fee of $31,740 for 158.7 hours of services rendered at $200 per hour; thereafter, claimant filed a supplemental request seeking an additional 5.3 hours at $200 per hour for a total of $1,060.[3] Claimant additionally sought $4,856.22 in costs. The administrative law judge addressed the objections raised by employer to these petitions and awarded claimant's counsel a fee of $32,800, plus $4,856.22 in costs, for a total of $37,656.22.

On appeal, employer challenges the administrative law judge's award of ongoing disability

[1]The parties stipulated that a fall on February 29, 1996, which resulted in similar injuries to claimant, was directly attributable to the February 20, 1996, incident.

[2]In addition to awarding appropriate medical benefits, the administrative law judge found employer entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

[3]Claimant actually requested an additional $1,070, which the administrative law judge determined to be an inaccurate calculation. *See* Decision and Order Granting Attorney's Fees at 9 n.7.

compensation to claimant; employer also appeals the administrative law judge's attorney's fee award, asserting that if it is successful in its primary appeal, claimant's attorney is not entitled to a fee. Claimant responds, urging affirmance of both decisions.

Initially, employer avers that the administrative law judge erred in concluding that claimant's present medical conditions are work-related. Specifically, employer asserts that the administrative law judge erred as a matter of law in weighing the medical evidence of record by creating a presumption that the medical opinion of claimant's treating physician, Dr. London, was correct. Additionally, employer contends that the administrative law judge erred by applying regulations promulgated under the Social Security Act when weighing the medical evidence of record. For the reasons that follow, we reject employer's contentions of error.

In the instant case, the administrative law judge, after analyzing at length the medical evidence of record, credited the opinion of Dr. London and testimony from claimant rather than the opinion of Dr. Miller. Prior to commencing his analysis of the medical evidence, the administrative law judge stated that, pursuant to the decision of the United States Court of Appeals for the Ninth Circuit in *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), the opinion of claimant's treating physician must be carefully considered. *See* Decision and Order at 20. Next, the administrative law judge set forth the regulations promulgated under the Social Security Act which are applicable to the evaluation of physician's opinions regarding disability, *see* 20 C.F.R. §404.1527(d)(1) - (6), stating that while those regulations are not directly applicable to claims arising under the Longshore Act, they do provide "a valuable framework for assessing the relative weight I ought to assign to conflicting medical opinions." *See* Decision and Order at 20-22. The administrative law judge thereafter proceeded to address the medical opinions of Drs. London and Miller; ultimately, the administrative law judge found Dr. London's opinion that claimant's February 20, 1996 work injury and his subsequent work activities aggravated and worsened his cervical disc disease, causing it to be more symptomatic and disabling, to be better supported and more direct and convincing than the opinion of Dr. Miller. Next, the administrative law judge accepted Dr. London's decision to place physical restrictions on claimant that prohibited him from prolonged forward flexion or repetitive lateral rotation of his neck, overhead work, or work involving heavy lifting or carrying, forceful pushing or pulling with his upper extremities. *See* EX 10. In rendering this determination, the administrative law judge specifically found that Dr. London, who was initially chosen by employer to see claimant, treated claimant approximately 30 times since 1996, that claimant's complaints were consistent with the doctor's clinical findings, and his conclusions were supported by the record.[4] *See* Decision

[4]The administrative law judge additionally found that Dr. London arrived at his conclusion that claimant was unable to work only after treating claimant over a period of time. It was during the course of this continued period of treatment, the administrative law judge found, that Dr. London had the opportunity to learn whether of not to accept claimant's

and Order at 19-24.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and he is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Contrary to employer's argument that the administrative law judge erred in citing *Amos,* 164 F.3d 480, 32 BRBS 144(CRT), the administrative law judge did not rely on *Amos* as the sole basis for crediting Dr. London's opinion, nor did he use it to create a presumption in favor of the treating physician. Rather, as this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the administrative law judge properly acknowledged this recent decision from that court, which he interpreted as requiring careful consideration of the opinion of the treating orthopedist. Nonetheless, the administrative law judge recognized that the status of the physicians as treating or examining doctors was not determinative, and he did not base his decision to credit Dr. London on any preference derived from *Amos*; rather, he analyzed in detail the underlying reasoning and support for Dr. London's opinion, as well as that of Dr. Miller.

Similarly, we reject employer's contention that the administrative law judge erred in affirmatively applying the Social Security Act regulations at 20 C.F.R. §404.1527(d)(1) - (6) to this Longshore case. In its reply brief, employer concedes that the administrative law judge determined that those regulations provided only a "valuable framework" for assessing the medical opinions. Specifically, the regulations led the administrative law judge to discuss factors such as the qualifications of the experts, length of treatment and underlying support for their opinions; such general factors are relevant to the analysis of medical opinions in any context.

---

complaints, which he in fact did. *See* Decision and Order at 21.

The administrative law judge's decision simply does not suggest, as employer asserts, that his weighing of the evidence was tainted by an initial presumption that claimant's treating physician's opinion was correct. To the contrary, the administrative law judge extensively discussed and weighed the medical opinions of record and provided valid and rational reasons for according Dr. London's opinion determinative weight and for finding Dr. Miller's less persuasive. The administrative law judge found, for example, that Dr. London gave a reasoned explanation for his belief that claimant's use of his neck in work activities aggravated his condition, whereas Dr. Miller, after initially opining that claimant's fall "most likely" did aggravate his condition, EX 7 at 88, did not adequately account for the wear and tear on claimant's neck in the years he worked after the accident in stating at his deposition that claimant's work did not worsen his neck condition. As the administrative law judge's conclusions are based on a full and rational weighing of the evidence, we affirm his decision to give determinative weight to the opinion of Dr. London.[5] *See Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001). Accordingly, we affirm the administrative law judge's ultimate finding that claimant's present cervical condition is causally related to his employment with employer, as the credited opinion of Dr. London constitutes substantial evidence to support that finding

[5]Although the administrative law judge did not analyze the causation issue in terms of the Section 20(a), 33 U.S.C. §920(a), presumption, any error in this regard is harmless inasmuch as claimant established the existence of a harm, and working conditions which could have caused or aggravated that condition, and the administrative law judge properly weighed the relevant medical evidence in determining that claimant's cervical condition is causally related to his employment. *See Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

Employer next challenges the administrative law judge's finding that claimant is incapable of resuming his usual employment duties with employer as a marine clerk. It is well-established that claimant bears the initial burden of establishing that he is incapable of resuming his usual employment duties with employer. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). In the instant case, the administrative law judge compared the restrictions placed upon claimant by Dr. London with the employment duties required of a marine clerk and determined that claimant was unable to perform either his usual duties or the modifications proffered by employer to accommodate claimant's physical restrictions.[6] Accordingly, the administrative law judge determined that claimant's physical limitations preclude his returning to work as a marine clerk.[7] *See* Decision and Order at 19-26. As we have affirmed the administrative law judge's decision to credit the opinion of Dr. London, we affirm his finding that claimant is incapable of resuming his work as a marine gate clerk with employer, as that determination is supported by substantial evidence, is rational, and is in accordance with law. *O'Keeffe,* 380 U.S. 359; *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT)(9th Cir. 1990), *cert. denied,* 499 U.S. 959 (1991); *Thompson,* 26 BRBS 53.

Finally, employer appeals the administrative law judge's award of an attorney's fee to claimant's counsel. Employer's sole contention on appeal is that claimant's counsel would not be entitled to a fee if employer is successful in its primary appeal. As we affirm the administrative law judge's decision and order, and employer has raised no specific objection to the fee awarded, it follows that employer's appeal of the attorney's fee must also be rejected. Accordingly, the administrative law judge's attorney's fee award to claimant's

---

[6]The usual job duties of a marine clerk required that the individual manage two work stations, one for each side of the booth, scan bar codes on gate passes, obtain identification and cargo information, survey containers and chasses for damage, input information into the computers, and print release forms, requiring the clerk to reach across trucks, turn his head in a lateral rotation, and exit the booth to inspect, test, and measure cargo. *See* Scognamillo depo. The administrative law judge determined that claimant's job required him to continuously move his head and flex his neck to speak with truckers, view paperwork, read the video monitor and use the computer keyboard. *See* Decision and Order at 11. Moreover, Dr. London did not believe that the modifications to the job suggested by employer, specifically that a claimant use a hand mirror to read container letters or numbers to reduce the extension of the head and neck and to limit all neck movements while working with the truck drivers, would enable claimant to perform the work.

[7]The administrative law judge, however, further determined that employer had established the availability of suitable alternate employment within the relevant community and that claimant, therefore, was only partially disabled. As no party challenges this finding, it is affirmed.

counsel is affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and the Decision and Order Awarding Attorney's Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge