BRB No. 00-0504

RHADAMES CHAVEZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents Cross-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Martin M. Glazer (Glazer, Kamel & Guberman), Elizabeth, New Jersey, for claimant.

Christopher J. Field (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-1784) of Administrative Law Judge Paul H. Teitler 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).

This case is before the Board for the second time. Claimant sustained work-related

injuries to his neck and right shoulder on March 11, 1996. Employer voluntarily paid claimant temporary total disability benefits from March 14, 1996, to April 1, 1996, and medical benefits. In his initial decision, the administrative law judge awarded claimant temporary total disability benefits from March 14, 1996, to May 22, 1996, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, until May 22, 1996.

On appeal, employer challenged the administrative law judge's award of temporary total disability benefits through May 22, 1996, and claimant, on cross-appeal, challenged the administrative law judge's denial of compensation and medical benefits after May 22, 1996.

In its decision, the Board vacated the administrative law judge's determinations that claimant's entitlement to temporary total disability benefits ceased on May 22, 1996, and that claimant is not entitled to medical benefits after May 22, 1996, and remanded the case for further consideration of those issues. *See Chavez v. Universal Maritime Service Corp.*, BRB Nos. 98-1555/A (Aug. 17, 1999)(unpub.). In addition, the Board affirmed the administrative law judge's denial of partial disability benefits. *Id.* On remand, the administrative law judge awarded both temporary total disability and medical benefits from March 11, 1996, until May 22, 1996.

On appeal, claimant again challenges the administrative law judge's denial of partial disability benefits, as well as the denial of temporary total disability and medical benefits after May 22, 1996. Employer responds, urging affirmance.

At the outset, we reject claimant's contention that he is entitled to an award of partial disability benefits in this case, as this issue was fully considered and resolved by the Board in its prior decision. *Chavez*, slip op. at 3-4. Specifically, the Board affirmed the administrative law judge's finding that claimant is not entitled to partial disability benefits as he did not establish that the loss of his usual work was due to the work injury. *Id*. Thus, as this issue has already been decided by the Board, and that decision constitutes the law of the case, we decline to address claimant's contentions regarding his entitlement to partial disability benefits. *Buchanan v. International Transportation Services*, 33 BRBS 32 (1999); *Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998).

Claimant next contends that the administrative law judge erred in terminating his entitlement to temporary total disability benefits on May 22, 1996, asserting that his award of benefits should extend to June 16, 1996, the date that his treating physician, Dr. Bradley, determined that he could return to work.

In order to demonstrate a *prima facie* case of total disability, claimant must establish that he is unable to return to his usual work due to his work injury. *See Harmon v. Sea-Land*

Service, 31 BRBS 45 (1997). It is well-established that an administrative law judge is entitled to weigh the evidence and evaluate the credibility of all witnesses, including doctors, and may draw his own conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, the Board may not re-weigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981).

On remand, the administrative law judge accorded greatest weight to the April and June 1996 medical reports of Dr. Nehmer stating that as of April 3, 1996, claimant was capable of returning to his usual work and to the negative MRI evidence, which the Board previously agreed supported a determination that claimant's disability ended on May 22, 1996. *Chavez*, slip op. at 3. In contrast, the administrative law judge gave less weight to the opinion of Dr. Bradley that claimant could not return to work until June 17, 1996, since it was based on the medical history and complaints provided by claimant, which the administrative law judge determined were not credible based on Dr. Nehmer's assessment that claimant was engaging in symptom magnification. As the administrative law judge's weighing of the medical evidence is within his discretion and as Dr. Nehmer determined that claimant was capable of returning to his regular work as of April 3, 1996, we affirm the administrative law judge's finding that claimant is not entitled to additional temporary total disability benefits beyond May 22, 1996, as it is rational, supported by substantial evidence, and in accordance with law. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998); *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

Claimant also contends that the administrative law judge erroneously concluded that claimant is entitled to medical benefits only through May 22, 1996, as the evidence of record establishes that a rehabilitation program beyond that date was authorized and would be beneficial to claimant's condition. Specifically, claimant avers that since the examination by Dr. Bradley on May 14, 1996, and subsequent recommendation for physical therapy on May 21, 1996, are within the period during which medical benefits were awarded, he is entitled to medical benefits for that physical therapy, particularly since both Drs. Bradley and Nehmer acknowledge the beneficial nature of the physical therapy in examinations conducted after May 22, 1996.[1] Claimant also argues that the administrative law judge did not follow the

[1]Contrary to claimant's assertion, Dr. Nehmer has made no comment regarding the beneficial nature of the physical therapy which claimant was receiving up to the time of his June 5, 1996, medical report. Rather, in that report, Dr. Nehmer merely acknowledged that "claimant is getting physical therapy, and feels that he has made some improvement."

Board's reasoning and instructions in terminating claimant's entitlement to medical benefits after May 22, 1996. In order for a medical expense to be assessed against employer, it must be both reasonable and necessary for the treatment of claimant's work-related injury. *See* 33 U.S.C. §907; *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989).

In its prior decision, the Board observed that the administrative law judge determined that employer was responsible for the payment of medical benefits until claimant's medical condition had been fully investigated by Dr. Bradley, and claimant was capable of returning to work. The Board, however, vacated the administrative law judge's finding that claimant is not entitled to medical benefits after May 22, 1996, since the administrative law judge did not address Dr. Bradley's recommendation that claimant undergo physical therapy after that date, and his continued treatment of claimant thereafter. In addition, the Board noted that a claimant's ability to return to work is not determinative of his entitlement to medical benefits if he remains in need of treatment for his work injury. *Chavez*, slip op. at 4, *citing Cotton v Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

On remand, the administrative law judge determined that claimant's testimony, relative to his need for further treatment, was not credible in light of the negative MRI and the reports of Dr. Nehmer's two physical examinations. The administrative law judge thus found that Dr. Bradley's recommendation for further physical therapy, based in large part on claimant's subjective complaints, was not necessary. In this regard, the administrative law judge followed the Board's instructions on remand to address Dr. Bradley's recommendation of physical therapy and continued treatment of claimant.

Employer's Exhibit (EX) 6.

In addition, the administrative law judge concluded that claimant's disability ended prior to May 22, 1996, on April 3, 1996, but that he allowed time for the negative MRI to rule out any and all disability. He therefore concluded that employer was responsible for medical benefits until May 22, 1996.[2] In so finding, the administrative law judge again relied upon the "well-reasoned" medical opinion of Dr. Nehmer, based on his examinations of claimant on April 3, 1996, and June 5, 1996. In his April 3, 1996, medical report, Dr. Nehmer opined that claimant was capable of returning to his usual work, and was not in need of any further testing or treatment. EX 3. On June 5, 1996, Dr. Nehmer reiterated this opinion. EX 6. The administrative law judge decision to credit Dr. Nehmer's opinion that claimant did not need any further treatment after April 3, 1996, over the contrary opinion of Dr. Bradley is rational, supported by substantial evidence, and in accordance with law. Accordingly, we affirm the administrative law judge's denial of medical benefits after May 22, 1996. *See generally 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)(4th Cir. 1993).

Claimant lastly requests that the Board issue an order stating that claimant is entitled to an attorney's fee to be assessed against employer based upon his successful appeal. Contrary to claimant's contention, his appeal has not been successful as he has not received any additional benefits as a result of the Board's remand, or as a result of the administrative law judge's decision on remand. The Board's present affirmance of the administrative law judge's decision on remand merely reinstates the administrative law judge's original award of benefits in this case. Claimant, however, may be entitled to an attorney's fee assessed against employer for work performed before the Board in successfully defending against employer's initial appeal of the administrative law judge's award of temporary total disability benefits through May 22, 1996. *See Bonds v. Smith & Kelly Co.*, 21 BRBS 240 (1988). In order to be entitled to an award of an attorney's fee, counsel must submit a fee petition which conforms to the requirements of 20 C.F.R. §802.203. *See generally Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989); *see also Smith v. Alter Barge Line, Inc.*, 30 BRBS 87, 89 (1996).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[2]The administrative law judge found that the award of medical benefits up to May 22, 1996, was "precautionary" in nature. Decision and Order dated January 7, 2000, at 4.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge