BRB No. 04-0922

ROBERT W. DODD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CROWN CENTRAL PETROLEUM CORPORATION	)	DATE ISSUED: 08/26/2005
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Employer's Request for Modification and the Decision and Order Denying Claimant's Petition for Reconsideration of Decision and Order Denying Employer's Request for Modification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Claimant, without counsel, appeals the Decision and Order Denying Employer's Request for Modification and the Decision and Order Denying Claimant's Petition for Reconsideration of Decision and Order Denying Employer's Request for Modification (1997-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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine if they are supported by substantial evidence, are rational, and are in accordance with law. If they are, they

must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case has been before the Board previously and has a lengthy procedural history. *See Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002); *Dodd v. Crown Central Petroleum Corp.*, BRB No. 02-0821 (Aug. 7, 2003)(unpub.); *Dodd v. Crown Central Petroleum Corp.*, BRB No. 98-1302 (June 25, 1999)(unpub.). To briefly recapitulate the facts, on October 24, 1995, claimant, a pumper/dock standby, stated that he experienced pain in his right knee while 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 sought benefits under the Act.

Ultimately, the administrative law judge awarded claimant temporary partial disability benefits from October 25, 1995 to January 16, 1996, temporary total disability benefits from February 6, 1996 until October 25, 1996, and permanent total disability benefits thereafter. However, the administrative law judge suspended claimant's 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. In addition, the administrative law judge found that employer is not liable for the cost of claimant's pain management during the period he refused to be seen by Dr. Axelrad. The Board affirmed the administrative law judge's finding that claimant's refusal to be examined by Dr. Axelrad was unreasonable, and thus affirmed the suspension of benefits and payment for pain management treatment for the period claimant refused to be examined. *Dodd*, 36 BRBS at 89.

On June 19, 2003, employer filed a petition for modification contending that claimant's condition had improved and that claimant is no longer eligible for permanent total disability benefits. 33 U.S.C. §922. The administrative law judge found that employer's petition for modification was timely filed, but that employer cannot present evidence of suitable alternate employment for the first time on modification. Moreover, the administrative law judge found that claimant's knee pain, while not the sole cause of claimant's depression, is a significant factor causing claimant's depression and, as such, claimant's depression is work-related and compensable. The administrative law judge also found, assuming, *arguendo*, that employer could submit evidence of suitable alternate employment, that claimant could not perform the alternate employment identified by employer. Thus, the administrative law judge denied employer's petition for modification and found that claimant remains entitled to permanent total disability benefits.

Claimant filed a motion for reconsideration. The administrative law judge affirmed his finding that employer's petition was for modification pursuant to Section 22,

not for reconsideration, and therefore its petition was timely filed. The administrative law judge also found that employer had the right to have claimant examined by Dr. Scarano, and that claimant is entitled to a resumption of his benefits after January 20, 2004, when he was examined by Dr. Scarano in place of Dr. Axelrad. The administrative law judge also found that claimant should pursue payment for services rendered by Drs. Garcia and Suchowiecky through the district director, but that he is not entitled to medical expenses for pain management by Dr. Suchowiecky during the period of his refusal to undergo a medical exam by a physician of employer's choice. In addition, the administrative law judge stated that claimant should pursue with the district director payment of compensation allegedly owed.

Claimant appeals this decision without legal representation. Initially, claimant raises the issues of whether the administrative law judge properly referred him to the district director to determine payment of outstanding medical bills and compensation. Claimant also contests Dr. Scarano's impartiality as a "forensic psychiatrist," and questions the doctor's failure to submit a report to him and to his doctor. Lastly, claimant contends that the administrative law judge erred in finding that his benefits should be suspended until January 20, 2004, the date he saw Dr. Scarano, as he had been willing to see Dr. Axelrad six months earlier, but Dr. Axelrad had refused to see him. Employer has not responded to this appeal.[1]

Initially, we affirm the administrative law judge's direction to claimant to pursue payments of medical benefits and compensation with the district director. *See generally* 33 U.S.C. §918. Section 702.407 of the implementing regulations provides that the district director shall actively supervise the medical care of an injured employee under the Act. 20 C.F.R. §702.401; *see* 33 U.S.C. §907. In addition, we reject claimant's contention that the administrative law judge did not address the qualifications of Dr. Scarano and that Dr. Scarano did not follow the proper reporting requirements of the Act. Employer is entitled to request that an injured employee be examined by a physician of its choosing. 33 U.S.C. §907(d)(4); 20 C.F.R. §§702.409, 702.410. Dr. Scarano is the Chief of Forensic Psychiatry and Director of the Occupational and Forensic Psychiatry Program at Baylor University, and the administrative law judge rationally found that there was nothing improper with his selection and that the fact that Dr. Scarano is a forensic psychiatrist does not make him biased. *See* 33 U.S.C. §907(d); 20 C.F.R. §702.410(c). In addition, Dr. Scarano was not required by the Act or its implementing regulations to send a report of his examination to claimant's treating physician, and employer's counsel, Andrew Schreck, stated that he had sent a copy to claimant himself.

[1] Employer initially filed a notice of cross-appeal, which was dismissed for failure to file a petition for review. 20 C.F.R. §802.402; *Dodd v. Crown Central Petroleum Corp.*, BRB No. 04-0922A (Mar. 30, 2005).

H. Tr. at 135. Moreover, claimant had the opportunity to cross-examine Dr. Scarano at the hearing. Lastly, the administrative law judge accorded greater weight to the medical opinions contrary to that of Dr. Scarano which state that claimant continues to suffer from knee pain and that his injury is at least a part of the cause of his depression. Decision and Order at 20. We therefore reject claimant's contentions in this regard.

Claimant also contends that the administrative law judge erred in finding that his benefits should be suspended through the date he was examined by Dr. Scarano, January 20, 2004. We agree with claimant that this finding cannot be affirmed. During the previous modification hearing, employer agreed to send a list of psychiatric doctors on staff at Baylor College of Medicine from among whom claimant would choose a physician to perform a psychiatric 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, 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 had the earliest available appointment. Claimant refused to be seen by Dr. Axelrad, which the administrative law judge found was unreasonable and thus suspended benefits pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4). *See* Decision and Order on Second Remand; Tel. Conf. Tr. at 15-17, 18. Subsequently, it appears that claimant agreed to be seen by Dr. Axelrad, but that Dr. Axelrad refused to see claimant without a signed waiver which claimant refused to sign. Employer then requested the administrative law judge to direct claimant to undergo an examination by Dr. Scarano. Decision and Order Denying Claimant's Petition for Reconsideration at 2-3. This examination took place January 20, 2004.

Claimant contends that the suspension should have been lifted when he was willing to see Dr. Axelrad, rather than when he was examined by Dr. Scarano. The administrative law judge summarily addressed this contention by stating that claimant was in large part responsible for delays in scheduling the exam. *See id.* at 3. However, it is not clear from the decision whether the administrative law judge is referring to this particular examination by Dr. Scarano, or to claimant's prior refusal to be examined by a physician of employer's choosing. It is also not clear from the record what date claimant agreed to be seen by Dr. Axelrad. Therefore, as claimant's right to benefits and payment of pain management was suspended due to his unreasonable refusal to be examined by a physician of employer's choosing, and the administrative law judge did not address whether claimant's agreement to be examined by Dr. Axelrad lifted the suspension, we must vacate the administrative law judge's finding and remand the case for clarification as to the date the suspension of benefits should be lifted. *See generally Dodd,* 36 BRBS at 88-89; *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989).

Accordingly, the administrative law judge's finding that claimant's suspension of benefits is lifted only as of January 20, 2004, the date he was examined by Dr. Scarano, is

vacated, and the case is remanded for further findings consistent with this opinion. The administrative law judge's decisions are affirmed in all other respects.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge