

T. M.	)	
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Claimant-Petitioner	)	
	)	
v.	)	
	)	
CENEX HARVEST STATES	)	DATE ISSUED: 07/28/2008
COOPERATIVES	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Zara Zeringue (Spyridon, Palermo & Dornan, L.L.C.), Metairie, Louisiana, for claimant.

Scott B. Kiefer and Dawn Danna Marullo (Duncan, Courington & Rydberg, L.L.C.), New Orleans, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Motion for Reconsideration (2005-LHC-01207) of Administrative Law Judge Lee J. Romero, Jr., 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 alleged that he injured his back on June 25, 2001, when he slipped and fell during the course of his employment for employer. On July 2, 2001, claimant was examined by his internist, Dr. Desse, who restricted claimant from returning to work. Employer voluntarily commenced payment of compensation for temporary total disability. 33 U.S.C. §908(b). On August 20, 2001, claimant began treating with Dr. Watermeier, an orthopedist, who diagnosed a lumbar sprain. An MRI and EMG of the lower back were interpreted as normal. Dr. Gallagher, an orthopedic surgeon, examined claimant at employer's request on August 28 and October 22, 2002. He opined after the latter exam that claimant could return to work and did not require further treatment for his back injury. Therefore, employer discontinued its compensation payments.

In his decision, the administrative law judge found that claimant established he sustained a back injury at work on June 25, 2001. The administrative law judge found that claimant's back condition reached maximum medical improvement on May 16, 2002, and that he was thereafter capable of returning to his usual employment for employer. The administrative law judge awarded claimant compensation for temporary total disability from June 25, 2001, to May 16, 2002. The administrative law judge rejected employer's allegation that a fall claimant sustained in April 2002, in which he broke his wrist, constituted an intervening cause of claimant's back disability. The administrative law judge found that claimant's back condition no longer required medical treatment upon his reaching maximum medical improvement on May 16, 2002. Claimant's motion for reconsideration was denied.

On appeal, claimant challenges the administrative law judge's findings that his back condition reached maximum medical improvement on May 16, 2002, and that he was then able to return to his usual employment. Claimant also asserts that employer failed to establish the availability of suitable alternate employment. Finally, claimant challenges the administrative law judge's finding that he no longer required medical treatment for his back condition, and contends that he is owed \$1,149.23 for out-of-pocket medical expenses.<sup>1</sup> Employer responds, urging affirmance of the administrative law judge's decisions in all respects.

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<sup>1</sup> We need not address claimant's challenge to the administrative law judge's finding that the April 2002 fall in which claimant broke his wrist "may" constitute an intervening cause of disability since the administrative law judge rejected employer's contention that this incident relieved it of liability for claimant's work-related back injury. Decision and Order at 35-37. The administrative law judge found that there is no medical opinion addressing to what extent, if any, the fall overpowered or nullified the extent of claimant's back condition attributable to the work injury. *Id.* at 37.

We initially address claimant's challenge to the administrative law judge's finding that claimant's back condition reached maximum medical improvement on May 16, 2002. Claimant contends that Dr. Watermeier's May 16, 2002 letter to the Office of Workers' Compensation Programs (OWCP) establishes that claimant's back condition reached maximum medical improvement on June 25, 2002. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement, *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5<sup>th</sup> Cir. 2004), or where it has continued for a lengthy period and appears to be of lasting or infinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5<sup>th</sup> Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

In this case, the administrative law judge rationally found that claimant's back condition reached maximum medical improvement on May 16, 2002, based on the opinions of Drs. Watermeier and Murphy. Claimant correctly asserts that in his May 16, 2002, letter to the OWCP, Dr. Watermeier opined that claimant's back condition would reach maximum medical improvement on June 25, 2002. CX 5 at 13. However, Dr. Watermeier subsequently testified at his deposition that claimant was at maximum medical improvement when he wrote the letter on May 16, 2002, EX 38 at 19-20, and that claimant was treated only for pain management thereafter. The administrative law judge also found that Dr. Murphy's deposition testimony showed that six to twelve months after the June 25, 2001 back injury would be an appropriate date of maximum medical improvement. EX 37 at 24-29. As the administrative law judge's decision to credit this evidence is within his discretion as the fact-finder, *see generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2<sup>d</sup> Cir. 1961), and as claimant was not undergoing active treatment to improve his condition after May 16, 2002, we affirm the administrative law judge's finding that claimant's back condition reached maximum medical improvement on May 16, 2002, as it is rational, supported by substantial evidence, and in accordance with law. *See Gulf Best Electric, Inc.*, 396 F.3d 601, 38 BRBS 99(CRT); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5<sup>th</sup> Cir. 1994); *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Ezell v. Direct Labor Inc.*, 33 BRBS 19 (1999).

We next address claimant's contention that the administrative law judge erred by finding that he was able to return to his usual work for employer upon reaching maximum medical improvement. The administrative law judge found that claimant did not sustain his burden of establishing that he was disabled after May 16, 2002. In order to establish a *prima facie* case of total disability, claimant must show that he is unable to

perform his usual work due to the work injury.<sup>2</sup> See *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Harmon v. Sea-Land Service*, 31 BRBS 45 (1997); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985).

In this case, claimant relies on Dr. Watermeier and Dr. Manale to support his claim of total physical disability, and on Dr. Culver, a psychiatrist, and Dr. Kronberger, a psychologist, to support his claim that he has a psychological disability. Dr. Watermeier stated that claimant was unable to work from August 20, 2001, to February 3, 2003, at which time he released him for light-duty work. EX 19 at 21-26, 33. Dr. Manale continued claimant's restrictions after February 3, 2003. CX 5 at 4.

The administrative law judge rejected these opinions because he found that the restrictions were based solely on claimant's subjective complaints, which the administrative law judge found were not credible. Decision and Order at 31; see EX 38 at 24-26. Dr. Watermeier stated in his deposition that there was no objective basis for claimant's disability status or the light-duty restrictions; they were placed solely based on claimant's subjective complaints. EX 38 at 24-28. The administrative law judge further found that Dr. Watermeier's opinion in this regard was not consistent, as Dr. Watermeier also opined that claimant could return to work without any restrictions as of May 16, 2002, the date of maximum medical improvement. CX 5 at 13; see EXs 25, 26, 38 at 19. The administrative law judge noted that Dr. Gallagher opined after examining claimant on October 22, 2001, that claimant sustained only a strain and could return to his usual work, and stated, on March 1, 2004, that claimant was malingering. EXs 22 at 8-9; 39 at 10-12. The administrative law judge further credited Dr. Murphy's opinion. Decision and Order at 33. Dr. Murphy opined at his deposition that claimant could have returned to his regular job duties within six to twelve months after the date of injury. See EX 37 at 24-29, 37-40. Finally, the administrative law judge rejected claimant's assertion that he was disabled due to a pre-existing psychological condition that arose from a physical altercation with a police officer in February 2001.<sup>3</sup> Decision and Order at 33. The administrative law judge credited the opinions of Dr. Culver and Dr. Kronberger that,

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<sup>2</sup> Employer's vocational consultant, Angeliki Bountovinas, opined, based on employer's and claimant's descriptions of his job duties and the Dictionary of Occupational Titles, that claimant's job as a stevedore is a medium-duty position with occasional heavy lifting up to 75 pounds. EX 15 at 13; see Decision and Order at 23.

<sup>3</sup> Claimant did not contend that this alleged psychological condition was caused or aggravated by the work injury. See May 10, 2006, Hearing Transcript at 12; August 3, 2006, Hearing Transcript at 36.

*inter alia*, claimant was psychologically capable of performing his usual employment.<sup>4</sup> EXs 47 at 53-54; 48 at 62-63.

In adjudicating a claim, it is well established that the administrative law judge is entitled to weigh the evidence, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5<sup>th</sup> Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5<sup>th</sup> Cir. 1991). In this case, the administrative law judge rationally rejected claimant's subjective complaints based on the absence of corroborating objective evidence and the disability opinions of Drs. Watermeier and Manale because they were based on those subjective complaints. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge rationally concluded, based on the other medical evidence of record, that claimant failed to sustain his burden of establishing that his injury precluded him from returning to his usual work after May 16, 2002.<sup>5</sup> Therefore, we affirm the denial of benefits after this date.<sup>6</sup> *See generally Gacki v. Sea-Land Service, Inc.*, 33 BRBS 128 (1998).

Claimant also challenges the administrative law judge's finding that he is not entitled to medical treatment for his work-related injury after his back condition reached maximum medical improvement. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment . . . medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184

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<sup>4</sup> The administrative law judge also found that claimant failed to establish that his alleged psychological condition pre-existed the work injury since he first sought treatment for this condition in September 2002. Decision and Order at 35; *see CX 16*; *see generally Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981).

<sup>5</sup> We reject claimant's contention that the evidence fails to establish that he can return to his usual employment since employer never offered him his former position. Claimant presented no evidence that his former job was no longer available, and the administrative law judge's finding that claimant's former job was available to him for which he made no application or inquiry is supported by substantial evidence. Decision and Order at 35; *see August 3, 2006, Hearing Transcript at 189-190*; *see generally McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988).

<sup>6</sup> Thus, we need not address claimant's contention that employer did not establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5<sup>th</sup> Cir. 1981).

(1988). In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. *See Davison v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1996); 20 C.F.R. §702.402. It is claimant's burden to prove the elements of his claim for medical benefits. *See Ingalls Shipbuilding, Inc., v. Director, OWCP*, 991 F.2d 163, 27 BRBS 14(CRT) (5<sup>th</sup> Cir. 1993).

In this case, the administrative law judge credited the opinions of Drs. Gallagher and Murphy that claimant did not require further medical treatment or testing after reaching maximum medical improvement. EXs 22 at 7; 37 at 23, 28-30; 39 at 10, 13. The administrative law judge also credited Dr. Watermeier's statement in his May 16, 2002, letter that "[C]ontinuing medical treatment is not necessary." CX 5 at 13. Based on this evidence, we hold that the administrative law judge did not err in finding that claimant is not entitled to further medical treatment for his back injury. *See generally* 33 U.S.C. §907; *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed. Appx. 126 (5<sup>th</sup> Cir. 2002)(table); *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom.*, *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4<sup>th</sup> Cir. 1993).

Finally, claimant argues that he is entitled to reimbursement for out-of-pocket medical expenses totaling \$1,149.23. *See* August 3, 2006, Hearing Transcript at 110; CX 12. Although this issue was raised in claimant's Post-Hearing Brief, the administrative law judge did not address it in his decisions. *See* Claimant's Post-Hearing Brief at 24. As some of the claimed expenses appear to pre-date maximum medical improvement, we must remand this case for the administrative law judge to determine claimant's entitlement to reimbursement for these expenses pursuant to Section 7(a).

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are affirmed. The case is remanded for findings addressing claimant's entitlement to reimbursement for out-of-pocket medical expenses.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge