

BRB Nos. 96-776
and 96-1031

KAREN A. PLAPPERT)
)
 Claimant-Respondent)
)
 v.)
) DATE ISSUED: _____
 MARINE CORPS EXCHANGE)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Supplemental Decision and Order of Robert D. Kaplan, Administrative Law Judge, and the Compensation Order of John J. McTaggart, District Director, United States Department of Labor.

Todd A. Goodman (Kornblau & Kornblau), Jenkintown, Pennsylvania, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Supplemental Decision and Order (94-LHC-1532) of Administrative Law Judge Robert D. Kaplan, and the Compensation Order (Case No. 06-96366) of District Director John J. McTaggart 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In June 1986, while performing her duties as a "plain clothes detective" for employer, claimant was attacked by a marine she was helping to apprehend. She sustained injuries to her head, neck and shoulder, and in March 1987, she underwent surgery to fuse the C5-6 discs in her cervical spine. Claimant returned to work for employer but left for other employment in January 1988. Emp. Ex. 51; Tr. at 35-38, 43. Employer voluntarily paid temporary total disability benefits and medical benefits for this injury. Emp. Ex. 1.

After leaving employer's employ, claimant secured a series of jobs.¹ Claimant testified she did not sustain a new injury to her neck or shoulder in any of her post-Marine jobs, but that her symptoms (pain, headaches) intensified in August 1992 when she was employed by Allied Services as a nurse's aide.² She consulted Dr. Newton, a physician she knew through Allied Services, and he treated her conservatively. Because the treatment was not successful, Dr. Newton referred claimant to a neurosurgeon, Dr. Black. An MRI taken in November 1992 revealed mild spondylitic formation at C5-6 and a mild herniation at C6-7. Emp. Ex. 26. In January 1993, Dr. Black performed surgery on claimant's cervical spine, fusing discs C6-7. Cl. Ex. 22; Tr. at 51. A post-surgery MRI revealed disc fusions at C5-6 and C6-7, mild to moderate spondylitic changes at C4-5, and mild to moderate bony densities at C5-6 and C6-7, but no large herniations. Cl. Ex. 22. Claimant remained out of work

¹Although claimant testified she continued to have neck and shoulder pain and headaches after her surgery, it appears her association with her subsequent employers was severed due to various unrelated medical problems. See, e.g., Emp. Exs. 7 (carpal tunnel exacerbation), 13-14, 16-23 (puncture wound to hand; left knee injury), 48-49 (broken foot, breast biopsy - surgery and continuing breast abscess). Only Allied Services, see discussion *infra*, which terminated claimant for failing to return to work, noted that she should not be rehired because she had a previous cervical spine fusion and she always complained of neck pain. Emp. Ex. 15.

²Medical reports indicate there was a new injury in 1992. Cl. Ex. 26 at 5-6; Emp. Exs. 25-26, 45.

following this surgery until August 5, 1994, when she secured employment as a private nurse's aide through a placement agency. Tr. at 54.

Claimant filed a claim under the Act against employer for temporary total disability benefits from December 13, 1992, through August 5, 1994, as well as past and future medical benefits. Jt. Ex. 1. Before the administrative law judge, employer argued that claimant was not disabled during that time period. Alternatively, employer argued that claimant's disability was not due to the natural progression of her 1986 injury but was the result of an intervening cause, *i.e.*, an injury incurred while working as a nurse's aide. Employer also argued that claimant failed to comply with the reporting requirements of Section 7(d)(2), 33 U.S.C. §907(d)(2), and that she was subject to the Section 8(j), 33 U.S.C. §908(j) (1988), forfeiture provision because the information she provided on the Report of Earnings Form (LS-200) was inaccurate.

The administrative law judge initially found that, based on uncontroverted evidence, claimant was temporarily totally disabled between December 13, 1992, and August 5, 1994, due to a cervical disc herniation with radiculopathy which resulted in a fusion of the spine at C6-7 on January 4, 1993. Decision and Order at 4. He also found that the Section 20(a), 33 U.S.C. §920(a), presumption is applicable and has not been rebutted; consequently, claimant's temporary total disability was the result of an aggravation of the chronic changes caused by the 1986 injury as well as the disc herniation at C6-7. *Id.* at 7-9. The administrative law judge determined that claimant is not subject to the Section 8(j) forfeiture provision because the wages she failed to report were earned prior to the period during which she claims disability, *i.e.*, before December 13, 1992. Finally, on the issue of medical benefits, the administrative law judge excused claimant's failure to comply with the Section 7(d)(2) reporting requirements, and he held employer liable for all related medical benefits commencing December 13, 1992. Decision and Order at 10-12.

On employer's motion for reconsideration, the administrative law judge revisited the issues of disability and medical benefits. He reaffirmed his conclusion that employer is liable for claimant's temporary total disability benefits because claimant's present condition was caused by a 1992 injury which aggravated the residuals from claimant's previous injury, plus the scarring from the previous surgery prevented the doctor from performing surgery to correct the 1992 symptoms. Supp. Decision and Order at 1-3. Additionally, he rejected employer's contention that because many of the medical expenses were paid by claimant's private health insurer, claimant does not have standing to seek medical benefits. Thus, he also reaffirmed his conclusion that employer is "generally responsible" for medical treatment. However, based on the Board's decision in *Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1995) (McGranery, J., dissenting), he remanded the case to the district director for "a determination of whether Employer is responsible for Claimant's medical treatment commencing on December 13, 1992 . . . pursuant to Section 7 of the Act." Supp. Decision

and Order at 4-5.

On remand, the district director corresponded with the parties, received responses and rendered a decision. He concluded, based on a letter she sent to him in 1993, that claimant was genuinely confused as to how her medical providers were to receive payment, Order at 2, and that claimant demonstrated good cause for failing to file a first report of treatment. Consequently, the district director held employer liable for the medical bills before him, payable directly to the providers, giving no credit for payments made by claimant or other insurers. *Id.* Employer appeals the decisions issued by the administrative law judge (BRB No. 96-776) and the determination issued by the district director (BRB No. 96-1031). Claimant responds to both appeals, urging affirmance of the decisions.

Causation

Employer first contends the administrative law judge erred in concluding that claimant's 1992 condition was caused by her 1986 injury. Specifically, it argues it rebutted the Section 20(a) presumption because claimant's 1992 injury was an intervening event which severed any connection with claimant's employment with employer. Moreover, it argues that the 1992 incident aggravated a pre-existing condition, and that therefore it is not liable for the aggravation and its consequences; employer asserts that to hold otherwise is to make it an insurer for life. Claimant responds, arguing that her 1992 disability was due in part to the 1986 injury which caused degenerative changes and scarring. After invoking the Section 20(a) presumption because it is uncontroverted that claimant sustained a harm from conditions at work in 1986, the administrative law judge found there is no evidence of record to rebut the causal connection, as no doctor ruled out a connection between the two injuries or stated that claimant's 1992 condition was attributable solely to the 1992 injury. Decision and Order at 7-9.

In a case involving a subsequent injury, an employer can rebut the Section 20(a) presumption by showing that the claimant's disabling condition was caused by a subsequent event, provided the employer also proves that the subsequent event was not caused by the claimant's work-related injury. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). The employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury; however, where the second injury is the result of an intervening cause, the employer is relieved of liability for that portion of the disability attributable to the second injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

The only doctors' reports of record pertaining to the cause of the 1992 disability are those of Drs. Black and Newton, both of whom the administrative law judge considered credible. Although Dr. Newton reported that claimant related an intensifying of her

symptoms in August 1992 to an injury sustained while working in a nursing home and to long hours working as a nurse's aide, Cl. Ex. 26 at 5-6; Emp. Exs. 25-26, 45, he also stated that her condition was due to a combination of her pre-existing arthritic changes as well as the C6-7 herniation. Cl. Ex. 26 at 16, 18-20. Specifically, he stated that the C6-7 herniation was caused by a nursing job injury but that the osteophytic changes in C6-7 and the spondylitic changes in C4-5 were due to the prior injury and surgery. Cl. Ex. 26 at 19-20. Dr. Black, who performed the 1993 surgery, stated in his post-operative report that there was a great deal of scarring and that normal tissue planes of the cervical spine were "totally obliterated" by the previous surgery "making dissection extremely difficult." Moreover, he reported that the dense scar tissue and obliteration of tracts prevented him from performing surgery at the C4-5 level as he wished.³ Cl. Ex. 10.

Based on this evidence, it was reasonable for the administrative law judge to credit the doctors' opinions that claimant's 1992-1994 disability was caused by her 1986 injury as well as by her 1992 injury. Effectively, they state that the chronic osteophytic and spondylitic changes are the result of the 1986 injury and operation, and the herniations were the result of some incident at the nursing home in 1992. Neither Dr. Black nor Dr. Newton attributed the disability to the 1992 injury alone. Therefore, we reject employer's contention that it rebutted the Section 20(a) presumption, as the credited evidence establishes that claimant's condition was caused, at least in part, by her 1986 injury. Moreover, we note that the administrative law judge also correctly found there is no evidence of record which apportions the disability between the two injuries. Therefore, we affirm his decision to hold employer liable for benefits for the entire disability. *See Bass*, 28 BRBS at 15-16; *Merrill*, 25 BRBS at 144-145; *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981).

Section 8(j)

Employer next contends that claimant is subject to the forfeiture provisions of Section 8(j). The administrative law judge held that claimant is not barred from receiving compensation pursuant to Section 8(j). Although he acknowledged that claimant omitted some earnings from the earnings form, he stated that all omitted wages were earned prior to the period during which claimant contends she was disabled, *i.e.*, prior to December 13, 1992. Further, the administrative law judge reasoned that, as Section 8(j) applies only to "disabled employees," the request for earnings information can only affect those periods during which "the employee claims he or she was disabled" because those would be the only periods during which a claimant's earnings are relevant. Decision and Order at 10.

³Dr. Black felt that claimant's cervical radicular headaches were being caused by a herniation at C4-5, but he was unable to operate around the scarring because of the great risk of tear to the esophagus and the carotid artery. Cl. Ex. 10.

Consequently, he equated this period of disability to the statutory "periods during which the employee was required to file such report." *Id.*; 33 U.S.C. §908(j) (1988). Additionally, the administrative law judge stated that claimant need only submit an earnings report if it is requested by employer, but that there is no evidence employer requested completion of the form in this case. Therefore, he concluded that Section 8(j) is not applicable and does not bar claimant's receipt of benefits. Decision and Order at 10-11.

Section 8(j) of the Act permits an employer to request a claimant to report her post-injury earnings. Once the inquiry is made, the claimant must complete and return the form within 30 days of receipt whether or not she has any post-injury earnings. The claimant's benefits are subject to forfeiture if earnings are knowingly omitted or understated. 33 U.S.C. §908(j) (1988); *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994) (decision on recon.); 20 C.F.R. §§702.285-702.286. An employer can recover such forfeited compensation only "by a deduction from the compensation payable" in the future. 33 U.S.C. §908(j)(3) (1988).

Initially, we reverse the administrative law judge's determination that employer did not request completion of the earnings form in this case. The evidence of record and the arguments made below establish that employer made such a request. Emp. Exs. 3, 44 at 15-16; Tr. at 58-59, 75-76. Because employer made the necessary request, *see Moore*, 28 BRBS at 182, the question of whether Section 8(j) applies to claimant's situation must be addressed.

Section 8(j)(1), (2) of the Act provides:

(1) The employer may inform a *disabled employee* of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.

(2) An employee who--

(A) fails to report the employee's earnings under paragraph (1) when requested, or

(B) knowingly and willfully omits or understates any part of such earnings,

and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, *forfeits his right to compensation with respect to any period during which the employee was required to file such report.*

33 U.S.C. §908(j) (1)-(2) (1988) (emphasis added). It is undisputed that claimant omitted earnings from the report, thereby potentially violating clause (B) of subsection (2). Decision

and Order at 10; Emp. Ex. 53; Tr. at 58-59. However, although the administrative law judge found that claimant omitted certain earnings from her report, he made no finding as to whether this omission was made knowingly or willfully. Nor did he state whether he considered it to be a failure to report the earnings and a violation of clause (A). Instead, he based his conclusion that Section 8(j) does not bar claimant's entitlement to benefits on the definition of the "period during which [claimant] was required to file such report." 33 U.S.C. §908(j)(2)(B). Employer interprets the "period" as being that time for which it requested a reporting. In this case, employer requested earnings information from claimant for the period between December 1, 1987, and August 25, 1994. The administrative law judge disagreed with employer and found that, as Section 8(j)(1) pertains only to "disabled employee[s]," subsection (j)(2) applies only to that period of time during which claimant claimed a disability, *i.e.*, December 13, 1992, through August 5, 1994. The Board previously has not had occasion to define the Section 8(j) statutory "period." *See Moore*, 28 BRBS at 177; *Zepeda v. National Steel & Shipbuilding Co.*, 24 BRBS 163 (1991); *Freiwillig v. Triple A South*, 23 BRBS 371 (1990).

When interpreting a statute, the starting point is the plain meaning of the words of the statute. *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989); *see also Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 183 (1993), *aff'd mem.* No. 93-4367 (5th Cir. December 9, 1993). If the intent of Congress is clear, that is the end of the matter; the court, as well as the agency that administers the policy under the statute, must give effect to the unambiguously expressed intent of Congress. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As emphasized above, the Act identifies the period in question only as "any period during which the employee was required to file such report." A review of the regulations reveals similar language in reference to the period in question. 20 C.F.R. §§702.285-702.286.

Section 8(j)(1) of the Act specifically limits an employer's request for earnings information to "disabled employees." A review of the legislative history of this provision reveals Congress contemplated that only employees who are receiving compensation need submit a report of their wage earnings. *See H.R. Rep. No. 1027*, 98th Cong., 2d Sess. 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2771, 2783. Those employees would naturally be considered "disabled." Moreover, the Board's decision in *Denton v. Northrop Corp.*, 21 BRBS 37 (1988), also provides some guidance. In *Denton*, the administrative law judge determined that Section 8(j) does not bar a claimant's entitlement to death benefits. The Board affirmed this conclusion, holding that Section 8(j) applies only to a disabled employee, and not to a surviving spouse. The Board reasoned that, while a disabled employee's post-injury earnings are relevant because a change in his wage-earning capacity could affect his employer's liability for disability benefits, his widow's death benefits are based on a fixed average weekly wage and are not affected by her earnings. *Id.* at 46.

From *Denton*, as well as the legislative history, clearly one of the purposes for requesting information about a disabled employee's earnings under Section 8(j) is to keep an employer informed about the employee's post-injury earning capacity. Thus, the administrative law judge in this case reasonably determined that pursuant to Section 8(j), employer may request an earnings report only for earnings during periods of disability, as those would be the only periods during which an employee's earnings could affect employer's liability for compensation. Consequently, we agree with the administrative law judge's interpretation of the Act, and we affirm his conclusion that Section 8(j) does not bar claimant's receipt of benefits in this case, as claimant's omissions from the earnings report, whether intentional or not, involved earnings received prior to the claimed period of disability. See *Denton*, 21 BRBS at 46.

Section 7(d)(2)

Employer also challenges the district director's determination that claimant is excused from her failure to comply with the reporting procedures set forth in Section 7(d)(2) of the Act. In particular, employer argues that the district director lacked good cause for excusing the failure to file a report of treatment within 10 days of the first medical treatment, and that he considered correspondence and medical bills which were not in evidence before the administrative law judge without giving employer an opportunity to review them or respond to them.⁴

⁴We reject employer's argument concerning its liability for expenses previously paid by claimant's private health insurer. Although employer introduces this contention, it does not thereafter set forth any arguments and authorities on the issue. Thus, the argument is inadequately briefed and need not be addressed by the Board. *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); 20 C.F.R. §802.211.

Under Section 7(d)(2) of the Act, an employer is not liable for medical expenses unless, within 10 days following the first treatment, the physician rendering such treatment provides the employer with a report of that treatment. The Secretary may excuse the failure to comply with the provisions of this section in the interest of justice. 33 U.S.C. §907(d)(2) (1988); *see Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in pertinent part*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991); 20 C.F.R. §702.422.⁵ The Board has held that the authority to determine whether non-compliance with Section 7(d)(2) may be excused rests with the district director and not the administrative law judge. *Krohn*, 29 BRBS at 74; *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting). A decision of the district director will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See, e.g., Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

Initially, employer argues that the district director erred in excusing claimant's physician's failure to file a first report of treatment. The district director considered a personal letter from claimant in which she voiced her frustration at being unsure of who would handle her medical bills after she underwent surgery and was told coverage is unclear. From this letter, he concluded that claimant's "confusion on how to proceed with advising [the medical] providers on [the Act's] reporting requirements was bona fide[.]" and he excused the reporting delay. Order at 2. The facts of this case, as found by the administrative law judge, also indicate that claimant and Dr. Newton notified employer's claims examiners of claimant's condition and requisite treatment in December 1992. *See* Cl. Ex. 2. We hold that employer failed to establish that the district director abused his discretion in excusing the reporting delay in this case. *See Rogers*, 784 F.2d at 694, 18 BRBS at 87 (CRT) (a reporting delay may be excused when an employer is not prejudiced by the delay or when a claimant substantially complies with the requirements of the Act). Therefore, we affirm the district director's conclusion that there was good cause for failing to file a first report of treatment, so that Section 7(d)(2) of the Act does not bar claimant's entitlement to medical benefits in this case.

However, employer also contends the district director improperly held it liable for two

⁵The implementing regulation, Section 702.422, states in pertinent part:

For *good cause* shown, the Director may excuse the failure to comply with the reporting requirements of the Act. . . .

20 C.F.R. §702.422(b) (emphasis added).

medical bills which were not part of the official record before the administrative law judge. The district director has been granted the general authority of overseeing medical care under Section 7 of the Act, *see generally Anderson v. Todd Shipyards Corp.* 22 BRBS 20 (1989), but that authority does not extend to approving *contested* medical expenses. *Krohn*, 29 BRBS at 72; *Toyer*, 28 BRBS at 347. The administrative law judge has the authority to resolve disputes over the necessity of any treatment. As employer contests its liability for two medical bills,⁶ and as it is entitled to a hearing before an administrative law judge on contested issues, the district director exceeded his authority in awarding payment of those contested bills. Therefore, we vacate his award of medical benefits to the extent it includes the unapproved medical bills. Claimant may request referral of this issue to the administrative law judge if she wishes to pursue payment of these bills.

⁶One medical bill indicates it is for emergency treatment to claimant's lumbosacral spine, and this case does not involve such an injury.

Accordingly, the administrative law judge's finding that employer did not request completion of the Report of Earnings form is reversed. In all other respects, his decisions are affirmed. The district director's award of medical benefits is vacated to the extent it includes the two contested medical bills. In all other respects, his decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge