BRB No. 05-0857

PHILLIP ALLEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DANOS & CUROLE MARINE	)	
	)	DATE ISSUED: 06/29/2006
and	)	
	)	
GRAY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Administrative Law Judge, United States Department of Labor.

Karen Wiedemann (Wiedemann & Wiedemann), New Orleans, Louisiana, for claimant.

Douglass M. Moragas, Harahan, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2003-LHC-2862) of Administrative Law Judge Lee J. Romero 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 was injured on September 9, 1998, while tying down and plugging a sump pump on an oil platform during a hurricane. He complained of pain in his neck, back and stomach, and requested to be referred to a physician upon returning to shore.

Employer made an appointment for claimant with Dr. Bourgeois in Morgan City. The administrative law judge found that Dr. Bourgeois appears to be a general practitioner. Subsequently, claimant sought treatment with Dr. Adatto, an orthopedic specialist, and notified employer that Dr. Adatto was his first-choice physician. Employer responded, refusing authorization for Dr. Adatto's treatment because it contended that claimant had already requested treatment with Dr. Cenac, also an orthopedist.

Initially, Dr. Adatto treated claimant conservatively with physical therapy, anti-inflammatory medication, and steroid injections. In January 1999, Dr. Adatto recommended that claimant undergo an anterior lumbar fusion at L3-4 and requested a financial commitment from employer. Claimant was examined by an independent medical examiner, Dr. Murphy, who was appointed by the Department of Labor and who concurred that claimant was a candidate for surgery. Claimant's back surgery was delayed due to an intervening diagnosis of colon cancer. Dr. Adatto performed an anterior lumbar discectomy and fusion on October 18, 2000. The surgery was not successful and claimant continues to complain of back pain and bilateral leg pain. Employer has not paid for the treatment provided by Dr. Adatto, and claimant sought reimbursement for this treatment.

In his decision, the administrative law judge found there is no credible evidence that claimant requested treatment from or designated Dr. Cenac as his treating physician. Rather, the administrative law judge found that on September 21, 1998, claimant requested Dr. Adatto as his first choice of physician, which employer declined to authorize. Thus, the administrative law judge found that claimant was not required to seek further authorization from employer for Dr. Adatto's treatment. Moreover, the administrative law judge found that although the back surgery was not ultimately successful, Dr. Adatto felt that it was reasonable and necessary at the time it was recommended. Absent evidence to the contrary, the administrative law judge found that employer is liable for this treatment.

On appeal, employer contends that the administrative law judge erred in finding that claimant did not choose Dr. Cenac as his first choice physician and that the administrative law judge erred in allowing claimant to travel over 100 miles to New Orleans for treatment with Dr. Adatto when Dr. Cenac and Dr. Walker, located in Houma, were equally qualified. In addition, employer contends that the administrative law judge erred in finding that the surgery was reasonable and necessary and that claimant properly requested authorization for the surgery.

Employer first contends that claimant chose Dr. Cenac as his first-choice physician and that employer had approved treatment with this doctor. Thus, employer contends that claimant's change to treatment with Dr. Adatto was not approved and the administrative law judge erred in finding employer responsible for payment for this

treatment. Section 7(b) provides that the employee shall have the right to choose an attending physician and Section 7(c)(2) provides that when the employer learns of its employee's injury it must authorize medical treatment by the employee's chosen physician. 33 U.S.C. §907(b), (c)(2); 20 C.F.R. §702.403. Once claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer or the district director. 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406.

The administrative law judge found that there is no credible evidence of record that claimant requested Dr. Cenac as his physician. The administrative law judge noted that the record contains two letters written by employer's representative acknowledging claimant's request to be treated by Dr. Adatto but denying it as claimant had already been "approved" for treatment by Dr. Cenac. Emp. Ex. 4 at 17, 36. The administrative law judge found these letters were "self-serving" and did not establish that claimant had ever requested treatment with Dr. Cenac. Decision and Order at 14. Employer contends that there is no evidence contradicting its letters, but the administrative law judge did not err in discounting them in light claimant's written request for treatment from Dr. Adatto and the absence of any evidence that claimant actually chose Dr. Cenac. As it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that Dr. Adatto was claimant's first-choice physician pursuant to Section 7(b). *See* 20 C.F.R. §702.403.

Employer contends that the administrative law judge erred in finding that Dr. Adatto is a reasonable first-choice physician as his office was over 100 miles from claimant's home. The relevant regulation provides, in pertinent part:

> Generally 25 miles from the place of injury, or the employee's home is a reasonable distance to travel, but other pertinent factors must also be taken into consideration.

20 C.F.R. §702.403. The administrative law judge considered the distance between Dr. Adatto's office and claimant's home and concluded that as claimant waived reimbursement for mileage to seek treatment with Dr. Adatto, and employer did not establish that other equally qualified physicians were available within 25 miles of claimant's home,[1] this factor does not weigh against a finding that claimant's choice of Dr Adatto was reasonable. Contrary to employer's contention, the regulations do not prohibit the administrative law judge from finding that a physician located over 25 miles

[1] The administrative law judge found that Dr. Cenac is located in Houma which is 35 miles from claimant's home in Morgan City.

from claimant's home is a reasonable choice.[2] Moreover, employer does not allege that it was harmed by claimant's choice of a physician 100 miles from his home. The administrative law judge also found that employer did not establish the credentials or prevailing rates of any specialists within a 25-mile radius from claimant's home. *See generally Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003). Therefore, we reject employer's contention of error in this regard.

Employer avers that the administrative law judge erred in finding that the treatment provided by Dr. Adatto was reasonable and necessary. Pursuant to Section 7(a) of the Act, 33 U.S.C. §907(a), employer is liable for medical and surgical treatment necessary to treat the work injury. *See also* 20 C.F.R. §702.402. Claimant can establish a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *See Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997).

In the present case, claimant began treatment with Dr. Adatto soon after his work-related accident. He complained of severe lower back pain with leg pain, and severe neck pain with discomfort on both sides. Cl. Ex. 3. Dr. Adatto treated claimant conservatively with physical therapy. *Id.* Claimant also was examined by Dr. Walker on December 14, 1998, at the request of employer. Emp. Ex. 6. He diagnosed a muscular strain and opined that claimant would recover in a matter of weeks. He concluded that surgery would result in little chance of improvement and a significant chance of worsening claimant's condition. In January 1999, Dr. Adatto reported that claimant was getting worse rather than better and that he could not control his pain. Cl. Ex. 3. An MRI taken on December 4, 1998 revealed a small herniation (Type IIa) at L3-4. *Id*. Claimant also was examined by Dr. Cenac on June 15, 1999, apparently at the request of the Social Security Administration. Emp. Ex. 5. Dr. Cenac reviewed the 1998 CT scan and confirmed a small herniation with no evidence of nerve root impingement or root compression. Dr. Cenac opined that from an orthopedic standpoint claimant was able to return to his regular employment with no restrictions. *Id.*

Due to the conflict in the medical opinions, the parties requested that claimant be examined by an independent medical examiner. The Department of Labor arranged for claimant to be examined by Dr. Murphy in June 1999 and December 1999. 33 U.S.C.

[2] In *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112, 114 (1996), the Board held that, while the proximity of the medical care to claimant's residence is a factor to be considered in determining the reasonableness of medical treatment, where claimant seeks more distant care and competent care is available locally, claimant's medical expenses may reasonably be limited to those costs which would have been incurred had the treatment been provided locally.

§907(e); 20 C.F.R. §702.408. On December 7, 1999, Dr. Murphy opined that claimant was a candidate for epidural steroid injections and for lumbar surgery. Emp. Ex. 7. He also suggested further studies. Treatment for claimant's back was postponed due to his diagnosis of and treatment for colon cancer, although he received epidural injections throughout this period to control the pain due to his back injury. An MRI taken on May 18, 2000 revealed a mild, broad-based posterior herniated disc (Type IIb). Cl. Ex. 3.

Prior to the surgery on October 18, 2000, claimant was examined by Dr. Cary on February 1, 2000, at the request of counsel for a third-party defendant. Emp. Ex. 8. Dr. Cary diagnosed a strain of the cervical spine superimposed on minimal degenerative changes. Dr. Adatto performed the surgery on claimant's back in October 2000. Cl. Ex. 3. On May 14, 2001, following a review of diagnostic testing, Dr. Cary disagreed with the opinion that claimant had been a candidate for surgery. Emp. Ex. 8. Dr. Wilson, who examined claimant at the request of the carrier, stated on October 8, 2002, that the surgery has not been of any great benefit and that claimant continues to have back pain. Emp. Ex. 9.

The administrative law judge found that Dr. Walker's opinion is less persuasive than Dr. Adatto's as he did not review the 2000 MRI which indicated that claimant's herniation was worsening. Likewise, the administrative law judge found that Dr. Cenac's opinion was less persuasive as there is no indication that he reviewed either the 1998 or 2000 MRI. Decision and Order at 16. The administrative law judge noted that although Dr. Cary did review the latest MRI, and stated that he disagreed with the opinion that claimant had been a candidate for surgery, he did not state that the surgery had been unreasonable or unnecessary. Similarly, although Dr. Wilson reviewed the medical reports and stated that claimant did not receive any benefit from the surgery, he did not opine that the surgery was unreasonable or unnecessary. Therefore, the administrative law judge concluded that employer did not establish that the surgery was not reasonable or necessary and thus, that employer is responsible for the expenses related thereto. Decision and Order at 14-15.

Contrary to employer's contention, the MRI results relied on by the administrative law judge show that claimant's disc herniation had progressed from a Type IIa to a Type IIb from 1998 to 2000. Further, the administrative law judge rationally relied on the opinion of claimant's treating physician, Dr. Adatto, and the opinion of Dr. Murphy, an independent examiner, that the surgery was necessary for claimant's condition. *See Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). The administrative law judge rationally gave less weight to the opinions of the doctors who did not review all the objective tests, and he properly noted that none of the physicians stated that the surgery was unreasonable treatment for claimant's condition. As the administrative law judge rationally weighed the medical evidence, we affirm the finding that the treatment,

including surgery, provided by Dr. Adatto was reasonable and necessary for the treatment of claimant's injury.[3] *Id.*

Employer also contends that it is not liable for the surgery performed by Dr. Adatto because claimant did not receive its approval before undergoing the surgery. Section 7(d)(1) provides that in order to be entitled to medical expenses, claimant must first request employer's authorization. 33 U.S.C. §907(d). If claimant's request for authorization is refused by employer, claimant may establish entitlement to medical treatment at employer's expense if he establishes that the treatment he subsequently procured on his own initiative was necessary for treatment of the injury. *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). It is undisputed that claimant requested treatment with Dr. Adatto which employer denied, Emp. Ex. 4, and we have affirmed the administrative law judge's finding that the treatment provided by Dr. Adatto was reasonable and necessary. Therefore, we affirm the administrative law judge's finding that claimant was not required to continue to seek employer's authorization for the treatment provided by Dr. Adatto, including the surgery performed in October 2000. *See Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988).

Lastly, we reject employer's contention that it was denied an opportunity to pursue this issue before the administrative law judge prior to the date the surgery was performed. The surgery was initially discussed with claimant in February 1999, and claimant gave notice to employer at that time, but it was postponed due to claimant's diagnosis of and treatment for colon cancer. In the interim, employer requested that claimant be examined by an independent medical examiner pursuant to Section 702.408, which was done in June 1999 by Dr. Murphy. Dr. Murphy agreed that claimant was a candidate for surgery. By employer's own admission, in September 2000 claimant gave notice that he was scheduled for surgery at least three weeks before the date it was to be performed. *See* Emp. Br. at 15. Moreover, employer was afforded a hearing as to whether the surgery was reasonable and necessary prior to being held liable for payment. *See generally Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1563 (1998). Therefore, we affirm the administrative law judge's finding that employer is liable for treatment provided by Dr. Adatto, including all related expenses for claimant's October 2000 back surgery.

[3] The fact that the surgery was not successful in relieving claimant's pain does not require a finding that the surgery was unreasonable and/or unnecessary at the time claimant chose to proceed.

Accordingly, the Decision and Order of the administrative law judge finding employer liable for the medical expenses incurred from claimant's treatment with Dr. Adatto is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge