BRB No. 11-0139

RAUL IBARRA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	DATE ISSUED: 09/29/2011
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Barry W. Ponticello (England, Ponticello & St. Clair), San Diego, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2009-LHC-0598) of Administrative Law Judge Anne Beytin Torkington 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, a welder, suffered a series of injuries to his back, the last of which occurred on May 31, 2006. Employer voluntarily paid claimant benefits for various time periods. Claimant began a vocational rehabilitation program on June 19, 2007, completed the program on June 16, 2008, and found suitable alternate employment on August 25, 2008. Claimant sought total disability benefits while he was in the vocational

program and continuing partial disability benefits thereafter. The parties stipulated that claimant's back condition reached maximum medical improvement on May 2, 2007.

The administrative law judge found that claimant was physically capable of returning to his usual job as of the date he reached maximum medical improvement. Accordingly, the administrative law judge denied the claim for additional compensation and found that employer is entitled to a credit for all compensation paid after May 2, 2007. 33 U.S.C. §914(j).

Claimant appeals, contending the administrative law judge erred in finding claimant was not disabled after May 1, 2007. Claimant contends that the administrative law judge erred by not crediting the opinion of his treating physician, Dr. Cleary, and that the opinion of Dr. Dodge does not support the conclusion that claimant was not disabled as of May 2, 2007. Claimant also alleges that the administrative law judge erred in crediting the opinion of a physical therapist, Mr. Ianazzo, and in failing to address the opinion of Dr. Levinsohn. Employer responds, urging affirmance of the administrative law judge's decision.[1]

Claimant bears the burden of establishing that his work injury prevents his return to his usual work. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000). The administrative law judge found that claimant could return to his usual work as of the date of maximum medical improvement. The administrative law judge addressed the opinions of the medical experts. Dr. Cleary, claimant's treating physician commencing in June 2006, placed physical restrictions on claimant which would prevent his return to his usual employment as a welder.[2] Dr. Dodge, who had treated claimant prior to his May 2006 injury, reviewed claimant's medical records and examined him in March 2009. Dr. Dodge concluded that claimant's pain was muscular rather than discogenic. He stated claimant has mild degenerative disc disease at L5-S1, but no disc herniation. Dr. Dodge stated that, "at this time," claimant has no impairment or physical restrictions as a result of a back condition. RX 1; HT at 388. The administrative law judge also addressed two

[1]We decline to address employer's contention, raised in its response brief, that claimant is not entitled to a nominal award. The administrative law judge did not discuss this issue and claimant has not raised this issue on appeal.

[2]Dr. Cleary limited claimant from heavy lifting, repeated bending, stooping and carrying more than 30 pounds. He recommended that claimant not return to his usual job in light of his repeated injuries, symptoms and objective findings. HT at 300; CXs 11, 31.

functional capacity evaluations (FCE). In 2009, Mr. Ianazzo, a physical therapist, opined that the results of his FCE show that claimant is recovered from his injury and is limited due only to his own deconditioning. RX 3; HT at 361. He concluded that claimant has no loss of functional capacity. Dr. Verna, a chiropractor, reviewed the results of a 2010 FCE performed under his supervision. RX 11. The FCE report stated that claimant should be precluded from medium work, which involves physical demands up to 30 pounds. CX 31 at 467-468. The report concluded that claimant did not demonstrate the ability to work in "the job title of welder" due to lifting, crawling, squatting, and twisting limitations. *Id.* at 473-474. Dr. Verna did not reach a conclusion as to the cause of claimant's limitations, but stated they were more due to deconditioning than to pain. RX 11 at 39-40.

The administrative law judge gave greater weight to the opinion of Dr. Dodge than to that of Dr. Cleary based on Dr. Dodge's superior credentials, his demeanor at the hearing, and the facts that he had been claimant's treating physician prior to May 2006 and performs "agreed medical evaluations." Decision and Order at 23-24. The administrative law judge also found the Ianazzo FCE to be the more creditable one. The administrative law judge acknowledged claimant's pain, which no medical professional believed was feigned, but found that claimant's discomfort is due to deconditioning and not to any permanent impairment from the work injury, as the injury had resolved.

We reject claimant's contention that the administrative law judge erred in giving greater weight to the opinion of Dr. Dodge than to that of Dr. Cleary. The administrative law judge is entitled to assess the credibility of all witnesses and to weigh the evidence and draw his own inferences from it. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge was not required to give determinative weight to the opinion of Dr. Cleary based on his status as claimant's treating physician, as he provided valid reasons for giving more weight to Dr. Dodge's opinion. *See generally 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 administrative law judge did not "elevate" the opinion of a "defense physician" to that of a treating physician, but rationally noted that Dr. Dodge had treated claimant in the past and therefore had also had an "opportunity to know and observe [claimant] as an individual." *Id.*, 153 F.3d at 1054, 32 BRBS at 146(CRT). Similarly, the administrative law judge was entitled to find the opinion of Mr. Ianazzo and the results of the 2009 FCE corroborative of Dr. Dodge's opinion. 608 F.3d 642, 44 BRBS 47(CRT).

Nonetheless, we must remand this case for further findings. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). We are unable to ascertain the specific basis for the administrative law judge's finding that the 2009 FCE and Dr. Dodge's opinion after his March 2009 examination support the conclusion that claimant could have returned to his usual work as of the date of maximum medical improvement, May 2, 2007. Dr. Dodge testified that claimant had suffered a strain or sprain to his back on May 31, 2006; examining claimant three years after the injury, Dr. Dodge testified that "at that time" claimant did not have any physical impairment. HT at 388. In addition, claimant correctly avers that the administrative law judge did not discuss the opinion of Dr. Levinsohn in the analysis portion of her decision.[3] On May 1, 2007, Dr. Levinsohn opined that claimant had an eight percent whole man impairment and imposed permanent restrictions of no heavy lifting or repeated bending. CXs 12, 30. The administrative law judge did not assess whether this evidence was probative of claimant's ability to perform his usual work. Therefore, we vacate the administrative law judge's finding that claimant's disability ended on May 1, 2007, and we remand the case for a determination of the date claimant became capable of performing his usual work.[4] *Wheeler*, 39 BRBS 49.

[3]The administrative law judge discussed Dr. Levinsohn's opinion in setting forth the evidence of record. *See* Decision and Order at 7-8.

[4]On remand, the administrative law judge should, if necessary, reconsider her finding that claimant is not entitled to disability benefits while he participated in a Department of Labor-sponsored vocational rehabilitation program. *See General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge