BRB No. 01-0458

DALE CARR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CARGILL, INCORPORATED	)	DATE ISSUED: Feb. 7, 2002
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	
	)	
Self-Insured Employer/Administrator-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Daniel E. Becnel, III, LaPlace, Louisiana, for claimant.

George J. Nalley, Jr. and Christopher J. Stahulak, Metairie, Louisiana, for employer/administrator.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-LHC-1241) of Administrative Law Judge James W. Kerr, 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, rational, 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 injured his back during the course of his employment for employer on January 16, 1998. Claimant returned to work the next day, and he received his regular wages from employer until March 29, 1998, when claimant stopped working. Employer also paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from February 4 to 17, 1998, and from July 16 to 26, 1998. Claimant has not returned to work since March 29, 1998. Claimant alleged that he is unable to work due to his back injury.

In his decision, the administrative law judge found that claimant established invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), linking claimant's back condition to his employment, and that employer failed to rebut the presumption. The administrative law judge found that claimant's back condition reached maximum medical improvement on July 24, 1998, without any residual impairment. The administrative law judge concluded that claimant is not entitled to any compensation after claimant last worked for employer on March 29, 1998. Accordingly, the administrative law judge denied the claim for compensation under the Act.

On appeal, claimant challenges the administrative law judge's denial of compensation benefits after March 29, 1998. Claimant also seeks payment of medical bills incurred for treatment with Drs. Waguespack and Murphy, and with St. James Parish Hospital, and reimbursement of his travel expenses for medical treatment. Employer responds, urging affirmance.

We initially address the administrative law judge's finding that claimant's back condition reached maximum medical improvement on July 24, 1998, and that claimant did not have any loss of wage-earning capacity thereafter. Claimant contends the administrative law judge erred by rejecting objective evidence of disability, the medical opinions of his treating physicians, and claimant's testimony as to his back condition. Claimant bears the burden of establishing the nature and extent of his work-related disability. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985).

In the instant case, the administrative law judge credited the opinions of Drs. Fraiche, Griffith, Hatcher, Mitchell, and Schumacher, and Mr. Melacon, a physical therapist, to find that as of July 24, 1998, claimant had no physical restrictions from the work injury, and thus, sustained no loss of wage-earning capacity due to his back condition. Specifically, Dr. Fraiche initially treated claimant's back injury, and Mr. Melacon administered physical therapy from January through March 1998. Their reports note claimant's history of lessening subjective complaints and their objective findings showing improvement of claimant's back condition. EXS 5, 7. Dr. Griffith, an orthopedist, examined claimant in January, February, and April 1998. Dr. Griffith reported in April that claimant's exam was "grossly inconsistent" with his subjective complaints. EX 6 at 3. Dr. Schumacher similarly diagnosed low back

symptoms without supporting objective evidence. EX 9 at 2. Dr. Mitchell, a neurologist, had claimant undergo an MRI and myelogram; thereafter, he opined on July 24, 1998, that claimant could return to work without restrictions. EXS 7 at 5; 34 at 15-17. Dr. Hatcher, a urologist, found no objective evidence to substantiate claimant's complaints of urinary frequency and burning. EX 8. The administrative law judge rejected claimant's testimony regarding his physical condition based on inconsistent statements by claimant, a surveillance tape that showed claimant is more active in walking and driving than he admits, and the testimony of both a private investigator, Mr. Miceli, and claimant's supervisor, Mr. Leeth, regarding their observations of claimant's physical activity. The opinion of Dr. Waguespack, that claimant is unable to work because of radiculopathy at L4-5, was rejected based on the opinion of Dr. Mitchell, that this condition is clinically insignificant, and the opinions of Drs. Mitchell and Griffith, that claimant's complaints are not supported by objective findings. Moreover, the administrative law judge rejected the opinions of Drs. Waguespack, Murphy, Clifton, and Bourgeois because they were based upon claimant's subjective complaints, which the administrative law judge found were not credible.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, the administrative law judge considered the record as a whole, and concluded that claimant did not sustain any loss of wage-earning capacity after July 24, 1994, when Dr. Mitchell released claimant to return to work without any restrictions. On the basis of the record before us, the administrative law judge's conclusion is rational and supported by substantial evidence. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Gacki v. Sea-Land Services, Inc.*, 33 BRBS 127 (1998). Accordingly, we affirm the administrative law judge's denial of compensation after July 24, 1998.

We next address claimant's challenge to the administrative law judge's denial of compensation from March 29 to July 23, 1998. We agree that this finding cannot be affirmed as the administrative law judge did not render any findings of fact with respect to claimant's ability to work during this period. Whereas the administrative law judge credited specific medical evidence supporting his finding that claimant did not sustain a loss of wage-earning capacity after July 24, 1998, the administrative law judge's decision contains no rationale for his conclusion that claimant is not entitled to any compensation after March 29, 1998, when claimant stopped working for employer. Moreover, the evidence credited by the administrative law judge to find that claimant had no loss of wage-earning capacity after July 24, 1998, does not unequivocally support a denial of compensation between March 29 and July 24, 1998. For example, Dr. Mitchell testified that claimant was restricted from returning

to work while undergoing neurological evaluation from May 1 to July 23, 1998. EX 34 at 21-22. Dr. Fraiche, after releasing claimant to return to work without restrictions on March 5, 1998, re-imposed work restrictions on March 24, 1998, of no climbing, bending, stooping, prolonged standing or walking, and lifting over 75 pounds.[1] EX 4. Given this record, we are unable to affirm the denial of compensation between March 29 and July 24. *See generally Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 356 (3d Cir. 1997). Because the administrative law judge must in the first instance evaluate the evidence regarding claimant's ability to work during the period in question, we vacate the administrative law judge's denial of compensation from March 29 to July 23, 1998, and remand this case to the administrative law judge for reconsideration of this issue. *See* 5 U.S.C. §557(c)(3)(A); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

On remand, the administrative law judge also must address claimant's assertion that employer is responsible for the payment of medical bills claimant submitted into evidence at the hearing, CXS 3-5, for treatment rendered by Drs. Waguespack and Murphy, and that provided by St. James Parish Hospital.[2] 33 U.S.C. §907(a); *see Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

[1]We note that the record contains evidence that claimant's usual employment with employer was actually available to him after he stopped working. Employer submitted evidence reflecting that it had written to Dr. Waguespack, stating that light duty work would be provided and that it would try to accommodate claimant's restrictions. EX 29. Claimant's supervisor, Mr. Leeth, testified that he repeatedly attempted to contact claimant after he quit working, to tell claimant that employer had work available. Tr. at 118-122, 140-142.

[2]Whereas claimant raised payment for medical treatment as an issue in his pre-hearing statement, claimant failed to raise before the administrative law judge reimbursement of his travel expenses for medical treatment. Accordingly, as claimant may not raise this issue for the first time on appeal, we will not address claimant's contention. *See generally Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

Accordingly, the administrative law judge's denial of benefits from March 28 through July 24, 1998 is vacated, and the case is remanded for further findings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge