



BRB No. 16-0658

NORMAN SELTHON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: <u>Apr. 19, 2017</u>
JONES STEVEDORING COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Regarding Medical Reimbursement of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz and Genavee Stokes-Avery (Law Offices of Charles Robinowitz), Portland, Oregon, for claimant.

James McCurdy and Gavin W. Bruce (Lindsay Hart, LLP), Portland, Oregon, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Regarding Medical Reimbursement (2014-LHC-02007) of Administrative Law Judge Richard M. Clark 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On August 9, 2005, claimant was injured while working as a casual longshore worker for employer when he tripped on a cable and fell forward, hitting his head, chest and right shoulder. In his May 2008 decision, Administrative Law Judge Pulver found that claimant's right shoulder and cervical spine conditions and his traumatic hearing loss are causally related to his August 9, 2005 work injury and that his cumulative 29.06

percent binaural hearing loss is related to noise exposure sustained during his employment with employer.¹ Decision and Order Awarding Benefits at 31-38 (CX 1 at 31-38). Subsequently, claimant sought to recover medical expenses he asserted were related to his work injuries.

In his decision, Administrative Law Judge Clark (the administrative law judge) found claimant entitled to reimbursement for medical expenses related to his neck condition, consisting of: \$19,000.47 for prescription medications, \$16,698.30 for medical and physical therapy treatment, and \$725 for a traction machine, plus interest. Decision and Order Regarding Medical Reimbursement (Decision and Order) at 9-12. Claimant also sought reimbursement for replacement hearing aids he obtained in 2009 and 2014, totaling \$11,290.² The administrative law judge denied this claim, finding that claimant did not seek prior authorization for new hearing aids in 2009 and 2014 or establish that they were reasonable and necessary for the treatment of his work-related hearing loss. *Id.* at 12-14.

On appeal, claimant challenges the denial of the hearing aid reimbursement claim. Employer responds that the administrative law judge's decision should be affirmed. Claimant filed a reply brief in support of his contentions.

The administrative law judge found that claimant did not offer any audiometric testing showing that his hearing loss had worsened since the work injury or that any increased hearing loss is related to the work injury. Decision and Order at 13. The administrative law judge found that claimant's "unsupported and bare assertion" of steady hearing loss after leaving longshore work "is insufficient to find he is entitled to reimbursement." *Id.*; see Tr. at 33.³ The administrative law judge reasoned that claimant is "not a medical doctor and there is nothing in the record that relates his alleged

¹ After remand from the Board to address suitable alternate employment, *N.S. [Selthon] v. Jones Stevedoring Co.*, BRB Nos. 08-0839/A (Aug. 11, 2009), Judge Pulver awarded claimant temporary total disability benefits from August 9, 2005 to December 20, 2005 and continuing permanent total disability benefits thereafter. Decision and Order on Remand at 28 (CX 2 at 69).

² Claimant wore hearing aids at the time of the 2005 work accident. Tr. at 32.

³ At the hearing, claimant testified that his hearing has steadily deteriorated since the work injury and that he required new hearing aids in 2014 because he could hear only four of about twenty or thirty words on the hearing test. Tr. at 33-34. The administrative law judge observed, however, that claimant did not offer into evidence any actual test results. Decision and Order at 13.

performance on a hearing test to the prior hearing loss or work-related injury.” *Id.* The administrative law judge found that the absence of medical documentation, which could be “reasonably obtained,” detracts from claimant’s credibility. *Id.* The administrative law judge thus found that claimant’s testimony alone is insufficient to show that new hearing aids were reasonable and necessary for his work-related hearing loss. *Id.*

The administrative law judge also found claimant did not submit any documentation to support his testimony that the hearing aid providers requested prior authorization from employer for new hearing aids.⁴ Tr. at 33-35. The administrative law judge found that claimant’s testimony suggested that claimant asked the providers to bill employer after the fact. Thus, the administrative law judge found that claimant did not comply with Section 7(d) of the Act, and is not entitled to reimbursement. Decision and Order at 14.

On appeal, claimant contends the administrative law judge erred by not accepting his uncontradicted testimony that the providers requested employer’s prior authorization for hearing aids and that the new hearing aids were necessary because his hearing was deteriorating. We reject claimant’s contention of error and affirm the administrative law judge’s decision.

Section 7 of the Act, 33 U.S.C. §907, describes an employer’s duty to provide medical services necessitated by its employee’s work-related injury and claimant’s and employer’s rights and obligations regarding compensable treatment. Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth prerequisites for employer’s liability for payment or reimbursement of medical expenses incurred by claimant. *See Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979). Specifically, under Section 7(d), an employee is entitled to recover medical expenses if he 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 for treatment of the work injury. *See* 33 U.S.C. §907(c)(2), (d); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (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); 20 C.F.R. §702.406. It is the employee’s burden to establish that the medical treatment at issue is necessary for the work-related injury. *Ramsey Scarlett & Co. v. Director, OWCP [Fabre]*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

⁴ Claimant obtained replacement hearing aids in December 2009 from Bay Hearing Center and in February 2014 from Willoughby Hearing. CX 4.

The administrative law judge properly recognized that hearsay evidence is admissible in cases arising under the Act and may be found credible and reliable. 33 U.S.C. §923(a); *Allen v. Agrifos, L.P.*, 40 BRBS 78 (2006); see *Richardson v. Perales*, 402 U.S. 389 (1971). In this case, however, the administrative law judge rationally found claimant's testimony insufficient to establish that the hearing aid providers sought authorization prior to providing claimant with replacement hearing aids, rather than payment after the fact. Decision and Order at 14; see generally *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988). The administrative law judge observed that claimant did not obtain any records from the providers in an attempt to bolster his testimony that they sought employer's authorization. Thus, the administrative law judge concluded that claimant did not comply with Section 7(d) of the Act and that his reimbursement claim is precluded. As this finding is rational, supported by substantial evidence and in accordance with law, it is affirmed it. *Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57(CRT) (D.C. Cir. 1989).

Moreover, the absence of any evidence contrary to claimant's testimony that he required new hearing aids does not, per se, conclusively establish their necessity for the treatment of his work-related hearing loss. Claimant had the burden of proof to show that hearing aids were reasonable and necessary treatment for the work injury; employer was not obligated to submit contrary evidence to support the administrative law judge's rejection of claimant's testimony. See *Schoen*, 30 BRBS 112. It is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence; thus, he is not required to credit uncontradicted testimony. See generally *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). In this case, the administrative law judge rationally declined to find, based solely on claimant's testimony, that new hearing aids were reasonable and necessary, on the basis that claimant could have obtained corroborative medical documentation.⁵ See *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979). Therefore, as claimant has not demonstrated error in the administrative law judge's rejection of his testimony, we affirm the finding that claimant did not establish that new hearing aids were reasonable and necessary for his work-related hearing loss. As claimant did not establish that he sought employer's prior authorization for, or the necessity of, new hearing aids in 2009 and 2014, we affirm the denial of claimant's reimbursement claim.

⁵ For example, the hearing and deposition testimony of Dr. Bert, claimant's treating physician for his neck condition, was credited by the administrative law judge. Thus, the administrative law judge found that the medical expenses related to the treatment of claimant's neck condition were reasonable and necessary. Decision and Order at 10; see Tr. at 56-97; EX 22.

Accordingly, the administrative law judge's Decision and Order Regarding Medical Reimbursement is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge