BRB No. 04-0846

LOUIS CAMERON, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOLT CARGO SYSTEMS, INCORPORATED	)	DATE ISSUED: 07/28/2005
	)	
	)	
and	)	
	)	
LUMBERMAN'S MUTUAL	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Brian R. Steiner (Steiner, Segal & Muller, P.C.), Philadelphia, Pennsylvania, for claimant.

John E. Kawczynski (Field, Womack & Kawczynski, L.L.C.), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-1358) of Administrative Law Judge Ralph A. Romano 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 worked for employer driving yard hustlers and forklifts. On April 1, 2002, he sustained an injury to his low back while attempting to hook a truck to a container. He was unable to continue work, and employer paid temporary total disability benefits from April 2 through December 12, 2002. Claimant filed a claim for additional disability benefits.[1]

The administrative law judge denied claimant's claim. Based on medical opinions, as well as videotapes showing claimant shoveling snow, the administrative law judge discredited claimant's testimony that he could not return to his usual work and relied on doctors' opinions that he could do so. Therefore, he denied additional disability benefits. Decision and Order at 3-4. The administrative law judge also found that claimant did not establish that employer consented to a change in claimant's treating physician. Consequently, the administrative law judge determined that the claimed medical expenses are not the liability of employer. Decision and Order at 4. Claimant appeals the decision, and employer responds, urging affirmance.

Claimant first contends the administrative law judge erred in denying benefits after December 12, 2002, arguing that he was not capable of returning to work as of that date. The administrative law judge credited the opinions of Dr. Lee, the impartial orthopedic surgeon selected by the district director, and Dr. Trager, employer's orthopedic expert, over that of Dr. Barris, claimant's treating physician, by virtue of their being better qualified in the orthopedic specialty. The administrative law judge then stated that, after viewing the videotapes of claimant shoveling snow, Drs. Lee and Trager agreed that claimant could return to his regular work.[2] The administrative law judge, however, relied most heavily on the opinion of Dr. Lee that claimant's physical functional capacity had improved based upon the activity shown in the videotapes. Accordingly, he stated that claimant's testimony to the contrary was not credible and found that claimant could return to work as of December 12, 2002. Decision and Order at 3-4.

To be entitled to total disability benefits, the claimant bears the initial burden of establishing his inability to perform his usual work as a result of his work injury. *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979);

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[1]Claimant filed a claim for additional temporary total disability benefits from December 12, 2002, through January 11, 2004, and for permanent total disability benefits thereafter. Claimant also filed a claim for medical benefits.

[2]The administrative law judge noted that Dr. Barris did not view the videotape, thereby "diminishing the integrity of his opinion on Claimant's disability status." Decision and Order at 3.

Trask v. Lockheed Shipbuilding & Constr. Co., 17 BRBS 56 (1980). The administrative law judge found that claimant did not satisfy this burden based on the opinions of Drs. Lee and Trager. Dr. Trager examined claimant on December 12, 2002. He found that, although claimant had sustained a strain or sprain of his lumbosacral spine and had underlying joint arthritis, claimant was capable of returning to work, as the acute injury had resolved. Emp. Ex. 15 at 11-12, 36. Dr. Lee had examined claimant in September 2002, and he also had diagnosed a sprain or strain of the lumbosacral spine superimposed on degenerative disc disease of the lumbosacral spine. As of that date, he determined that claimant's work-related injury had not resolved. Emp. Ex. 1. During his deposition on April 20, 2004, Dr. Lee viewed the videotapes, and based on those recordings dated after December 6, 2002, which showed claimant shoveling snow, he concluded that claimant's condition appeared to have improved. Emp. Ex. 14 at 14-15, 18-19. Dr. Lee expressed his agreement with Dr. Trager's conclusion regarding the date of maximum medical improvement and claimant's ability to return to work. Emp. Ex. 14 at 20-21.

While the above-cited evidence supports the administrative law judge's finding that claimant could return to work as of December 12, 2002, claimant correctly contends that Drs. Lee and Trager made additional statements potentially contradictory to the administrative law judge's finding, which the administrative law judge did not discuss and weigh. Specifically, Dr. Trager noted that claimant complained of pain as of December 12, 2002. Although he dismissed the pain as resulting from claimant's underlying arthritic condition, he was unable to state with certainty that the acute injury to claimant's back did not affect the degenerative condition. Emp. Exs. 3, 15 at 37-38. Additionally, Dr. Lee backed away from his agreement with Dr. Trager by stating that he would prefer to hear how claimant felt after shoveling snow before drawing a conclusion about his disability status. After hearing claimant's testimony that his back tightened up and was throbbing the next day, Dr. Lee stated that he would like to re-examine claimant before deciding whether claimant could return to his usual work. He stated he did not want to draw a conclusion from only the videotapes and claimant's testimony. Emp. Ex. 14 at 27-28, 36-46, 48, exh. 3; Tr. at 57-59.

It is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and may draw his own conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). It is solely within the administrative law judge's discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Nevertheless, the Board is not bound to accept an ultimate finding or inference if the decision discloses that it was reached in an invalid manner or is not supported by substantial evidence. *Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968); *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965). In this case, claimant has shown no

error in the administrative law judge's decision to credit the opinions of Drs. Lee and Trager over that of Dr. Barris. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). However, before the administrative law judge, claimant raised the issue of whether his acute back injury aggravated his pre-existing degenerative back condition, Cl. Post-H. Brief at 9-10, and the administrative law judge did not address the evidence that might support this theory of recovery. Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Kubin v. Pro-Football, Inc.* 29 BRBS 117 (1995). As claimant raised the aggravation issue, and as the administrative law judge did not discuss the entirety of the credited doctors' opinions, we vacate the denial of disability benefits after December 12, 2002. We remand the case to the administrative law judge to address the evidence fully and to render findings on claimant's disability status after December 12, 2002.

Next, claimant contends the administrative law judge erred in finding that his medical expenses, after he changed doctors, are not the liability of employer. Employer argues that claimant did not properly request or obtain its consent prior to changing treating physicians; therefore, he is not entitled to reimbursement of those costs. Initially, claimant went to NovaCare after his injury. He treated with that group of physicians for more than one month, visiting approximately five times with a physician and approximately 17 times with a physical therapist. Claimant testified that, on May 8, 2002, the doctor at NovaCare discharged him and told him to return to work as of May 9, 2002. According to claimant, the doctor told claimant he must try to return to work, but if he could not work, he could return to NovaCare for additional treatment. Tr. at 40-41. Claimant then testified that, instead, on advice from the union and his attorney, claimant went to another medical group and began treating with Drs. Goodman and Barris. He also testified that he called his supervisor and notified the supervisor that he had changed doctors. Thereafter, claimant continued to treat with Dr. Barris. Tr. at 41-43, 47-48. The administrative law judge found that claimant did not show that employer had consented to the change in physicians and, as the Act "requires such consent, the claimed expenses … are not recoverable." Decision and Order at 4. We cannot affirm this finding.

An employer's liability for a claimant's medical treatment is governed by Section 7 of the Act. 33 U.S.C. §907. A claimant is entitled to his initial free choice of physician; thereafter if a claimant wishes to change physicians, he must seek written approval from the employer, the carrier or the district director. 33 U.S.C. §907(b), (c); *Jackson v. Universal Maritime Services Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring); *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364, *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); 20 C.F.R. §702.406. In order to be reimbursed for

medical expenses, a claimant must request authorization from his employer for such treatment; if the requested authorization is denied, he may be reimbursed for medical treatment he thereafter obtained on his own if he demonstrates that such treatment was reasonable and necessary for his work-related condition. 33 U.S.C. §907(a), (d); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); 20 C.F.R. §702.421.

In this case, claimant testified that he "notified" employer of his decision to change physicians. Tr. at 41-43, 47-48. The administrative law judge denied medical benefits solely on the basis that claimant did not show that employer consented to the change. This finding, however, is not sufficient to support the denial of payment for treatment, as this issue is governed by Section 7(d). Under this provision, claimant must demonstrate that he requested approval to change physicians. *Id.* If he did not, employer is not liable for the costs incurred by claimant for unauthorized treatment. *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989). If he did request authorization, but employer refused to grant it, employer may be liable for the claimed medical expenses if claimant demonstrates that the treatment he obtained was reasonable and necessary for the work injury. *Roger's Terminal*, 784 F.2d 687, 18 BRBS 79(CRT); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). As the administrative law judge did not determine whether claimant requested authorization, and as that is a factual issue he must resolve, we remand the case to him for consideration of this issue. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *see also Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000) (compliance with 33 U.S.C. §907(d) was raised and should have been addressed). If the administrative law judge finds that claimant requested authorization, he must then address whether employer refused authorization and, if so, whether the treatment claimant obtained thereafter was reasonable and necessary for his work injury. *Roger's Terminal & Shipping Corp.*, 784 F.2d 687, 18 BRBS 79(CRT); *Anderson*, 22 BRBS 20.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for consideration consistent with this opinion.

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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REGINA C. McGRANERY
Administrative Appeals Judge