BRB No. 03-0739

VERNON LUKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: Aug. 3, 2004
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,' UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Imposing Sanctions Against Claimant, the Order Partially Granting Employer's Motion in Limine, and the Decision and Order Awarding Benefits of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

William H. Shibley, Long Beach, California, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Imposing Sanctions Against Claimant, the Order Partially Granting Employer's Motion in Limine, and the Decision and Order Awarding Benefits (1993-LHC-2205) 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and 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 marine clerk and class A longshoreman, suffered many injuries, including injuries to his hip, pelvis, back, and knees, after being involved in a motor vehicle accident at work on June 24, 1987. He was working in a jeep when he was run over twice by a top handler, a massive mobile four wheel crane used to move shipping containers to and from truck trailers and storage areas. Claimant has not returned to work. Employer voluntarily paid claimant temporary total disability benefits from June 25, 1987, through May 31, 1990, and ongoing permanent partial disability benefits from June 1, 1990, excluding a period from June 21, 1993, through April 11, 1994, when employer paid no benefits.

Prior to the formal hearing, the administrative law judge issued orders on October 26, 2001 and June 28, 2002, which excluded from the record any medical evidence claimant intended to offer regarding any non-orthopedic or non-neurological conditions that claimant alleged were work-related, due to claimant's failure to comply with the administrative law judge's July 21, 2001 Order to show cause.[1] Following the formal hearing, the administrative law judge awarded claimant temporary total disability benefits from June 28, 1987, through May 31, 1990, and permanent total disability benefits from June 1, 1990, through February 8, 1993. 33 U.S.C. §908(a), (b). The administrative law judge found that employer established the availability of suitable alternate employment on February 9, 1993, and thus awarded claimant ongoing permanent partial disability benefits from that date. 33 U.S.C. §908(c)(21). Employer was awarded relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, claimant challenges the administrative law judge's exclusion of all evidence relating to his allegedly work-related non-orthopedic and non-neurological injuries. Claimant also challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Employer responds in support of the administrative law judge's decision.

[1] The Board dismissed claimant's initial appeal of these orders as interlocutory. *Luke v. Stevedoring Services of America*, BRB No. 02-0181 (Jan. 24, 2002)(order).

Exclusion of Evidence

Claimant contends that the administrative law judge abused her discretion in excluding from the record evidence concerning his allegedly work-related non-orthopedic and non-neurological conditions. Claimant also contends that the administrative law judge erred in relying on 29 C.F.R. §18.6(d)(2) to support her exclusion of this evidence. An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *See, e.g., Patterson v. Omniplex World Services,* 36 BRBS 149 (2002); *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002).

On July 10, 2001, the administrative law judge ordered claimant to provide employer within 60 days a formal notice of all non-orthopedic and/or non-neurological injuries which claimant alleged are work-related, and to provide employer with medical reports regarding these injuries, specifically indicating whether any of the conditions create an ongoing or permanent disability. On September 6, 2001, claimant timely filed a formal notice to employer of all allegedly work-related non-orthopedic and non-neurological conditions in response to the administrative law judge's show cause order of July 10, 2001. Claimant did not provide any medical reports as ordered, but asserted that employer already had copies of all medical documents concerning claimant's non-neurological or non-orthopedic problems. Claimant's counsel stated that he would furnish additional copies of these reports upon employer's request and would submit any new medical reports to employer when he obtained them. Claimant's counsel also submitted the declaration of Dr. Rabin with his notice.[2] Claimant asserted that some of his physicians had not prepared reports, but that claimant was planning to have them testify at the hearing.

Employer moved for sanctions against claimant on October 4, 2001, for failing to comply with the administrative law judge's July 10, 2001, Order. Employer asserted that claimant's providing notice of his additional medical conditions did not fully comply with the administrative law judge's order to submit medical reports to employer. Consequently, employer requested, pursuant to 29 C.F.R §18.6(d)(2), that any medical evidence concerning claimant's non-orthopedic or non-neurological problems be deemed adverse to claimant, and/or that claimant be barred from introducing such evidence. On October 15, 2001, the administrative law judge ordered claimant to show cause within seven days why employer's motion for sanctions should be denied. Claimant opposed employer's motion for sanctions by asserting that employer had all the medical reports concerning claimant's non-

[2] Dr. Rabin summarily stated that, upon his review of claimant's medical records, claimant suffered work-related injuries to his vascular system, heart and kidneys, urological and psychiatric problems, and complications from diabetes, in addition to neurological and orthopedic problems, which cause him to be permanently and totally disabled.

neurological and non-orthopedic problems in its possession, but nonetheless offered to copy the entirety of claimant's medical records and serve them on employer. Employer responded by reiterating its request for sanctions.

On October 26, 2001, the administrative law judge granted employer's motion for sanctions due to claimant's failure to comply with her July 10, 2001, Order. Pursuant to 29 C.F.R. §18.6(d)(2), the administrative law judge barred claimant from introducing any medical evidence asserting any non-orthopedic or non-neurological injuries. Subsequently, employer filed two motions *in limine*, requesting the exclusion of evidence which concerned claimant's non-neurological and non-orthopedic problems. The administrative law judge granted both of employer's motions in an order dated June 28, 2002.[3]

We affirm the administrative law judge's exclusion of evidence concerning claimant's allegedly work-related non-orthopedic or non-neurological problems as claimant has not shown that the administrative law judge abused her discretion in this regard. *Burley*, 35 BRBS 185; *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *French v. California Stevedore & Ballast*, 27 BRBS 1 (1993). In response to the administrative law judge's order, claimant generally identified the nature of these conditions as pertaining to his vascular system, kidneys and heart, complications from diabetes, and urologic and psychiatric problems, but did not provide to employer any documentation regarding these conditions, insisting that employer had the reports in its possession. Due to claimant's general response to the specific orders of the administrative law judge, the administrative law judge committed no abuse of discretion in sanctioning claimant by excluding evidence. Claimant did not produce the medical evidence ordered by the administrative law judge or attempt to identify by date or physician the medical evidence on which he intended to rely, such that employer or the administrative law judge could ascertain whether employer indeed had the reports in its possession. Contrary to claimant's contention, the administrative law judge's exclusion of evidence is in accordance with 29 C.F.R. §18.6(d)(2) as this regulation allows for such exclusion for failure to comply with any type of order of the administrative law judge; the order need not be specifically labeled a pre-trial or discovery order. *See* 29 C.F.R. §18.6(d)(2).[4] Moreover, claimant has not raised before the Board any prejudice that ensued

[3] By Order dated June 28, 2002, the administrative law judge excluded Claimant's Exhibits 9-11, 14, 18-20, 23, 36, 38, 47, 60-61, 67-69, 71-73, 75, 78, 79, and 95 because they involved claimant's non-neurological and non-orthopedic problems. Claimant's Exhibits 66 and 91 were excluded as illegible, and from what the administrative law judge could read, referred to claimant's non-neurological and non-orthopedic problems.

[4] 29 C.F.R. §18.6(d)(2) provides in relevant part:

> (2) If a party . . . fails to comply with . . . *any other order of the administrative law judge*, the administrative law judge, . . ., may take such action in regard

to him due to the administrative law judge's exclusion of this evidence. Thus, claimant's contention of error is rejected.

Suitable Alternate Employment

Claimant next contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Claimant contends that the administrative law judge erred in discounting the opinion of his treating physician, Dr. Larsen, and in not fully discussing the opinions of Dr. Feldman and Dr. Jackson. Claimant also asserts that telemarketing positions cannot constitute suitable employment.

Where, as here, employer concedes that claimant is unable to return to his usual work, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the present case arises, has held that employer must demonstrate that specific job opportunities, which claimant can perform considering his age, education, background, work experience, and physical and mental restrictions, are realistically and regularly available in claimant's community. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT)(9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). Claimant's entitlement to total disability benefits continues until the date suitable alternate employment is found to be first available to claimant. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration).

The administrative law judge found that employer established the availability of suitable alternate employment based on the 1993 labor market survey prepared by Rochelle Cafferty. Decision and Order at 35. She identified jobs as an order taker, a service cashier, a self-storage manager, and a dispatcher, as well as customer relations/service as within claimant's restriction to sedentary work. EX 37. The administrative law judge rejected the opinion of Dr. Larsen, claimant's current treating physician, that claimant is unable to work

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> thereto as is just, including but not limited to the following:
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> (iii) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, . . . , or the documents or other evidence, in support of or in opposition to any claim or defense; . . . .

29 C.F.R. §18.6(d)(2)(emphasis added).

at all, in favor of the opinions of several other doctors who stated claimant can work in a sedentary capacity. Decision and Order at 35.

We affirm the administrative law judge's rejection of Dr. Larsen's opinion, as the administrative law judge rationally found that it was based on claimant's non-credible subjective symptoms which are not supported by objective findings, that Dr. Larsen misunderstood claimant's work accident and was unaware of claimant's pre-existing knee injuries, and because Dr. Larsen's reports are filled with inaccurate information provided by claimant. Thus, the administrative law judge properly stated that he is not required to credit Dr. Larsen merely because he is the current treating physician. *See Amos v. Director, OWCP*, 153 F.3d 1051, *as amended by*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999); *see Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989); Decision and Order at 31-33, 34-35; Emp. Ex. 70; Cl. Ex. 106. Rather, the administrative law judge rationally credited as well-reasoned and persuasive the opinions of Drs. Noel, Miller, London, Batkin, and Fonseca that claimant can perform sedentary work with certain restrictions, finding those reports were based on accurate information and objective findings, and detailed and thorough in the analysis of claimant's condition.[5] *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); Decision and Order at 35. Additionally, the administrative law judge rationally relied on Dr. Feldman's opinion that claimant can perform sedentary work. *Id*.

Any error in the administrative law judge's failure to specifically discuss the 1992 restrictions of Dr. Feldman or the restrictions of Dr. Jackson is harmless as all of the jobs identified in employer's 1993 labor market survey allow claimant to sit frequently/constantly with the ability to stand or walk for personal comfort. Thus, the jobs identified are within these physicians' restrictions.[6] Emp. Exs. 9 at 74; 37 at 153; Cl. Ex. 65 at 112-113. Contrary to claimant's contention, the administrative law judge committed no error in not giving

[5] Contrary to claimant's contention, Dr. Noel reviewed claimant's medical records provided to him, and he also examined claimant. *See* Emp. Exs. 21 at 99-100; 28 at 114-116.

[6] In 1991, Dr. Feldman restricted claimant to sedentary work with no repeated bending, stooping, or lifting; he stated claimant required frequent changes from sitting to standing. Emp. Ex. 20 at 98. In 1992, Dr. Feldman additionally restricted claimant from repetitive squatting and limited claimant to intermittent short term sitting, standing, and walking. Cl. Ex. 65 at 112-113. Dr. Jackson restricted claimant to sedentary work with the ability to rest and to be able to change positions as necessary. Emp. Ex. 9 at 74. Additionally, the administrative law judge discussed Dr. Jackson's 1991 opinion that it was an excellent idea that claimant return to work because "he is going to have trouble whether he is at work or not at work." Decision and Order at 25; Emp. Ex. 18 at 96.

weight to the medical records from the VA Hospital, which report claimant as mostly wheelchair bound, as she excluded these records as illegible. Moreover, the administrative law judge noted that claimant used a wheelchair only at the hospital as he had to traverse a long distance within the building. Decision and Order at 6 n. 21; Tr. at 10-11, 66.

Claimant does not otherwise challenge the administrative law judge's finding that employer established the availability of suitable alternate employment by way of its 1993 labor market survey, and the administrative law judge's finding is rational and supported by substantial evidence. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). The jobs are within the restrictions imposed by the doctors who the administrative law judge credited, and, moreover, the jobs were specifically approved by Drs. London and Noel. *See* Emp. Ex. 29 at 117; Emp. Ex. 31 at 119-130; Emp. Ex. 32 at 133-137. We need not address claimant's contention that employer cannot establish the availability of suitable alternate employment through its identification of telemarketing jobs which, claimant asserts, are no longer "available" in light of the Federal and California "do not call" registries. The administrative law judge did not find that employer established the availability of suitable alternate employment based on any telemarketing jobs. The administrative law judge relied on all of the jobs identified in the 1993 labor market survey, none of which was for a telemarketer position, and not on the telemarketing jobs identified in the 1999 and 2001 surveys. *See* Decision and Order at 35; Emp. Exs. 37, 60-62, 66. Thus, we affirm the administrative law judge's award of partial disability benefits commencing February 9, 1993. *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

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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BETTY JEAN HALL
Administrative Appeals Judge