BRB No. 99-0162

ARTHUR G. NIDES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
1789, INCORPORATED	)	DATE ISSUED: 10/18/99
	)	
and	)	
	)	
GAB BUSINESS SERVICES	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits in Part and Rejecting Certain Claims and Decision and Order Denying Petition for Reconsideration of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Arthur G. Nides, Rockville, Maryland, *pro se.*

Kelly D. Vanstrom (Dirska & Levin), Columbia, Maryland, for employer/ carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

SMITH, Administrative Appeals Judge:

Claimant, without the assistance of counsel, appeals the Decision and Order - Awarding Benefits in Part and Rejecting Certain Claims and the Decision and Order Denying Petition for Reconsideration (92-DCW-1) of Administrative Law Judge Edward Terhune Miller 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973)(the Act). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they 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).

On June 24, 1982, while working for employer, claimant sustained a low back injury when he fell down a wet staircase. On April 7, 1988, claimant's claim under the Act was settled pursuant to Section 8(i), 33 U.S.C. §908(i); pursuant to this approved settlement, employer remained liable to claimant, pursuant to 33 U.S.C. §907, for medical benefits arising as a result of claimant's work-related injury. Subsequently, claimant sought and was awarded reimbursement for various medical expenses, including the cost of a treadmill. Employer thereafter declined to pay for claimant's medical visits with Dr. Marcolin, as well as various medical charges submitted for reimbursement by claimant.[1]

In his Decision and Order, the administrative law judge awarded claimant ongoing reasonable and necessary medical care related to his June 24, 1982, back injury, including medical consultations with Dr. Marcolin and physiotherapy sessions. The administrative law judge determined, however, that employer is not liable for a new stationary exercise bicycle, the cost of a swimming program, or travel expenses sought by claimant. Claimant's request for reconsideration of the administrative law judge's decision regarding his request for a stationary exercise bicycle was denied by the administrative law judge.

On appeal, claimant, representing himself, challenges the administrative law judge's refusal to hold employer liable for the various medical charges submitted by claimant. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Section 7, 33 U.S.C. §907, of the Act generally describes an employer's duty to provide 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). In this regard, Section 7(a) of the Act 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.

33 U.S.C. §907(a); *see Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In

[1]We note that this is the fourth time that claimant and employer appeared before an administrative law judge regarding a dispute over employer's liability for claimant's purported work-related medical expenses.

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 Exchange Service*, 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 the instant case, the administrative law judge denied four specific requests for medical expenses rendered by claimant. We will address each of these requests individually.

Following the work injury which forms the basis of this claim, claimant's treating physician, Dr. Marcolin, prescribed and claimant obtained the use of a stationary exercise bicycle for therapy purposes. Thereafter, claimant sought and was awarded reimbursement for the cost of a treadmill which also was prescribed by Dr. Marcolin. At the formal hearing, claimant testified that his stationary bicycle subsequently wore out due to its repeated use, that he disposed of it, and that he requested and received Dr. Marcolin's prescription for a replacement bicycle; thus, claimant sought to establish employer's liability for a replacement stationary exercise bicycle. In addressing this issue, the administrative law judge initially acknowledged that the original prescription and use of a stationary exercise bicycle for therapy purposes appears to have been reasonable and necessary; however, in light of subsequent events, the administrative law judge concluded that a second, replacement bicycle was not reasonable and necessary based upon the record before him. Specifically, the administrative law judge determined that the record indicated that Dr. Marcolin was neither familiar with the attributes of the bicycle which he prescribed or that he exercised independent judgment in issuing that prescription. Moreover, the administrative law judge found that claimant is now in possession of a treadmill, and that the record fails to establish that the use of these two therapeutic modalities, *i.e.*, a treadmill and a stationary bicycle, would not be medically redundant and cumulative as to claimant's low back complaints. Accordingly, the administrative law judge concluded that a new stationary exercise bicycle, in addition to the aforementioned treadmill, is not justified on the record by medical necessity and is not reasonable. It is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses, including physicians, and to draw his own inferences from the evidence. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). As the record is devoid of evidence supportive of a finding that the replacement stationary exercise bicycle requested by claimant is complimentary to, and not cumulative of, claimant's present treadmill for therapeutic purposes, we affirm the administrative law judge's determination that employer is not liable for the cost of such a bicycle, as that finding is rational and in accordance with law. *See generally Wheeler,* 21 BRBS at 35.

Next, the administrative law judge denied claimant's request that employer be held liable for the cost of a county facility permit; claimant sought such a permit in order to have

access to a swimming pool. In the instant case, claimant, in 1993, sought and was awarded the cost of a swimming program. Employer subsequently controverted its ongoing liability for such a benefit, asserting that a definitive swimming program had not been set forth for claimant. After considering the testimony of Dr. Marcolin and claimant, the administrative law judge concluded that "Claimant has not pursued a swim program conforming to a particular prescription by Dr. Marcolin," and that claimant's "swimming apparently constituted only a minute and irregular portion of Claimant's use of the swim facility provided for treatment at Respondent's expense." *See* Decision and Order at 29-30. Our review of the record reveals that Dr. Marcolin, after testifying as to the beneficial aspects of swimming, conceded that he was unaware of claimant's actual swimming efforts or his use of a county recreational facility. In addressing his request for a facility pass, claimant testified that although he attempts to swim approximately once or twice a week, his back pain usually allows for only one or two laps of such exercise after which he uses the recreational facility's exercise machines and whirlpool. Accordingly, as the record contains no medical opinion or prescription outlining a specific swimming regimen or exercise machine program to be undertaken by claimant, we affirm the administrative law judge's decision holding that employer is not liable for a county facility permit, as claimant has not established his entitlement to such a permit.

Lastly, the administrative law judge denied claimant's request for reimbursement for travel expenses claimant allegedly incurred commuting to and from various local malls and his treating physicians. With regard to the expenses undertaken by claimant in pursuit of his "mall walking" program, the administrative law judge found that the record contained no evidence of a prescription nor of the medical necessity of such a program of exercise in addition to the therapy provided by the treadmill previously awarded to claimant; accordingly, the administrative law judge concluded that employer is not responsible for the transportation costs incidental to claimant's mall walking activities. The administrative law judge's findings in this regard are rational and are in accordance with law; we therefore affirm administrative law judge's determination that employer is not liable for these expenses. *See O'Keeffe,* 380 U.S. at 359.

Claimant similarly sought reimbursement for the transportation costs incurred traveling to and from his physicians offices and his physiotherapy appointments. *See* 20 C.F.R. §702.401(a)(1982). In support of his request for reimbursement, claimant submitted into evidence a hand-written invoice documenting 27 trips to either Dr. Marcolin or Health South; these trips totaled 252 miles which, at a reimbursement rate of 30 cents per mile, resulted in expenses totaling $75.60. *See* CX 6B - C. Thereafter, in a post-hearing brief, claimant's counsel set forth various additional transportation expenses. Regarding the expenses set forth in claimant's brief, the administrative law judge found those items to be undocumented, in some cases undated, and unsupported by credible evidence; the administrative law judge thus denied those requested charges in their entirety. Regarding the

transportation expenses incurred traveling to and from Dr. Marcolin's office and his physiotherapy appointments, the administrative law judge determined that while claimant's submission identified time frames and a finite number of trips, "there is no credible evidence of the distances involved or the basis for Claimant's estimates thereof. Consequently, there is a failure or proof on this record, and Claimant has not established entitlement to reimbursement of those expenses." *See* Decision and Order at 30. Our review of the record reveals that the summary statements set forth in claimant's post-hearing brief are undocumented and unsupported by further evidence; we hold, therefore, that the administrative law judge acted within his discretionary authority in evaluating and ultimately rejecting claimant's post-hearing submissions.

However, with regards to the specific travel expenses incurred as a result of claimant's continued treatment with Dr. Marcolin and his physiotherapy at Health South, we hold that the administrative law judge's summary rejection of these requested expenses must be reversed. As set forth *supra*, Section 7 of the Act states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment ... for such period as the nature of the injury or the process of recovery may require. 33 U.S.C. §907. Regarding this issue, Section 702.401(a) of the regulations, 20 C.F.R. §702.401(a)(1982), defines medical care as including "the reasonable and necessary cost of travel . . . which is recognized as appropriate by the medical profession for the care and treatment of [claimant's] injury or disease."

In the instant case, employer has not filed an appeal challenging the administrative law judge's decision to award claimant reimbursement for the costs of his ongoing medical consultations with Dr. Marcolin or his physiotherapy sessions at HealthSouth. *See* 33 U.S.C. §907(a). Thus, pursuant to the applicable regulation, claimant is entitled to reimbursement for the reasonable and necessary cost of travel incident to those approved ongoing medical services. In this regard, claimant submitted a limited itemized accounting of these travel expenses, setting forth specific dates as well as the round-trip mileage involved in commuting to either Health South, the location of his physiotherapy sessions, or to Dr. Marcolin's office. *See* CX 6B - C. The administrative law judge, while acknowledging that claimant's submission identified time frames and a finite number of trips to these approved medical providers, ultimately denied the requested expenses on the basis that "there is no credible evidence of the distances involved or the basis for claimant's estimates thereof." *See* Decision and Order at 30. Although the administrative law judge is afforded great discretion in his evaluation of the evidence of record, we are at a loss in attempting to determine what would constitute "credible evidence of the distances involved" in this case, where claimant's credibility regarding these distances was not challenged by employer. Specifically, our review of the record reveals that, while employer controverted the expenses allegedly associated with claimant's mall walking activities, no similar challenge was made to the veracity and accuracy of claimant's statement regarding the distances involved in his limited request for transportation expenses resulting from his ongoing approved medical treatment.

Furthermore, the claimant's method of submitting the mileage claimed is a well known acceptable practice made in the ordinary course of business, not exorbitant on its face, with no evidence of record to the contrary. We therefore reverse the administrative law judge's summary dismissal of claimant's evidence regarding the distances involved in traveling between claimant's residence and his approved medical treatment, and we modify the administrative law judge's decision to reflect employer's liability for the $75.60 in travel expenses sought by claimant.

According, the administrative law judge's denial of claimant's travel expenses to Dr. Marcolin and Health south is reversed, and his decision modified to reflect employer's liability for the sum of $75.60, representing the travel expenses sought by claimant. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's opinion insofar as it affirms the administrative law judge's decision; I dissent, however, from the majority's determination to reverse the administrative law judge's denial of travel expenses requested in Claimant's Exhibits 6B and 6C. In those exhibits, claimant set out the dates in 1995 of his appointments with both Dr. Marcolin and a physical therapist (referred to as "Health South)." Claimant indicated that round-trip travel was ten miles to the physical therapist and four miles to the doctor's office. It is noteworthy that in his post-hearing brief he indicated that round trip travel was six miles to the doctor's office. The administrative law judge denied claimant's request for these travel expenses because claimant failed to explain the method by which he determined or estimated the distances stated. *See* Decision and Order at 30. The administrative law judge is entirely correct. Furthermore, the lack of reliability of the proffered evidence is underscored by its

conflict with the distance stated in claimant's post-hearing brief.

It cannot be denied that claimant offered no documentation to support the distance claimed for his travel expenses. Hence, substantial evidence supports the administrative law judge's determination that claimant did not establish his entitlement to the expenses requested. *See Doss v. Director, OWCP*, 53 F.3d 654, 658, 19 BLR 2-183, 191 (4th Cir. 1995). I believe that the majority exceeds its authority when it reverses the administrative law judge's order denying these travel expenses because it simply disagrees with the decision. *See Smith v. Director, OWCP*, 843 F.2d 1053, 1057, 11 BLR 2-125, 131 (7th Cir. 1988). In view of the broad discretion entrusted to the administrative law judge to determine the credibility of the evidence, I would affirm the administrative law judge's decision denying travel expenses. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

REGINA C. McGRANERY
Administrative Appeals Judge