BRB No. 04-0735

ROBERT WAINWRIGHT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 06/16/2005
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Compelling Furnishing of Medical Treatment of B.E. Voultsides, District Director, United States Department of Labor.

John E. Robins, Jr. and Stephen F. Forbes (Forbes & Broadwell), Hampton, Virginia, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Kathleen H. Kim (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Order Compelling Furnishing of Medical Treatment (OWCP No. 05-98148) of District Director B.E. Voultsides 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). The determination of the district director must be affirmed unless it is shown to be arbitrary, capricious, and abuse of discretion or not in accordance with law. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

Claimant was injured while working at employer's shipyard on March 6, 1996. He sustained injuries to his back and both legs and sought treatment in the emergency room of the local hospital, where he was treated by Dr. Bryant and released. Claimant continued treatment with Dr. Bryant, a general surgeon. Dr. Bryant has referred claimant to a number of specialists for treatment of his back and leg injuries, as well as to a psychologist to treat depression. Claimant has not returned to work since the accident.

Claimant has not requested a change in physician. Employer refused to authorize continued treatment with Dr. Bryant and pursued a change in physician through the Virginia Workers' Compensation Commission. In an opinion dated April 6, 1999, the commission found that claimant no longer needs to be treated by a general surgeon, but should instead be treated by a physician who is qualified to provide treatment for his chronic leg pain. Pursuant to the Virginia Workers' Compensation Act, employer submitted a list of three physicians to claimant, who chose Dr. Goldstein from the list.

Subsequently, employer refused to pay for the treatment of Dr. Bryant and the specialists to whom he referred claimant. Claimant pursued payment for this treatment under the Longshore Act. The district director held an informal conference on this issue on May 12, 2004. In an Order Compelling Furnishing of Medical Treatment dated May 17, 2004, the district director found that neither party had requested a change in physician. In addition, the district director found that employer did not submit any evidence regarding the unreasonableness of Dr. Bryant's treatment of claimant's injuries and, thus, ordered employer to pay for the treatment provided by Dr. Bryant. *See* Order Compelling Furnishing of Medical Treatment. Employer submitted a motion for reconsideration and a request for change in physicians. The district director responded to employer's motion in a letter dated May 24, 2004, stating that there was no evidence submitted to show that Dr. Bryant's treatment was inappropriate and thus no basis to order a change in physician.[1] In addition, the district director stated that he is not bound

[1] The letter in response to employer's request for reconsideration and request for change in physicians was written by claims examiner Theresa Magyar on behalf of the district director. *See generally Mazzella v. United Terminals, Inc.*, 8 BRBS 755 (1978); *Traina v. Pittston Stevedoring Corp.*, 8 BRBS 715 (1978). For purposes of this decision, we will refer to these decisions in the aggregate as being authored by the district director.

by the actions of the Virginia Workers' Compensation Commission and that claimant's election of Dr. Goldstein does not pertain to the claim under the Longshore Act.

On appeal, employer contends that the district director erred in failing to give "Full Faith and Credit" to the Virginia Commission's decision that Dr. Bryant's continued care was inappropriate for claimant's injury. Alternatively, employer argues that the state decision should have collateral estoppel effect on claimant's claim for payment of the bills for Dr. Bryant's treatment. Employer also contends that claimant selected Dr. Goldstein as his treating physician on a form dated June 10, 1999, and that he should be bound by this action. In addition, employer contends that the district director erred in failing to consider employer's request for a change in physicians, which was raised in employer's motion for reconsideration. Claimant and the Director, Office of Workers' Compensation Programs, respond, urging affirmance of the district director's actions.

Initially, we reject employer's contention that the district director erred in failing to give "Full Faith and Credit" to the decision by the Virginia Commission.[2] Employer has not cited any cases in its brief, nor made any cogent arguments, suggesting how the Full Faith and Credit doctrine would apply here. *See generally Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); 20 C.F.R. §802.211. Moreover, in deciding the applicability of the Full Faith and Credit doctrine in the workers' compensation context, the Supreme Court of the United States held that "the critical differences between a court of general jurisdiction and an administrative agency with limited statutory authority forecloses (sic)

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[2] The United States Constitution, Art. IV, §1 provides that :

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

28 U.S.C. §1738 provides, in part:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory, or Possession thereto.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such Stated, Territory or Possession from which they are taken.

the conclusion that constitutional rules applicable to court judgments are necessarily applicable to workmen's compensation awards." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 281-282, 12 BRBS 828, 841(CRT) (1980). The Court held that the Industrial Commission of Virginia's jurisdiction is limited to questions arising under the Virginia Workmen's Compensation Act and that Full Faith and Credit need not be given to determinations that it does not have the power to make, such as those affecting a claimant's rights under the District of Columbia extension of the Longshore Act. *Thomas*, 448 U.S. at 282, 12 BRBS at 842.

Employer also contends that the district director failed to apply the doctrine of collateral estoppel to the issue of whether a change in physicians is warranted in the instant case. The doctrine of collateral estoppel generally is applicable to the findings of fact of a state agency acting in an adjudicatory capacity. *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997). However, relitigation of an issue is not precluded by the doctrine of collateral estoppel where the burdens of proof differ or where different legal standard apply in each forum. *See id.; Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Jenkins]*, 583 F.2d 1273, 8 BRBS 723 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979); *Plourde v. Bath Iron Works Corp.*, 34 BRBS 45 (2000); *Casey v. Georgetown Univ. Medical Center*, 31 BRBS 147 (1997).

Under the Act, a claimant is entitled to choose his attending physician. 33 U.S.C. §907(b), (d). Thereafter, Section 7(b) states in pertinent part:

> The Secretary shall actively supervise the medical care rendered to injured employees…[and] shall have the authority to determine the necessity, character and sufficiency of any medical aid furnished or to be furnished, and may, on his own initiative or at the request of the employer, order a change of physicians or hospitals when *in his judgment* such change is desirable or necessary in the interest of the employee….

33 U.S.C. §907(b) (emphasis added). The implementing regulations authorize the district director to order a change in physicians when such change is necessary or desirable. 20 C.F.R. §§702.406(b), 702.407(c).[3] Thus, the district director has broad discretion in

[3] Section 702.406(b) states:

> The district director…may order a change of physicians or hospitals when such a change is found to be necessary or desirable or where the fees charged exceed those prevailing in the community….

considering whether to order a change in physicians. *See Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997)(Brown, J, concurring).

Under the Virginia Act, a claimant is entitled to choose his attending physician from a list of three physicians selected by employer. Va. Code Ann. §65.2-603. The Virginia code is silent regarding the legal standard applicable to the issue of when a change in physicians may be ordered. State court and agency decisions, however, have articulated a number of specific grounds under which a change in physician may be warranted should employer so establish. Specifically, the Court of Appeals of Virginia held that:

> The commission has previously set forth several grounds upon which it will order a change in an employee's treating physician: inadequate treatment is being rendered; it appears that treatment is needed by a specialist in a particular field and is not being provided; no progress being made in improvement of the employee's health condition without any adequate explanation; conventional modalities of treatment are not being used; no plan of treatment for long-term disability cases; and failure to cooperate with discovery proceedings ordered by the Commission.

Allen & Rocks, Inc. v. Briggs, 508 S.E.2d 335, 341 (Va. Ct. App. 1997), quoting *Powers v. J.B. Constr. Co.*, 68 O.I.C. 208, 211 (1989); *see also Apple Constr. Corp. v. Sexton*, 605 S.E.2d 351 (Va. App. 2004). The Virginia Court of Appeals has referred to such factors as "objective" criteria. *Schwab Constr. v. McCarter*, 486 S.E. 2d 562, 567 (Va. App. 1997).

A comparison of the two statutes shows that claimant's choice of physician is restricted under Virginia law, in contrast to his free choice under the Longshore Act, and that the district director under the Longshore Act is afforded broader discretion in determining whether to order a change in physician. In the present case, the Virginia commission ordered a change of physicians because it found that claimant's "condition no longer requires the treatment of a general surgeon," and that claimant "is in need of a physician who is qualified to provide treatment for the employee's chronic left leg pain." While the district director may consider these factors, his failure to order a change on these grounds does not alone establish reversible error as the district director's actions are reviewed under the abuse of discretion standard. *See Jackson*, 31 BRBS 103. Thus, employer has a different burden of persuasion in seeking a change in the Longshore claim

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20 C.F.R. §702.406(b). Section 702.407(c) states that the district director has the authority to determine "whether a change of physician . . . should be made or is necessary." 20 C.F.R. §702.407(c).

than it did in the Virginia claim, and claimant's choice of physician is more limited in Virginia. Contrary to employer's contention, "collateral estoppel effect may be denied because of differences in burden of proof (for example, where the victor in the first case has a greater burden in the second)." *Acord*, 125 F.3d at 21, 31 BRBS at 111(CRT); *see also Jenkins*, 583 F.2d at 1277, 8 BRBS at 732. Therefore, we affirm the district director's finding that the Virginia Commission's decision does not require that he order a change in physicians under the Longshore Act.

The district director also considered employer's request on reconsideration for a change in physicians, but found that employer submitted no evidence to support its request.[4] The district director rationally stated that employer's mere submission of the Virginia Commission's opinion does not establish that Dr. Bryant's care is not desirable or necessary. *See generally Jackson*, 31 BRBS 103. Moreover, the district director properly stated that claimant's election of Dr. Goldstein under the Virginia Act does not negate his choice of Dr. Bryant as his treating physician under the Longshore Act. Therefore, we affirm the district director's finding that employer remains liable for treatment provided by Dr. Bryant.

[4] Contrary to employer's contention, the Act does not require the district director to independently investigate a claim that a physician's treatment is not reasonable or necessary on the basis of an undocumented assertion by employer. *See generally* 20 C.F.R. §702.406(b).

Accordingly, the Order Compelling Furnishing of Medical Treatment and decision on reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge