BRB No. 04-0808

CHRISTOPHER C. LYNCH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: July 13, 2005
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2002-LHC-0230) of Administrative Law Judge Richard K. Malamphy rendered 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).

Claimant injured his back on March 11, 1994, during the course of his employment for employer. In a prior proceeding, the parties stipulated that claimant was entitled to compensation from March 14, 1994, for various periods of temporary total disability, temporary partial disability, permanent partial disability, and permanent total disability, and to continuing compensation for permanent total disability from May 6, 1997. The administrative law judge awarded employer Section 8(f) relief, 33 U.S.C. §908(f).

In 2002, claimant's treating orthopedist, Dr. Molligan, closed his private practice and became affiliated with Sentara Norfolk General Hospital. CX 1. Claimant chose his family physician, Dr. Franklin, as his new treating physician. Employer responded that claimant should see an orthopedic specialist. Tr. at 15. Claimant therefore chose Dr. Stiles, an orthopedic surgeon, who had treated claimant in the 1980s for a non work-related knee injury Tr. at 16, 21-22. Employer objected on the basis that claimant should seek treatment by a spine specialist. Claimant requested an informal conference to address his choice of Dr. Stiles. CX 4. In a letter dated November 12, 2002, employer informed the district director that Dr. Molligan is a spine specialist, and that it would agree to claimant's treating with either Dr. Byrd or Dr. Thomas, spine specialists who formerly practiced with Dr. Molligan.

A Memorandum of Informal Conference was issued on December 20, 2002, in which a claims examiner for the Office of Workers' Compensation Programs, denied claimant's choice of Dr. Stiles. EX 1. In her memorandum, the claims examiner stated that Dr. Stiles does not specialize in the treatment of backs and agreed with employer that claimant should treat with a spine specialist. The claims examiner further stated that she researched the issue and located a "neutral" spine specialist, Dr. Carlson, and she directed employer to schedule an appointment for claimant with Dr. Carlson. Dr. Carlson examined claimant on January 9, 2003. EX 4. He diagnosed non-radicular lower back pain, and he noted that an x-ray examination revealed significant arthrosis throughout the lumbar spine. Dr. Carlson recommended that claimant seek treatment from a pain management doctor and follow-up with him as needed. Claimant received treatment on April 16, 2003, from Dr. Dahl for his pain. EX 5; Tr. at 17-18.

Claimant requested referral of his claim to the Office of Administrative Law Judges (OALJ) to address the claims examiner's memorandum directing claimant to seek treatment from Dr. Carlson and refusal to authorize Dr. Stiles as his treating physician. Employer filed a motion for summary decision on the ground that the administrative law judge lacked jurisdiction to address this issue, as the choice of physician issue is solely within the discretion of the district director. Claimant opposed the motion. The administrative law judge denied the motion; in his Order Denying the Employer's Motion for Summary Decision, the administrative law judge stated that, "if claimant's counsel still wishes for Dr. Stiles to be the treating physician, it would be helpful if counsel

presented a concise description of Dr. Stiles' practice regarding treatment of the spine." Order at 4.

A formal hearing was subsequently held on November 20, 2003. In his Decision and Order, the administrative law judge initially found that he has jurisdiction to resolve the issue of claimant's choice of a treating physician because there is a factual dispute as to Dr. Stiles' qualifications to treat claimant's back condition. Decision and Order at 3, 6. Claimant submitted into evidence Dr. Stiles' curriculum vitae (CV), which shows that he is a Board-certified orthopedic surgeon and has been licensed to practice in Virginia since 1963. CX 2. The administrative law judge noted that claimant's counsel was to provide additional details addressing the nature of Dr. Stiles' practice and that no such documentation was submitted. Decision and Order at 6; *see* Tr. at 6. The administrative law judge declined to take judicial notice of Dr. Stiles' specialization based on his familiarity with Dr. Stiles from prior cases. Instead, the administrative law judge reasoned that claimant's counsel had appeared before him in several hundred cases arising under the Act, and the administrative law judge accepted counsel's "testimony" at the hearing that Dr. Stiles treats spinal impairments. Decision and Order at 6. The administrative law judge concluded that claimant is entitled to his choice of a physician who treats spinal disorders, and that Dr. Stiles meets this criterion. The administrative law judge therefore designated Dr. Stiles as claimant's treating physician. *Id*.

On appeal, employer challenges the administrative law judge's designation of Dr. Stiles as claimant's treating physician. Claimant responds, urging affirmance.

Employer argues that the plain language of Section 7(b) permits only the district director to grant a change in physicians, and that this is a discretionary act which is directly reviewable by the Board; therefore, employer contends the administrative law judge did not possess the authority to review the claims examiner's memorandum and to address the issue of claimant's treating physician.

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

> The employee shall have the right to choose an attending physician. . . . 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 [her] own initiative or at the request of the employer, order a change of physicians or hospitals when in [her] judgment such change is desirable or necessary in the interest of the employee. . . .

33 U.S.C. §907(b). The Board has held that, in view of the 1972 Amendments transferring adjudicative functions to the administrative law judge, the statutory references to the "Secretary" are considered references to the district director, whereas statutory references to the "deputy commissioner" may refer to the administrative law judge or district director.[1] 33 U.S.C. §919(d); *Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989); *Ogundele v. American Security & Trust Bank*, 15 BRBS 96 (1980). Thus, the authority vested by Section 7(b) to supervise medical care rests with the delegate of the Secretary, the district director.

The regulations implementing Section 7(b) provide:

> (a) Whenever the employee has made his initial, free choice of an attending physician, he may not thereafter change physicians without the prior written consent of the employer (or carrier) or the district director. 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.
>
> (b) The district director . . . may order a change of physicians or hospitals when such a change is found to be necessary or desirable. . . .

20 C.F.R. §702.406(a), (b). Section 702.407 authorizes the Director, through the district directors and their designees," to actively supervise the medical care of injured employees. In pertinent part, it states:

[1]Pursuant to 20 C.F.R. §701.301(a)(7), the term "district director" was substituted for the term "deputy commissioner" used in the statute when referring to the official in charge of the initial administrative level under the Act.

> Such supervision shall include:
>
> * * *
>
> (b) The determination of the necessity, character and sufficiency of any medical care furnished or to be furnished the employee. . . .
>
> (c) The determination of whether a change of physicians, hospitals or other persons or locales providing treatment should be made or is necessary. . . .
>
> (d) The further evaluation of medical questions in any case under the Act, with respect to the nature and extent of the covered injury, and the medical care required therefor.

20 C.F.R. §702.407(b), (c), (d). Thus, employer argues that the plain language of the Act and the regulations grant sole authority to change a claimant's physician to the district director. *See also Roulst v. Marco Construction Co.*, 15 BRBS 443 (1983).[2] Specifically, the Act provides that a change may be made at the discretion of the district director or at the request of an employer if such change is necessary or desirable in the interest of the employee. 33 U.S.C. §907(b).

Employer first contends that, as claimant was seeking to change his treating physician from Dr. Molligan, claimant was required to obtain approval from employer or the district director in order to treat with Dr. Stiles, pursuant to Section 702.406.[3] We disagree. In this case, claimant was not seeking to change his treating physician but to select a new one after Dr. Molligan became unavailable due to his leaving private practice. Claimant therefore had "good cause" for requiring a new physician. *See* 20 C.F.R. §702.406(a) Under these circumstances, claimant was not required to obtain the consent of employer or the district director to a change of physician from Dr. Molligan. *See Maguire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299 (1992). This holding is consistent with the plain language of Section 7(b): "The employee shall have the right to

[2]In *Roulst*, the Board vacated a compensation order as it was not entered pursuant to the parties' agreement, but declined to disturb that part of the district director's order which directed the claimant to obtain future medical treatment from a Board-certified orthopedic surgeon. The Board stated that the district director was authorized to order a change of physician under Section 7(b), and moreover, neither party challenged this portion of the Order. *Roulst*, 15 BRBS at 447.

[3]There is no dispute that claimant sought authorization to treat with Dr. Stiles, which employer refused. Therefore, the statutory requirement that claimant request authorization from employer is not at issue in this case. *See* 33 U.S.C. §907(d).

choose an attending physician authorized by the Secretary." However, the statute also provides the district director with the authority to supervise claimant's choice: "The Secretary shall . . . have the authority to determine the necessity, character, and sufficiency or any medical care furnished or to be furnished, and may . . . order a change of physician or hospitals when in [her] judgment such change is desirable or necessary in the interest of the employee. . . ." 33 U.S.C. §907(b); *see also* 20 C.F.R. §§702.403, 703.407(b), (c). Therefore, notwithstanding that claimant had a right to choose a new attending physician, the district director had the authority under Section 702.406(b) and Section 702.407(b), (c), to address employer's objection to Dr. Stiles' qualifications to treat claimant's back condition and to order a change in the treating physician.

We next address employer's contention that the administrative law judge did not possess the authority to review the claims examiner's determination that Dr. Stiles was not appropriate because he is not a spine specialist. As discussed, active supervision of a claimant's medical care is performed by the Secretary of Labor and her delegates, the district directors. There are, however, issues with regard to medical benefits which remain in the domain of the administrative law judge. Disputes over whether authorization for treatment was requested by the claimant, whether the employer refused the request for treatment, whether the treatment obtained was reasonable and necessary, or whether a physician's report was filed in a timely manner, are all factual matters within the administrative law judge's authority to resolve. *See Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002); *Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997) (Brown, J., concurring); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Consequently, despite the authority the district director has over certain medical matters,[4] the Board has declined to interpret the provisions of Section 7(b) of the Act, or Section 702.407 of the regulations, in such a manner as to exclude the administrative law judge's jurisdiction over questions of fact. *Weikert*, 36 BRBS at 40; *Sanders*, 31 BRBS at 21; *see also Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000).

In this case, the claims examiner issued a memorandum in which she determined that Dr. Stiles does not specialize in the treatment of backs.[5] There is no basis in the

[4]For example, only the district director may excuse a doctor's failure to file a timely first report of treatment if it is in the interest of justice to do so. 33 U.S.C. §907(d)(2); *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting).

[5]Contrary to employer's contention, claimant could not have appealed the claimant's examiner's recommendation to the Board, as the district director did not issue an Order embodying the recommendation.

record for this finding. Claimant disagreed with this finding and requested referral of the case to the OALJ. As there is a disputed issue of fact, *i.e.*, Dr. Stiles' qualifications to treat claimant's work injury and specifically whether Dr. Stiles specializes in spinal injuries, we hold that the administrative law judge had the statutory authority to address the reasonableness of claimant's choice of Dr. Stiles as his treating physician. *Weikert*, 36 BRBS at 40; *Sanders*, 31 BRBS at 21.

Finally, we address the administrative law judge's designation of Dr. Stiles as claimant's treating physician for his work-related back injury. The administrative law judge properly found that claimant is entitled to his choice of physician who treats spinal impairments. The administrative law judge concluded that Dr. Stiles meets this criterion. In this regard, the administrative law judge credited, "[claimant's counsel's] testimony at the hearing to the effect that Dr. Stiles does provide treatment for spinal impairments." Decision and Order at 6. Claimant's counsel, however, was not a witness at the hearing. His statements therein, or statements in briefs to the administrative law judge, are not part of the evidentiary record. The administrative law judge's decision must be based on the evidence of record. *See Williams v. Hunt Shipyards Geosource, Inc.*, 17 BRBS 32 (1985); 5 U.S.C. §556(d), (e). Moreover, contrary to the administrative law judge's finding, there is no statement by claimant's counsel in the hearing transcript that Dr. Stiles treats spinal impairments.[6] Accordingly, we vacate the administrative law judge's designation of Dr. Stiles as claimant's treating physician, as his finding that Dr. Stiles provides treatment for spinal impairments is not supported by substantial evidence of record. *McCrackin v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002).

In his Order denying employer's motion for summary decision, the administrative law judge stated that submission by claimant's counsel of a concise description of Dr. Stiles practice regarding treatment of the spine would be helpful. Order at 4. Claimant submitted into evidence only Dr. Stiles' CV. CX 2. Claimant's counsel stated at the hearing that he had asked Dr. Stiles to send him a description of his practice, which he had yet to receive. The administrative law judge granted claimant's counsel's request that the record be left open to receive Dr. Stiles' response. Tr. at 6. In claimant's brief to the administrative law judge, claimant's counsel stated that further information from Dr. Stiles is unavailable. Claimant's Brief at 4. Inasmuch as claimant was provided ample opportunity by the administrative law judge to present specific evidence of Dr. Stiles' qualifications to treat back injuries, we will not remand this case to the administrative law

[6]In claimant's response to employer's motion for summary judgment, claimant's counsel states that Dr. Stiles: "has treated legions of back injuries over the course of his lengthy career, including no doubt many hundreds of (employer's) employees with work related back injuries. . . ." Claimant's Response to employer's Motion for Summary Decision at 3.

judge for further findings of fact. We instead remand this case to the district director. On remand, the district director should issue an order addressing and resolving the parties' contentions regarding claimant's choice of Dr. Stiles as his treating physician. The district director's order should "determine the necessity, character, and sufficiency" of any medical treatment to be provided by Dr. Stiles, and determine whether treatment by another physician "is desirable or necessary in the interest of the employee." 33 U.S.C. §907(b); *Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring).

Accordingly, the administrative law judge's Decision and Order designating Dr. Stiles as claimant's treating physician is vacated. The case is remanded to the district director for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge