U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0453

WANDA L. OLIVER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 04/19/2021
CERES MARINE TERMINALS, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter Mills, LLP), Norfolk, Virginia, for Claimant.

Lawrence P. Postol (Postol Law Firm, P.C.), McLean, Virginia, for Self-insured Employer.

Before: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer appeals Administrative Law Judge Larry W. Price's Decision and Order Awarding Benefits (2019-LHC-01446) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant works as a heavy equipment operator for Employer. While driving a shuttle truck on April 9, 2019, she injured her left shoulder when the wheel locked up and she pulled her left arm. She finished her work and reported the incident at the end of the day. EX 2. Dr. Arthur Wardell, her chosen physician, saw her on April 16, 2019, diagnosed bursitis, and recommended an MRI to rule out a rotator cuff tear. He also prescribed medicine, an ultrasound, and physical therapy. CXs 3-4.

On April 29, 2019, Claimant saw Employer's expert, Dr. Daniel Cavazos, who diagnosed left shoulder impingement syndrome related to the work incident and a pre-existing neurological condition which was not aggravated by the incident. He expected Claimant's condition to reach maximum medical improvement six weeks from the date of injury, but said impingement syndrome may include rotator cuff lesion/tendinitis and any final examination should exclude the possibility of a rotator cuff condition. He advised Claimant to return to work as soon as possible with no overhead activities for four weeks and to operate a truck she feels more comfortable controlling. EX 8. Employer terminated Claimant's temporary total disability benefits based on Dr. Cavazos's release to modified work effective May 1, 2019, EX 1, and filed its first notice of controversion, EX 3.

Also on April 29, 2019, Claimant saw Dr. Wardell who noted Claimant's complaint of constant pain and Employer's lack of approval for the MRI and physical therapy. He found Claimant had a positive impingement test for deltoid tenderness and weakness and again diagnosed bursitis. CX 3. Although an ultrasound revealed a normal left shoulder, Dr. Wardell repeated his recommendation for an MRI due to Claimant's continued pain. He kept Claimant in off-work status.

Claimant filed a claim under the Act. EX 4. Using her personal insurance, she continued to treat with Dr. Wardell, began physical therapy, and underwent an MRI in June 2019. Her shoulder range of motion decreased, and the MRI revealed a partial tear in the rotator cuff and adhesive capsulitis (frozen shoulder). The parties agreed for Claimant to see Dr. Sheldon Cohn who examined her on September 17, 2019. EX 13. He concluded she had adhesive capsulitis but considered her history "consistent with idiopathic adhesive capsulitis" unrelated to "any trauma." *Id*. at 2. He also stated his belief that Claimant did not "suffer[] an injury to her shoulder." *Id.* Meanwhile, Dr. Wardell continued to note positive impingement and performed arthroscopic surgery in October 2019. Surgery confirmed the partial tear and adhesive capsulitis. CX 3. Post-surgery physical therapy aided Claimant in returning to work on March 2, 2020. She sought temporary total disability benefits from May 1, 2019 through March 1, 2020, and medical benefits. ALJX 1; EX 4.

After summarizing the evidence -- medical and non-medical -- the administrative law judge found Claimant credible, invoked the Section 20(a), 33 U.S.C. §920(a),

presumption that her shoulder injury is work-related, found it rebutted by Dr. Cohn's opinion, and gave greater weight to the opinions of Drs. Cavazos and Wardell on the record as a whole.[1] Decision and Order at 15-20. He awarded Claimant the requested temporary total disability and medical benefits. *Id.* at 21. Employer appeals, and Claimant responds, urging affirmance.

Injury/Causation

Employer contends the administrative law judge erred in finding Claimant's condition work-related because his conclusion that "[a]ll three physicians opined Claimant has adhesive capsulitis of her left shoulder[,]" Decision and Order at 19, mischaracterizes Dr. Cavazos's opinion. It asserts the case must be remanded because Dr. Cavazos did not diagnose adhesive capsulitis, did not find it was work-related because it manifested two months after the date of injury, and did not corroborate Dr. Wardell's opinion. We disagree.

Once the Section 20(a) presumption has been invoked and rebutted, as here, the question of a causal relationship must be decided on the record as a whole with the claimant bearing the burden of establishing the work-relatedness of her injury by a preponderance of the evidence. *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); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). The fact-finder has the authority and discretion to weigh, credit, and draw his own inferences from the evidence of record; he is not bound to accept the opinion or theory of any particular expert. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969).

The administrative law judge correctly stated both Dr. Cavazos and Dr. Wardell diagnosed work-related shoulder conditions, while Dr. Cohn diagnosed a shoulder condition unrelated to her work. Decision and Order at 19. He also correctly summarized Dr. Cavazos's report, including his diagnosis of impingement syndrome which he opined may include a rotator cuff condition. *Id.* at 12-13; EX 8. While Dr. Cavazos did not specifically identify adhesive capsulitis like Drs. Wardell and Cohn, the administrative law judge accurately summarized statements in Dr. Wardell's February 3, 2020, report linking

[1] Because "Claimant consistently reported" the details of her accident and her complaints afterward, the administrative law judge rejected Dr. Cohn's conclusion on the record as a whole as "generalized and not well-explained." Decision and Order at 19.

the impingement syndrome with the frozen shoulder condition. Decision and Order at 10-11; CX 4. Dr. Wardell stated:

> *Dr. Cavazos correctly suspected impingement syndrome which he attributed to Ms. Oliver's work activity. Dr. Cavazos mis-judged the severity of the condition, perhaps a result of his earlier assessment.* Dr. Cavazos also suspected a possible rotator cuff involvement which was indeed verified at the time of the arthroscopic procedure. Dr. Cohn agree[d] with the diagnosis of adhesive capsulitis and acknowledge[d] that arthroscopic manipulation under anesthesia would be reasonable but *unlike myself and Dr. Cavazos, describe[d] the claimant's frozen shoulder as 'idiopathic.'* Dr. Cohn's conclusion in this regard is puzzling [given] the clear correlation between [Claimant's work activity and the demands of her position.]

CX 4 (emphasis added). Dr. Cohn similarly linked the two conditions, stating Dr. Cavazos saw Claimant "relatively early in the progression of her adhesive capsulitis" and confirming Claimant's history, records, and course make her "essentially a typical frozen shoulder patient." EX 13. Therefore, a factual basis exists for the administrative law judge's conclusion that Claimant suffers from adhesive capsulitis and Dr. Cavazos's diagnosis of work-related impingement syndrome is consistent with the other doctors' diagnosis of adhesive capsulitis. *Calbeck*, 306 F.2d 693; CX 4; EXs 8, 13, 18, 19. The administrative law judge appropriately weighed the medical opinions to determine the weight of the evidence establishes the work-relatedness of Claimant's shoulder condition.[2] *Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016).

Employer contends Dr. Cohn's opinion that Claimant's condition is not work-related should be given great weight. *See also* discussion, *infra.* The administrative law judge found Dr. Cohn's opinion unpersuasive because it was "inconsistent with the medical record" and "conclusory." Decision and Order at 19-20. He credited the opinions of Drs. Wardell and Cavazos diagnosing work-related shoulder conditions, including Dr. Wardell's explicit diagnosis of adhesive capsulitis, shoulder impingement, and a partial rotator cuff tear.[3] *Ceres Marine Terminals, Inc. v. Director, OWCP [Jackson]*, 848 F.3d

[2] Regardless, beyond merely arguing the administrative law judge made a factual error in finding Dr. Cohn diagnosed adhesive capsulitis, Employer never articulates how that alleged error affected the decision. *See* Emp. Br. at 18-19.

[3] Employer's argument that Claimant did not experience decreased range of motion until long after her work injury is without merit. Claimant consistently complained of pain, Dr. Wardell consistently found positive impingement, as well as tenderness and weakness

115, 50 BRBS 91(CRT) (4th Cir. 2016); *Suarez*, 50 BRBS 33. As substantial evidence supports the administrative law judge's conclusions, we affirm his finding that Claimant's adhesive capsulitis, partial rotator cuff tear, impingement syndrome, and resulting surgery are all work-related.

Temporary Total Disability Benefits

Employer paid Claimant temporary total disability benefits from April 15 to April 30, 2019. The issue before the administrative law judge was whether she is entitled to temporary total disability benefits from May 1, 2019, to March 1, 2020, as she returned to work on March 2, 2020. Decision and Order at 2; ALJX 1; Tr. at 5-6. Upon finding Claimant's injury is work-related based on the evidence as a whole, the administrative law judge ordered Employer to pay her temporary total disability benefits for the entire period. Decision and Order at 21. Employer contends the administrative law judge erred in awarding temporary total disability benefits because he did not address the extent of Claimant's disability during the period she requested benefits because he did not address the conflict of opinion on the matter between Dr. Wardell and Dr. Cohn. Emp. Br. at 23. We disagree.

A claimant bears the burden of establishing her inability to do her usual work because of her work-related injury. If she establishes this prima facie case, the employer bears the burden of establishing the availability of suitable alternate employment to show her disability is, at most, partial. *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998). To demonstrate the availability of suitable alternate employment, an employer must identify jobs, not merely tasks, for the administrative law judge to compare with the claimant's capabilities. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *see also Pietrunti v. Director OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

Dr. Wardell first examined Claimant on April 15, 2019. CXs 3-4. At each appointment, he stated she was to remain out of work until he examined her again, considered her "disabled from her occupation," and did not release her to return to work until March 2020. *Id.* Also in April 2019, well before Claimant's October 2019 surgery, Dr. Cavazos advised her to return to work as soon as possible despite the likelihood it would cause her increased pain. He limited her, however, to no overhead activities for four

---

in abduction and flexion, and Dr. Wardell found decreased range of motion commencing at the May 2019 appointment, which worsened until it improved following surgery. CX 3.

weeks and to operating a truck she felt comfortable driving.[4] EX 8. Dr. Cohn, while not directing she return to work, stated Claimant could drive vehicles only with certain-sized steering wheels. EXs 13, 18-19. Notably, a doctor's opinion that a claimant can perform some work, alone, is insufficient to show the claimant is only partially disabled, as "disability" under the Act is an economic, not a medical, concept. 33 U.S.C. §902(10); *Am. Stevedores, Inc. v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976). The medical opinions confirm Claimant cannot return to her usual job, as Dr. Wardell stated she cannot return, while Drs. Cavazos and Cohn stated she could return to work only with modifications.[5]

As Claimant established she could not return to her usual work following her injury, it is Employer's burden to show the availability of suitable alternate employment. The record contains no evidence of alternate jobs Claimant could have performed during the pre-surgical period. Consequently, Employer has not shown Claimant was only partially disabled during that time. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989); *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988). Only Dr. Wardell addressed Claimant's ability to work after the surgery, and he did not release her to any employment until March 1, 2020. As the administrative law judge credited Dr. Wardell's opinion overall, and it supports his conclusion, we affirm Claimant's entitlement to temporary total disability benefits for the periods before and after her surgery, May 1, 2019 to March 1, 2020.[6]

---

[4] Dr. Cavazos acknowledged Claimant would likely "experience a mild increase in pain with her return to full duty. However, she has a functional shoulder which should allow her to continue working." EX 8.

[5] With respect to Drs. Cavazos' and Cohn's assessments that Claimant could operate certain trucks/steering wheels, Claimant -- whose testimony the administrative law judge found credible -- stated employees do not have control over which truck they are assigned on a given day. Decision and Order at 5; Tr. at 30. Employees do not operate the same truck every day and do not know which truck they will be assigned until they arrive at work. Decision and Order at 5; Tr. at 28-29. Some vehicles "drive better than others" and "vary" in their functionality. Thus, on any given day, she could be assigned a truck that drives smoothly or could be assigned one that is difficult to steer. *Id.*

[6] In this respect, Employer's general assertion that the administrative law judge "did not even discuss Claimant's level of disability" and did not resolve the conflict between Dr. Wardell and Dr. Cohn on the matter, Emp. Br. at 23, mischaracterizes the administrative law judge's decision. While he did not include a separate section on the issue, the administrative law judge sufficiently identified and weighed the conflicting opinions regarding the interrelated issues of cause and extent of disability throughout his

Section 7(e)

Employer asserts Dr. Cohn was the agreed-upon independent medical examiner (IME) under Section 7(e), 33 U.S.C. §907(e), and the administrative law judge erred in failing to give great weight to his opinion based on his status. We disagree.

Section 7(e) gives the Secretary, through the district directors, the discretion to have an impartial physician examine the injured employee when a "medical question" exists about her diagnosis, extent of disability, or appropriate treatment. 33 U.S.C. §907(e);[7] 20 C.F.R. §702.408. The independent examining physician's findings are not binding and are intended only to provide an unbiased evaluation of the employee's condition. *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585, 589 (1981). The IME's opinion therefore need not be given dispositive weight and must be considered along with the other opinions of record. *Jackson*, 848 F.3d 115, 50 BRBS 91(CRT); *Cotton v. Newport News*

---

decision. He thoroughly summarized Dr. Wardell's treatment records and report, Decision and Order at 7-11, as well as Dr. Cohn's reports, *id.* at 14-15. He then weighed the conflicting opinions as a whole against each other, "crediting the opinions of Dr. Wardell and Dr. Cavazos over the unpersuasive opinion of Dr. Cohn[,]" and finding "Dr. Wardell's treatment records demonstrated the condition of Claimant's left shoulder[.]" *Id.* at 18-20. Explicit portions of the administrative law judge's discussion further addressed the extent of the injury: among other things, he noted they showed Claimant "failed to report any improvement of her symptoms;" physical therapy "helped" but her "constant aching" "remained unchanged;" and Dr. Wardell's surgery "confirm[ed] the diagnosis of adhesive capsulitis of the shoulder with a traumatic incomplete tear of the left rotator cuff[.]" *Id.* at 20. Given these findings, Employer's unexplained assertion that the administrative law judge somehow could pivot and credit Dr. Cohn's opinion over Dr. Wardell's opinion -- and his extensive treatment records -- on the extent of the injury is puzzling.

[7] Section 7(e) states:

> In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician employed or selected by the Secretary and to obtain from such physician a report containing his estimate of the employee's physical impairment and such other information as may be appropriate. Any party who is dissatisfied with such report may request a review or reexamination of the employee by one or more different physicians employed or selected by the Secretary. The Secretary shall order such review or reexamination unless he finds that it is clearly unwarranted.

Shipbuilding & Dry Dock Co., 23 BRBS 380 (1990); *Shell*, 14 BRBS at 589; *see Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 440 n.3, 37 BRBS 17, 21 n.3(CRT) (4th Cir. 2003). The administrative law judge weighed Dr. Cohn's opinion alongside the other opinions here and -- by comparison -- permissibly found it "generalized," "not well-explained," and "inconsistent with the medical record." Decision and Order at 19; *see Donovan*, 300 F.2d 741. We therefore reject Employer's argument that Dr. Cohn's opinion is entitled to great weight simply because of his status. *Id.*

Section 7(d)(4)

Employer argues payment should have been suspended for a period due to Claimant's "unreasonable" refusal to agree to a second examination with Dr. Cavazos. We disagree.

Section 7(d)(4) of the Act gives the administrative law judge *the discretion* to suspend compensation during any period in which a claimant unreasonably refuses to submit to medical or surgical treatment or to an employer's or the Secretary's expert's examination. 33 U.S.C. §907(d)(4);[8] *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *B.C. [Casbon] v. Int'l Marine Terminals*, 41 BRBS 101 (2007); *Dodd v. Crown Cen. Petroleum Corp.*, 36 BRBS 85 (2002); 20 C.F.R. §702.410(c). Determining whether a claimant's refusal is "unreasonable" involves a two-prong inquiry: whether the refusal is objectively "unreasonable" and, if so, whether it is nevertheless subjectively "justified." *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007).

The Board has defined the "reasonableness" of refusal as an objective inquiry that examines whether an ordinary person in the claimant's position would object to the examination. It has defined "justification" as a subjective inquiry that evaluates the individual claimant's particular reasons for refusing. *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238, 241-242 (1979) (S. Smith, C.J., dissenting); *see Pittsburgh & Conneaut*, 473 F.3d at 261-262, 40 BRBS at 77-79(CRT); *Malone v. Int'l Terminal Operating Co., Inc.*,

[8] Section 7(d)(4) states:

> If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

29 BRBS 109 (1995). The employer bears the burden of proof of showing the employee's refusal was unreasonable; if carried, the burden shifts to the employee to show the circumstances justified her refusal. *Hrycyk*, 11 BRBS at 241-242. Only if the refusal is found to be both unreasonable and unjustified may compensation be suspended at the administrative law judge's discretion. 33 U.S.C. §907(d)(4); *Hrycyk*, 11 BRBS at 241-243. If suspension is warranted, benefits cease as of the date of refusal and recommence on the date of compliance. *Casbon*, 41 BRBS at 104; 20 C.F.R. §702.410(c).

Here, Employer argues payment should have been suspended based on Claimant's refusal to see Dr. Cavazos a second time after Claimant subsequently underwent physical therapy, had an MRI taken, and received a recommendation for surgery. Claimant objected because she believed Dr. Cavazos pre-determined her condition would reach maximum medical improvement six weeks after the injury and the medical evidence showed her condition was worsening. Moreover, she asserted suspension was unwarranted because Employer refused to authorize medical treatment in the first place, and she agreed to be evaluated by Dr. Cohn less than one month later. EX 20.

The administrative law judge agreed with Claimant. He found "Employer did not establish good cause" for the second visit to Dr. Cavazos because there was "no other additional trauma to Claimant's actual condition" since the first examination. Moreover, Employer did not face a "prolonged delay" between evaluations given Dr. Cohn's examination. Therefore, he found the requested additional examination "*unreasonably cumulative, duplicative, [and] burdensome*[.]" Decision and Order at 20-21 (emphasis added); 29 C.F.R. §18.62(a)(1). He thus concluded Claimant's refusal was reasonable and denied application of the Section 7(d)(4) suspension provision. Decision and Order at 20-21.

We reject Employer's assertion of error. *First*, Employer's primary argument that Dr. Wardell's diagnosis of an allegedly new condition, adhesive capsulitis, required a second examination is undermined by the administrative law judge's permissible finding discussed above equating Dr. Wardell's and Dr. Cohn's diagnoses of adhesive capsulitis with Dr. Cavazos' earlier identification of impingement syndrome. *Second*, Employer's remaining argument -- that Claimant's "only reason" for not attending was Employer's failure to pay benefits -- is factually incorrect: her counsel specifically informed Employer her refusal was reasonable because "she just had an evaluation with Dr. Cavazos who opined" her condition would "resolve in six weeks." EX 10. *Finally*, and most significantly, Employer does not even attempt to address the administrative law judge's finding that a second examination was "unreasonably cumulative, duplicative, [and] burdensome" in light of the fact Claimant suffered no additional trauma subsequent to Dr. Cavazos's first examination. Decision and Order at 20-21. It was well within the administrative law judge's discretion to find the second examination unwarranted and that,

regardless, Dr. Cohn's examination cured any disadvantage to Employer. Therefore, we affirm his decision to decline to apply Section 7(d)(4) to suspend Claimant's compensation.[9] *Pittsburgh & Conneaut*, 473 F.3d at 261-262, 40 BRBS at 77-79(CRT).

[9] Contrary to our dissenting colleague's assessment, we do not hold that an administrative law judge can choose not to apply the correct law when determining whether a claimant's benefits should be suspended. Rather, consistent with *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007), the administrative law judge specifically found Employer's request to have Claimant re-examined objectively unreasonable. While our colleague *sua sponte* alleges the administrative law judge erred by failing to explicitly recite the two part test prior to making that finding, she does not explain how the allegedly different standard could have made a difference to the outcome where the examination was deemed "unreasonably cumulative, duplicative, [and] burdensome." In our view, Employer simply cannot meet its burden, given those factual findings. And to the extent our colleague argues the administrative law judge erred in finding the request objectively unreasonable, the argument amounts to a simple request to reweigh the evidence, which we are not empowered to do. *Sea-Land Services, Inc., v. Director, OWCP* [*Ceasar*], 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020). Nor does our colleague attempt to address Claimant's subjective reasons for refusal under the second part of the test even if Employer somehow could satisfy the first. Remand to simply quote the omitted boilerplate and then reinstate the same outcome would be unnecessary and wasteful. Regardless, even if none of this were true, the plain language of Section 7(d)(4) leaves the decision to suspend payment even when a claimant "unreasonably" refuses treatment in the sole discretion of the Secretary or administrative law judge: *the statute says "may" suspend payment, not "shall" suspend it.* 33 U.S.C. §907(d)(4); *see Mallard v. United States Dist. Court*, 490 U.S. 296, 300-301 (1989) (if statutory language is plain, congressional intent is clear, and the statute must be enforced according to its terms).

Accordingly we affirm Decision and Order Awarding Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

JONES, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with the majority's decision to affirm the administrative law judge's findings that Claimant's shoulder conditions are work-related and Dr. Cohn's opinion is not entitled to any special weight under Section 7(e). However, I respectfully dissent from my colleagues' holdings on the remaining two issues.

With regard to Claimant's entitlement to temporary total disability benefits, the administrative law judge's failure to specifically address the issue in his decision requires remand. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). While Dr. Wardell's opinion could support a finding of temporary total disability following the date of injury and continuing until the date Claimant returned to work, I would remand for the administrative law judge to specifically discuss the relevant evidence and make findings of fact including whether Claimant could return to her usual work with the restrictions placed by the doctors, and if not, whether Employer established the availability of suitable alternate employment. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Langley]*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982); *Volpe v. Ne. Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982).

Similarly, I would vacate the Section 7(d)(4), 33 U.S.C. §907(d)(4), portion of the administrative law judge's decision and would remand for findings on this issue. The administrative law judge quoted Section 7(d)(4) but did not discuss the case law applying this section. *See Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Malone v. Int'l Terminal Operating Co., Inc.*, 29 BRBS 109 (1995); *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238, 241-242 (1979) (S. Smith, C.J., dissenting). Section 7(d)(4) requires a two-part test, with the employer bearing the burden of proof on the objective factor that the employee's refusal to attend the medical

appointment was unreasonable; if the employer satisfies its burden, the burden shifts to the employee to show the circumstances subjectively justified the refusal. *Pittsburgh & Conneaut*, 473 F.3d at 261-262, 40 BRBS at 77-79(CRT); *Hrycyk*, 11 BRBS at 241-242.

Instead of analyzing whether an ordinary person would have refused to be re-evaluated by Dr. Cavazos under the circumstances of this case, the administrative law judge instead required Employer to show it had "good cause" for scheduling a second examination. An employer is permitted to have a claimant examined by a doctor of its choice, 33 U.S.C. §907(d)(4), and a claimant is not entitled to control the circumstances under which she will be examined by the employer's expert. *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979) (lack of confidence in doctor not valid reason for refusing to be examined); *B.C. [Casbon] v. Int'l Marine Terminals*, 41 BRBS 101, 104 (2007) (doctor's lack of medical records or disagreement with doctor's initial opinion not valid reasons for refusing to be examined); *Dodd v. Crown Cen. Petroleum Corp.*, 36 BRBS 85 (2002) (claimant does not get to choose which employer's doctor will perform examination).

The final sentence in Dr. Cavazos's April 29, 2019 letter stated his opinion was rendered with a reasonable degree of medical certainty, but he reserved the right to change his opinion if he received new information. EX 8. As Employer states, the facts establish Claimant's condition worsened, and she underwent an MRI after she saw Dr. Cavazos in April 2019. CXs 3-4. Although he may have "pre-determined" a date of maximum medical improvement based on the information he had at the time, the additional information could have resulted in Dr. Cavazos changing his opinion. Thus, if the administrative law judge had applied the proper test, he may have concluded Claimant's refusal to attend a second examination with Dr. Cavazos was objectively unreasonable.[10]

Only if Employer satisfies the first prong do Claimant's personal justifications, such as her concerns about a duplicative evaluation or a pre-determined conclusion, become relevant. Such consideration, however, could *not* include Claimant's later attendance (September 17, 2019) at Dr. Cohn's evaluation. The administrative law judge stated: "Claimant was not unreasonable in her refusal to attend the second that (sic) examination after the Dr. Cohn examination was scheduled." Decision and Order at 21. Contrary to this statement, Claimant's refusal to see Dr. Cavazos a second time occurred before Dr. Cohn was identified as an IME and before the appointment with him was scheduled.

[10] Though such evidence could support the need for a second evaluation, contrary to the administrative law judge's cursory summarization, the test does not require Employer to show a change or an "additional trauma to Claimant's actual physical condition[.]" Decision and Order at 21; *see Pittsburgh & Conneaut Dock Co.*, 473 F.3d 253, 40 BRBS 73(CRT); *Hrycyk*, 11 BRBS 238.

Therefore, it was irrational for the administrative law judge to consider Dr. Cohn's appointment as justification for Claimant's refusal to see Dr. Cavazos because Dr. Cohn's evaluation had not yet been scheduled and could not have been a factor in her early August decision to refuse to see Dr. Cavazos. Because the administrative law judge did not address the evidence under the proper tests in the first instance, and there is evidence that could support Employer's position, I would vacate this portion of his decision and remand the case for him to do so. *Langley*, 676 F.2d at 115, 14 BRBS at 727-728; *Volpe*, 671 F.2d at 701, 14 BRBS at 542-543. Whereas the majority's opinion seems to give the administrative law judge the discretion of whether to apply the appropriate test, I consider the language of the Act to mean that while suspension of benefits is discretionary, application of the Section 7(d)(4) test is not. 33 U.S.C. §907(d)(4). If the administrative law judge were to find both prongs met, then he must determine whether suspension of Claimant's benefits is warranted. *Dodd*, 36 BRBS at 88; *Hrycyk*, 11 BRBS at 241-242.

Although after performing an analysis the administrative law judge may reach the same conclusion, he, not this Board, has a responsibility to perform that analysis. *Sea-Land Services, Inc., v. Director, OWCP* [*Ceasar*], 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); 20 C.F.R. §802.301.

For the foregoing reasons, I dissent from my colleagues' decision to affirm the award of temporary total disability compensation and the finding that Claimant's compensation should not be suspended.

MELISSA LIN JONES
Administrative Appeals Judge