BRB No. 01-0819

JAMES R. THORNTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICES	)	DATE ISSUED: July 17, 2002
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

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

SuAnne Hardee Bryant (Bryant & Associates, P.C.), Chesapeake, Virginia, for claimant.

F. Nash Bilisoly (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-2322, 99-LHC-2323) 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).

The parties stipulated at the hearing that claimant sustained work-related back injuries on August 14, 1995 and March 19, 1996, while working for employer. The contested issues presented to the administrative law judge which are relevant to the instant appeal involved the question of claimant's entitlement to temporary partial disability benefits for three dates on which claimant received medical treatment for his work-related back injury and questions as to whether claimant requested a change in his treating physician from Dr. Morales to Dr.

Byrd and whether claimant is entitled to reimbursement for Dr. Morales's medical services.[1] In his Decision and Order, the administrative law judge found, with respect to these issues, that claimant is not entitled to compensation for the three dates on which he obtained medical treatment, that Dr. Byrd is claimant's authorized treating physician, and that employer is not responsible for the payment of treatment provided by Dr. Morales to claimant after October 1996.

On appeal, claimant challenges the administrative law judge's denial of his request for temporary partial disability compensation for the three dates during which he was unable to work as a result of his having to undergo medical treatment. Claimant further contests the administrative law judge's findings that claimant requested a change in his treating physician from Dr. Morales to Dr. Byrd and that he therefore is not entitled to reimbursement for Dr. Morales's treatment after October 1996. Employer responds, urging affirmance.

We first address the administrative law judge's determination that claimant is not entitled to the temporary partial disability benefits he sought to compensate for his loss of earnings incurred on December 6, 1995, January 10, 1996, and February 21, 1996, when he received medical treatment from Dr. Morales. The administrative law judge acknowledged claimant's uncontested testimony that he could not work a partial work day after his appointments with Dr. Morales because his position had been filled by another employee on each of the three dates for which he sought disability benefits. *See* Decision and Order at 3; Tr. at 17-18. Thereafter, citing the Board's holding in *Castagna v. Sears, Roebuck & Co.*, 4 BRBS 559 (1976), that Section 7(a) of the Act, 33 U.S.C. §907(a), does not entitle a claimant to reimbursement for loss of annual leave used to attend medical appointments, the administrative law judge summarily rejected the claim for disability compensation for these dates.

[1]The remaining issue presented to the administrative law judge involved claimant's entitlement to temporary total disability compensation for the period from March 19-24, 1996. The administrative law judge's conclusion that claimant is entitled to compensation during this period of time is not challenged by employer in the appeal presently before the Board.

Initially, the administrative law judge's reliance on *Castagna* to support his determination that claimant is not entitled to disability benefits for the dates on which he received medical treatment is misplaced. Unlike the case at bar, the claimant in *Castagna* did not make a claim for disability benefits for lost time under Section 8 of the Act, 33 U.S.C. §908; rather, he sought only to be reimbursed under Section 7(a) for the annual leave he was assessed by his employer for the time he spent attending medical appointments. In contrast to the situation in *Castagna,* the claimant here sought disability benefits to compensate him for his loss of wage-earning capacity resulting from the medical treatment of his work-related injury, pursuant to Section 8(e) of the Act, 33 U.S.C. §908(e). [2] The Board's holding in *Castagna* is thus inapposite to the present claim.

The administrative law judge in the instant case did not address the relevant issue, which is whether claimant has established a loss of wage-earning capacity due to a work-related inability to work on those dates on which he underwent medical treatment.[3] *See* 33 U.S.C. §908(e), (h); *see generally Stallings v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 193 (1999), *aff'd in pert. part,* 250 F.3d 868, 35 BRBS 51(CRT)(4th Cir. 2001) (claimant's work-related injury held to have diminished claimant's post-injury wage-earning capacity as demonstrated by his actual post-injury wage loss notwithstanding that the actual wage loss sustained by the claimant was intermittent and small in amount). We therefore vacate the administrative law judge's denial of temporary partial disability benefits for

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[2]Section 8(e) provides as follows:

> Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

33 U.S.C. §908(e).

[3]The record reflects that on each of the three dates in question, Dr. Morales's treatment of claimant included injections with Marcaine in claimant's painful trigger point areas. *See* EX 1. Claimant's pain is a relevant factor in determining post-injury wage-earning capacity. *See, e.g., Ramirez v. Sea-Land Services, Inc.,* 33 BRBS 41, 45 n.5 (1999). *See generally Metropolitan Stevedore Co v. Rambo [Rambo II],* 521 U.S. 121, 31 BRBS 54(CRT) (1997).

December 6, 1995, January 10, 1996, and February 21, 1996, and remand the case for the administrative law judge to reconsider, in accordance with the applicable law, the issue of claimant's loss of wage-earning capacity on the dates on which he underwent medical treatment for his work-related injury. *See* 33 U.S.C. §908(e), (h); *Stallings*, 33 BRBS 193; *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41, 45 n. 5 (1999).

We next consider claimant's challenge to the administrative law judge's findings that claimant requested a change in his treating physician, from Dr. Morales to Dr. Byrd, which was approved by employer and that, accordingly, employer is not liable for the payment of Dr. Morales's treatment rendered after October 1996. Section 7(c)(2) of the Act, 33 U.S.C. §907(c)(2), provides that once claimant has made his initial choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier or district director. *See also* 20 C.F.R. §702.406. In the case at bar, the administrative law judge determined that the record evidence supports a finding that claimant's prior counsel, Tom Hennessey, requested a change in treating physician from Dr. Morales to Dr. Byrd and that employer consented to this change in October 1996.[4] In contesting this finding, claimant avers that the evidence demonstrates that there was not an agreement between the parties in 1996 that Dr. Byrd had become claimant's treating physician. The Board, however, is not empowered to substitute its views for those of the administrative law judge or to reweigh the evidence; rather, the Board must accept the credibility assessments, the inferences drawn from the evidence, and the factual findings of the administrative law judge which are reasonable and supported by substantial evidence. *See Norfolk Shipbuilding & Dry Dock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000). In this case, the administrative law judge's finding that Mr. Hennessey requested a change of physician from Dr. Morales to Dr. Byrd is reasonable and supported by substantial evidence. *Id.* Accordingly, we affirm the administrative law judge's determination that Dr. Byrd was

[4]In this regard, the administrative law judge considered the evidence in support of claimant's position that he simply wanted to obtain a second opinion from Dr. Byrd, and continued to consider Dr. Morales to be his treating physician. *See* Decision and Order at 6; Tr. at 19-21, 25-30. The administrative law judge also considered the testimony of the claims adjuster, Marsha Townsend, and documentary evidence supporting employer's position that claimant's prior attorney requested a change in treating physician from Dr. Morales to Dr. Byrd in August 1996 and that employer consented to this change by letter dated October 30, 1996. *See* Decision and Order at 6-7; Tr. at 37-38; EXS 2, 3. Having considered all the relevant evidence, the administrative law judge determined that Ms. Townsend would not have stated in her October 30, 1996 letter that she agreed to a change in treating physician unless Mr. Hennessey had made such a request. *See* Decision and Order at 8. Thus, the administrative law judge concluded that Dr. Byrd was the authorized treating physician as of October 1996. *Id.*

claimant's authorized treating physician as of October 1996. *See* 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406.

Our affirmance of the administrative law judge's finding that Dr. Byrd was claimant's authorized treating physician as of October 1996 is not dispositive, however, of the issue of whether the administrative law judge erred in proceeding to summarily find that employer is not liable for the payment of Dr. Morales's charges for all medical treatment provided after October 1996. Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for employer's liability for payment or reimbursement of medical expenses incurred by claimant. *See Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 574 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Section 7(d) requires that a claimant request employer's authorization for medical services performed by any physician. *See, e.g., Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 27 (1999); *Anderson*, 22 BRBS at 23. Where a claimant's request for authorization is refused by the employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was necessary for his injury in order to be entitled to such treatment at employer's expense. *See Ezell*, 33 BRBS at 28; *Schoen v. U.S. Chamber of Commerce*, 130 BRBS 112 (1996); *Anderson*, 22 BRBS at 23.

In the instant case, the record reflects that during the fall of 1997, claimant sent employer invoices for medical care rendered by Dr. Morales after October 1996; by letter dated December 12, 1997, employer refused to authorize payment of Dr. Morales's bills. EX 3; *see also* EX 4. The administrative law judge, however, did not address the issue of claimant's entitlement pursuant to Section 7(d) to reimbursement by employer of the cost of Dr. Morales's medical care procured by claimant after employer refused to authorize such treatment. *See Ezell*, 33 BRBS at 28; *Schoen*, 130 BRBS at 113; *Anderson*, 22 BRBS at 23. We therefore must vacate the administrative law judge's finding that employer is not liable for any treatment rendered by Dr. Morales subsequent to October 1996, and remand the case for the administrative law judge to consider the issue of employer's liability for any treatment by Dr. Morales procured by claimant after he requested treatment with that doctor which was reasonable and necessary for claimant's work-related injury. *Id.*

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge