

NATHANIEL CARTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ITO CORPORATION OF	)	
BALTIMORE	)	DATE ISSUED: <u>Oct. 18, 20002</u>
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order On Remand of John C. Holmes,  
Administrative Law Judge, United States Department of Labor.

Paul B. Hairston, Sr., Baltimore, Maryland, for claimant.

Robert J. Lynott (Thomas & Libowitz, P.A.), Baltimore, Maryland, for  
employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (99-LHC-0389) of Administrative Law Judge John C. Holmes 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 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).

This case is before the Board for the second time. To recapitulate the facts, claimant worked as a climber for employer. Claimant suffered an injury to his left hand on August 22, 1997, when he was hooking lumber to a crane and his finger got caught between the lumber and the cable. In treating claimant's injury, Dr. Apostolo detected carpal tunnel syndrome in his wrist which became symptomatic following the work injury. Cl. Exs. 7-8. Employer paid claimant temporary total disability benefits between August 27 and October 3, 1997. 33

U.S.C. §908(b). Having been released by Dr. Apostolo, claimant returned to work on October 4, 1997, and worked for three days before he claimed his hand became swollen and painful. He returned to his treating physician, Dr. Young, who referred him to an orthopedic surgeon, Dr. Pushkin, who in turn evaluated and treated claimant until November 9, 1997, when he released claimant to return to work. Cl. Exs. 4, 9; Tr. at 175-177. In March 1998, claimant returned to Dr. Pushkin for treatment of his carpal tunnel syndrome and, due to the continuing symptoms, Dr. Pushkin assessed a 15 percent permanent impairment of the left hand and wrist. Cl. Ex. 9. Claimant filed a claim for additional temporary total disability benefits, permanent partial disability benefits and medical benefits.

In his original decision, the administrative law judge denied disability benefits, finding that claimant's left hand injury had healed with no residual disability as of October 1, 1997, when Dr. Apostolo released claimant to return to work. Decision and Order at 6. He also stated that Dr. Pushkin's services were not compensable; however, he remanded the case to the district director for a determination on the issue of claimant's entitlement to medical benefits.<sup>1</sup> *Id.* at 9. The administrative law judge denied claimant's motion for reconsideration. Claimant appealed the decisions, and employer responded, urging affirmance.

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<sup>1</sup>In addition, the administrative law judge severed claimant's claim for compensation for carpal tunnel syndrome of the right wrist, finding it was not ripe for adjudication. Decision and Order at 5.

In its decision, the Board held that the administrative law judge did not fully analyze the evidence to determine whether claimant was disabled for an additional month due to an exacerbation of his condition following an attempted return to work in October 1997. Specifically, the administrative law judge was to address Dr. Apostolo's opinion concerning claimant's condition after October 1, 1997.<sup>2</sup> *Carter v. ITO Corp. of Baltimore*, BRB No. 00-0192 (Oct. 20, 2000). Thus, the Board vacated the administrative law judge's denial of temporary total disability benefits and remanded the case for further consideration. *Id.* at 2-3. The Board affirmed the administrative law judge's denial of permanent partial disability benefits for claimant's left carpal tunnel syndrome. *Id.* at 5. In addition, the Board vacated the administrative law judge's order remanding the case to the district director on the issue of claimant's entitlement to medical benefits, and ordered the administrative law judge to determine which doctor is claimant's chosen physician, whether authorization to see a specialist had been obtained or was necessary, whether there was a refusal of treatment, whether the treatment claimant received was reasonable and necessary, and whether it was compensable. *Id.* at 6. The Board denied claimant's subsequent motion for reconsideration. *Carter v. ITO Corp. of Baltimore*, BRB No. 00-0192 (March 12, 2001).

On remand, the administrative law judge found that Dr. Apostolo's opinion, that claimant had reached maximum medical improvement on October 1, 1997, with no residual disability, is entitled to determinative weight. The administrative law judge found that any subjective symptoms claimant had after this date are not credible, that claimant's inability to work was "self-imposed," and thus that claimant is not entitled to temporary total disability benefits after October 1, 1997. Decision and Order on Remand at 2-3. In addition, the administrative law judge found that Dr. Young was claimant's treating physician, and thus employer is liable for the cost of his treatment, as well as the treatment provided by Dr. Weitzman, a chiropractor who treated claimant's wrist on referral from Dr. Young. However, he found that Dr. Pushkin's treatment was not necessary and, therefore, not compensable.

On appeal, claimant contends that the administrative law judge erred in finding that he is not entitled to temporary total disability benefits for the period from October 9 through November 8, 1997, and that employer should be held liable for the treatment provided by Dr. Young and Dr. Pushkin. Employer responds, urging affirmance of the administrative law judge's decision.

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<sup>2</sup>Dr. Apostolo released claimant to return to work on October 1, 1997. He stated in his deposition, however, that claimant's work also caused the symptomatic exacerbation of claimant's condition in October and November 1997, Emp. Ex. 4a at 37, and that, per Dr. Pushkin's reports, claimant's disability finally resolved in November 1997 as he had initially predicted on October 1, 1997. Emp. Ex. 4a at 53.

Initially, claimant contends that the administrative law judge erred in finding that he is not entitled to temporary total disability benefits for the period from October 9 through November 8, 1997. To establish a *prima facie* case of total disability, the employee must show that he cannot return to his regular or usual employment due to his work-related injury. The same standard applies whether the claim is for permanent or temporary total disability. *Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989).

In the present case, the Board remanded the case to the administrative law judge to fully analyze the medical evidence to determine whether claimant was disabled for an additional month. *Carter*, slip op. at 3. On remand, the administrative law judge did not address Dr. Apostolo's testimony regarding claimant's treatment with Drs. Young and Pushkin after October 7, 1997, or the disability assessed by Drs. Young and Pushkin. Rather, the administrative law judge found that any claims of pain or swelling claimant made after October 1 are not credible, that any medical reports after that time are based solely on claimant's subjective complaints and thus are not credible, and that Dr. Apostolo's report is the best indicator of claimant's condition in October 1997. The administrative law judge concluded that claimant's failure to return to work until after November 8, 1997 was "self-induced" and not medically authorized. Decision and Order on Remand at 3-4.

We cannot affirm the administrative law judge's denial of benefits. Contrary to the administrative law judge's finding, Dr. Young did not rely solely on claimant's subjective complaints of pain, but found on examination that the swelling and decreased range of motion continued in claimant's left hand after October 1, 1997.<sup>3</sup> Emp. Exs. 3j-m. Due to the continued symptoms, Dr. Young referred claimant to a specialist, Dr. Pushkin, for an evaluation. Dr. Pushkin provided treatment and released claimant for return to work on November 9, 1997.<sup>4</sup> Emp. Ex. 7. After reviewing the reports by Drs. Young and Pushkin,

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<sup>3</sup>On October 2, 1997, Dr. Young found slight swelling and that claimant's fingers had 90 percent of normal active motion. Emp. Ex. 3k; Tr. at 74. On October 9, Dr. Young found, objectively, that claimant's third, fourth and fifth fingers had a 75 percent range of motion. Emp. Ex. 3L; Tr. at 62. He referred claimant to Dr. Pushkin at this time.

<sup>4</sup>Dr. Pushkin first evaluated claimant on October 16, 1997. He found a positive Tinel's test into the third and fourth fingers and a positive Phalen's test into all the fingers. He gave claimant a cortisone injection, and took him off work for three weeks. Emp. Ex. 7A. On November 7, 1997, the objective tests were negative, and Dr. Pushkin released claimant to return to work. Emp. Ex. 7B. Dr. Young's evaluation of claimant on November 11, 1997 revealed normal range of motion in claimant's hand, wrist and fingers. Emp. Ex. 30.

Dr. Apostolo testified that it appeared that claimant had suffered a setback of his inflammatory condition and that the treatment provided by Dr. Pushkin was appropriate, and apparently effective.<sup>5</sup> Emp. Ex. 4a at 21.

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<sup>5</sup>Dr. Apostolo stated that the effects of the cortisone shot he gave claimant apparently were temporary, and that Dr. Pushkin “did the appropriate thing” by giving claimant a second injection. Emp. Ex. 4 at 21. Dr. Apostolo further stated that the work injury “completely and totally resolved based upon my understanding” of Dr. Pushkin’s November 1997 reports. *Id.* at 53.

The Board is not bound to accept an ultimate finding or inference if the decision discloses that it was reached in an invalid manner. *See Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252, 254 n.1 (1988). Although the administrative law judge rationally found that claimant's subjective complaints of pain were not credible, the evidence is uncontradicted that claimant continued to suffer from objective symptoms of his condition until November 9, 1997, and the physicians of record agree that this episode was due to his work-related injury.<sup>6</sup> Therefore, the administrative law judge's decision to discredit claimant's testimony cannot be the basis for the denial of additional temporary total disability benefits. As there is no medical evidence in the record supportive of the administrative law judge's decision, and in fact, the medical evidence supports only the contrary result, we reverse the administrative law judge's finding that claimant's work-related condition had resolved by October 1, 1997, as it is contrary to the evidence of record. Claimant is, therefore, entitled to temporary total disability benefits from October 1, 1997, through November 7, 1997.

Claimant also contends that the administrative law judge erred in finding that employer is not liable for the medical treatment of Drs. Young and Pushkin. Contrary to claimant's contention, the administrative law judge found that employer is liable for the treatment provided by Dr. Young as he is claimant's first choice physician, and employer does not contest that finding. With regard to the treatment provided by Dr. Pushkin in October and November 1997, the administrative law judge found that it was not authorized by employer or reasonable or necessary. Section 7(a) of the Act, 33 U.S.C. §907(a), provides that employer is liable for medical expenses that are reasonable and necessary for the treatment of the work-injury. *See also* 20 C.F.R. §702.402. Claimant can establish a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *See Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997).

In the present case, the administrative law judge found that as claimant's symptoms after October 1, 1997, were not credible, further treatment was not necessary in October or November 1997. However, as discussed above, the administrative law judge rejected the opinion of Dr. Pushkin on an invalid basis. Moreover, the administrative law judge improperly found that Dr. Pushkin's services are not compensable because there is no

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<sup>6</sup>Moreover, neither Dr. Hunt's assessment of claimant's condition in 1998 nor the administrative law judge's assessment of claimant's condition at the time of the hearing in 1999 is directly relevant to the extent of claimant's condition in 1997.

evidence that Dr. Young referred claimant for treatment, but only for evaluation. *See generally Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992)(Smith, J., dissenting on other grounds); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988). To the contrary, there is no evidence that Dr. Pushkin was only to evaluate claimant's condition. Moreover, the evidence is uncontradicted that Dr. Pushkin's treatment was necessary. *See* Emp. Ex. 4a at 21; *see generally Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). As discussed, Dr. Apostolo stated that Dr. Pushkin's treatment was appropriate and effective. Emp. Ex. 4 at 21. In the absence of evidence that treatment is unnecessary or inappropriate, it is error for the administrative law judge to question the validity of treatment. *See Amos v. Director, OWCP*, 153 F.3d 1051 (9<sup>th</sup> Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT)(9<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). Thus, we reverse the administrative law judge's finding that employer is not liable for the treatment provided by Dr. Pushkin through November 7, 1997. *See Buckland*, 32 BRBS at 101; *see generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2<sup>d</sup> Cir. 1997).

Accordingly, the Decision and Order on Remand of the administrative law judge denying further temporary total disability benefits and finding that employer is not liable for the treatment provided by Dr. Pushkin is reversed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

PETER A. GABAUER, Jr.  
Administrative Appeals Judge