BRB No. 01-0352

ROGER RASCOE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
I.T.O. CORPORATION OF VIRGINIA	)	DATE ISSUED: Dec. 27, 2001
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

Chanda L. Wilson (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Christopher J. Field (Field Womack & Kawczynski), Jersey City, New Jersey, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (1999-LHC-1513) of Administrative Law Judge Richard E. Huddleston awarding benefits 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained an injury to his back and neck while working as a hustler driver for employer on October 20, 1998. At Sentara Norfolk General Hospital, claimant was diagnosed with cervical and lumbar strains and prescribed medicine. Thereafter he sought and received treatment for his back injury at regular intervals from Dr. Morales. On October 30, 1998, Dr. Morales removed claimant from work, and began a course of treatment consisting of regular injections to his neck and back, and physical therapy. Dr. Morales pronounced claimant fit for duty as of January 13, 1999. Meanwhile, an independent medical examination was performed by Dr. Kirven on November

17, 1998, at which time he opined that claimant had reached maximum medical improvement with no residual disability and thus could return to work with no restrictions.

Claimant returned to his usual employment as a hustler driver sometime after January 13, 1999, but after one day, he felt that he was unable to do that job so he requested and received alternative work as a driver of a slinger, *i.e.*, a forklift job. Claimant continued to operate a slinger for employer at the time of the hearing. Employer voluntarily paid temporary total disability benefits from October 21, 1998, until November 17, 1998. Claimant thereafter filed a claim seeking a continuation of total disability benefits until January 12, 1999, as well as payment of medical treatment provided by Dr. Morales after November 11, 1998.[1]

In his decision, the administrative law judge determined, based on claimant's testimony and the opinion of Dr. Morales, that claimant was unable to return to his usual work until January 13, 1999.[2] Accordingly, he found claimant entitled to temporary total disability benefits from November 17, 1998, until January 12, 1999. In addition, the administrative law judge determined that all of the medical treatment provided to claimant by Dr. Morales was reasonable and necessary, and thus, he ordered employer to pay all work-related medical expenses, including those specifically disputed by employer. *See* n.1, *supra*.

On appeal, employer challenges the administrative law judge's award of temporary total disability benefits and medical expenses. Claimant responds, urging affirmance.

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[1]Claimant specifically sought payment for the following disputed items: an EMG dated November 9, 1998; trigger point injections on October 30, 1998, November 9, 1998, November 16, 1998, and December 7, 1998; a lumbar epidural on December 9, 1998; and a full body scan, MRI, and x-ray all performed on December 31, 1998.

[2]Employer did not present any evidence of suitable alternate employment in this case as its position was that claimant was capable of returning to his usual employment as of November 17, 1998.

Employer initially contends that the administrative law judge erred in finding claimant entitled to temporary total disability benefits between November 17, 1998 and January 12, 1999, since the comprehensive report of Dr. Kirven, dated November 17, 1998, conclusively established the absence of any residual disability after that date.[3] A claimant establishes his *prima facie* case of total disability if he is unable to perform his usual employment duties due to a work-related injury. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

[3]Initially, we reject employer's assertion, that the administrative law judge mischaracterized the issue in this case when he stated that "the only question to be answered is the extent (whether it is total or partial) of claimant's temporary disability," Decision and Order at 3, as it properly encompasses a consideration of the extent of claimant's temporary disability during the pertinent period in question, *i.e.*, November 17, 1998 until January 12, 1999. Additionally, the administrative law judge's consideration of the evidence and subsequent analysis of the case is, in actuality, limited to the parties' contention, *i.e.*, claimant's entitlement to temporary total disability for the period between November 17, 1998 and January 12, 1999. Moreover, the administrative law judge, prior to making any determinations, set out the appropriate standard for determining whether claimant is entitled to total disability benefits.

Contrary to employer's argument, there is no requirement that the administrative law judge give greater weight to the opinion of an independent medical examiner. Rather, he may accept or reject all or any part of any testimony according to his judgment, *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), and he may consider a variety of medical opinions, as well as the claimant's testimony, in determining the extent of the claimant's disability. *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); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table); *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). Moreover, the Board may not re-weigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). In the instant case, the administrative law judge's decision to rely upon claimant's testimony that he found his usual work as a hustler driver too physically demanding following his work-related injuries, thus prompting his change to other "easier" work as a forklift driver, as bolstered by the opinions of Drs. Morales and Gold,[4] to find that claimant was not able to return to his usual employment until January 12, 1999, is rational, and is therefore affirmed as it is supported by substantial evidence. *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989). Accordingly, the administrative law judge's finding that claimant is entitled to temporary total disability benefits between November 17, 1998, and January 12, 1999, is affirmed as employer presented no evidence of suitable alternate employment. *See generally Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

Employer next argues that the administrative law judge erred in awarding claimant medical benefits for treatment and tests performed after November 8, 1998. First, employer argues that the administrative law judge erred by initially assuming that Dr. Gold was a certified orthopedic surgeon when no such proof is in the record, and then compounded his error by conducting independent research to determine Dr. Gold's qualifications. Second, employer maintains that the administrative law judge erred in assuming that Dr. Morales followed orthopedic protocol in the care and management of claimant's injuries, particularly with regard to his use of trigger point injections which is not in line with the opinions of Drs. Gold and Kirven.[5] Third, employer avers that the administrative law judge, in finding that

[4]Dr. Morales opined that claimant was not able to return to his usual work until January 12, 1999, and Dr. Gold concurred with that opinion. Claimant's Exhibits 4, 10.

[5]Employer asserts that Drs. Gold and Kirven both testified that the use of trigger point injections should begin only after a trial and failure of oral medications, and since Dr. Morales began the trigger point injections on the first day of treatment, no prior testing of oral medications was used. We note, however, that Dr. Gold's opinion, that "steroid

the x-ray performed on December 31, 1998, was reasonable and necessary, did not address the specific issue raised by employer, *i.e.*, whether subjecting claimant to an x-ray examination was appropriate following a full body scan and a lumbar MRI. Employer also contests the necessity of the EMG performed on November 9, 1998.

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 v. Willamette Western Corp.*, 20 BRBS 184 (1988). 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; 20 C.F.R. §702.402. It is claimant's burden to prove the elements of his claim for medical benefits. *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996); *see also Ingalls Shipbuilding, Inc., v. Director, OWCP*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

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injections are appropriate when areas of tenderness persist after oral medication has been tried," Claimant's Exhibit 10a, falls short of the definitive conditional statement suggested by employer.

In reviewing the medical evidence, the administrative law judge acknowledged the credentials of each of the physicians of record. Of particular concern to employer is the administrative law judge's statement that Dr. Gold is board-certified in orthopedic surgery. Contrary to employer's assertion the record contains notice of Dr. Gold's credentials, albeit in the form of a caption on his letterhead. Claimant's Exhibit 10. Nevertheless this is sufficient evidence of Dr. Gold's credentials. Moreover, under Section 23(a) of the Act, 33 U.S.C. §923(a), and 20 C.F.R. §702.339 of the implementing regulations, administrative law judges are not bound by statutory rules of evidence, "but may make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties." Consequently, the administrative law judge did not commit any error by going to the public record to verify Dr. Gold's credentials. *See* Decision and Order at 5, n.3.

In his decision, the administrative law judge explicitly considered and rejected employer's contention that Dr. Morales utilized an improper protocol for treatment by giving trigger point injections on claimant's initial visit. In addressing this issue, the administrative law judge considered the entirety of treatment rendered to claimant in this case in light of the statements of Drs. Kirven and Gold as to the propriety of the trigger point injections. The administrative law judge found that claimant was given a prescription for Motrin, an anti-inflammatory, and Flexoril, for any associated spasms, during his treatment at the emergency room on October 20, 1998, but that this medication apparently did not alleviate his pain as he visited Dr. Morales on October 30, 1998, complaining of neck pain, numbness and tingling down both legs, and low back pain. In addition, the administrative law judge noted that Dr. Morales knew that oral medications had been prescribed at the emergency room and had not alleviated claimant's pain, thus prompting the doctor's use of trigger point injections. Thus, the conditions for using trigger point injections, as stated by Drs. Kirven and Gold, had been met. *See* n. 5, *supra*. Consequently, the administrative law judge rationally concluded that the trigger point injections were reasonable and necessary. *Davison*, 30 BRBS 45.

In determining employer's liability for the x-ray dated December 31, 1998, the administrative law judge considered employer's contention, *i.e.*, that there was no reason for this x-ray since both an MRI and full body scan had already been performed on the same day. The administrative law judge found that the fact that there was only a few hours' difference in the timing of these tests does not affect the reasonableness or necessity of the x-ray. Specifically, the administrative law judge determined that it is likely that Dr. Morales had no control over what tests were performed at what time, as he does not actually schedule the tests for the hospital. He therefore concluded that the x-ray was reasonable and necessary. Moreover, neither Dr. Kirven nor Dr. Gold specifically addressed the reasonableness/necessity of this x-ray, thereby leaving employer with no medical evidence to support its position. As the x-ray dated December 31, 1998, represented an additional means for diagnosing claimant's condition, and the administrative law judge determined that the timing of that test, in conjunction with the MRI and full-body scan, did not alter the necessity

of the test, the administrative law judge's rationally found that the x-ray was reasonable and necessary. *Davison,* 30 BRBS 45.

With regard to the EMG performed on November 9, 1998, the administrative law judge found that Dr. Morales's testimony as to the reasons for this testing, *i.e.*, to determine whether there was any motor nerve damage, and to develop a course of treatment for claimant, were credible, and thus, despite the contrary statements of Drs. Kirven and Gold, he concluded that this test was reasonable and necessary. As for the remaining tests, *i.e.*, the lumbar epidural performed on December 9, 1998, and the full body scan and MRI which were performed on December 31, 1998, the administrative law judge rationally determined, based on the medical opinions of Drs. Morales and Gold, that they were reasonable and necessary given the condition of claimant's work-related back injury.

Lastly, employer asserts that the administrative law judge's misapplication of the holding in *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1999), *amended*, 164 F.3d 480, 32 BRBS 144(CRT)(9th Cir. 1999), *cert. denied* 528 U.S. 809 (1999), resulted in a improper use of the "true doubt" rule in determining the propriety of the disputed medical treatment issues. Employer maintains that the administrative law judge used the *Amos* decision to break every "tie" that existed between its medical consultant and claimant's physician on treatment issues by automatically deeming every test or procedure "necessary" because claimant "chose" to have it performed.

In *Amos*, the Ninth Circuit held that a treating physician's opinion is entitled to special weight. *Amos*, 153 F.3d at 1054, 32 BRBS at 147-148(CRT). Specifically, the court held that "[a]lthough the employer is not required to pay for unreasonable and inappropriate treatment, when the patient is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny." *Id.* The present case, however, is not directly on point with *Amos*, for as employer suggests, a majority of the disputed expenses reflect particular testing ordered by Dr. Morales and do not necessarily involve consideration of whether claimant was entitled to make independent decisions about treatment when faced with reasonable divergent opinions.[6] Nonetheless, contrary to employer's assertion, the administrative law judge did not apply *Amos* to break every "tie" with regard to the disputed medical expenses in this case. In fact, while the administrative law judge cited *Amos*, he, in turn as evidenced above, offered additional,

[6]The expenses associated with the trigger point injections and the lumbar epidural fall within *Amos*, 153 F.3d at 1054, 32 BRBS at 147(CRT), as they involve a choice by claimant regarding two divergent, and reasonable options for treatment, *i.e.*, these particular treatments offered by Dr. Morales, or the option of no additional treatment as recommended by Dr. Kirven, who did not believe claimant required any treatment. Thus, the administrative law judge did not misapply *Amos* in finding that these particular expenses were reasonable and necessary.

alternative reasons for all of his conclusions regarding the six medical expenses disputed by employer in this case. Consequently, inasmuch as all of the disputed expenses are related to treatment of claimant's work injuries, the administrative law judge considered all of the relevant evidence, and he acted within his discretion in assessing the credibility of that evidence in determining that each of the disputed medical expenses is reasonable and necessary, his determination that employer is liable for all medical expenses is affirmed as it is supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge