BRB No. 06-0918

Z.F.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AMERICAN WAREHOUSING OF NEW YORK	)	DATE ISSUED: 07/20/2007
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Baker, Garber, Duffy & Pedersen), Hoboken, New Jersey, for claimant.

Lawrence P. Postal (Seyfarth Shaw, LLP), Washington, D.C., for employer/carrier.

Before: SMITH, HALL, and BOGGS Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2005-LHC-01616) of Administrative Law Judge Paul H. Teitler 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).

Claimant was injured on February 16, 2002, when a 150-pound bag of coffee beans fell from a conveyor belt onto his head during the course of his employment for employer as a warehouseman. Claimant was taken by ambulance to Lutheran Medical Center where he was hospitalized for four days. He was diagnosed with cervical spine spasm. CX 3. Claimant subsequently sought treatment with Dr. Alan Rosen, a chiropractor, who noted cervical spasm and lumbosacral derangement. CX 36 at 5-12. He treated claimant for these conditions approximately three times a week, and referred claimant to Dr. Krishna, a neurologist. Dr. Krishna diagnosed cervical and lumbar disc herniation resulting in radiculopathy, neuropathic pain syndrome, post-traumatic cerebral concussion syndrome, cephalgia, and a superimposed cervical and lumbar strain. CX 3 at 5-6. An MRI of the lumbar spine taken on April 3, 2002, was interpreted as showing herniations at L4-5 and L5-S1. EX 12A. On September 17, 2003, claimant was examined for jaw pain by Dr. Jamie Rosen, a dentist, who diagnosed temporo-mandibular joint (TMJ) dysfunction, which he related to claimant's work accident. CX 18. Claimant sought compensation for total disability, payment of the medical bills of Drs. Alan Rosen and Krishna, and a finding that he sustained back and TMJ injuries due to the work accident.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his injuries to the work accident, and that employer rebutted the presumption. In weighing the evidence as a whole, the administrative law judge found that claimant did not sustain any lasting head injury, including TMJ. The administrative law judge also found that for years prior to the work injury claimant had had low back pain for which he had undergone x-rays, received medication, and been placed on light-duty. In view of this evidence, the administrative law judge found that a February 2004 MRI showing a herniation at L5-S1 and bulging at L4-L5 did not establish that the work injury aggravated claimant's pre-existing back condition. Decision and Order at 12. The administrative law judge credited the opinions of Drs. Duggan, Steinberger, and Head to find that claimant does not have any current disability related to the work injury and can return to his usual employment as a warehouseman. The administrative law judge denied payment of the bills claimant submitted from Drs. Alan Rosen and Krishna. The administrative law judge found that neither doctor submitted a report within 10 days of their initial treatment as required by Section 7(d)(2) of the Act, 33 U.S.C. §907(d)(2). The administrative law judge also found that Dr. Alan Rosen failed to submit x-ray evidence showing subluxation of the spine. *See* 20 C.F.R. §702.404.

On appeal, claimant challenges the administrative law judge's findings that claimant's TMJ dysfunction and herniated lumbar discs are not related to the work accident, that he can return to his usual employment, and that employer is not required to pay the outstanding medical charges of Drs. Alan Rosen and Krishna. Employer responds, urging affirmance.

Claimant first contends that the administrative law judge erred in finding that his TMJ and low back conditions are not related to the work accident. We agree that the administrative law judge's findings in this regard cannot be affirmed as the administrative law judge did not discuss all the evidence relevant to these issues. Thus, we vacate the administrative law judge's finding that claimant's TMJ and lower back conditions are not work-related. We remand the case for the administrative law judge to discuss and weigh all relevant evidence regarding these conditions in order to determine if claimant established that they are related to the work injury. *See generally Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989).

Once, as here, the Section 20(a) presumption is invoked and rebutted, all relevant evidence must be weighed to determine whether a causal relationship has been established, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). If claimant establishes that the work injury aggravated a pre-existing condition, employer is liable for medical benefits for the entire resulting condition as well as for any disability resulting therefrom. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001).

With regard to the TMJ claim, the administrative law judge did not discuss the September 17, 2003 report by Dr. Jamie Rosen, a dentist, who diagnosed TMJ dysfunction related to claimant's work accident. CX 18. This opinion was rendered approximately 19 months after the work injury. In discussing the TMJ condition, the administrative law judge appears to discount its relation to the work accident because Dr. Greenberg first diagnosed the condition three years after the work accident. Decision and Order at 12.[1] Dr. Steinberger, whose opinion the administrative law judge also did not discuss on this issue, opined it was "highly unlikely" that TMJ dysfunction could be related to an incident occurring three years previously. EX 46 at 32-33. The administrative law judge must reevaluate his conclusion taking into account all of the relevant evidence.

With regard to claimant's lower back condition, the administrative law judge found that claimant put forth evidence of herniated discs, which qualifies as an injury to his lower back. Decision and Order at 13. The administrative law judge also found that

[1] The administrative law judge also discredited Dr. Alan Rosen's TMJ notation made one month after the accident, as Dr. Rosen did not address this finding in his deposition testimony, there is no evidence that the diagnosis was based on any testing, and Dr. Rosen is a chiropractor who treated claimant for back pain. Decision and Order at 12.

claimant's prior medical history evidences years of lower back complaints, resulting in x-rays, medication, and light-duty work. This finding is supported by substantial evidence. EX 9 at 12, 18, 20, 24, 26, 28, 35. The administrative law judge summarily found, however, that claimant's current complaints of low back pain do not appear to have increased due to the accident and that therefore the herniation is not due to the accident. As claimant correctly states on appeal, the administrative law judge did not discuss the opinions of Drs. Greenberg, Krishna and Alan Rosen that claimant's herniated discs are related to the work accident, CXs 33 at 29-30; 34 at 28, 34-35; 46 at 24-27, or the evidence that, post-injury, claimant was first diagnosed with lumbar radiculopathy and required injection therapy for lower back pain, which could indicate a worsening condition. CXs 8; 15; 21; 22; 28; 33 at 4-5, 17-18, 42; 34 at 18, 30-31; 36-37 at 8-9, 12, 18-19. On remand, the administrative law judge must determine the weight to be accorded to this evidence and make a finding as to whether claimant established that his back condition was caused or aggravated by the work accident.

Claimant next contends that the administrative law judge erred by finding that he is able to return to his usual employment. In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. *See, e.g., Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). The administrative law judge rejected the opinions of Drs. Krishna and Greenberg that claimant is totally disabled because neither was aware of claimant's pre-injury medical history and Dr. Krishna did not view the surveillance videotape. The administrative law judge found the videotape to be particularly important since claimant is not a credible witness.[2] The administrative law judge credited the opinions of Drs. Duggan, Steinberger and Head, who did view the videotape, that claimant may have been temporarily disabled after the accident, but does not have any current work-related disability. EXs 19, 25, 35.

The Board is not empowered to reweigh the evidence, and the administrative law judge's weighing of the evidence must be affirmed if it is rational and supported by substantial evidence. *See generally Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, the administrative law judge rationally credited the opinions of Drs. Duggan, Steinberger and Head to conclude that claimant is able to return to his usual employment as a warehouseman. *Id.* Claimant argues the administrative law judge's finding is based on his determination that only claimant's neck condition is related to the work accident, and that the surveillance videotape does not show claimant engaging in activity that replicates his longshore duties. We reject these

[2] Claimant does not challenge the administrative law judge's finding that he is not credible.

contentions. The credited doctors assessed claimant's entire physical condition, particularly focusing on his complaints of head, neck, and back pain, and concluded there is no objective evidence substantiating claimant's alleged symptomatology. EXs at 12-14; 25; 35. Moreover, Dr. Steinberger specifically addressed claimant's contention that the surveillance videotape does not show claimant performing longshore duties. He stated that the tape was relevant to his opinion that claimant can return to work without restriction because it is clear to him that claimant "has no pain at all." EX 46 at 54-56. Thus, substantial evidence supports the administrative law judge's finding that claimant is capable of performing his usual work. *Gacki*, 33 BRBS 127.

However, in concluding that claimant sustained only a temporary disability after the accident, the administrative law judge did not determine the date that claimant was able to return to his usual employment. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from February 17, 2002 to January 4, 2003, and for temporary partial disability, 33 U.S.C. §908(e), from January 5 to March 15, 2003. On remand, the administrative law judge must determine, based on the medical evidence, when claimant could return to work and state the periods for which claimant is entitled to compensation.

Finally, claimant contends that the administrative law judge erred by finding that employer is not liable for the unpaid medical bills of Drs. Alan Rosen and Krishna. In his decision, the administrative law judge found that employer is not responsible for the unpaid bills because it did not receive a report from these physicians within 10 days of their treating claimant. Pursuant to Section 7(d)(2) 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); *see 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); *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in pert. part*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991); 20 C.F.R. §702.422. The authority to determine whether non-compliance with Section 7(d)(2) may be excused rests solely with the district director as the designee of the Secretary, and not the administrative law judge. *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting). Accordingly, the administrative law judge's finding that employer is not liable for the medical bills of Drs. Alan Rosen and Krishna on this basis must be vacated.

Additionally, the administrative law judge summarily stated that employer submitted evidence that treatment by Drs. Alan Rosen and Krishna was unnecessary or unrelated to claimant's work injury and that claimant has not demonstrated that he requested authorization. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment . . . medicine, crutches,

and apparatus, for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Section 7(d)(1) requires that a claimant request his employer's authorization for medical services performed by any physician. 33 U.S.C. §907(d)(1); *see Maquire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992). Moreover, in order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. *See Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996); 20 C.F.R. §702.402. It is claimant's burden to prove the elements of his claim for medical benefits. *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996); *see also Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

In this case, the administrative law judge did not discuss any evidence that treatment rendered by Drs. Krishna and Rosen was unnecessary or unrelated to the work accident or that claimant did not request authorization to treat with these physicians. Claimant avers that employer authorized treatment with Dr. Krishna and Dr. Alan Rosen, the latter of whom testified on deposition that employer paid his medical bills through October 15, 2002.[3] CX 36 at 20-21. On remand, the administrative law judge must make reviewable findings on whether claimant requested authorization to treat with these physicians, whether employer granted or denied any request, and whether the medical treatment by these doctors was necessary for the treatment of claimant's work injury. *See generally Hite v. Dresser Guiberson Pumping,* 22 BRBS 87 (1989); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). If the administrative law judge finds that the unpaid bills are otherwise the liability of employer, he must then remand the case to the district director for a determination on whether the failure of Drs. Rosen and Krishna to timely submit a first report of injury is excused in the interest of justice. 33 U.S.C. §907(d)(2).

Accordingly, the administrative law judge's findings that claimant's TMJ and lower back conditions are not related to the work accident and that employer is not liable for the unpaid bills of Drs. Alan Rosen and Krishna are vacated. We remand this case for further proceedings consistent with this opinion, including a determination by the

[3] The administrative law judge also found that Dr. Alan Rosen's chiropractic treatment is not compensable because neither he nor claimant provided an x-ray showing subluxation. *See* 20 C.F.R. §702.404. The regulation, however, provides that subluxation may be shown by x-ray or by clinical findings. Dr. Rosen testified on deposition that at his initial examination of claimant on February 21, 2002, he diagnosed subluxation based on his clinical findings. CX 35 at 12. This evidence is relevant to employer's liability for Dr. Rosen's treatment, and the administrative law judge must address it on remand.

administrative law judge of the date that claimant was no longer disabled. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge