BRB No. 97-1618

JOSEPH D. NELSON	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
ZAPATA HAYNIE CORPORATION	)	
	)	
and	)	
	)	
HARTFORD ACCIDENT AND INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and the Decision on Motion for Reconsideration of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Timothy D. Crawley and Kaye J. Persons (Hopkins, Crawley, Bagwell, Upshaw & Persons, P.L.L.C.), Gulfport, Mississippi, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and the Decision on Motion for Reconsideration (96-LHC-0285) of Administrative Law Judge David W. DiNardi 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, are rational, and are 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, a net mender, injured his back on October 31, 1988, when he slipped and fell while lifting heavy wooden crates onto a cart. Claimant, who has not returned to work since the date of this work incident, subsequently underwent three surgical procedures and currently suffers from chronic back pain, diabetes, obesity, and psychological problems.

In his Decision and Order, the administrative law judge awarded claimant permanent total disability compensation and held employer liable for certain specific medical treatments and apparatuses.[1] Employer's motion for reconsideration was denied by the administrative law judge.

Employer now appeals, challenging the administrative law judge's award of medical benefits. Employer specifically asserts that the administrative law judge's finding that the treatment plan of Dr. Tracy constitutes reasonable and necessary treatment is not supported by substantial evidence. In addition, employer contends that the administrative law judge erred in holding it liable for housekeeping services, a treadmill and stair climber, and a handicapped vehicle. Claimant responds, urging affirmance.

Section 7, 33 U.S.C. §907, of the Act generally describes an employer's duty to provide medical and related services and costs necessitated by its employee's work-related injury, employer's rights regarding control of those services, and the Secretary's duty to oversee them. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In this regard, Section 7(a) of the Act 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.

[1]The administrative law judge's findings that claimant is entitled to compensation for a total permanent disability and that employer is entitled to relief under Section 8(f), 33 U.S.C. §908(f), as well as his approval of claimant's attorney's fee of $17,500, are not raised on appeal and are hereby affirmed.

33 U.S.C. §907(a); *see Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary and must be related to the injury at hand. *See Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve.[2] *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

In the instant case, employer challenges the administrative law judge's determination that it is liable for certain specific medical treatments and expenses. We will address each of employer's specific contentions individually.

Employer initially challenges the administrative law judge's order holding employer liable for claimant's future counseling with Dr. Tracy. Employer does not dispute its liability for services rendered by Dr. Tracy prior to February 15, 1996, or for claimant's future psychiatric services *per se*, but argues that claimant's continued treatment with Dr. Tracy is not reasonable since Dr. Tracy's credibility is suspect and her authorization was revoked by Dr. Dempsey. For the reasons that follow, we vacate the administrative law judge's award to claimant of ongoing psychiatric counseling with Dr. Tracy and remand the case to the administrative law judge for reconsideration of the evidence regarding this treatment.

Following the work incident which forms the basis of the instant claim, claimant was treated by Dr. Dempsey, a board-certified orthopedic surgeon, for his physical conditions. In 1992, Dr. Dempsey referred claimant to Dr. Tracy, a psychiatrist, in an attempt to address claimant's pain and his increasing dependence on medications. Claimant thereafter had four years of treatment and counseling with Dr. Tracy. On February 26, 1996, Dr. Dempsey wrote to Dr. Tracy, stating his concerns with claimant's continued use of pain medication and the possible role of the medications in his continued depression. In this letter, Dr. Dempsey also stated he wanted claimant to see Dr. Barnes regarding weaning claimant from his medication. CX 9, p.1. Thereafter, Dr. Barnes, a board-certified psychiatrist, examined claimant on two occasions in April 1996 and opined that claimant was depressed, that his problems are related to his injury, and that he required psychiatric treatment. However, he also questioned claimant's prior treatment, concluding that after so much time he should have

[2]In order for treatment costs to be paid by employer, the treatment must also be authorized. 33 U.S.C.§907(d). Where employer refuses authorization, however, treatment procured thereafter need only be reasonable and necessary for employer to be liable. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

stabilized so that his psychiatric visits could be reduced. Dr. Barnes felt that supportive care such as medication checks once a month or every other month would be "more than adequate." RX 20, 21. Employer ceased paying for treatment by Dr. Tracy after February 15, 1996.

In addressing this issue, the administrative law judge, after noting the deposition and formal hearing testimony of Dr. Tracy, found that her psychiatric services were reasonable, necessary and causally related to claimant's work-related condition. In so finding, he implicitly credited the testimony of Dr. Tracy, stating that she testified in detail about the nature of the services provided and the reasons such treatment should continue, and that of claimant, which the administrative law judge stated confirmed the reasonableness and necessity of Dr. Tracy's services. Decision and Order at 18. Accordingly, the administrative law judge found employer liable for the "supportive treatment plan recommended by Dr. Tracy." *Id.* We reject employer's assertions of error regarding the testimony of Dr. Tracy, specifically its contention that Dr. Tracy's testimony regarding the reasonable and necessary nature of her continued course of treatment of claimant lacks credibility based upon employer's characterization of Dr. Tracy's reports as inconsistent and exaggerated. Such credibility determinations are within the purview of the administrative law judge and must be upheld unless inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, the administrative law judge committed no error in relying upon claimant and Dr. Tracy in addressing this issue.

We agree with employer, however, that the administrative law judge did not fully discuss the relevant evidence of record which, if credited, could establish that Dr. Tracy's course of treatment is not reasonable or necessary. Specifically, the administrative law judge, although noting that Dr. Dempsey referred claimant to Dr. Tracy for treatment, did not discuss Dr. Dempsey's later letter to Dr. Tracy regarding the fact that her treatment had not been successful in achieving the purposes for which claimant was referred to her, *i.e.*, the development of pain management techniques and a reduction in his reliance on pain medications. CX 9, p. 1.[3] Additionally, while the administrative law judge correctly stated

[3]In this letter, Dr. Dempsey stated that he wanted claimant to see Dr. Barnes, and that claimant was willing to do so. However, employer's characterization of this letter as "de-authorizing" Dr. Tracy over-states what the letter actually says. In addition, in a later letter to the insurer on March 6, 1996, Dr. Dempsey stated he "would rescind the previous letter that I had written concerning [claimant's] referral for a second opinion. He seems to have confidence in Dr. Tracy. I really cannot comment one way or the other on that and if you see fit to get him to another psychiatrist, then I will be glad to work with anyone that you choose. However, I do not feel confident nor comfortable in handling the psychological or psychiatric

that Dr. Barnes concurred that claimant was in need of continued psychiatric services, he did not discuss Dr. Barnes' conclusions regarding an alternate course of treatment. An administrative law judge's failure to analyze or discuss the relevant evidence of record is a violation of the Administrative Procedure Act, 5 U.S.C. §557. *See, e.g., Shrout v. General Dynamics Corp.*, 27 BRBS 160 (1993)(Brown, J., dissenting on other grounds); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). Accordingly, we vacate the administrative law judge's decision regarding the ongoing treatment rendered to claimant by Dr. Tracy, and we remand the case for the administrative law judge to fully consider all of the evidence regarding this issue.[4]

Employer next challenges the administrative law judge's determination that it is liable for the cost of "domestic services" three times a week; specifically, employer avers that (1) there is no medical testimony supporting such an award as reasonable and necessary for claimant's work-related conditions; (2) the requirement is too vague, failing to describe the nature, extent, cost, or objective of such services; and (3) the request for such services was only raised in a post-hearing brief, thereby denying employer of fair notice in order to adequately address the issue.[5] We agree with employer's assertions and, for the reasons that

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aspects of his disease process." CX 9, p.3.

[4]If, on remand, the administrative law judge finds that Dr. Tracy's treatment is reasonable and necessary, he may reinstate his approval of her treatment plan and award of these services. With regard to the future, employer's remedy is set forth in Section 7, which allows an employer to seek approval of a change of physician from the district director as necessary or desirable in the interest of the employee. 33 U.S.C. §907(b); 20 C.F.R. §702.407(b), (c).

[5]Although the administrative law judge ordered employer to provide domestic services for claimant three days a week, claimant never requested outside help *per*

follow, we reverse the administrative law judge's award of domestic services to claimant.

Initially, we note that employer is correct in stating that claimant did not seek an award of "domestic services" prior to, or even at, the formal hearing; rather, claimant apparently raised this issue for the first time in his post-hearing brief. Thereafter, employer's attempt to address the issue in its Motion for Reconsideration was summarily rejected by the administrative law judge. *See* Decision on Reconsideration at 2. Moreover, a review of the record reflects that there is no medical opinion stating that "domestic services" are reasonable and/or necessary for the treatment or management of claimant's work-related conditions. Although the Board has affirmed an administrative law judge's order to reimburse a claimant's wife for home health care services, *see, e.g., Falcone v. General Dynamics Corp*., 21 BRBS 145 (1988), in those instances, the claimant required nursing care which the spouse was able to provide and which had been ordered by the physicians of record. In the instant case, claimant does not argue that his wife would provide any specialized services, and none of claimant's physicians has found the provision of "domestic services" necessary. The administrative law judge's provision of such services to enhance the quality of life of claimant and his wife does not comport with the requirements of Section 7 that such awards be medically reasonable and necessary for the treatment of claimant's condition. While the issue of whether claimant's entitlement to medical services, including housekeeping assistance, is a factual dispute for the administrative law judge to resolve, in the instant case there is no medical evidence supporting an award for these services. Given the absence of evidence supporting the administrative law judge's award of domestic services as reasonable and necessary, employer may not be assessed liability for their provision under Section 7. Accordingly, the administrative law judge's award of domestic services is reversed.

Employer similarly challenges the administrative law judge's finding that it must provide claimant with a stair climber and a treadmill, stating that claimant has failed to establish that such equipment is reasonable and necessary for his condition. We agree. A review of the record reveals no medical opinion supporting the conclusion that claimant requires either a treadmill or stair climber. Although Dr. Prebil had claimant engage in therapy involving a stair-climber, CX 6 at 24-25, this exercise took place prior to claimant's last surgery and there is no indication in the record that claimant has undergone such therapy since that procedure was performed. Additionally, although Dr. Tracy opined that claimant should exercise at a walking track, CX 10 at 34-35, Dr. Dempsey opined that claimant should not use a treadmill. HT at 40. Thus, contrary to the administrative law judge's finding,

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se to assist in his daily living but rather the payment of his wife for housekeeping services already being rendered. Post-Hearing Brief at 5; Response Brief at 11.

these two specific apparatuses have not been prescribed, ordered, or suggested by any of claimant's physicians subsequent to his third surgery. Accordingly, as the record does not support the administrative law judge's finding that these devices are reasonable and necessary for claimant's care, the administrative law judge's award of a stair climber and treadmill to claimant is reversed.

Lastly, employer asserts that the administrative law judge erred in awarding claimant a "handicapped vehicle" since, employer argues, claimant has failed to establish that its purchase of such a vehicle for claimant's ownership is reasonable and necessary. Costs incurred for transportation for medical purposes are recoverable under Section 7(a) of the Act. *See Castagna v. Sears, Roebuck & Co.*, 4 BRBS 559 (1976), *aff'd*, No. 86-2090 (D.C. Cir. Dec. 5, 1978). In the instant case, employer acknowledges its duty to provide necessary medical transportation to claimant; however, employer argues that it prefers an alternate method of providing this service, *i.e.*, a rental van, which it contends has met claimant's needs in the past.

Upon review of the administrative law judge's Decision and Order, we are unable to ascertain with certainty exactly what the administrative law judge has awarded to claimant. For example, the administrative law judge interchangeably refers to a "suitable van," a "handicap-accessible van," a "suitable vehicle" or a "handicapped vehicle." *See* Decision and Order at 6, 19. Moreover, in the instant case, it is unclear that the administrative law judge has ordered employer to purchase such a vehicle for claimant. While employer's purchase of a vehicle may be a reasonable method of fulfilling its duty to provide currently necessary transportation under Section 7(a), *see Day v. Ship Shape Maintenance Co.*, 16 BRBS 38 (1983), the administrative law judge did not explicitly state how employer was to provide such transportation in the future; additionally, the administrative law judge did not address the testimony of record that the then current arrangement of providing rental vehicles was working satisfactorily. Finally, the administrative law judge failed to specifically consider employer's assertion that it had already given claimant an undetermined amount of money toward the purchase of a vehicle and claimant had purchased a car rather than a van or pick-up truck. HT at 50. Thus, based upon the administrative law judge's failure to address all of the evidence and our inability to determine the precise nature of the transportation for which employer has been held liable, we vacate the administrative law judge's finding that employer is liable for a suitable vehicle for claimant; on remand, the administrative law judge must reconsider this issue, taking into consideration all of the relevant evidence and clarify his award.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and his Decision on Motion for Reconsideration are affirmed in part, reversed in part, and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge