BRB No. 93-2011

DOROTHY MORRALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNITED STATES MARINE CORPS,	)	DATE ISSUED: _____
	)	
and	)	
	)	
ALEXSIS, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Robert J. Shea, Administrative Law Judge, United States Department of Labor.

Colden R. Battey, Jr., Beaufort, South Carolina, for claimant.

Gerard E.W. Voyer (Taylor & Walker, P.C.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-LHC-1308) of Administrative Law Judge Robert J. Shea denying 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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).

On April 17, 1990, claimant hit the wrong pedal of the clothing press she was operating for employer, thereby accidentally closing the top of the hot press on her hand and damaging her right middle finger. Claimant was treated initially by her family physician, Dr. Gray, who referred her to Dr. Jones, an orthopedic surgeon. On November 9, 1990, Dr. Jones found that claimant had reached maximum medical improvement, and assigned her

an impairment rating of 2 percent of the right upper extremity. Dr. Jones examined claimant again on December 19, 1990 and January 2, 1991. Thereafter, claimant sought treatment by another physician, Dr. Laughlin, without requesting a change in physicians. Dr. Laughlin's initial examination was performed on April 12, 1991, and he treated claimant until January 3, 1992, at which time he found that claimant reached maximum medical improvement with a 20 percent permanent impairment of the right hand. On March 24, 1992, claimant returned to Dr. Jones for treatment.

Employer voluntarily paid claimant temporary total disability compensation from April 18, 1990 through December 3, 1990, and permanent partial disability for a 2 percent loss use of the right upper extremity thereafter consistent with Dr. Jones' disability assessment. Claimant sought continuing total disability compensation through the time of the hearing, permanent partial disability compensation for a 20 percent impairment of the hand, and reimbursement for the medical services provided by Dr. Laughlin.

The administrative law judge determined that as Dr. Jones' opinion was more persuasive than that of Dr. Laughlin, and the testimony of Roberta Sullivan, the manager of the dry cleaning shop, and Carol Freeman, employer's vocational expert, established that claimant could perform her prior work, claimant was not entitled to additional disability benefits beyond those which employer had voluntarily paid. The administrative law judge also determined that claimant was not entitled to reimbursement for the medical treatment provided by Dr. Laughlin on the rationale that the treatment was unauthorized, that Dr. Laughlin provided no treatment that was not provided by Dr. Jones, and that no improvement was achieved. In so concluding, the administrative law judge rejected claimant's assertion that she was not required to obtain approval for a change in physicians to Dr. Laughlin pursuant to Section 7(c)(2) of the Act, 33 U.S.C. §907(c)(2), because Dr. Jones had refused to provide her additional treatment.

Claimant appeals the administrative law judge's denial of Dr. Laughlin's medical expenses, reiterating the argument that she was relieved of the obligation of requesting a change in physicians to Dr. Laughlin because Dr. Jones advised claimant on November 9, 1990, that he would no longer see her. In addition, claimant contends that the administrative law judge erred in denying her claim for additional compensation because the evidence credited by the administrative law judge is insufficient to establish that she can perform her usual work and employer failed to demonstrate the availability of other suitable alternate employment.

We initially reject claimant's contention that the administrative law judge erred in finding that employer is not liable for reimbursement of Dr. Laughlin's medical treatment under Section 7(c)(2). Section 702.406(a) of the regulations, 20 C.F.R. §702.406(a), provides that where 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. *See* 33 U.S.C. §907(c)(2); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988). Under Section 7(d) of the Act, 33 U.S.C. §907(d), an employee is entitled to reimbursement of medical expenses if he requests employer's

authorization for such treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 23 (1989); *see also 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). The employee is released from the obligation of seeking authorization if employer has unreasonably refused or neglected to provide treatment. 33 U.S.C. §907(d); 20 C.F.R. §702.406(a); *Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in part and rev'd in part on other grounds sub. nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989); *Marvin v. Marinette Marine Corp.*, 19 BRBS 60 (1986).

In this case, claimant concedes that she did not request a change in physicians but asserts that she was not required to do so because Dr. Jones refused to provide her further treatment after she achieved maximum medical improvement. Claimant testified below that she attempted to obtain treatment by Dr. Jones, after trying unsuccessfully to return to work in November 1990, but was informed that there was nothing he could do for her. Tr. at 16. In addition, claimant testified that a woman in Dr. Jones' office informed her that Dr. Jones would not consult with her without her providing a cash payment of $50 in advance and that she had been refused treatment even upon tendering the requested payment. Tr. at 17.

The administrative law judge, however, acting within his discretion, discredited claimant's testimony regarding the alleged refusal, finding that it was not borne out by the record. *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990). The administrative law judge reasonably inferred from the fact that claimant ultimately returned to Dr. Jones on May 24, 1992, that Dr. Jones had not refused her further treatment and concluded that claimant had been referred to Dr. Laughlin by her attorney based on a notation in Dr. Laughlin's report of claimant's initial visit. We thus affirm these determinations. Inasmuch as we affirm the administrative law judge's finding that claimant was not refused medical treatment by Dr. Jones and it is undisputed that claimant did not request a change in physicians, his denial of Dr. Laughlin's medical expenses is also affirmed.[1] *See Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989).

We also reject claimant's assertion that the administrative law judge erred in denying her claim for additional compensation. Claimant argues on appeal that the administrative law judge's denial of additional temporary total disability benefits through the time of the

[1]We note that Dr. Jones' November 9, 1990 report, indicating that he would see claimant as needed and his January 2, 1991, report, evidencing the need for continuing conservative treatment provide additional evidentiary support for the administrative law judge's finding that Dr. Jones did not refuse to provide claimant additional treatment.

hearing is improper because employer failed to introduce any evidence sufficient to establish claimant's ability to perform her usual or alternative work since the time that claimant attempted to return to work in November 1990. We disagree. The administrative law judge rationally concluded based on the hearing testimony provided by Roberta Sullivan and Carol Freeman that claimant could perform her usual work for employer. Ms. Sullivan, the manager of the dry cleaning store, testified that the flatbed press on which claimant worked was operated primarily by foot pedals with the exception of a lever located on the upper part of the press which required only a light tap with a couple of fingers or palm of the hand. Tr. at 61-62. Ms. Freeman, employer's vocational rehabilitation expert, testified that as of the time claimant reached maximum medical improvement on November 9, 1990, Dr. Jones had indicated that claimant's only restriction was no repetitive bending of the right finger. Tr. at 85-81. After observing the operation of the press and claimant's injured finger, and discussing the nature of claimant's injury and limitations with Dr. Jones, Ms. Freeman indicated that she could not see anything which would prevent claimant from performing this work provided she wore a buddy splint or something similar to prevent the finger from bending. Tr. at 92-93. In addition, the administrative law judge credited Ms. Freeman's testimony that she provided Dr. Jones with a videotape of the operation and that he indicated that claimant could do this work. Tr. at 78-79. 81.

The administrative law judge rationally found that claimant could perform her usual work based on the testimony of Ms. Freeman and Ms. Sullivan, in conjunction with Dr. Jones' medical opinion, and therefore the administrative law judge's denial of additional total disability compensation is affirmed. *See Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1985). Claimant's assertions regarding employer's failure to establish the availability of suitable alternate employment thus need not be addressed.

Finally, claimant asserts that she should have been awarded compensation for a 20 percent impairment of the right hand consistent with Dr. Laughlin's evaluation. The administrative law judge, however, acted within his discretion in crediting Dr. Jones' opinion over that provided by Dr. Laughlin based on his long-term status as claimant's treating orthopedic surgeon and physician of choice. *See Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). Accordingly, we affirm the administrative law judge's determination that claimant was limited to the compensation for a 2 percent impairment of the right upper extremity which she had been voluntarily paid. Claimant's ability to perform her usual or alternate work is irrelevant to this determination; a loss of wage-earning capacity is presumed for injuries falling within the schedule. *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989).

Accordingly, the Decision and Order of the administrative law judge denying claimant additional benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge