

LARRY BROUSSARD)	
)	
Claimant-Respondent)	
)	
v.)	
)	
LAKE CHARLES FOOD PRODUCTS,)	DATE ISSUED: 04/29/2010
L.L.C.)	
)	
and)	
)	
AMERICAN LONGSHORE MUTUAL)	
ASSOCIATION, LTD)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order on Appeal of Modification Decision of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Alan G. Brackett, Jon B. Robinson, and Beth S. Bernstein (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for employer/ carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Appeal of Modification Decision (2007-LHC-1143) 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case has been before the Board previously. To recapitulate the facts, claimant was injured on October 30, 2003, when a fellow employee backed up a forklift and knocked claimant to the ground, causing injuries to his right hip, leg, elbow and lower back. In his Decision and Order Awarding Benefits, the administrative law judge found that employer remained liable for claimant's injuries despite a subsequent automobile accident. The administrative law judge awarded claimant temporary total disability compensation from the date of injury and continuing, as well as related and necessary medical expenses, excluding a discogram and a referral to Dr. McDonnell for treatment. The Board and the United States Court of Appeals for the Fifth Circuit affirmed the administrative law judge's decision. *Broussard v. Lake Charles Food Products, L.L.C.*, BRB No. 07-0153 (Aug. 24, 2007), *aff'd*, No. 07-60818, 2008 WL 3820861 (5th Cir. Aug. 15, 2008).

Subsequently, claimant filed a motion for modification under Section 22 of the Act, 33 U.C.S. §922. Claimant alleged that his condition had worsened and that the discogram and treatment by Dr. McDonnell and Dr. Juneau were necessary. The administrative law judge denied claimant's motion, finding that claimant did not establish that his condition had deteriorated such that a discogram was required. Claimant appealed this decision. With regard to the issue of the necessity of the discogram, the Board held that where specific medical treatment is at issue, claimant may establish that the need for certain treatment has changed even if his physical condition has not worsened. *L.B. [Broussard] v. Lake Charles Food Products, L.L.C.*, BRB No. 08-0372 (Oct. 29, 2008). Thus, the Board held that the pertinent inquiry is whether claimant has demonstrated that a discogram is now necessary for the treatment of his injury, and remanded the case to the administrative law judge to weigh the conflicting evidence on this issue. *Id.*, slip op. at 5.

In his decision on remand, the administrative law judge found that Drs. Heard and Staires repeatedly recommended a lumbar discogram to determine whether claimant's lumbar pain was discogenic in origin. Subsequently, Dr. Juneau recommended a discogram also. To counter these recommendations, employer offered the opinion of Dr. Foster, who opined that a discogram was not necessary and suggested work hardening instead. The administrative law judge accorded greater weight to the opinions of Drs. Heard, Staires and Juneau and found that the discogram is necessary based on a weighing of the evidence as a whole. Moreover, the administrative law judge found that this conclusion is supported by the fact that claimant's conservative treatment has not worked and further diagnostic work-up is warranted. The administrative law judge also found that claimant did not establish that treatment by Dr. Juneau is necessary at this time because his necessity as a neurosurgeon is dependent on the outcome of the discogram.

On appeal, employer contends that the administrative law judge erred in his weighing of the evidence to find that a discogram is necessary for the treatment of claimant's back condition. In addition, employer contends that claimant failed to establish a change in condition, and thus the administrative law judge erred in applying Section 22 to reconsider the issue of the necessity of the discogram. Claimant has not responded to this appeal.¹

Section 7(a) of the Act, 33 U.S.C. §907(a), states that “[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require.” Claimant must, however, establish that the treatment procured or anticipated is necessary for his injury in order for employer to be liable for it. *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F. 2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). On remand, the administrative law judge was instructed to weigh the conflicting evidence regarding the necessity of a discogram, giving regard to such factors as the credentials of the physicians, their status as treating or examining physician, and the reasoning behind their opinions. Contrary to employer's contention, the Board previously stated that claimant was not required to establish either a change in condition or mistake in fact to establish the necessity for a discogram. *Broussard*, BRBS No. 08-0372 at 4 n.5. Claimant may seek new or additional medical treatment without establishing either of these elements, as claims for medical benefits are not subject to the time limitations of Section 22 of the Act. *See generally Marshall v. Pletz*, 317 U.S. 383 (1943); *Strachan Shipping Co. v. Hollis*, 460 F.2d 1108, 1116 (5th Cir.), *cert. denied*, 409 U.S. 867 (1972); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 43 BRBS 179 (2010); *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994). The need for treatment may be addressed whenever claimant requests payment for treatment he asserts is necessary. *See generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

¹ Employer also contends that claimant's Notice of Appeal was sent to the administrative law judge, not the Board, and as more than thirty days had passed from the date of the filing of the administrative law judge's decision, any appeal would be untimely. We need not address this contention as claimant's appeal was dismissed by the Board as abandoned by Order dated February 25, 2010.

In his review of the evidence, the administrative law judge found that Drs. Heard and Staires repeatedly recommended a lumbar discogram to determine whether claimant's pain was discogenic in origin.² Cl. Exs. 1, 3. He considered Dr. Heard's qualification as a board-certified orthopedic surgeon and Dr. Staires's board-certification in anesthesiology and pain medicine.³ The administrative law judge found these opinions supported by the opinion of Dr. Juneau, a board-certified neurosurgeon, who recommended a discogram to determine the etiology of claimant's lumbar pain, in order to possibly avoid surgical intervention. Cl. Ex. 4. Employer relied on the opinion of Dr. Foster, an orthopedist, to contend that a discogram is not necessary. Dr. Foster noted that claimant showed signs of symptom magnification and recommended that claimant undergo a work hardening program and be returned to work. Emp. Ex. 32. The administrative law judge accorded greatest weight to the opinions of Drs. Heard, Staires and Juneau, finding that Drs. Heard and Staires are treating physicians, and that these physicians are specialists in three pertinent fields, orthopedics, anesthesiology and neurosurgery. The administrative law judge also reviewed the articles from medical journals submitted by the parties. See Decision and Order at 3-4. While the administrative law judge recognized that a controversy exists regarding the use of discograms, he was persuaded by the recommendation that they be used in cases such as this one where other diagnostic tests have failed to reveal the source of pain. *Id.* at 4. Thus, the administrative law judge found that as claimant has undergone extensive conservative treatment which has been unsuccessful, the recommended discogram is a reasonable and necessary diagnostic procedure.

We affirm the administrative law judge's finding because it is rational, supported by substantial evidence, and in accordance with law. See *O'Keefe*, 380 U.S. 359. It is well established that, in arriving at his decision, the administrative law judge is entitled to determine the weight to be accorded to the evidence and that the Board is not empowered to reweigh it. See generally *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). In this case, the administrative law judge fully discussed the

² In his decision dated September 21, 2006, the administrative law judge did not address the recommendations of Drs. Staires and Heard that claimant undergo a discogram. Rather, the administrative law judge rejected Dr. McDonnell's recommendation for a discogram as Dr. McDonnell was prepared to operate on claimant's back prior to obtaining a discogram, which the administrative law judge found was not reasonable or necessary. Decision and Order Awarding Benefits at 11.

³ The administrative law judge found that although Dr. Heard has a specialty in hand surgery, he also performs lumbar decompressions and discectomies. Emp. Ex. 20.

evidence and rationally explained the basis for his findings. Therefore, we affirm the administrative law judge's determination that a discogram is a reasonable and necessary diagnostic aid under the facts of this case. *See generally Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (1993).

Accordingly, the administrative law judge's decision granting claimant's request for a discogram is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge