BRB No. 00-0557

THOMAS MAYS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES	)	DATE ISSUED: July 11, 2001
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Jeffery Favors (Law Offices of Martin, Shepherd & Favors), New Orleans, Louisiana, for claimant.

Christopher M. Landry (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (96-LHC-0677) of Administrative Law Judge James W. Kerr, Jr., 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). Claimant, while working for employer on March 18, 1991, sustained a blow to the head and a fracture of the right cheek when he was kicked during an altercation. Claimant was initially treated at West Jefferson Hospital by Dr. McKeon, who performed surgery for claimant's injuries on March 20, 1991. Claimant was referred to Dr. Leftwich, an ophthalmologist, for additional treatment for his sight-related problems. After treating claimant in March and April 1991, Dr. Leftwich concluded that there was no disability from an ophthalmic standpoint. Claimant thereafter sought additional medical treatment because of continued pain and trouble with his eyesight, and his attorney at that time referred him to Dr. Sabatier, who initially treated claimant on April 9, 1991. Claimant returned to both Drs. Sabatier and McKeon for additional examinations. On May 29, 1991,

Dr. McKeon stated that claimant could return to work on a restricted basis as of the date of his last examination, April 12, 1991. On July 12, 1991, Dr. McKeon filled out a work restriction form, indicating that claimant could continuously sit, walk, lift, bend, squat, climb, kneel, twist and stand, and restricting claimant's lifting to a maximum of 75 pounds. Following his final examination of claimant on July 15, 1991, Dr. Sabatier concurred with Dr. McKeon's work restrictions, and informed claimant via a letter dated August 5, 1991, that he would not participate in further examinations.

Claimant sought a change in physicians from employer, based on his move from Marrero, Louisiana, to Mer Rouge, Louisiana. Claimant testified that he requested the change on the same day that he saw Dr. McKeon, May 5, 1991, and was granted the request by employer's workers' compensation specialist, Ms. Smith, as long as he sought treatment by a specialist. Tr. at 82-92. Ms. Smith's records however indicated that the request took place on July 2, 1991, and that claimant's request had been denied. RX-11 at 107. In any event, claimant sought additional treatment with Dr. Patterson, a family practitioner near Mer Rouge, on June 14, 1991, and continued treatment with Dr. Patterson through 1995. Subsequent to August 6, 1991, claimant also sought treatment for his physical complaints from Dr. Hubli, and underwent pain treatment at the Louisiana State University (LSU) Medical Center. Claimant also sought psychiatric treatment for depression from Drs. Ware, Stephens, Baker, and Roniger, commencing in February 1992.

Employer voluntarily paid claimant temporary total disability compensation and medical expenses from the date of injury until August 6, 1991, at which time claimant did not comply with employer's request that he return to work immediately based on his release to work by Drs. McKeon and Sabatier, RX-11 at 103. Claimant subsequently sought disability compensation and medical expenses.

In his initial decision, the administrative law judge determined, based on the opinions of Dr. McKeon, who found claimant's only physical restriction to be a 75 pound lifting restriction, Dr. Leftwich, who found no disability from an ophthalmic standpoint, and Dr. Ware, who concluded that claimant suffered no psychological disability, that claimant was able to perform his usual work as a welder, and thus is not entitled to any additional disability benefits. The administrative law judge further determined that claimant is not entitled to reimbursement for the medical treatment procured after August 6, 1991, on the rationale that such treatment was unauthorized. In reaching this conclusion, the administrative law judge found the notations in Ms. Smith's logs more persuasive than the contrary testimony of claimant, and thus found that claimant requested a change in physicians pursuant to Section 7(c)(2) of the Act, 33 U.S.C. §907(c)(2), on July 2, 1991, and that his request was denied. The administrative law judge additionally determined that claimant failed to show good cause for the request and that he had not been denied additional treatment.

Claimant thereafter appealed the administrative law judge's denial of disability compensation and medical expenses incurred since August 6, 1991. In its decision dated May 3, 1999, the Board initially affirmed the administrative law judge's denial of disability benefits, and the finding that employer refused claimant's request to change physicians. *Mays v. Avondale Industries, Inc.*, BRB No. 98-1084 (May 3, 1999)(unpub.). The Board held, however, that the administrative law judge's analysis regarding the compensability of the medical expenses incurred by claimant since August 6, 1991, was flawed as he denied the claim for said benefits based on his finding that claimant's care was unauthorized, without considering the reasonableness or necessity of the treatment.[1] *Id.* Accordingly, as the record revealed that claimant underwent treatment for his work-related injury after August 6, 1991,[2] the Board vacated the administrative law judge's denial of medical benefits incurred thereafter, and remanded the case for consideration of the necessity and reasonableness of the medical expenses sought by claimant. *Id.*

On remand, the administrative law judge found that because qualified physicians indicated that claimant's treatment subsequent to August 6, 1991, was for a work-related condition, the treatment is reasonable and necessary, and thus compensable under the Act.

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[1]Specifically, the Board observed that pursuant to Section 7(d) of the Act, 33 U.S.C. §907(d), once, as in the present case, it has been established that claimant sought, and was denied authorization, the question of reimbursement for treatment claimant subsequently procured on his own turns on whether the treatment was reasonable and necessary. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (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). Moreover, the Board stated that well-settled law establishes that Section 7, 33 U.S.C. §907, does not require that a work injury be economically disabling in order for claimant to be entitled to medical expenses. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

[2]Specifically, the Board observed that the record indicates that claimant was under the care of Dr. Patterson after 1991, and that he was treated by Dr. Hubli commencing November 10, 1995, including undergoing facial surgery on two occasions; on February 22, 1996, he had an open reduction internal fixation of the depressed zygomatic arch fracture, and on November 13, 1997, a facial reconstruction with a demineralized bone graft. In addition, Dr. Hubli concluded in December 1997 that claimant may need additional surgery. CX-7 at 4, 5, 9, 31, 53, 57. The record also shows that claimant sought regular continued care for his facial injuries from Dr. Patterson and the LSU Medical Center. *See* CX-5. Furthermore, although the administrative law judge concluded that claimant suffered no psychological disability, he did not consider the reasonableness and necessity of the psychological care claimant sought from Drs. Ware, Baker, Stephens, and Roniger commencing February 1992.

Accordingly, the administrative law judge awarded medical benefits for the treatment procured by claimant subsequent to August 6, 1991, at the LSU Medical Center and with Drs. Patterson, Hubli, Ware, Stephens, Baker, and Roniger. Moreover, the administrative law judge determined that employer also is liable for future treatment resulting from claimant's work-related injury.

Employer appealed the administrative law judge's Decision and Order on Remand. By Order dated April 3, 2000, the Board dismissed employer's appeal as untimely. Upon employer's motion for reconsideration, the Board reinstated employer's appeal on the docket in an order dated June 5, 2000. By Order dated October 13, 2000, the Board denied claimant's request for remand for modification but stated that employer's appeal would be expedited. Nonetheless, the case file was inadvertently misplaced. Pursuant to the terms of Pub. L. No. 106-554, 114 Stat. 2763, the Board should have issued its decision in this case on or before June 4, 2001, within one year of the reinstatement of the appeal on June 5, 2000.[3] Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is deemed affirmed as of June 5, 2001.[4] *See* 33 U.S.C. §921(c); 20 C.F.R. §802.406. In addition, our review of employer's contentions regarding the administrative law judge's decision supports the conclusion that it must be affirmed on the merits as well.

[3]Pub. L. No. 106-554, 114 Stat. 2763, states in relevant part that "any decision pending a review by the Benefits Review Board for more than 1 year shall be considered affirmed by the Benefits Review Board on the 1-year anniversary of the filing of the appeal, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals."

[4]Pursuant to Section 21(c), 33 U.S.C. §921(c), a person adversely affected may appeal the Board's decision within 60 days "following the issuance of such Board order." *See also* 20 C.F.R. §802.410(a). Accordingly, employer has 60 days from June 5, 2001, in which to pursue any further appellate review. *See* Pub. L. No. 106-554, 114 Stat. 2763; *Gooden v. Director, OWCP,* 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

Employer argues that, contrary to the administrative law judge's decision, claimant is not entitled to reimbursement of the medical expenses which he incurred after August 6, 1991, as they were neither reasonable nor necessary for the treatment of his work-related injury. Specifically, employer asserts that as Drs. McKeon, Sabatier, and Leftwich all determined, as of August 6, 1991, that claimant was capable of full work and suffered from no physical or psychological disability, it is clear that claimant was not in need of any additional treatment. In addition, employer argues that no treating physician of record after August 6, 1991, issued a specific finding that treatment was necessary nor did any physician subsequently contradict the conclusions of Drs. McKeon, Sabatier, and Leftwich regarding claimant's physical and psychological conditions.[5]

In his decision, the administrative law judge initially determined from the record that Dr. Patterson first examined claimant for complaints of facial pain in June and July of 1991, and at that time diagnosed claimant as experiencing residual headaches and pain from his work-related accident. In addition, the administrative law judge found that Dr. Patterson stated that claimant was suffering some depression related to his facial injury. The administrative law judge also found that on subsequent visits from January 1992 through November 1996, Dr. Patterson predominantly treated claimant for facial pain.[6] Moreover,

[5]Employer raises particular objections regarding the treatment rendered by Drs. Patterson, Ware and Stephens, but does not directly challenge the treatment for facial pain provided by the LSU Medical Center, the subsequent surgeries performed by Dr. Hubli, or the psychological treatment provided by Drs. Baker and Roniger. Employer specifically maintains that the majority of Dr. Patterson's treatment is not compensable as it is not related to claimant's work injury, and that neither Dr. Ware nor Dr. Stephens opined that the treatment provided to claimant was necessary to treat his work injury.

[6]In particular, the administrative law judge noted that although claimant was treated for other symptoms during some of his visits with Dr. Patterson, facial pain was stated consistently as a reason for the visit.

the administrative law judge found that the evidence establishes that claimant was also treated at LSU Medical Center for his facial injuries. He therefore concluded that the evidence of record establishes that claimant's treatment by Dr. Patterson and LSU Medical Center was reasonable and necessary and related to his compensable injury. Similarly, the administrative law judge found that claimant's treatment for facial pain and decreased vision by Dr. Hubli, which included two surgeries, was reasonable and necessary, and emanated from claimant's work-related injury.

With regard to the psychological and psychiatric care provided by Drs. Ware, Stephens, Baker and Roniger, the administrative law judge determined that all of this treatment was reasonable and necessary and resulted from claimant's work injury. Specifically, the administrative law judge relied on Dr. Ware's opinion, in February 1991, diagnosing claimant with adjustment disorder with depressed mood secondary to trauma, as well as Dr. Baker's opinion in May 1995, relating, in part, the kicking incident at work, *i.e.*, claimant's work-related injury, to the problems exhibited by claimant,[7] to find that the psychological and psychiatric care received by claimant was, contrary to employer's contentions, related to his work-injury. Similarly, given the extent of claimant's condition, *e.g.*, Dr. Stephens, in April 1993, ordered hospitalization of claimant for suicidal tendencies, the administrative law judge found that the entirety of the treatment provided by Drs. Ware, Stephens, Baker and Roniger was reasonable and necessary.

It is well-established that an administrative law judge is entitled to weigh the evidence and evaluate the credibility of all witnesses, including doctors, and may draw his own conclusions from the evidence. *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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). 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 findings of fact and conclusions of law are rational, supported by substantial evidence and in accordance with law. Consequently, the administrative law judge's award of medical benefits is likewise affirmable on the merits.

[7]The administrative law judge noted that although Dr. Baker admitted that there could be a non-trauma related source of a malingering component to claimant's problem, he related the kicking incident at work as a cause of claimant's psychological problems.

Accordingly, the Decision and Order on Remand Awarding Benefits is affirmed.
SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge