

ALGIE FORT)	
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Claimant-Petitioner)	
)	
v.)	
)	
ATLANTIC MARINE & DRY DOCK, INCORPORATED)	DATE ISSUED: 08/19/2005
)	
and)	
)	
ARM INSURANCE COMPANY)	
)	
Employer/Carrier- Respondents)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Thomas M. Farrell, IV (Farrell & Gasparo, P.A.), Jacksonville, Florida, for claimant.

Robert M. Sharp (Moseley, Warren, Prichard & Parrish), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-2349) of Administrative Law Judge Richard K. Malamphy 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 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant severed the fingertips of his right middle and ring fingers in the course of his work for employer on January 18, 1999. Employer immediately referred him to an orthopedic hand specialist, Dr. Steinberg, who diagnosed partial right middle and ring finger amputations, and subsequently performed two surgical procedures on the injured digits.¹ Dr. Steinberg released claimant to full-duty work on November 22, 2000, with a recommendation that claimant seek follow-up treatment on an as needed basis.

Claimant continued to experience numbness, soreness and a limited range of motion in his right hand, prompting him to request an evaluation, and if necessary, treatment, from Dr. Steinberg's partner, Dr. Kleinhans. Employer denied claimant's request, alleging that Dr. Steinberg was claimant's physician of choice. In his decision, the administrative law judge determined that Dr. Steinberg was claimant's treating physician, and that claimant did not establish that Dr. Steinberg refused to provide further treatment or that Dr. Kleinhans is capable of providing better care. Accordingly, he denied claimant's request for a change in treating physician to Dr. Kleinhans.

On appeal, claimant challenges the administrative law judge's denial of his request for a change in physician to Dr. Kleinhans. Employer responds, urging affirmance.

Claimant contends, citing the Board's decisions in *Hurd v. Bay Shipbuilding Corp.*, BRB No. 93-0636 (Feb. 26, 1996) (unpub.), and *Martin v. Ceres Gulf, Inc.*, BRB No. 93-2346 (July 19, 1996) (unpub.), that the administrative law judge erred in denying his request for a change in physician as the uncontroverted evidence demonstrates that employer, not claimant, made the initial choice of physician, and that claimant was unaware of his right to a free choice of physician.

Section 7(b) of the Act, 33 U.S.C. §907(b), provides the employee with the right to choose an attending physician for treatment of his work-related injuries, unless by virtue of his injury he cannot, at which point the employer shall select a physician for him.² Section 7(c)(2) of the Act, 33 U.S.C. §907(c)(2), provides that when the employer

¹Specifically, on January 19, 1999, Dr. Steinberg performed a V-Y advancement flap repair of the right middle and ring finger amputations. He performed a second surgery on claimant's fingers on August 24, 2000, to correct an inclusion cyst along the ulnar border of the right finger aspect and to insert a nail plate with retained sterile matrix.

²Section 7(b) states:

The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this chapter as hereinafter provided. If, due to the nature of the injury, the employee is

or carrier learns of its employee's injury, either through written notice or as otherwise prescribed by the Act, it must authorize medical treatment by the employee's chosen physician. Once claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior consent of the employer, carrier or district director. 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406.³ The determination of whether a doctor is claimant's initial free choice of physician rests on the findings of fact of the administrative law judge. *See generally Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002); *Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997) (Brown, J., concurring).

In the instant case, the administrative law judge acknowledged claimant's uncontroverted testimony that he did not choose Dr. Steinberg, HT at 14, and further recognized that it is undisputed that employer selected Dr. Steinberg and that claimant was unaware that he had a right to the choice of physician. Decision and Order at 2. Nevertheless, the administrative law judge rationally found that Dr. Steinberg had been treating claimant for almost two years as of November 22, 2000, that during that period claimant had signed two surgical release forms, that thereafter claimant went another three years without any treatment, that Drs. Steinberg and Kleinhans have the same specialty, *i.e.*, they are both orthopedists, and that Dr. Steinberg, whose specific expertise is in the treatment of upper extremity disorders, is better qualified to treat claimant's specific injury.⁴ *See* 20 C.F.R. §702.406(a); *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995)(table). Based on these findings, the administrative law judge concluded that claimant "acquiesced" to treatment by Dr. Steinberg. Decision and Order at 5; *see also Hunt*, 28 BRBS 364. Moreover, since Dr. Steinberg had not refused further treatment, and claimant did not establish that Dr. Kleinhans can provide better care, the administrative law judge denied

unable to select his physician and the nature of the injury requires immediate medical treatment and care, the employer shall select a physician for him.

33 U.S.C. §907(b).

³The Act and regulations state that consent "shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease." 20 C.F.R. §702.406. In all other cases, "consent may be given upon a showing of good cause for change." *Id.*

⁴In contrast, the administrative law judge found that Dr. Kleinhans is a generalist in orthopedic surgery.

claimant's request for a change in physician to Dr. Kleinhans, for any additional treatment of claimant's work-related injuries by Dr. Kleinhans would be duplicative. *See generally Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988). Accordingly, the administrative law judge's conclusion that claimant is not entitled to a change in physician is affirmed as it is rational, supported by substantial evidence, and in accordance with law.⁵ *See Hunt*, 28 BRBS 364.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁵ The Board has stated that its unpublished cases should not be cited or relied on by the parties as they lack precedential value. *See Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n.2 (1990). In any event, in both *Hurd* and *Martin* the Board affirmed the administrative law judges' factual determinations that the claimant had not been allowed an initial choice of physicians as they were supported by substantial evidence. The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. 33 U.S.C. §921(b)(3); *see, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). In this case, the administrative law judge's inference that claimant, by virtue of his own actions, acquiesced to having Dr. Steinberg serve as his treating physician is supported by substantial evidence.