

BRB Nos. 00-578
and 01-840

ROBERT W. DODD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CROWN CENTRAL PETROLEUM)	DATE ISSUED: <u>July 29, 2002</u>
CORPORATION)	
)	
and)	
)	
LIBERTY MUTUAL INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order on Remand, the Order Denying Motions for Reconsideration, and the Decision and Order Granting and Denying in Part Claimant's Petition for Modification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Robert W. Dodd, Houston, Texas, *pro se*.

Andrew Schreck (Galloway, Johnson, Tompkins, Burr & Smith), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand, the Order Denying Motions for Reconsideration, and the Decision and Order Granting and Denying in Part Claimant's Petition for Modification (97-LHC-1408) of Administrative Law Judge Clement J. Kennington 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). As claimant appeals without representation by counsel, we will

review the administrative law judge's findings of fact and conclusions of law to determine whether they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220. If they are, they must be affirmed.

On October 24, 1995, claimant, a pumper/dock standby, experienced pain in his right knee while allegedly hurrying across employer's facility during the course of his employment duties. Claimant returned to work on November 7, 1995, and worked until January 16, 1996.

Employer locked out all of its employees on February 5, 1996, following a contract dispute. Claimant, who received compensation under the Texas workers' compensation statute, sought benefits under the Act.

In his initial Decision and Order, the administrative law judge found that claimant failed to establish his *prima facie* case and thus he concluded that claimant was not entitled to invocation of the Section 20(a) presumption. The administrative law judge therefore denied claimant's claim for benefits. On reconsideration, the administrative law judge summarily dismissed claimant's contention that he had inadequate representation at the hearing.¹

¹Claimant was represented by counsel at the first hearing, but dismissed him before briefs were due, and has been proceeding without representation by counsel since that time.

Claimant, representing himself, appealed to the Board. The Board reversed the administrative law judge's finding that claimant failed to establish a harm, holding that the medical evidence of record, as well as claimant's testimony, established that something has gone wrong within the human frame. *Dodd v. Crown Central Petroleum Corp.*, BRB No. 98-1302 (June 25, 1999) (unpublished). The Board also reversed the administrative law judge's finding on the "working conditions" element, based on the uncontested fact that claimant was in the course of his employment when he experienced the harm alleged. The Board thus held that claimant is entitled to the Section 20(a) presumption that the knee pain he experienced on October 24, 1995 is causally related to his employment.² The Board then remanded the case for the administrative law judge to determine whether employer rebutted the presumption, and if so, to weigh the causation issue based on the record as a whole, and if he finds a causal relationship between claimant's condition and work injury, to consider the nature and extent of claimant's disability.³ *Id.*

In his Decision and Order on Remand, the administrative law judge found that employer did not establish rebuttal of the Section 20(a) presumption and that therefore claimant's knee condition is causally related to his employment. He found that claimant was not disabled from October 24, 1995, to February 5, 1996, the date of the lockout. He then found claimant entitled to temporary total disability benefits from February 6, 1996, to October 25, 1996, the date of maximum medical improvement, based on an average weekly wage of \$1,180.18. He also found employer liable for permanent partial disability benefits thereafter under Section 8(c)(2), (19), for 43.2 weeks, for a 15 percent impairment of the leg. The administrative law judge also ordered employer to provide claimant with a psychiatric evaluation by a mental health specialist of claimant's choice, and an evaluation of claimant's knee impairment by Dr. Landon, an orthopedist, and future medical care related to claimant's knee condition. The administrative law judge subsequently denied motions for reconsideration filed by both claimant and employer.

Claimant appealed the administrative law judge's decisions, but filed a petition for

²In the present appeal, claimant states that the Board remanded the case to the administrative law judge to determine whether the Section 20(a) presumption was applicable to claimant's psychological condition. This is an incorrect statement. The Board only addressed the work-relatedness of claimant's knee condition under Section 20(a) and remanded the case to the administrative law judge to determine whether employer established rebuttal with respect to that condition. *Dodd v. Crown Central Petroleum Corp.*, BRB No. 98-1302 (June 25, 1999) (unpublished).

³By Orders dated August 17, 1999, and September 1, 1999, the Board denied claimant's motion for reconsideration on the ground that it was untimely filed.

modification prior to the time the Board acted on his appeal. Claimant sought total disability benefits from the date of injury, October 24, 1995, until the present and continuing, based on his inability to perform his usual employment due to a psychiatric condition, in addition to orthopedic and pain complaints. Claimant also sought payment of medical expenses associated with pain management and depression, alleging that his mental condition has deteriorated since the initial hearing on January 13, 1998. The Board dismissed claimant's appeal and remanded the case to the administrative law judge for modification proceedings. Following a new hearing, during which claimant represented himself, the administrative law judge issued a Decision and Order Granting and Denying in Part Claimant's Petition for Modification.

In the decision on modification, the administrative law judge found that from October 25, 1995, the date of the injury, to January 16, 1996, claimant performed light duty work for employer, rather than his usual work. The administrative law judge then found that claimant established a *prima facie* case of total disability from January 17, 1996, and continuing, *id.*, that employer did not establish the availability of suitable alternate employment, and that even had employer established availability of suitable alternate employment, claimant established diligence in seeking suitable alternate work. The administrative law judge therefore determined that claimant is entitled to temporary total disability benefits until October 25, 1996, the date of maximum medical improvement, and to permanent total disability benefits thereafter. The administrative law judge then suspended compensation benefits pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), because of claimant's refusal to be examined by Dr. Axelrad, a psychiatrist. The administrative law judge also found, pursuant to 29 C.F.R. §18.6(d), that employer is not liable for the cost of claimant's pain management program. On appeal, claimant, representing himself, challenges the administrative law judge's decision on modification.⁴ Employer responds, urging affirmance, but additionally moves for remand of the case to the administrative law judge.

We first address claimant's allegation that employer is withholding relevant material from him. On February 10, 2001, claimant served four subpoenas on individuals associated with employer, seeking all records concerning his October 24, 1995 injury. At the hearing, claimant asserted that employer had not turned over supplemental and final reports of his injury maintained by employer, and counsel for employer denied the allegation. According to employer's attorney, two of the subpoenaed persons could not be located, and a third verified compliance. Tr. at 26, 27, 29, 30. The administrative law judge found that there was no evidence to support claimant's allegations and no documents or testimony to show non-

⁴By Order dated August 22, 2001, the Board reinstated claimant's appeal in BRB No. 00-0578. The issues raised by this appeal, however, are moot, as the administrative law judge modified the rulings adverse to claimant in his subsequent Decision and Order.

compliance. The administrative law judge specifically noted that employer's counsel offered to let claimant come to his office and inspect the entire file and that claimant refused the offer. Decision on Modification at 4. We affirm the administrative law judge's rejection of claimant's allegations in this regard, as he rationally determined that claimant has not been refused any relevant documentation.

Claimant also appeals the denial of total disability benefits beginning on October 25, 1995, the date of his knee injury. Once claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet its burden by offering claimant a job in its facility, including a light duty job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT)(5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). The fact that a claimant works after an injury will not forestall a finding of total disability if the claimant works only with extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence, although an award of total disability while working is to be the exception, rather than the rule. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT)(11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), *aff'g* 5 BRBS 62 (1976); *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 216 (1989). In this case, the administrative law judge's finding that claimant was not performing his light duty work at employer's facility only due to employer's beneficence or while in excruciating pain is rational and supported by substantial evidence. The denial of total disability benefits from October 25, 1995, through January 16, 1996, therefore is affirmed. See *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986).

Where claimant's pain and limitations do not rise to the level of total disability, such factors nonetheless are relevant in determining post-injury wage-earning capacity and may support an award of partial disability based on reduced earning capacity despite the fact that claimant's actual earnings may have remained the same or increased. See, e.g., *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT)(9th Cir. 1991); *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41, 45 n. 5 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Since the administrative law judge did find that on occasion claimant experienced some severe pain while performing his light duty work with employer, and that he eventually had to stop working due to pain, an award of temporary partial disability benefits under Section 8(e), 33 U.S.C. §908(e), may be appropriate during this period. Accordingly, we vacate the administrative law judge's denial of any disability benefits from October 25, 1995, through January 16, 1996, and remand the case for the administrative law judge to consider whether

claimant is entitled to an award of temporary partial disability benefits for this period. *See Ezell*, 33 BRBS at 27; *Jordan*, 19 BRBS at 84. The administrative law judge's award of total disability benefits from January 17, 1996, and continuing is affirmed, as it is unchallenged on appeal.

Although finding claimant entitled to total disability benefits, the administrative law judge ordered those benefits suspended pursuant to Section 7(d)(4), on the ground that claimant unreasonably refused to submit to medical treatment, *i.e.*, an examination which the administrative law judge ordered and employer scheduled with Dr. Axelrad. Section 7(d)(4) provides that an administrative law judge may, by order, suspend the payment of all further compensation to an employee during any period in which he unreasonably refuses to submit to a medical examination by a physician selected by employer or the administrative law judge, unless the circumstances justified the refusal. 33 U.S.C. §907(d)(4); *see also* 20 C.F.R. §702.410(b). Section 7(d)(4) requires a dual inquiry. Initially, the burden of proof is on the employer to establish that claimant's refusal to undergo a medical examination is unreasonable; if carried, the burden shifts to claimant to establish that circumstances justified the refusal. For purposes of this test, reasonableness of refusal has been defined by the Board as an objective inquiry, while justification has been defined as a subjective inquiry focusing narrowly on the individual claimant. *See Malone v. Int'l Terminal Operating Co.*, 29 BRBS 109 (1995); *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979)(Smith, S., dissenting).

The administrative law judge found that claimant's refusal to undergo an evaluation by Dr. Axelrad was unreasonable and unjustified, citing claimant's erroneous belief that he has the right to determine the alleged independence and choice of any physician employer chooses to conduct its examination or can refuse to undergo the examination because employer did not present him with a list of doctors in a timely manner, and claimant's abuse of the administrative law judge by yelling and insulting the integrity of other parties.⁵ We

⁵Apparently during the modification hearing employer agreed to send a list of psychiatric doctors on staff at Baylor College of Medicine from among whom claimant would choose to perform an examination. Claimant was to choose three of the names and go to the doctor who could see him first. Claimant had objected to Dr. Scarano, employer's original choice, who was on the staff at Baylor, because he allegedly represented insurance companies, and Dr. Scarano then recommended two other psychiatrists who had experience with pain management. Employer made an appointment for claimant with Dr. Axelrad, because he was able to get an appointment with him soonest. These facts were related to the administrative law judge in a contentious telephone conference call on May 10, 2001, requested by employer when claimant refused to see Dr. Axelrad. The administrative law judge refers to claimant's conduct of yelling and screaming during the conference. *See, e.g.*, Tel. conf. Tr. at 15-17, 18.

hold that the administrative law judge did not abuse his discretion by finding that claimant's refusal to undergo employer's scheduled examination was unreasonable and unjustified given the circumstances of this case, and we affirm the finding that claimant's compensation benefits should be suspended during the period he refuses to be examined by Dr. Axelrad. See 20 C.F.R. §702.410(b); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 98 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). We note, however, that compensation cannot be suspended retroactively, but only from the date of refusal. See *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989). Accordingly, we vacate the administrative law judge's suspension of payments for all disability compensation due claimant and we remand the case for the administrative law judge to make a finding as to the date on which claimant refused to undergo the examination. Compensation will be suspended from the date of such refusal until claimant complies with the administrative law judge's order.

The administrative law judge also denied claimant's request for reimbursement for expenses related to his treatment for pain management. The administrative law judge rejected claimant's evidence in support of his request for reimbursement for pain management treatment pursuant to 29 C.F.R. §18.6(d).⁶ Section 18.6(d)(2) provides that where a party fails to comply with an order of the administrative law judge, the administrative law judge, "for the purpose of permitting resolution of the relevant issues may take such action thereto as is just," including,

(iii) Rule that the non-complying party may not introduce into evidence . . . documents or other evidence . . . in support of . . . any claim

* * *

⁶The general regulations applicable to proceedings before administrative law judges, 29 C.F.R. Part 18, may be applied unless they are inconsistent with the Act or the Act's regulations. See 29 C.F.R. §18.1(a); 20 C.F.R. Part 702; *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989). Section 7(d)(4), 33 U.S.C. §907(d)(4), of the Act references only suspension of compensation when claimant unreasonably refuses to undergo an examination. Therefore, medical benefits cannot be denied under this section. See generally *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 5, 1991). The Act also provides for imposition of sanctions for failure to comply with an order. Under Section 27(b), the administrative law judge may certify the facts to a district court if a person resists any lawful order. 33 U.S.C. §927(b). As these provisions are not inconsistent with the regulation at 29 C.F.R. §18.6(d)(2), the administrative law judge did not err in applying it in this case.

(v) Rule . . . that a decision of the proceeding be rendered against the non-complying party.

29 C.F.R. §18.6(d)(2). Accordingly, it was within the administrative law judge's authority to reject claimant's evidence regarding pain management and to deny his request for reimbursement of medical benefits for his pain management program for the duration of the time claimant refuses to undergo the medical examination which the administrative law judge ordered him to undergo. We therefore affirm the administrative law judge's decision in this regard.

Employer has included a motion to remand in its response brief. Employer states that claimant has requested a formal hearing in connection with the district director's adverse recommendation in response to claimant's Section 49 claim, 33 U.S.C. §948a. Employer states that it intends to seek modification of the administrative law judge's Decision on Modification. Employer may seek Section 22 modification, 33 U.S.C. §922, on remand.

Accordingly, the administrative law judge's determination that claimant is not entitled to compensation while he performed light duty work for employer from October 25, 1995, until January 16, 1996, and his suspension of all benefits to claimant is vacated, and the case is remanded for further proceedings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Granting and Denying in Part Claimant's Petition for Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge