BRB No. 03-0153

KURT C. ROBINSON	)	
Claimant-Petitioner	)	
v.	)	
CHRISTINA SERVICE COMPANY	)	DATE ISSUED:Oct. 22, 2003
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Picard Losier (Picard Losier and Associates), Philadelphia, Pennsylvania, for claimant.

Michael D. Schaff (Naulty, Scaricamazza & McDevitt), Philadelphia, Pennsylvania, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (00-LHC-1659) 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 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).

This is the second time that this case is before the Board. Claimant, a laborer, sustained a work-related injury on September 25, 1997, when steel coils struck his left ankle. Employer voluntarily paid claimant temporary total disability compensation and medical

benefits from September 26, 1997, through December 15, 1997. Claimant returned to his usual employment on January 4, 1998, without restrictions, but stopped working on October 5, 1998, allegedly due to an inability to work because of the 1997 injury. Dr. Sharps performed surgery on claimant=s left ankle on August 16, 1999. Claimant filed a claim under the Act seeking continuing temporary total disability benefits from October 1998, and payment of medical benefits, including the costs of his ankle surgery, pursuant to Section 7, 33 U.S.C. ' 907.

In his initial decision, the administrative law judge found that claimant did not prove that his 1997 work-related ankle injury caused any disability after December 15, 1997, or that it resulted in his need for the surgery he underwent in August 1999. Claimant appealed these determinations to the Board. In its Decision and Order, the Board affirmed the administrative law judge=s denial of disability benefits from October 5, 1998, through August 16, 1999, and from February 2000 and continuing, finding that claimant was able to work without restrictions during these periods of time.[1]

The Board held, however, that the administrative law judge applied erroneous legal standards when addressing the issue of claimant=s entitlement to the payment of the costs for his surgery and related disability. Specifically, as the administrative law judge erred in not applying the Section 20(a) presumption to the issue of whether claimant=s ankle condition in August 1999 was related to his injury, the Board remanded the case for the administrative law judge to discuss whether employer rebutted the presumption. The Board also instructed the administrative law judge to determine on remand whether claimant=s surgery was necessary for the treatment of his condition and thus, whether claimant is entitled to medical benefits for that surgery and to disability benefits during claimant=s period of recovery.

[1] On December 15, 1997, Dr. Hershey returned claimant to full duty work. EX 12. On January 19, 1999, Dr. Okereke, retained by the Department of Labor, stated that claimant had no residual impairment in his ankle that would preclude his return to his normal employment duties. EX 17. Claimant thereafter underwent surgery in August 1999. In February 2000, Dr. Lee, also retained by the Department of Labor, stated that claimant could return to any occupation, including that of longshoreman, and that claimant did not have any residual impairment. EX 25, 29. Similarly, in October 2000, Dr. Lefkoe opined that claimant has a zero percent permanent partial disability. EX 28.

Robinson v. Christina Serv. Co., BRB No. 01-0686 (May 20, 2002)(unpub.).

In his Decision and Order on Remand, the administrative law judge found that employer rebutted the Section 20(a) presumption, and that claimant=s 1999 surgery was neither reasonable nor necessary. Accordingly, he denied claimant=s claim for benefits. On appeal, claimant challenges the administrative law judge=s denial of his claim for benefits under the Act. Employer responds, urging affirmance.

Section 7, 33 U.S.C. ' 907, of the Act generally describes an employer=s duty to pay for medical and related services and costs necessitated by its employee=s work-related injury, employer=s rights regarding control of those services, and the Secretary=s duty to oversee them. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Section 7(a) of the Act states that:

> [the] employer shall furnish such medical, surgical, and other attendance or treatment Y, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. ' 907(a); *see Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff=d sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary and must be related to the injury at hand. *See Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); 20 C.F.R. ' 702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge=s authority to resolve. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

In challenging the administrative law judge=s decision, claimant alleges that none of the doctors of record expressed the opinion that his surgery was not reasonable and necessary treatment for his ankle condition. Therefore, the administrative law judge erred in making such a finding and incorrectly concluded that the employer met its burden in rebutting the Section 20(a) presumption. We disagree. In the instant case, the administrative law judge determined that claimant=s ankle condition had healed prior to his examination and subsequent surgery by Dr. Sharps.[2] Decision and Order on Remand at 12. The administrative law judge based this finding upon the medical opinions of Drs. Hershey, Gross and Okereke. Dr. Hershey indicated that claimant=s ankle had fully healed as of December 1997. EX 12. Dr. Gross found no residual ankle difficulty and full ankle motion as of

[2] Dr. Sharps, who examined claimant in November 1998, performed claimant=s ankle surgery based on claimant=s subjective complaints and after claimant declined further conservative treatment; he opined that this surgery was necessitated by claimant=s work injury. CX 1.

January 1998, and was of the opinion that claimant could return to full, unrestricted activities at that time. EX 13. Dr. Okereke opined in January 1999 that claimant had full ankle motion and exhibited no residual ankle impairment which would preclude his return to normal work duties. EX 17. Based upon this evidence, the administrative law judge concluded that employer met its burden of production on rebuttal to sufficiently dissolve the Section 20(a) presumption. Then, the administrative law judge, based on the record as a whole, found that the August 16, 1999, surgery performed on claimant=s left ankle was neither reasonable nor necessary, and he accordingly denied claimant=s claim for reimbursement for that procedure.[3]

The administrative law judge may consider a variety of medical opinions and observations in assessing the extent of claimant=s disability. *See Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). Moreover, it is well established that the administrative law judge is entitled to weigh the evidence and draw his own inferences from it, *see Wheeler*, 21 BRBS 33, and is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). We therefore affirm the administrative law judge=s determination that claimant=s ankle condition resolved prior to his August 1999 surgery, as that finding is rational and supported by substantial evidence, and his consequent determination that employer is not liable for that

[3] The administrative law judge did not discuss the opinion of Dr. Lee when addressing the issue of whether the surgery performed by Dr. Sharps in August 1999 was reasonable and necessary for claimant=s condition. However, although Dr. Lee offered no personal opinion regarding the need for that surgery, he found a completely normal ankle as of February 14, 2000 and stated that his findings were the same as Dr. Okereke=s findings in January 1999. *See* EX 29 at 20, 22, 23, 40, 43-44. Thus, Dr. Lee=s opinion supports the administrative law judge=s ultimate conclusion that claimant=s ankle condition had resolved prior to his August 1999 surgery.

surgery, as it follows that the surgery was not necessary for the treatment of his work injury.[4] *See Brooks,* 26 BRBS 1.

[4] We thus need not address the administrative law judge=s findings regarding the causal nexus between claimant=s ankle condition and his work injury.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge