BRB No. 11-0846

MAURICE DUNCAN	)	
Claimant-Petitioner	)	
v.	)	
DANOS AND CUROLE MARINE CONTRACTORS, INCORPORATED	)	DATE ISSUED: 08/13/2012
and	)	
THE GRAY INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision on Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr., W. Jared Vincent, and V. Jacob Garbin (Law Offices of William S. Vincent, Jr.), New Orleans, Louisiana, for claimant.

Douglass M. Moragas, River Ridge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Decision on Reconsideration (2010-LHC-1036) of Administrative Law Judge Patrick M. Rosenow 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a rigger on an oil rig in the Gulf of Mexico, was injured on June 27, 2009, when he was inadvertently struck by another employee when a safety harness failed. Claimant experienced neck and right shoulder pain following this incident, was taken to a hospital on the mainland, and subsequently received medical treatment from a number of physicians. He has not returned to gainful employment since this incident. Employer voluntarily paid claimant total disability benefits from June 27 to September 27, 2009, and from August 16, 2010 to February 6, 2011. 33 U.S.C. §908(b).

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant's June 27, 2009 work incident resulted in injuries to his neck and right shoulder. The administrative law judge found that claimant's conditions reached maximum medical improvement on September 24, 2009, and that claimant failed to establish that he was unable to resume his usual employment duties with employer after that date. The administrative law judge denied claimant's claim for reimbursement of the costs associated with emergency room visits between November 30, 2009, and April 26, 2010, and of the charges associated with the treatment by Dr. Voorhies, finding that these medical expenses were neither reasonable nor necessary; however, employer was ordered to provide claimant with an EMG test requested by Dr. Shults on February 11, 2011. The administrative law judge awarded claimant temporary total disability benefits from June 27, 2009, to September 24, 2009, based upon a calculated average weekly wage of $637.42.

Both parties filed motions for reconsideration with the administrative law judge. In his Decision on Reconsideration, the administrative law judge denied claimant's motion to reopen the record and to reconsider his decision. However, after finding that Dr. Shults did not in fact request that claimant undergo an additional EMG but, rather, stated on January 20, 2011, that no further testing was warranted, the administrative law judge granted employer's motion and vacated his order that employer provide an additional EMG test.

On appeal, claimant challenges the administrative law judge's denial of his claim for disability and medical benefits under the Act. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant challenges the administrative law judge's denial of his claim for ongoing disability benefits. Specifically, claimant contends that he has presented evidence sufficient to establish that he is incapable of resuming his usual employment duties with

employer.[1] In order to establish a prima facie case of total disability, claimant must establish that he is unable to perform his usual work due to the injury. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

In his decision, the administrative law judge credited the opinion of Dr. Shults, and declined to give determinative weight to the testimony of claimant, in concluding that claimant did not meet his burden of establishing that he was disabled subsequent to September 24, 2009, due to conditions related to his June 27, 2009, work injury. *See* Decision and Order at 25-26. Dr. Shults first examined claimant on July 2, 2009, and on September 24, 2009 opined that claimant had reached maximum medical improvement. Dr. Shults noted that claimant continued to complain of neck and right shoulder pain thereafter, but that, based on objective test results, he could find no anatomic reason for claimant's subjective complaints; consequently, Dr. Shults released claimant to return to work.[2] CX 4 at 5. Dr. Shults next examined claimant on January 20, 2011, during which time he also reviewed medical notes and evaluations taken since he had last seen claimant in September 2009. After noting claimant's ability to bend over without difficulty, Dr. Shults reiterated his prior opinions, stating that claimant never fully participated in his examinations and that claimant showed signs of malingering or symptom magnification. CX 4 at 6-10. The administrative law judge additionally addressed claimant's testimony, which he concluded was not particularly credible, noting that claimant did not attempt to return to work following Dr. Shults's recommendation that he attempt to do so, and that claimant did not attend, and thereafter denied being told about, his prescribed physical therapy. The administrative law judge further noted Dr. Shults's notation that claimant was inappropriately seeking additional pain medication. *See* Decision and Order at 25-26. The administrative law judge rationally rejected claimant's testimony and acted within his discretion in relying upon Dr. Shults's opinion. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijanjos v. Avondale Shipyards*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). As substantial evidence supports it, we affirm the administrative law judge's finding that claimant did not establish he was disabled by the work injury subsequent to September 24, 2009.

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[1]Claimant contends the opinion of Dr. Shults does not support the administrative law judge's finding that he is capable of resuming his usual employment duties as a rigger, while the opinions of Drs. Voorhies and Davis establish that he presently remains totally disabled.

[2]Dr. Shults testified that he released claimant to return to work "as tolerated;" the physician acknowledged the possibility that claimant may have had restrictions but stated that he had no diagnosis on which to make such a finding. *See* EX 1 at 46-47; CX 4 at 5.

Claimant next challenges the administrative law judge's finding that his injuries reached maximum medical improvement on September 24, 2009. In this regard, claimant avers that since he continues to seek medical treatment in an effort to improve his condition, his condition must be considered temporary in nature. We reject claimant's contention of error. The administrative law judge relied upon the opinion of Dr. Shults who stated that claimant's subjective complaints had not improved with physical therapy and narcotic medication, and that claimant's condition had reached maximum medical improvement on September 24, 2009. CX 4 at 5. On January 20, 2011, Dr. Shults reiterated his opinion that claimant reached maximum medical improvement on September 24, 2009. *Id.* at 10; EX 1 at 45-46. Dr. Shults noted that the test results did not correspond with claimant's injuries, that his symptoms are non-anatomic, and that claimant shows signs of symptom magnification. Thus, although claimant continued to seek treatment for his pain subsequent to September 24, 2009, Dr. Shults's January 20, 2011 report constitutes substantial evidence to support the administrative law judge's determination that claimant's work injury had reached maximum medical improvement several months after the work incident. We therefore affirm the administrative law judge's finding that claimant's injury reached maximum medical improvement as of September 24, 2009. *See generally Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

Claimant contends that the administrative law judge erred in calculating his average weekly wage. Specifically, claimant avers that the administrative law judge erred in failing to utilize one of the calculation methods set forth in his post-hearing brief; alternatively, claimant asserts that the administrative law judge erred in presuming that claimant would have worked the same number of hours as a co-worker similarly employed by employer as a rigger in the year prior to claimant's injury.

Section 10(c) of the Act, 33 U.S.C. §910(c), provides a general method for determining average weekly wage where Section 10(a) or (b), 33 U.S.C. §910(a), (b), cannot fairly or reasonably be applied to calculate claimant's annual earning capacity at the time of his injury.[3] The object of Section 10(c) is to arrive at a sum that reasonably represents the claimant's annual earning capacity at the time of his injury,[4] s*ee Hall v.*

[3]In this case, no party asserts that Section 10(a) or (b) is applicable.

[4]Section 10(c) of the Act states that if neither Section 10(a) nor Section 10(b) applies,

> the claimant's average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar

Consol. Employment Sys., Inc., 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998), and Section 10(c) states that a claimant's average annual earnings under this subsection shall have regard for his earnings at the time of the injury and the earnings of other employees of the same or similar class of employment. *See Hayes v. P & M Crane Co.*, 23 BRBS 389 (1990), *rev'd on other grounds*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). It is well-established that the administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

In this case, claimant worked for employer for approximately eight weeks prior to his injury. In his decision, the administrative law judge set forth the calculations offered by the parties, and the limited evidence in the record, Decision and Order at 26-27, and determined that claimant's annual earning capacity was best represented by a combination of claimant's weekly earnings at the time of his injury and the number of weeks worked the preceding year by a similarly situated co-worker. Using this method, the administrative law judge found that claimant's average weekly wage was $637.42. Decision and Order at 26-27. The result reached by the administrative law judge constitutes a reasonable estimate of claimant's annual earning capacity based on the limited evidence presented, is supported by substantial evidence, and is in accordance with law. *See generally B&D Contracting v. Pearley*, 549 F.3d 338, 42 BRBS 60(CRT) (5th Cir. 2008); *Staftex Staffing v. Director*, OWCP, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000); *Hall*, 139 F.3d 1025, 32 BRBS 191(CRT); *Hayes*, 23 BRBS 389. We, therefore, affirm the administrative law judge's calculation of claimant's average weekly wage.

Claimant next asserts that the administrative law judge erred in failing to find employer liable for the costs associated with his emergency room visits to the Thibodaux Regional and Terrebone General hospitals, as well as the treatment he received from Dr. Voorhies. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). Medical care must be appropriate for the injury, 20 C.F.R. §702.402, and claimant must establish that the

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> employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c).

requested services are reasonable and necessary for the treatment of the work injury. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Claimant is entitled to medical benefits for a work-related injury even if that injury is not economically disabling so long as the treatment is necessary for his work injury. *See Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997).

With regard to his emergency room visits, claimant asserts that New Orleans, where his treating physician practices, is approximately one hour from his home, and that, consequently, it was necessary for him to occasionally seek medical treatment closer to his residence. In his decision, the administrative law judge found that, as claimant was treating with Dr. Davis during the period he sought emergency room services, he would have consulted that physician in the absence of a "true emergency." Decision and Order at 27. Finding that claimant's emergency rooms visits were necessitated by his desire to seek medication for increased pain and did not result in his hospitalization, the administrative law judge concluded that claimant failed to establish that his emergency room visits were "more likely than not reasonable and necessary." *Id.*

We agree with claimant that the administrative law judge should have considered whether, in light of the distance between his residence and his treating physician, claimant's complaints of pain required that he occasionally seek treatment closer to his residence. *See generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). Moreover, we note that the pertinent issue is whether the treatment claimant received was reasonable and necessary for the work injury. It is not necessary, as the administrative law judge implied, that the emergency room treatment result in hospitalization.[5] With regard to claimant's treatment with Dr. Voorhies, the administrative law judge denied claimant's request for reimbursement of his expenses associated with that physician since employer had previously objected to claimant's change in physician and did not thereafter authorize such treatment. Decision and Order at 27. Where, however, a claimant's request for authorization is refused by employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was necessary for the injury in order to be entitled to such treatment at employer's expense. *See 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); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Moreover, claimant avers that employer did, in fact, authorize the treatment and therefore is liable. Consequently, as the administrative law judge did not

[5]Employer, in urging affirmance of the administrative law judge's decision on this issue, argues that emergency room visits in this case were unnecessary since claimant could renew his pain medication prescriptions via telephone. The administrative law judge may consider this argument on remand.

address whether claimant's subsequent treatment with Dr. Voorhies was necessary for his injury, nor did he address the totality of the evidence regarding the necessity of claimant's emergency room visits, we vacate the administrative law judge's denial of reimbursement for those services and remand the case for reconsideration of those expenses, in accordance with the relevant caselaw.

Lastly, claimant avers that the administrative law judge erred in failing to address Claimant's Exhibits 5, 6, 7, and 20, in his decision. We disagree. The administrative law judge addressed Claimant's Exhibits 5, 6, and 20 in his Decision and Order.[6] *See* Decision and Order at 20 n.53, 54; 23 n.62. With regard to Claimant's Exhibit 7, which consists of 79 pages of emergency room records from the Thibodaux Regional Medical Center, claimant has not established reversible error in the administrative law judge's decision. At the formal hearing, the parties were directed by the administrative law judge to specifically cite to page numbers in any document over 20 pages in length. *See* H.Tr. at 6. In his post-hearing brief, claimant did not cite or address exhibit 7 in his summary of pertinent exhibits, *see* Cl. Post-hearing br. at 6-13, nor did he cite that exhibit in his discussion of the issues presented for adjudication before the administrative law judge. *Id.* at 15-26. Therefore, claimant has not demonstrated error on the part of the administrative law judge.[7] *See generally James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

[6]This specific contention was raised by claimant in his motion for reconsideration before the administrative law judge. In his Decision on Reconsideration, the administrative law judge rejected claimant's allegation of error, directing claimant's attention to the pages of his decision which cited to the exhibits presently in dispute. *See* Decision on Reconsideration at 4.

[7]On remand, claimant may refer the administrative law judge to any pages in this document as it pertains to his entitlement to medical benefits.

Accordingly, the administrative law judge's denial of claimant's claim for reimbursement of his expenses related to his emergency room visits and treatment with Dr. Voorhies is vacated, and the case remanded for further consideration in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge