BRB No. 01-0912

DUSAN JUKIC	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AMERICAN STEVEDORING, INCORPORATED	)	DATE ISSUED: August 23, 2002
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Christopher J. Field (Field, Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-LHCA-2297) of Administrative Law Judge Ralph A. Romano 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 if they 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, while working for employer as a holdman on January 15, 1999, sustained an injury to his right foot. Dr. Sasson initially diagnosed a severe right foot sprain, prescribed medication, removed claimant from work and instructed him to wear a pro-walker cast brace. On February 16, 1999, claimant was evaluated by an orthopedic specialist, Dr. Nelson, who diagnosed a resolved right ankle sprain, and opined that claimant could return to longshore work, wearing a high top shoe and protective boot. Dr. Sasson, on March 8, 1999, found that claimant exhibited no sign of swelling or instability in his right foot, and thus opined that he could attempt a return to work. An MRI performed on June 21, 1999, revealed no fractures of any kind or any tears of the visualized ligaments or tendons of claimant's right foot. Following an examination of claimant's right foot and an EMG on August 21, 2000, Dr. Sasson diagnosed tarsal tunnel syndrome which he stated was traumatic in origin and resulted from the work injury sustained in January 1999.

Meanwhile, claimant attempted a return to work on March 11, 1999, but only worked for a half of a day due to alleged right ankle pain. Claimant later returned to work for employer on June 23, 1999. Employer voluntarily paid temporary total disability benefits from January 16, 1999, through February 19, 1999, as well as all related medical benefits during that time. Claimant thereafter sought temporary total disability benefits for the period from February 20, 1999, until his return to work on June 27, 1999.

In his decision, the administrative law judge determined that claimant has not demonstrated that his work-related injury prevented him from returning to his regular and usual employment as of February 17, 1999. In addition, the administrative law judge found that employer fulfilled its responsibilities under Section 7(a) of the Act, 33 U.S.C. §907(a), as it voluntarily paid medical benefits from January 15, 1999, through February 19, 1999. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance.

Claimant first argues that the administrative law judge erred by denying medical benefits, contending that the issue was not before him for resolution. Additionally, claimant argues that the administrative law judge erroneously denied medical benefits subsequent to the date of Dr. Nelson's report, *i.e.*, February 19, 1999, as the record establishes that claimant was in need of continued treatment for his work-related injuries.

After a review of the record in this case, we cannot ascertain to what extent the issue

of medical benefits was before the administrative law judge.[1] Nevertheless, we shall review

[1]In particular, it is not entirely clear from the transcript whether the issue of claimant's entitlement to medical benefits for the period between February 19, 1999, and June 23, 1999, was before the administrative law judge. Claimant's counsel specifically asked at the hearing for the administrative law judge to make a ruling on the need for further medical treatment, which prompted an objection by employer, and following a discussion by the parties, the consequent statement by claimant's counsel that he would "consent to develop the record on the issue of degree of disability up until the date of the claimant's return to work and to remand to the district director concerning the need for further treatment and permanency." Hearing Transcript (HT) at 22. However, as part of the discussion, employer stated that "if you're talking about medical [benefits] between the point that [employer] cut him off and when the claimant returned to work, that's fine." HT at 20-21. Based on this, the administrative law judge queried claimant's counsel as to whether he was "seeking medical [benefits] beyond a return to work," to which counsel responded "no." HT at 21. The parties' closing statements are similarly cloudy. In his closing argument, claimant states that he "withdrew the issue of permanency and need for further medical treatment," Closing Statement on Behalf of Claimant at 1, 10, which seemingly cuts in favor of finding that the

the administrative law judge's denial of medical benefits other than those for the period between January 15, 1999, and February 19, 1999. In considering claimant's entitlement to medical benefits, the administrative law judge stated only that "I find that the employer has fulfilled the responsibilities of Section 7(a) of the Act, as the employer paid medical benefits from January 15, 1999, through February 19, 1999." Decision and Order at 3. The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). An administrative law judge must independently analyze and discuss the evidence, and must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985).

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issue of medical benefits beyond February 19, 1999, was not before the administrative law judge. However, employer's closing argument states that "claimant withdrew from dispute the issue of whether medical treatment was necessary or warranted *after June 26, 1999*." Employer's Closing Argument at 3, n. 1 [emphasis added]. The parties however are apparently in agreement that medical benefits for the post-June 26, 1999, period are not presently before the administrative law judge for resolution in this case.

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment . . . medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." *See Ballesteros,* 20 BRBS 184. In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. *See Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996); 20 C.F.R. §702.402. Section 7 does not require that an injury be economically disabling in order for claimant to be entitled to medical expenses, but only that the injury be work-related. *See Ingalls Shipbuilding, Inc. v. Director, OWC*P, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Ballesteros,* 20 BRBS 184; *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984).

The administrative law judge's finding regarding claimant's entitlement to medical benefits in this case does not comport with the requirements of the APA, as he did not discuss any medical evidence or provide a rationale for the denial of additional medical benefits and thus his decision can not be affirmed. The reports of Dr. Sasson indicate that claimant continued to need treatment for his right ankle injury at least up until the time of the doctor's examination on May 14, 1999, and perhaps even beyond that until the June 21, 1999, MRI, which revealed no fractures of any kind nor any tears of the visualized ligaments or tendons and thus, objectively showed that claimant's right ankle injury had completely resolved. CX 2. This opinion is, to some extent, supported by the opinion of Dr. Nelson, who, on February 16, 1999, advised claimant to follow-up with his own orthopedist. EX 5. Consequently, we must vacate the administrative law judge's denial of medical benefits and remand for further consideration of this issue. On remand, the administrative law judge, in conjunction with the parties must delineate the time period for which medical benefits are being sought. The administrative law judge must then fully consider the relevant evidence of record to determine claimant's entitlement to medical benefits pursuant to the appropriate standard.

Claimant next argues that the administrative law judge's finding that claimant is not entitled to total disability benefits for the period he remained out of work, *i.e*., February 19, 1999, through June 23, 1999, violates the APA, as he failed to sufficiently discuss all of the relevant medical evidence of record.[2] In particular, claimant argues that the administrative law judge did not discuss reports submitted by Drs. Pearl and McGee which show that claimant was not able to work and therefore disabled during the time in question. Claimant

[2]Contrary to claimant's assertion, the administrative law judge did not consider, let alone, deny a claim for permanent partial disability benefits. Following a review of the record, it is clear that the issues of permanency as to claimant's right ankle injury and any resulting scheduled award were not before the administrative law judge. *See, e.g.,* Hearing Transcript (HT) at 22.

also argues that the administrative law judge erred by crediting Dr. Nelson's opinion regarding claimant's ability to perform his usual work over the contrary opinion of his treating physician, Dr. Sasson.

The instant case presents two injuries for consideration by the administrative law judge, which allegedly occurred as a result of the January 15, 1999, work accident. The first, as indicated by Drs. Sasson, Nelson, Pearl and McGee, was a right ankle sprain. With regard to this injury, Dr. Sasson initially diagnosed, on January 15, 1999, that claimant sustained a severe right ankle sprain. In progress notes dated March 8, 1999, Dr. Sasson, upon acknowledging Dr. Nelson's opinion that claimant could return to work, opined that claimant "may attempt resuming work." CX 2. In a follow-up, dated May 14, 1999, Dr. Sasson noted that claimant "had attempted returning to work." *Id.* However, in this progress note, and a subsequent one dated June 18, 1999, Dr. Sasson did not explicitly comment on claimant's ability to perform his usual work as a result of this injury. He did, however, note that "there is no evidence of any swelling or instability." *Id.* In addition, Dr. Sasson admitted, in his deposition testimony, that he thought claimant was working at the time of his May examination and further stated that during that examination he did not see any reason why claimant could not work if he was already working. CX 5, Deposition at 26. On February 16, 1999, Dr. Nelson acknowledged that claimant sustained a right ankle sprain, but opined that claimant was capable of returning to work as a longshoreman. EX 5. His opinion, however, was contingent upon claimant's "wearing a high top shoe and protective boot," and he also noted that claimant should follow up with his orthopedist. *Id.* The record also contains two reports, dated March 15, 1999, and May 4, 1999, by Dr. Sasson's partner, Dr. Pearl, noting a right ankle sprain due to the January 15, 1999, work injury and stating that claimant is not working and that he is disabled from his regular duties or work,[3] CX 2, and a report by Dr. McGee, dated March 11, 1999, wherein he opined that claimant should put a "hold on return to work duty at this time, until his symptoms" abate. CX 3.

[3]The reports, entitled "Attending Doctor's Report and Carrier/Employer Billing Form," and presumably filed with the State of New York's Workers' Compensation Board, are signed by Dr. Pearl. The documents contain diagnoses, as a result of the January 15, 1999, accident of an ankle sprain and achilles tendonitis/bursitis, and the following questions/responses: "Is patient working? NO; Is patient disabled from regular work duties or work? YES." CX 2.

Despite the administrative law judge's statement that he "fully considered the various medical reports which have been submitted into evidence," Decision and Order at 5, there is no explicit discussion of the notes of Drs. Pearl and McGee, which contradict Dr. Nelson's opinion that claimant was capable of returning to longshore employment as of February 17, 1999. Moreover, the administrative law judge did not discuss the contingency placed upon claimant's return to work by Dr. Nelson, *i.e.*, that he wear a high-top shoe, or claimant's testimony that he was unable to continue with his usual work. Thus, the administrative law judge's decision violates the APA. 5 U.S.C. §557(c)(3)(A). Accordingly, we vacate the administrative law judge's finding that as a result of his right ankle sprain, claimant was capable of returning to his usual employment as of February 17, 1999, and therefore not entitled to total disability benefits from that date until his return to work on June 27, 1999. On remand, the administrative law judge must, with regard to the right ankle injury, fully consider all of the relevant evidence of record, including the opinions of Drs. Pearl and McGee and claimant's testimony regarding his inability to work between February 19, 1999, and June 23, 1999, to determine whether claimant is capable of performing his usual employment and thus whether he has established a *prima facie* case of total disability for the pertinent time period.[4] In addition, the administrative law judge must consider the

[4]We observe, however, that the administrative law judge acted within his discretion in according diminished weight to the opinion of Dr. Sasson, since the record indicates, as the administrative law judge determined, that Dr. Sasson was never truly aware of when claimant

relevance, if any, of claimant's attempts to return to work on March 11, 1999, and June 23, 1999.[5]

With regard to the tarsal tunnel syndrome diagnosis, it is undisputed that it is work-related. Specifically, Dr. Sasson is the only physician to discuss the condition which he related to the January 15, 1999, work injury. There is no evidence to contradict this finding. However, the pertinent issue herein is whether claimant was, as a result of his tarsal tunnel syndrome, unable to perform his usual work between February 17, 1999, and June 23, 1999.

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was actually working, CX 5 at 26. *See 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). As such, we reject claimant's contention that Dr. Sasson is entitled to greater weight solely because he is claimant's treating physician, since this fact alone does not overcome the other deficiencies, as observed by the administrative law judge in his decision, in Dr. Sasson's opinion. *Id; see also* Decision and Order at 4-5.

[5]The record establishes that claimant returned to work on June 23, 1999, that he worked six hours that day, and that he then did not return again to regular full-time work until June 27, 1999. Hearing Transcript at 51, 57. Claimant stated that he remained off work between June 23, and June 27, 1999, because he was waiting to see the results of the MRI done on June 21, 1999. *Id.* Claimant contended that he is entitled to temporary total disability benefits up to his return to regular work on June 27, 1999, less the one day he worked on June 23, 1999. In contrast, employer argued that, assuming claimant is adjudged to be totally disabled past February 19, 1999, he would be entitled to benefits only until June 23, 1999, as that is the date that he first returned to his regular and usual employment.

In this regard, the administrative law judge's finding that claimant was capable of returning to his usual work, at least insofar as his tarsal tunnel syndrome is concerned, is affirmed. In his discussion of the relevant evidence, *i.e.*, the deposition testimony of Dr. Sasson, the administrative law judge found that Dr. Sasson did not diagnose claimant's tarsal tunnel syndrome until August 2000, more than a year after claimant's return to regular work for employer. The administrative law judge found that Dr. Sasson failed to explain how claimant's complaints during the pertinent time period, February 19, 1999, until June 23, 1999, were a result of the tarsal tunnel syndrome. The combination of these factors supports the administrative law judge's finding that claimant's tarsal tunnel syndrome did not prevent him from performing his usual work for employer between February 19, 1999, and June 23, 1999. Thus, the conclusion that claimant is not entitled to temporary total disability benefits for the pertinent period based on his tarsal tunnel syndrome is affirmed.

Accordingly, the administrative law judge's denial of medical benefits and temporary total disability benefits based on claimant's work-related right ankle injury are vacated and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge