BRB No. 12-0608

BILLY J. NICHOLS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 06/18/2013
	)	
	)	
Party-in-Interest	)	
	)	
STEAMSHIP TRADE ASSOCIATION – INTERNATIONAL LONGSHOREMEN'S ASSOCIATION BENEFITS FUND	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Michael J. Perticone (Hardwick & Harris, L.L.P.), Baltimore, Maryland, for claimant.

Lawrence P. Postol (Seyfarth Shaw, L.L.P.), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2009-LHC-00002) of Administrative Law Judge Daniel F. Solomon 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).

In this case, the administrative law judge awarded claimant two periods of temporary total disability benefits as well as medical benefits for his work-related hernia. In a separate order, the administrative law judge denied the Steamship Trade Association – International Longshoremen's Association Benefit Fund's (the Fund) motion to intervene to protect its lien against claimant's award of benefits. Employer appealed the award of benefits (BRB No. 11-0220), and the Fund appealed the administrative law judge's denial of its motion (BRB No. 11-0385). The Board affirmed the award of temporary total disability benefits to claimant but vacated the award of future medical benefits for treatment by Dr. Arrison. The Board remanded the case to the administrative law judge for further consideration of whether the medical benefits issue was properly before him, and, if raised by employer on remand, whether Dr. Arrison is authorized to treat claimant. Additionally, the Board vacated the denial of the Fund's motion to intervene and remanded the case for the administrative law judge to reconsider the motion and, if necessary, determine the Fund's entitlement to an enforceable lien on claimant's compensation. *Nichols v. Ceres Marine Terminals, Inc.*, BRB Nos. 11-0220, 11-0385 (Nov. 30, 2011).

On remand, the administrative law judge permitted the parties to address whether claimant is entitled to future medical care by Dr. Arrison. Based on the parties' submissions, he found that employer's denial of claimant's request for authorization of treatment by Dr. Arrison was improper because Dr. Badro, claimant's treating surgeon, referred claimant to Dr. Arrison for pain management treatment. Therefore, he found employer liable for claimant's medical treatment with Dr. Arrison. Additionally, the administrative law judge found that the Fund is entitled to repayment by claimant pursuant to Section 17 of the Act, 33 U.S.C. §917. Decision and Order on Remand at 4, 6, 8. Employer appeals the award of medical benefits, and claimant responds, urging affirmance.[1]

[1]No party has appealed the administrative law judge's finding that claimant is liable to repay the Fund, and that finding is affirmed. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Employer contends the administrative law judge erred in awarding medical benefits for treatment by Dr. Arrison because neither it nor the district director authorized a change of physicians to Dr. Arrison. By finding that its refusal to authorize Dr. Arrison as claimant's treating pain management specialist was improper, and ordering it to pay for treatment, employer argues that the administrative law judge authorized a change of physicians, which is beyond the scope of his authority. Additionally, employer asserts that, contrary to the administrative law judge's statement, Decision and Order on Remand at 4, it challenged the reasonableness and necessity of pain management treatment by Dr. Arrison, and it continues to do so. Specifically, employer asserts that the use of narcotic pain prescriptions is inappropriate for claimant.

An employer's liability for medical treatment is governed by Section 7 of the Act, 33 U.S.C. §907. Section 7 provides in pertinent part as follows:

> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.
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> (c)(2) . . . An employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent for such change. Such 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. In all other cases, consent may be given upon a showing of good cause for change.

33 U.S.C. §907(a), (c)(2); *see also* 20 C.F.R. §702.406. While active supervision of a claimant's medical care is performed by the district directors, the administrative law judge has the authority to address those medical benefits issues which involve factual disputes as opposed to those which are discretionary. *See, e.g., Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002). In this case, the Board stated that, on remand, the administrative law judge should address whether employer lawfully denied claimant's request to authorize Dr. Arrison's treatment. *Nichols*, slip op. at 7.

The administrative law judge found that claimant's surgeon, Dr. Badro, whom he continued to see following his hernia surgery, referred claimant to Dr. Elsamanoudi in August 2007 because of lower abdomen and groin pain. Claimant's condition did not improve despite his undergoing the recommended nerve block, so Dr. Badro referred

claimant to Dr. Zamfirov in February 2008 for pain management. Claimant treated with him for one month, but because claimant's urinalysis was negative for the prescribed medications, Dr. Zamfirov refused to continue treating claimant.[2] In October and November 2008, claimant saw Dr. Ogunsola, also a pain management specialist; however, because claimant refused to provide a urine sample, continued to treat with Dr. Elsamanoudi, and did not follow Dr. Ogunsola's recommendations, Dr. Ogunsola refused to continue treatment. Thereafter, claimant saw Dr. Arrison, whose treatment successfully returned claimant to work. Decision and Order on Remand at 5. Every doctor who treated claimant for pain had been recommended by Dr. Badro. *Id.* at 4. Based on the evidence submitted on remand, the administrative law judge found that Dr. Badro referred claimant to Dr. Arrison in November 2008. *Id.* at 4; Cl. ALJ Reply Br. at exh. 3.

A claimant need not seek authorization for a change in physician where the treating physician refers the claimant to an appropriate specialist; under such circumstances the employer must consent to the change in physician. *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992) (Smith, J., dissenting on other grounds); 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406. As employer notes, Dr. Badro had referred claimant to three pain management physicians prior to claimant's seeing Dr. Arrison. However, the administrative law judge found that those doctors were unsuccessful in, and/or refused to continue, treating claimant. *See* Decision and Order on Remand at 5. Therefore, Dr. Badro, claimant's treating physician, referred claimant to another pain management specialist, Dr. Arrison, due to claimant's continued pain, and this treatment succeeded in returning claimant to work. Despite Dr. Badro's answering "no" to employer's question of whether he had referred claimant to Dr. Arrison, Emp. Ex. 111, the record contains a copy of the referral note, and the administrative law judge accepted this evidence of a referral. Decision and Order on Remand at 4; Cl. ALJ Reply Br. at exh. 3. Accordingly, as Dr. Badro is claimant's undisputed treating physician and is not a pain management specialist, and as substantial evidence of record establishes that he referred claimant for pain management treatment with a specialist, Dr. Arrison, after claimant's relationship with the other specialists had terminated, we affirm the administrative law judge's finding that employer's denial of claimant's request to authorize treatment with Dr. Arrison was improper.[3] *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784

[2]The administrative law judge acknowledged claimant's statement that he stopped taking the medications because of their side effects. Decision and Order on Remand at 5.

[3]Moreover, the administrative law judge's statement that claimant showed good cause for a change in physicians was rational in light of the fact that the other pain management specialists had nothing further to offer claimant. 20 C.F.R. §702.406. Nevertheless, because Dr. Badro referred claimant to Dr. Arrison, claimant did not need to obtain authorization for a change in physicians from either employer or the district

F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Armfield*, 25 BRBS 303; 20 C.F.R. §702.406; *compare with Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995) (an employer is not liable for duplicate treatment); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8, 11 (1988) (treating physician referred the claimant to appropriate specialists who continued to provide treatment, so the employer need not authorize a duplicate specialist chosen by the claimant).

Employer also contends the administrative law judge erred in stating it did not challenge the reasonableness or necessity of Dr. Arrison's treatment. The administrative law judge stated that this issue was not raised. Decision and Order on Remand at 4. In support of its assertion that it raised the issue, employer cites to pages in its two prior briefs to the administrative law judge; however, those pages contain a recitation of the testimony and medical opinions of record and a contention regarding claimant's credibility in light of the inconsistencies in his testimony. Emp. Brief (9/1/10) at 10; Emp. Brief (5/25/12) at 5-7. These pages do not raise the issue of the reasonableness or necessity of Dr. Arrison's treatment. Rather, as claimant argues, it appears employer re-raised the issue of claimant's credibility. As claimant's credibility was not an issue for which the case was remanded, the administrative law judge correctly limited his discussion to the issues on remand. *See generally Randolph v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 443 (1989); *Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986); 20 C.F.R. §802.405(a). As employer failed to raise the issue of the reasonableness and necessity of Dr. Arrison's treatment before the administrative law judge on remand, it may not raise the issue for the first time on appeal.[4] *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." (footnote omitted)); *accord, Woodford v. Ngo*, 548 U.S. 81, 90 (2006); *see Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).

director. *Armfield*, 25 BRBS 303. Consequently, the administrative law judge did not exceed his authority, as he did not authorize a change of physicians in this case.

[4]Moreover, the administrative law judge noted claimant's testimony that Dr. Arrison's treatment was effective in returning claimant to work in December 2008. Decision and Order on Remand at 5.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge