No. 16-60835

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PORTS AMERICA LOUISIANA, INCORPORATED

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
and
ALEXANDER SCOTT,

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 28.2.2, the Director, OWCP, requests oral argument, which he believes would assist the Court.

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Petitioner,

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
and
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Respondents.

On Petition for Review of a Final Order
Of the Benefits Review Board

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (Longshore Act). On October 28, 2015, the district director (a Department of Labor official responsible for, *inter alia*, supervising medical treatment in Longshore Act claims, 20 C.F.R. § 702.407) issued an order requiring Ports America Louisiana (Employer) to pay for (1) medical treatment

provided to Claimant Alexander Scott by Dr. Douglas Bostick, and (2) an independent medical examination ordered by the district director. Record Excerpts (RE) 18.[1] The Employer filed a notice of appeal with the Benefits Review Board on October 29, 2015, within the thirty-day period provided by 33 U.S.C. § 921(a). Record on Appeal (R) 156.[2] That appeal invoked the Board's review jurisdiction under 33 U.S.C. § 921(b)(3).

On November 14, 2016, the Board issued a Decision and Order, which largely affirmed the district director's order. RE 4. Under 33 U.S.C. § 921(c), any party aggrieved by a final decision of the Board may obtain judicial review in the United States Court of Appeals in which the injury occurred by filing a petition for review within sixty days of the Board's order. The Employer filed its Petition for Review with this Court on December 19, 2016, within the prescribed sixty-day period. The Board's order is final pursuant to § 921(c) because it completely

[1] The Record Excerpts are not consecutively paginated. The pages cited in this brief are those included in the docket entry information at the top of each page.

[2] There are two sections of the Record on Appeal. The first section contains 158 pages submitted to the Board, and came to the Court with a hand-written page number at the bottom of each page. Citations to this section will use those page numbers with the designation "R." The second section consists of 99 pages submitted while the case was before the district director, and does not include hand-written page numbers. The Director has added page numbers to his copy of those 99 pages, and when citing to one of them will use the added page number with the designation "RD," as well as a description of the document being cited.

resolved all issues presented. *See Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406 (5th Cir. 1984) (en banc). This Court has geographic jurisdiction under § 921(c) because Scott was injured in Louisiana, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUES

I. The Longshore Act and its implementing regulations give the district director the discretion to order a change of a claimant's physician on his own initiative when he determines it is "desirable or necessary in the interest of the employee," or at the request of the claimant upon a showing of good cause. 33 U.S.C. § 907(b), (c)(2); 20 C.F.R. §§ 702.406(b), 407(c). The Claimant's treating physician stated that he needed no further treatment, and released him for full-time work with no restrictions, even though the Claimant told him he was unable to walk, stand or drive for extended periods, and did not feel comfortable returning to work. Did the district director act within his discretion in ordering a change of the Claimant's physician?

II. The Longshore Act and its implementing regulations give the district director the discretion, whenever "medical questions are raised," to have an injured employee examined by an independent physician, and to "charge the cost of the independent examination . . . to the employer." 33 U.S.C. § 907(e); 20 C.F.R.

§§ 702.408, 702.412. Here, two doctors disagreed with regard to the Claimant's need for further treatment, as well as his ability to return to work. Did the district director act within his discretion in finding that a medical question existed, ordering an independent medical examination, and charging its cost to the Employer?

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

On January 30, 2015, Scott, a 57-year-old longshore foreman, was working for the Employer when he was struck from behind by a forklift and knocked to the ground. He injured his left hip and lower back. It was subsequently determined that he tore his iliotibial band,[3] and that fluid had accumulated in the area of his left hip. He reported experiencing a burning pain in the lateral side of his left hip. RE 29-30, 31, 34; RD 25 (5/7/2015 medical report).

After initial treatment with other doctors, the Employer sent Scott to Dr. Robert Steiner on February 19, 2015. RE 29. At this first visit, Scott signed a Louisiana state workers' compensation form stating that he agreed "to continue

[3] The iliotibial band is a tendon that runs along the outside of the leg. It connects from the top of the pelvic bone to just below the knee. *See* https://medlineplus.gov/ency/patientinstructions/000683.htm (last visited May 5, 2017).

treating with my Employer's Doctor: Dr. Steiner." R. 151. Scott stated that he was told that the Employer would not approve the treatment unless he signed the form. RE 19.

Scott saw Dr. Steiner through August 20, 2015. RE 24. During that time, he remained off work, and was prescribed several medications for pain and inflammation. RE 30, 31; RD 81, 79, 69, 25, 76 (medical reports dated 2/26/15, 3/19/15, 4/16/15, 5/7/15, and 6/4/15). He also underwent two MRIs, RD 83, 55 (MRI reports of 2/23/15 and 7/16/15); a pelvic bone scan, RD 59, 29 (7/14/15 imaging report and 7/16/15 medical report); and approximately four months of physical therapy, RD 60-68, 71-78 (PT treatment notes).

On July 7, 2015, Dr. Steiner noted that Scott was still symptomatic, with pain brought on by prolonged walking, standing, or driving. Scott told him he did not believe he could return to his regular work. RD 27 (7/7/15 medical report). On July 20, 2015, Scott reiterated that he did not feel comfortable returning to work. R 35. Dr. Steiner nonetheless found that Scott had reached maximum medical improvement, and "require[d] no additional treatment." R 34. He further opined that there was nothing "that would prevent him from returning to his full duty activity without restriction." R 35; RE 20; *see* RD 88 (7/20/15 work status report). Dr. Steiner scheduled a follow-up exam "in one month for a checkup." R

35. Scott returned to Dr. Steiner for that checkup on August 20, 2015. Although Dr. Steiner acknowledged that Scott "remains symptomatic following a left hip contusion" and was complaining of "left low back pain," he dismissed that pain as "related to the incident at work only based on [Scott's] subjective complaints." R 39-40. He repeated that he had no recommendations for further treatment, and that Scott should try to return to his regular work. R 40; RD 87 (8/20/15 work status report).

Because Scott remained symptomatic and did not believe he had fully recovered from his injury, he started seeing Dr. Bostick. RE 24. In a report dated August 25, 2015, Dr. Bostick noted that Scott had an "altered gait pattern" and "significantly limited lumbar flexion and extension," and was still experiencing hip and lower back pain. R 37. Dr. Bostick prescribed an additional medication for a burning sensation Scott felt in his leg, and recommended that Scott continue physical therapy, remain off work, and begin using a crutch on his left side. R 37.

II. DECISIONS BELOW

A. The District Director's Recommendations and Order

The Employer refused to pay for the treatment by Dr. Bostick, and ceased paying compensation. Scott requested an informal conference so the district director could "recommend that the employer pay indemnity benefits and authorize

medical treatment." (September 9, 2015 request for informal conference).[4] An informal conference was held with a claims examiner, who issued recommendations on behalf of the district director on October 15, 2015. RE 42. The Employer requested reconsideration of those recommendations by the district director. R. 125-30. The district director issued a revised set of recommendations on October 22, 2015. RE 24. The Employer then requested that those revised recommendations be incorporated into a formal order from which it could appeal. RE 21. The district director issued an order on October 28, 2015. RE 18.

In that order, the district director found that, although Dr. Steiner was the Employer's chosen physician, he was also Scott's choice through acquiescence because he had agreed to treat with Steiner, and continued that treatment for six months.[5] RE 20, 25. He found, however, that Scott was entitled to select another physician because Dr. Steiner had "effectively discharged" the Claimant and "refused [him] further medical treatment," when Dr. Steiner advised Scott that he

[4] The Director has asked the Court to supplement the record with this document, which was submitted to the district director below, but not included in the record on appeal.

[5] This was a rejection of the claims examiner's recommended finding that Dr. Steiner was never Scott's physician of choice. RE 20, 43. The district director also rejected the claims examiner's recommendation that the Employer be required to reinstate payments of compensation for temporary total disability, finding that further information was needed to determine the Claimant's disability status. RE 20, 122.

required no further treatment, and should return to duty with no work restrictions. He relied on the Employer's own argument, which stated that Dr. Steiner told the Claimant that he "had nothing further to offer him," and that "the only thing left was for a final follow-up in one month." RE 20, citing R 135. He also relied on case law holding that a doctor effectively refuses a claimant treatment where he concludes that the claimant has reached MMI and is in need of no further treatment. RE 25 (citing *Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780, 787 (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp*., 14 Ben. Rev. Bd. Serv. 657, 664 (1982); *Buckhaults v. Shippers Stevedore Co.*, 2 Ben. Rev. Bd. Serv. 277, 278-279 (1975)). Given Steiner's indication that he had no further treatment to offer, and Scott's complaints of continued hip and back pain, the district director found the Claimant was entitled to select another physician. *Id.*

Moreover, in light of the doctors' "clear disagreement as to whether or not the Claimant needs additional treatment," the district director found that an independent medical examination (IME) was warranted to "help make a determination as to what, if any, further treatment is required and what the claimant's ability to work is." RE 21, 25.[6]

[6] The Claimant underwent an IME with Dr. George Murphy on November 10, 2015. R 42-43. Dr. Murphy reported that Scott's left hip was tender, and that movement of the hip caused him pain. R 43. He opined that the Claimant needed

The district director ordered the Employer to pay for all necessary and reasonable medical treatment resulting from his workplace injury, including the treatment provided by Dr. Bostick, "unless or until such treatment is denied by the ALJ or District Director." RE 21. He also ordered the Employer to reimburse the cost of the IME. *Id*.

B. The Board's Decision

The Employer appealed the district director's order to the Board, arguing that the district director abused his discretion by: (1) authorizing a change of physician; and (2) ordering an IME. R 99-119. The Board rejected both arguments. RE 4-12.

Addressing the change of physicians, the Board agreed with the district director that Scott acquiesced to Dr. Steiner as his treating physician, and that the district director, consequently, had to authorize Scott's change to Dr. Bostick. RE 7-8. The Board recognized that the district director has "the discretionary authority to order a change in a claimant's physician." RE 6-7 (citing 33 U.S.C. §§ 907(b), (c)(2); 20 C.F.R. §§ 702.406, 407). He may order a change of physician "on his

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further testing to determine the condition of his lower back, and recommended an MRI of the lumbar spine to determine whether significant limitations were required for work. *Id.* Dr. Murphy also noted that the Claimant might need additional steroid injections, and might benefit from oral anti-inflammatory medications. *Id.*

own initiative . . . when in his judgment such change is desirable or necessary in the interest of the employee." RE 6 (citing 33 U.S.C. § 907(b)). And he may do so at the claimant's request upon a showing of good cause. *Id*. (citing 33 U.S.C. § 907(c)(2)).

The Board noted that, in ordering the change of physician, the district director relied on Dr. Steiner's opinion that Scott was at maximum medical improvement, required no further treatment, and could return to work without restrictions. RE 9. "In light of these statements, and Section 7(b)'s proviso that the change may be authorized when 'in his judgment such a change is desirable,' the district director did not abuse his discretion in concluding that Dr. Steiner effectively discharged claimant from treatment and claimant was entitled to select a new physician." *Id*. (citing *Roulst v. Marco Constr. Co*., 15 Ben. Rev. Bd. Serv. 443 (1983)). It found that Dr. Steiner's indication that he would like to see Scott again for a follow-up exam did not change the situation because he had already opined that Scott had reached maximum medical improvement, and stated that he had no further treatment to offer. RE 9.

The dissenting Board member would have found that the Claimant sought a change of physician, and that section 7(c)(2)'s "good cause" standard therefore

applied.[7] He cited one case in which the good cause standard was applied, and that case involved the claimant going to a new doctor because his treating physician left private practice. RE 13 (citing *Lynch v. Newport News Shipbuilding & Dry Dock Co*., 39 Ben. Rev. Bd. Serv. 29 (2005)).[8] The Board majority, however, noted that Dr. Steiner's de facto refusal to further treat the Claimant "could be interpreted as either 'good cause' under Section 7(c)(2) or 'desirable and necessary' under Section 7(b), as the district director merely stated that claimant is 'entitled to select another physician.'" RE 7 n.3. In addition to recognizing that the district director's findings met either standard, the majority found that, "[i]n any event, it is clear the decision is a discretionary one belonging to the district director," *id*., and that his discretion exists regardless of which party requests the change. RE 9 n.6. And the Board concluded that the district director did not abuse his discretion in ordering a change to Dr. Bostick. RE 9. It did, however, modify the district

[7] Although the dissenting Board member treated it as a fact that the Claimant requested a change of physician, Scott never expressly made such a request. Rather, he sought an informal conference for the district director to "recommend that the employer pay indemnity benefits and authorize medical treatment." Attachment A (*see supra* n.4). The result of that request was that the district director ordered a change of physician.

[8] The Director is aware of only one other case in which the "good cause" standard was applied which, similar to *Lynch*, involved a situation in which the claimant's doctor had retired. *Maguire v. Todd Pacific Shipyards Corp.*, 25 Ben. Rev. Bd. Serv. 299 (1992).

director's order to hold that the Employer was not liable for Dr. Bostick's bills until after the district director authorized the change on October 28, 2015. RE 9-10.[9]

The Board next addressed the district director's decision to order an IME. It recognized that the district director has discretion to order an independent medical examination ("IME") if "medical questions" arise in a case, 33 U.S.C. § 907(e), and that medical questions may pertain "to the appropriate diagnosis . . . appropriate treatment, and the duration of any such care or treatment." RE 11 (quoting 20 C.F.R. § 702.408).

The Board held that the district director reasonably found that there were medical questions raised with regard to Scott's need for additional treatment and ability to return to work, with Dr. Steiner stating that the Claimant needed no further treatment and could return to work without restrictions, and Dr. Bostick stating that the Claimant should remain off work, continue physical therapy, take additional medication, and begin using a crutch. RE 11. "Based on these opinions, the district director could reasonably find that there is a 'medical question'

[9] This is consistent with section 7(c)(2)'s requirement that the district director give "prior consent" for a claimant to change physicians, 33 U.S.C. § 907(c)(2), and section 7(d)(1)(A), which provides that the employer shall not be liable for medical expenses incurred by an employee unless the employer has refused treatment "and the employee has complied with subsections (b) and (c)" of section 7, 33 U.S.C. § 907(d)(1)(A).

concerning claimant's ability to work and whether he needs continuing treatment." RE 11. The Board thus found that the district director had not abused his discretion in ordering a IME, or in ordering the employer to pay for it under section 7(e). RE 12 (citing *Augillard v. Pool Co*., 31 Ben. Rev. Bd. Serv. 62 (1997)).

The Board also rejected the Employer's argument that an IME could not be ordered unless there was a dispute between a claimant's doctor and an employer's doctor, and where the Claimant had either chosen or acquiesced to both Drs. Steiner and Bostick, no such dispute existed. RE 10-11. The Board found that section 7(e) asks only "whether there are questions about the claimant's medical condition; contrary to the employer's assertion, the doctors with differing opinions need not have been chosen by opposing parties." RE 11.

SUMMARY OF ARGUMENT

The district director is given wide discretion to change an injured worker's physician, to order an IME, and to have an employer pay for that IME. In taking those actions here, the district director did not abuse his discretion.

STANDARD OF REVIEW

The Board will affirm discretionary acts of the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. RE 5; *Jackson v. Universal Maritime Servs. Corp.*, 31 Ben. Rev. Bd. Serv. 103, 107 (1997). This Court's function is to correct any errors of law and determine if the Board adhered to its proper scope of review. *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 1119 n.1 (5th Cir. 1980). In cases involving a discretionary act, therefore, the Court employs essentially the same standard of review as the Board, ensuring that there was no abuse of discretion. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 688, 692 (5th Cir. 1999) (ALJ's award of attorney's fees is reviewed for abuse of discretion by both the Board and the Court). Thus, if the district director did not abuse his discretion, the Board's decision affirming his order should be affirmed.

ARGUMENT

I. THE DISTRICT DIRECTOR PROPERLY EXERCISED HIS DISCRETION UNDER SECTION 7 OF THE LONGSHORE ACT TO ORDER A CHANGE OF PHYSICIAN FROM DR. STEINER TO DR. BOSTICK

A. The district director permissibly concluded that Dr. Steiner effectively discharged Scott as a patient, and that a change in physicians was therefore "desirable or necessary in the interest of the employee" as required by section 7(b).

Section 7(b) of the Act provides in pertinent part:

> The Secretary shall actively supervise the medical care rendered to injured employees, … shall have the authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished, and *may, on his own initiative or at the request of the employer, order a change of physicians* or hospitals *when in his judgment such change is desirable or necessary in the interest of the employee* ….

33 U.S.C. § 907(b) (emphasis added).[10]

The implementing regulations reiterate that "[t]he district director . . . may order a change of physicians . . . when such a change is found to be necessary or

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[10] The Secretary's responsibilities under Section 7 have been delegated to district directors. *Toyer v. Bethlehem Steel Corp.*, 28 Ben. Rev. Bd. Serv. 347, 351 (1994); *Cooper v. Todd Pacific Shipyards Corp.*, 22 Ben. Rev. Bd. Serv. 37, 40-41 (1989); *see* 20 C.F.R. §§ 1.1(b), 1.2(e) (delegating Secretary's authority to administer the Longshore Act to the Director, OWCP); 20 C.F.R. § 702.407 (delegating the Director's authority to supervise medical care and determine whether a change of physician should be made to district directors).

desirable[.]" 20 C.F.R. § 702.406(b); *see also* 20 C.F.R. § 702.407(c) (district directors "shall actively supervise" injured employees' medical care, to include "[t]he determination of whether a change of physicians . . . should be made or is necessary."). The plain language of these provisions invests the district director with the authority to direct a change of a claimant's physician when the district director believes such a change is appropriate. *See Roulst*, 15 Ben. Rev. Bd. Serv. at 447; *Jackson*, 31 Ben. Rev. Bd. Serv. at 106. The district director did not abuse that discretion here.

The district director relied on controlling case law to find that Dr. Steiner "effectively discharged" the Claimant and "refused [him] further medical treatment." RE 25 (citing *Slattery Associates*, 725 F.2d at 787; *Swain*, 14 Ben. Rev. Bd. Serv. at 664; *Buckhaults*, 2 Ben. Rev. Bd. Serv. at 278-279). These Board decisions make clear that a physician need not expressly discharge a worker from his care for a refusal of treatment to exist; it is enough that the physician concludes that the worker requires no additional treatment and can return to work without restrictions.[11] The Board's law is consistent with decisions of this Court

[11] The Employer's argument that Dr. Steiner did not expressly refuse treatment because he asked Claimant to come back for a "check-up," therefore, is unavailing. Not only had he already told the Claimant he had no further treatment to offer him, RE 20, R 135, but when Scott returned for the subsequent check-up, Dr. Steiner

and other courts of appeals. *See Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908, 911 (5th Cir. 1971) (when physician tells employee that he is recovered from his injury and requires no further treatment, the employee has been effectively refused treatment); *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968, 970 (D.C. Cir. 1982) (same); *Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 693 (5th Cir. 1986) (same); *Rivera v. National Metal & Steel Corporation*, 16 Ben. Rev. Bd. Serv. 135, 137-38 (1984) (where doctor urged claimant to return to work, which made him believe he would get no further treatment, it was tantamount to refusal of treatment).[12]

As in those cases, Dr. Steiner advised the Claimant that he was at maximum medical improvement, no longer needed any treatment, and could return to full-duty work without restrictions, R 34, 35; RD 87, 88 (work status reports from 8/20/15 and 7/20/15), even though the Claimant informed him that he had

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reiterated his opinion that he could return to work, and repeated that he had no recommendations for further treatment. R 39; RD 87 (8/20/15 work status report).

[12] These cases address refusal of treatment by an employer's physician. But as the district director found, Dr. Steiner *was* the Employer's physician. RE 20, 25. Indeed, there is no dispute that the Employer referred Scott to Dr. Steiner. Moreover, Scott indicated that he signed the form naming Dr. Steiner as his chosen physician only because the Employer said it would not approve the treatment unless he signed the form, RE 19, and the form itself identified Dr. Steiner as the "Employer's Doctor." R 151. The fact that Steiner later became Scott's physician through acquiescence does not change the fact that he was also the Employer's physician.

difficulty with prolonged standing, walking, or driving, RD 27 (7/7/15 medical report), and did not feel capable of returning to work given his injury, R 35. Indeed, the Employer flatly acknowledged that Dr. Steiner told the Claimant that he "had nothing further to offer" him, that "no further accident-related medical treatment was warranted, and the only thing left was for a final follow-up in one month." RE 20 (district director's order), citing R 135 (employer's request for reconsideration). The district director's determination that Dr. Steiner's statements were equivalent to a refusal to provide further treatment to the Claimant, therefore, is an entirely reasonable exercise of his discretion. And the Employer does not even attempt to argue that a refusal of further treatment is an insufficient basis for the district director's conclusion that a change in physicians was "desirable or necessary" as required by 33 U.S.C. § 907(b). The district director's order should therefore be affirmed.

B. The employer's argument that the district director should have applied section 7(c)(2)'s "good cause" standard instead of section 7(b)'s "desirable or necessary" standard is irrelevant and incorrect.

The Employer, echoing the dissenting Board member, argues that the district director should not have applied section 7(b)'s "desirable or necessary in the interest of the employee" standard. In its view, the proper standard is found in section 7(c)(2), which allows district directors to consent to a change of physician

requested by the employee "upon a showing of good cause for change." 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406 (same).[13] This argument is both irrelevant and incorrect.

The most immediate problem with the Employer's argument is that the district director's quotation of section 7(b)'s "desirable or necessary" standard rather than section 7(c)(2)'s "good cause" standard played no role in the outcome of this case. Tellingly, the Employer makes no argument, and provides no authority, to support the proposition that applying the "good cause" standard would have changed the result below. It would not have.

Dr. Steiner refused to further treat the Claimant. When a claimant is refused treatment, the district director's decision to order a change of physician must be

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[13] In full, 33 U.S.C. § 907(c)(2) provides:

> Whenever the employer or carrier acquires knowledge of the employee's injury, through written notice or otherwise as prescribed by the chapter, the employer or carrier shall forthwith authorize medical treatment and care from a physician selected by an employee pursuant to subsection (b). An employee may not select a physician who is on the list required by paragraph (1) of this subsection. An employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent for such change. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

upheld under either standard. Under any reasonable definition of "good cause" to change physicians, an ailing claimant has such cause when his treating doctor states that he has no further treatment to offer him.[14] And changing physicians under such circumstances is certainly "desirable in the interest of the employee" under the section 7(b) standard.

[14] Neither section 7(c)(2) nor its implementing regulations define "good cause." Its general definition is "A legally sufficient reason. . . . to show why a request should be granted or an action excused." Black's Law Dictionary (10th ed. 2014). Courts interpreting the term in other contexts in which it is undefined by statute or regulation have warned against attempting to fashion "a rigid or all-encompassing definition of good cause." *Winters v. Teledyne Movible Offshore, Inc.*, 776 F.2d 1304, 1306 (5th Cir. 1985) (interpreting Fed. R. Civ. Proc. 4(j); and suggested that "good cause" should be determined on a case-by-case basis, *Berlin v. Dept. of Labor*, 772 F.3d 890, 894-95 (Fed. Cir. 2014) (addressing the Merit System Protection Board's finding that there was "good cause" to furlough administrative law judges). For example, this Court has recognized that test for whether a claimant has shown "good cause" to allow an untimely claim under Texas's workers' compensation statute is "is that of ordinary prudence, that is, whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances." *Nat'l Auto. & Cas. Ins. Co. v. Shawver*, 222 F.2d 764, 766-67 (5th Cir. 1955) (quoting *Hawkins v. Safety Cas. Co.*, 207 S.W.2d 370, 372 (1948)); *see also U.S. v. Albright*, 115 F.Supp.2d 1271, 1275 (D. Kan. 2000) (noting that courts interpreting Fed. R. Crim. Proc. 32(b)(6)(D), which allows a new objection to be raised for good cause shown at any time before sentencing, "have fashioned definitions of 'good case' that refer to a substantial, good faith reason"). There is no need for this Court to craft a comprehensive definition of "good cause" for purposes of section 7(c)(2) because the Employer has not proposed any definition of the term that would render the district director's actions below an abuse of discretion.

The Board majority held as much, noting that the district director's statement that the Claimant was entitled to seek a new physician when Dr. Steiner refused further treatment "could be interpreted as either 'good cause' under Section 7(c)(2) or 'desirable and necessary' under Section 7(b)." RE 7 n.3. The dissent suggested that the case be remanded for express application of the good cause standard, but offered no explanation of what that standard requires or why it had not been met here, and did not argue that the outcome of the case would be different if it were applied.[15] Under these circumstances, where the Board majority effectively found that the district director's findings would meet either standard, remand for the district director to expressly make the same finding would be futile. Even if the district director erred by applying section 7(b) rather than section 7(c)(2), that error was harmless. Accordingly, it is not a sufficient basis to overturn the decisions below. *See, e.g., NLRB v. Wyman-Gordon Co*., 394 U.S. 759, 766 n. 6 (1969) (Explaining that "remand would be an idle and useless formality" where the substance of the agency's decision is "not seriously contestable.").

[15] As noted above, *supra* at 11 and n.7, the Board has expressly addressed the "good cause" standard in only two cases, both of which involve the claimant's doctor retiring or leaving private practice and, consequently, shed little light on the application of the standard to the facts of this case.

In any event, the district director did not err by invoking section 7(b) below. The Employer simply assumes that section 7(c)(2) implicitly voids the district director's authority under section 7(b) to, "on his own initiative . . . order a change of physicians or hospitals when in his judgment such change is desirable or necessary in the interest of the employee" in any case where the employee requests such a change. But the employer cites no authority supporting this assumption, and nothing in the statutory or regulatory text commands such a result.

The most straightforward reading of sections 7(b) and 7(c)(2) in tandem is that district directors can order a change of physicians: (1) in any situation where the district director believes that the change is desirable or necessary in the interest of the employee; or (2) if the claimant requests the change and demonstrates good cause. The dissenting Board member rejected this reading of the text because he believed that it renders section 7(c)(2) meaningless. RE 10 n.7. He would accordingly limit section 7(b) to situations where the district director ordered a change in physician *sua sponte* or at the employer's request, and require the application of only section 7(c)(2) if the claimant requests the change.

This distinction makes a difference only if one presumes, as the dissenter apparently did, that "good cause" is a stricter standard than "desirable or necessary." But there is no authority supporting this view. Indeed, the two

sections can easily be read as distinct but complimentary sources of authority to order a change of physician. Section 7(b) gives a district director the general power to order a change of physicians in any situation – including one in which the claimant requests it – if he believes a change is desirable or necessary in the interest of the employee[.]" Section 7(c)(2) expands that power to include situations where the claimant demonstrates good cause for the change, even if the district director does *not* believe that the change is desirable or necessary. This reading solves the dissenting Board member's conundrum, as section 7(c)(2) is not rendered meaningless. RE 10 n.7. It also goes a long way toward explaining the lack of precedent on section 7(c)(2): in most circumstances, claimants request changes that district directors recognize as in the claimant's interest, and the district directors thus simply apply section 7(b).

Moreover, the dissenter's approach produces absurd results. On his reading of the statute, section 7(b)'s allegedly laxer "desirable or necessary" standard governs changes in physician up to the point where the claimant requests such a change. After that point, however, a change is possible only if the supposedly stricter "good cause" standard is satisfied. This necessarily entails that there will be situations where the district director has the authority to order a change in the claimant's physician *unless* the claimant asks for that change. It is difficult to

imagine the rationale for such a rule. Section 7 should not be construed to compel such an illogical outcome. *See, e.g., U.S. v. Mathena*, 23 F.3d 87, 93 (5th Cir. 1994) (construing statute to avoid an "absurd result").

In sum, the district director reasonably directed a change of Scott's treating physician, and – because an employer is liable for all reasonable treatment necessitated by a work-related injury, 33 U.S.C. § 907(a) – the Board properly ordered the Employer to pay for treatment provided by Dr. Bostick's after the district director authorized the change. *See* 20 C.F.R. § 702.402; *Schoen v. United States Chamber of Commerce*, 30 Ben. Rev. Bd. Serv. 112 (1996). Because the district director's decision to order a change of physicians must be upheld under either section 7(b)'s "desirable or necessary" standard or section 7(c)(2)'s "good cause" standard, there is no need for this Court to address whether section 7(b) applies to cases where the claimant has requested a change in physician. If the Court chooses to address that issue, it should hold that section 7(b) applies to such cases.

II. THE DISTRICT DIRECTOR DID NOT ABUSE HIS DISCRETION BY ORDERING AN INDEPENDENT MEDICAL EXAMINATION BECAUSE THERE WAS A MEDICAL QUESTION REGARDING THE CLAIMANT'S NEED FOR ADDITIONAL TREATMENT.

The district director also acted within his discretion in directing the Claimant to undergo an independent medical examination ("IME") with Dr. Murphy, and in

ordering the Employer to reimburse the Office of Workers' Compensation Programs for the cost of the IME. Section 7(e) of the Act states, in pertinent part:

> *In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician* employed or selected by the Secretary and to obtain from such physician a report containing his estimate of the employee's physical impairment and such other information as may be appropriate. . . . *The Secretary shall have the power in his discretion to charge the cost of examination or review under this subsection to the employer*, if he is a self-insurer, or to the insurance company which is carrying the risk, in appropriate cases.

33 U.S.C. § 907(e) (emphasis added).

The regulation addressing IMEs further provides:

> In any case in which medical questions arise with respect to the appropriate diagnosis, . . . *appropriate treatment, and the duration of any such care or treatment*, for an injury covered by the Act, the Director, OWCP, *through the district directors* having jurisdiction, *shall have the power to evaluate such questions by appointing one or more especially qualified physicians to examine the employee* . . . . The physician or physicians, including appropriate consultants, should report their findings with respect to the questions raised as expeditiously as possible. Upon receipt of such report, action appropriate therewith shall be taken.

20 C.F.R. § 702.408 (emphasis added); *see generally Shell v. Teledyne Movible Offshore, Inc.*, 14 Ben. Rev. Bd. Serv. 585, 587-89 (1981). *See also* 20 C.F.R. § 702.412(a) (cost of IME may be charged to employer).

Thus, the statute and regulations allow the district director to order an IME if a "medical question" arises with respect to the diagnosis or treatment of a claimant.

That is exactly what happened here. As the district director noted, there was "clear disagreement [between Dr. Steiner and Dr. Bostick] as to whether or not the claimant needs additional treatment," and whether he was able to return to work given his medical status. RE 21, 25. In July and August of 2015, Dr. Steiner examined Scott and opined that the Claimant was at maximum medical improvement, required no additional treatment, and should return to work without any restrictions. RE 20; R 34-35, 39-40; RD 87, 88 (work status reports from 7/20/15 and 8/20/15). By contrast, Dr. Bostick, who also examined the Claimant in August 2015, recommended continued physical therapy, the use of a crutch, additional medication, and no return to work. R 37. Based on this evidence, the district director reasonably found that a medical question existed regarding the appropriate treatment and duration of that treatment for the Claimant's work-related injury.

The Employer argues an IME may be ordered only if there is a medical "dispute" between a physician selected by a claimant and one selected by an employer. And because the Claimant chose Dr. Bostick, and acquiesced to Dr. Steiner, the Employer argues that there is no dispute between opposing-side physicians here. But as the Board noted, the plain language of the statute and regulations make clear that no "dispute" is required to justify an IME, much less a

dispute between doctors hired by opposing sides. And the Employer offers no authority that would support requiring such a dispute. Rather, an IME requires only that there be "medical questions" raised in a case. 33 U.S.C. § 907(e); 20 C.F.R. § 702.408. Because there were medical questions here – what if any further treatment the Claimant needed, and whether he could return to work – the district director acted within his discretion in ordering an IME. *See Augillard*, 31 Ben. Rev. Bd. Serv. at 62, 64 (where neurological examination was within normal range, but claimant remained symptomatic with pain and numbness, and surgery had not been ruled out, medical questions justifying an IME existed with regard to claimant's diagnosis and appropriate treatment).

The district director's order requiring the Employer to bear the costs of the IME should also be affirmed. Both the relevant statute and regulation give district directors the discretion to charge the costs of an IME to an employer. 33 U.S.C. § 907(e); 20 C.F.R. § 702.412(a). The Employer does not specifically object to the district director's decision to exercise that authority here aside from its general argument that the IME itself was not justified. Pet. Brf 31-33. Therefore, if the Court upholds the district director's decision to order the IME, it should also uphold his decision to charge the cost of that IME to the employer.

CONCLUSION

Because the district director acted within his discretion in ordering a change of Scott's physician, requiring an independent medical examination with costs charged to the Employer, the Court should affirm the decisions below.

Respectfully submitted,

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COMBINED CERTIFICATES OF COMPLIANCE

I certify that:

1. Pursuant to Fed. R. App. Proc. 32(a)(5), (6) and (7)(B) and (C), this brief has been prepared using Microsoft Word, fourteen-point proportionally spaced typeface (Times New Roman), and that, exclusive of the certificates of compliance and service, the brief contains 6,624 words;

2. Pursuant to Fifth Circuit Rule 25.2.1, the text of the electronic brief filed with the Court is identical to the text in the paper copies; and

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