BRB Nos. 91-2071
and 91-2071A

JOANN SCHOEN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
	)	
UNITED STATES CHAMBER OF COMMERCE	)	DATE ISSUED:
	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Stephen M. Vaughn (Mandell & Wright, P.C.), Houston, Texas, for claimant.

Phillip B. Dye, Jr. and Daniel B. Shilliday (Vinson & Elkins, L.L.P.), Houston, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and MCGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order and Supplemental Decision and Order (90-LHC-792) of Administrative Law Judge Donald W. Mosser 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). We must affirm the findings of fact and the 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).

Claimant, a resident of Austin, Texas, who had previously been awarded permanent total disability benefits and reasonable and necessary medical benefits in connection with an April 13,

1976, work-related back and leg injury, sought reimbursement of $14,403.45 in medical expenses and related costs associated with her self-procured treatment at the Boston Pain Center. Claimant received treatment at the Boston Pain Center for seven weeks, beginning April 2, 1989. Employer opposed these medical expenses, contending that inasmuch as claimant changed physicians and sought the treatment in question without obtaining authorization, the expenses associated with the treatment in Boston are not reimbursable.

Crediting claimant's testimony, the administrative law judge determined that claimant had requested authorization from employer for treatment at the Boston center by telephone in January 1989. The administrative law judge further determined that employer's failure to tender a specific offer of treatment until 5 or more weeks thereafter where employer knew that claimant was experiencing a great deal of pain was unreasonable and therefore constituted a constructive refusal of treatment. The administrative law judge also concluded that the treatment claimant procured on her own initiative by Dr. Aronoff at the Boston Pain Center was necessary, but found that the cost of this treatment was not reasonable inasmuch as comparable treatment was available to claimant at a lower cost at the Baylor Pain Control and Functional Restoration Clinic (Baylor Clinic) in Houston, Texas, closer to claimant's residence. The administrative law judge accordingly awarded claimant medical expenses for her pain clinic treatment, but limited her recovery to the cost of such treatment at the Houston facility. Accordingly, claimant was awarded $5,400 for the cost of treatment at the Baylor Clinic, $1,718.55 in expenses for 27 days lodging in the Houston area, and $918 for meals based on the Houston federal *per diem* rate. In a Supplemental Decision and Order, pursuant to the stipulations of the parties, claimant also was awarded $175 for round trip airfare to Houston.

Claimant appeals the administrative law judge's finding that the cost of the treatment at the Boston Pain Center was not reasonable. Employer responds, urging that the administrative law judge's finding in this regard be affirmed. Employer cross-appeals the administrative law judge's finding that claimant requested authorization for the treatment provided by Dr. Aronoff and that the request was constructively refused by employer. Claimant responds, urging that employer's cross-appeal be denied.

We first address employer's contention that the administrative law judge erred in finding that claimant requested and was constructively refused authorization for treatment at the Boston Pain Center. Under Section 7(d) of the Act, 33 U.S.C. §907(d), an employee is entitled to recover medical benefits if she requests employer's authorization for treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 23 (1989); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986); 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406.

We reject employer's contention that the administrative law judge's findings regarding claimant's request for authorization are erroneous. Employer correctly avers that employer's mere knowledge of claimant's pain does not create an obligation to pay for medical care in the absence of a request for treatment. *See Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). In the present case, however, the administrative law judge

reasonably concluded, based on claimant's testimony, *see* Tr. at 16-18, that claimant actually requested authorization for either inpatient treatment at the Spaulding Hospital Pain Clinic in Boston or outpatient treatment by Dr. Aronoff at the Boston Pain Center in a telephone conversation with the carrier in January 1989 or by letter of February 21, 1989, at the latest. Cx. 2. The administrative law judge further determined that employer neglected to specifically authorize treatment in either Houston or Dallas until March 30, 1989, when employer tendered an offer to claimant's counsel of alternative treatment at the Baylor Clinic. The administrative law judge further concluded that given that the record reflected that employer was aware that claimant was in severe pain, this delay was unreasonable, and accordingly constituted a constructive denial of claimant's authorization request. *See generally Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57 (CRT) (D.C. Cir. 1989). Inasmuch as the administrative law judge's determination that claimant requested and was refused authorization of treatment in this case is rational and supported by substantial evidence, we reject employer's arguments on cross-appeal and affirm the administrative law judge's determination that employer is liable for the medical care that claimant procured on her own initiative to the extent that it was reasonable and necessary. *See generally Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT).

Although the necessity of the medical care at the Boston Pain Center is not contested on appeal, claimant's assertions, in her appeal, that the administrative law judge erred in concluding that the cost of the treatment at the Boston Pain Center was not reasonable must fail. Specifically, we reject claimant's contentions that in making this determination the administrative law judge erred by failing to afford her the benefit of a presumption of reasonableness under Section 20(a) of the Act, 33 U.S.C. §920(a), and by failing to place the burden of proof upon employer to establish that the charges incurred were unreasonable. Although neither Section 7 of the Act nor the regulations explicitly assign the burden of proof, claimant is not relieved of the burden of proving the elements of her claim for medical benefits. *Maryland Shipbuilding and Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *see also Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994). Thus, the administrative law judge did not err in determining that it was claimant's burden to establish that her self-procured medical expenses were reasonable. *See generally Newport News Shipbuilding & Dry Dock Co. v. Loxley*, 934 F.2d 511, 24 BRBS 175 (CRT) (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1941 (1992);

Claimant also asserts that the administrative law judge erred in comparing the cost of Dr. Aronoff's treatment at the Boston Pain Center to the cost of similar treatment in Houston inasmuch as Section 702.413 of the regulations requires that a provider's fees are limited to prevailing community charges for similar care in the community in which the medical care provider is located. 20 C.F.R. §702.413.[1] We reject this contention as Section 702.413 acts as a ceiling for

[1]Section 702.413 states, in pertinent part:

> All fees charged by medical care providers shall be limited to such charges for the same or similar care ... as prevails in the community in which the medical care provider is located ....

compensable fees, and does not preclude the administrative law judge from awarding a lesser amount where, as here, comparable less expensive treatment was available to claimant locally.[2]

We also reject claimant's assertions that the administrative law judge erred in finding that the treatment available at the Baylor Clinic was comparable to that provided at the Boston clinic. Claimant initially cites Dr. Douglas's testimony for the proposition that the Baylor Clinic in Houston had little more to offer than the pain clinic in Austin where claimant had previously been treated unsuccessfully. Cx. 6 at 10-11. The administrative law judge, however, specifically considered Dr. Douglas's testimony in this regard and rationally discredited it, finding that Dr. Douglas did not have a sufficient basis for making this comparison based on his concession that he had no absolute knowledge about the similarities of the Austin and Baylor Clinics and was not familiar with the reputation of the staff at the Baylor Clinic or the Baylor Clinic's success rate. Moreover, the administrative law judge rationally found that Dr. Douglas's opinion in this regard was suspect and therefore not credible because Dr. Finch stated that Dr. Douglas had previously recommended the Houston clinic for claimant. Cx. 5, 6 at 49-52.

Claimant also notes that Dr. Blacker, the head of the Baylor clinic in Houston, stated in a letter dated April 22, 1989, that there was a possibility that claimant would not have been accepted at his clinic even if she had been referred based upon her prior lack of success at the Austin center. Ex. 6 at 5. The administrative law judge, however, considered this letter and inferred that inasmuch as Dr. Blacker also stated that motivation was the most important factor regarding acceptance into the Baylor Clinic, Ex. 6 at 4, and both Drs. Douglas and Glass stated that claimant was motivated to get well, there was a reasonable likelihood that she would have been accepted.[3] *See* Decision and Order at 15.

[2]We note that claimant concedes that the record is devoid of evidence of the prevailing community charges in Boston. Claimant's brief at 8.

[3]Dr. Glass deposed that Dr. Aronoff's approach was excellent, that his new pain information was significantly ahead of the average pain clinic, and that claimant needed such a tertiary pain center because she had been treated unsuccessfully at the pain center in Austin. Cx. 7 at 15-16, 21: Depo. Ex. 1. The administrative law judge considered this testimony but found Dr. Glass's opinion entitled to little weight in light of his admission that evaluating pain clinics was not within his expertise. Cx. 7 at 15, 33-34.

Lastly, while the proximity of the medical care to claimant's residence is a factor to be considered in determining the reasonableness of medical treatment, where competent care is available locally, claimant's medical expenses may reasonably be limited to those costs which would have been incurred had the treatment been provided locally. *See generally Welch v. Pennzoil Co*, 23 BRBS 395, 401 n.3 (1990).[4] After considering the treatment available at both clinics, their professional accreditations and success rates, and the experience of each clinic's director, the administrative law judge in the present case reasonably concluded based on the record before him that claimant's claim for reimbursement for the Boston Pain Center was unreasonable because adequate comparable treatment was available at the Baylor Clinic in Houston at a lesser cost. Inasmuch as claimant has failed to raise any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, *see generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28 (CRT) (D.C. Cir. 1994), we affirm the administrative law judge's finding that employer's liability was limited to the lesser medical expenses and travel costs which claimant would have incurred had she received treatment at the Baylor Clinic in Houston.

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[4]In *Welch*, the Board remanded a case for the administration law judge to determine whether it was reasonable for a claimant residing in Shreveport to request a change to a physician practicing in New Orleans, some 300 miles away, in light of employer's contentions that it offered the services of a nearby specialist and the regulation at 20 C.F.R. §702.403. This regulation states that in choosing a physician, 25 miles from the employee's home is generally a reasonable distance to travel. The Board noted that the fact that travel expenses for medical purposes are recoverable by claimant is a relevant factor in determining the reasonableness of claimant's request.