BRB No. 98-1444

ROBERT E. MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES	)	DATE ISSUED: Aug. 5, 1999
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

J. Paul Demarest (Favret, Demarest, Russo & Lutkewitte), New Orleans, Louisiana, for claimant.

Joseph J. Lowenthal, Jr. and Michelle A. Bourque (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-2898) of Administrative Law Judge C. Richard Avery 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 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, while working as a welder for employer on January 25, 1996, stepped through a hole and fell 20 feet from the deck of a vessel, landing on his tail bone. Unaware of the severity of his injuries, claimant initially began to drive home but shortly thereafter stopped to see his family physician, Dr. Sharp, who determined that claimant suffered a

comminuted fracture of the T12 vertebrae with compromise of the spinal canal and fractures of his eighth and ninth ribs. Dr. Butler, an orthopedic surgeon, subsequently performed a fusion at T12 with a graft from claimant's hip, and rods were put on both sides of his spine for support. Following a year of treatment with Dr. Butler,[1] claimant sought out Dr. Provenza, a neurosurgeon, who felt that additional testing of claimant's condition was needed. In addition, Dr. Provenza sent claimant to physical therapy and pain management with Dr. Gupta. Claimant testified that Dr. Gupta provided him relief with treatment, but ceased seeing him in March, 1998, because employer refused payment of Dr. Gupta's medical bills.

Claimant also started seeing Dr. Palotta, a psychiatrist, for depression.[2] Dr. Palotta diagnosed a major depressive disorder and post-traumatic stress disorder, and opined that claimant's anxiety, depression, lack of concentration and irritability with people would interfere with his being around or dealing with people. In addition, claimant had independent examinations by psychiatrists Dr. Roniger, who opined that claimant suffers from depression, and Dr. MacGregor, who agreed with Dr. Palotta's assessment that claimant suffers from a major depressive disorder and post-traumatic stress disorder.

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[1]At this point, Dr. Butler stated that there was nothing more he could offer claimant for relief of his pain. This prompted claimant to visit Dr. Provenza. In addition, a second orthopedic surgeon, Dr. Russo, examined claimant on July 22, 1996, at employer's request. He opined that claimant should achieve maximum medical improvement six months post-surgery, *i.e.*, August, 1996, and at that point would be capable of light to sedentary work eight hours a day.

[2]The record indicates that claimant previously received treatment, including hospitalization, for depression in June and July of 1994, from Dr. Hammond, a staff psychiatrist at Mississippi State Hospital. Claimant, however, testified that this earlier bout of depression is totally unrelated to his present psychological condition.

Claimant has not worked since his accident, and alleged that he remains temporarily totally disabled and he seeks to remain under the care of Drs. Provenza, Gupta, and Palotta. Employer voluntarily paid temporary total disability benefits and certain medical benefits through February 17, 1997,[3] but maintains that since that date claimant has reached maximum medical improvement and is capable of light to sedentary work. In support of its case, employer submitted the labor market survey of Joe Walker, which identified a number of sedentary jobs that claimant is capable of performing.

In his decision, the administrative law judge initially determined that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption with regard to both his back and psychiatric conditions and that employer could not establish rebuttal thereof. The administrative law judge therefore concluded that claimant's back and psychiatric conditions are work-related. The administrative law judge next found that claimant had not yet reached maximum medical improvement with regard to either condition as the most credible medical evidence of record suggests that further treatment would be beneficial to claimant. The administrative law judge then determined that claimant was not capable of returning to his usual employment, and that employer did not meet its burden of establishing the availability of suitable alternate employment. Consequently, the administrative law judge concluded that claimant is entitled to temporary total disability benefits. 33 U.S.C. §908(b). The administrative law judge also ordered employer to pay claimant for his medical expenses including past and future treatment provided by Drs. Provenza and Gupta.

On appeal, employer challenges the administrative law judge's findings that claimant had not reached maximum medical improvement, that employer did not establish the availability of suitable alternate employment, and that employer is liable for the past and future medical bills of Drs. Provenza and Gupta, including any treatment related to claimant's cervical complaints, which employer alleges are not work-related. Additionally, employer argues that it is entitled to Section 8(f) relief, 33 U.S.C. §908(f). Claimant responds, urging affirmance.

CAUSATION

Employer initially argues that the administrative law judge's decision is in error because it contains no finding that claimant has a work-related cervical condition, yet orders employer to pay for a cervical workup and myelogram. Employer maintains that the

[3] Employer continues to pay for Dr. Palotta's psychiatric treatment.

testimony and evidence supports a finding that claimant's supposed cervical complaints are unrelated to his January 25, 1996, work-related accident.

In order to be entitled to the Section 20(a), 33 U.S.C. §920(a), presumption linking claimant's condition to his employment, claimant must establish a *prima facie* case by showing that he sustained a harm and that working conditions existed or an accident occurred which could have caused or aggravated the harm. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). A claimant's credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case for Section 20(a) invocation. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the presumption is rebutted, the administrative law judge must weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994).

In his decision, the administrative law judge discussed the issue of causation in terms of claimant's back and psychiatric conditions and ultimately concluded that claimant invoked the Section 20(a) presumption with regard to both conditions and that employer could not establish rebuttal thereof. Absent from the administrative law judge's analysis of causation is any specific consideration of claimant's alleged work-related cervical complaints.

We hold, however, that invocation of the Section 20(a) presumption and rebuttal thereof, are established with regard to claimant's cervical complaints as a matter of law, and we remand the case for consideration as to whether claimant established the existence of a causal relationship based on the record as a whole. *See Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon.*, 32 BRBS 224 (1998); *Greenwich Collieries*, 512 U.S. at 267, 28 BRBS at 43 (CRT). Specifically, the record establishes that claimant suffered a harm, *i.e.*, pain around his cervical region, as documented by both Drs. Provenza and Gupta, and that this pain may be due to the severity of the work-related accident sustained on January 25, 1996.[4] *See generally Stevens*, 23 BRBS at 193. In addition, Dr. Butler's testimony, that to a

[4]Dr. Provenza noted that claimant's symptoms could be from his cervical region, and recommended, in view of the perceived severity of claimant's trauma (*i.e.*, the work-related accident of January 25, 1996), a myelogram of the cervical region in reference to the thoracic and lumbar region, in order to determine the full extent of his injury. CX 2. In addition, Dr. Gupta's examinations revealed palpable spasms in the lower back, upper back, and lower cervical region, which he explained could be brought on by either a recent injury or chronic

reasonable degree of medical probability claimant's cervical complaints are not related to his January 25, 1996, work-related injury, establishes rebuttal of the Section 20(a) presumption. *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1 (CRT) (9th Cir. 1999).

NATURE AND EXTENT OF DISABILITY

Employer next argues that, contrary to the administrative law judge's finding, claimant reached maximum medical improvement on October 28, 1996. Additionally, employer asserts that the record supports a finding that claimant is capable of performing sedentary work and that there is no reliable evidence to support the administrative law judge's finding that claimant is incapable of performing the jobs identified in Mr. Walker's labor market survey.

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pain, of which claimant suffered from his work-related injury on January 25, 1996. CX 3.

In the instant case, as all three psychiatrists, Drs. Palotta, Roniger and MacGregor, opined that claimant needs additional treatment for his work-related psychological condition, *see Louisiana Ins. Guaranty Assoc. v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993), we affirm the administrative law judge's finding that claimant has not yet reached maximum medical improvement with regard to his injuries. [5] *See James v. Pate Stevedoring Co.,* 22 BRBS 271 (1989); *Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1985).

In considering the evidence relevant to the issue of suitable alternate employment, the administrative law judge accorded greatest weight to Dr. Palotta, whose opinion that claimant, from an emotional and mental standpoint, is not ready to do any work is unequivocal and supported by both Drs. Provenza and Gupta, who believe more medical treatment and diagnostic testing is in order. In rejecting the remaining relevant opinions of record, the administrative law judge found that although Dr. Butler opined that claimant can perform light to sedentary work, he ultimately deferred to Dr. Palotta regarding claimant's overall ability to perform work. Additionally, the administrative law judge declined to accept the opinions of Drs. Roniger and MacGregor, who each examined claimant only once, over that of Dr. Palotta, who treated claimant a number of times over the course of a year. Moreover, the administrative law judge discredited, as too cautious, Dr. MacGregor's opinion that claimant might be able to perform some form of light duty which did not put him in the hazardous position of injuring himself or others due to his relative lack of concentration. We therefore affirm the administrative law judge's determination that employer did not establish the availability of suitable alternate employment. *See Lostanau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *see generally New Orleans (Gulfwide) Stevedores, Inc. v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Roger's Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986).

[5] In light of our affirmance of the administrative law judge's finding that claimant's back and psychiatric conditions remain temporary, we need not address employer's contention that it is entitled to Section 8(f) relief. *Sizemore v. Seal & Co.*, 23 BRBS 101 (1989).

MEDICAL BENEFITS

Employer also contends that the administrative law judge's finding that employer must pay the past and future medical expenses of Drs. Provenza and Gupta is not supported by any evidence and must be reversed. First, employer asserts that said medical expenses are not reimbursable since claimant never received its authorization. Additionally, employer maintains that the treatment in question is neither reasonable nor necessary. Specifically, employer argues that the workup recommended by Dr. Provenza, in essence, consists only of a cervical myelogram which cannot be reimbursed as claimant's work-related accident did not cause his cervical condition.

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." Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. Section 7(d) requires that a claimant request his employer's authorization for medical services performed by any physician, including the claimant's initial choice. *See Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981)(Miller, J., dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Where a claimant's request for authorization is refused by the employer, however, 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 his injury in order to be entitled to such treatment at employer's expense. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). An employer must consent for a change of physician where claimant has been referred by his treating physician to a specialist skilled in treating claimant's injury. *See generally Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992)(Smith, J., dissenting on other grounds); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988); 20 C.F.R. §702.406(a). Whether a particular medical expense is reasonable and necessary is a factual issue within the administrative law judge's authority to resolve. *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

In the instant case, claimant sought authorization for treatment by Dr. Provenza through Dr. Butler, as evidenced by Dr. Butler's letter dated June 25, 1996, wherein he stated that the purpose of the letter was to notify employer of claimant's request to be referred for treatment by Dr. Provenza. EX 2-1, Dep. at 10-11, EX 2-2. Employer however refused to pay for the treatment rendered by Drs. Provenza and Gupta. Tr. at 17, 18. As claimant's request for authorization was denied, claimant is entitled to all reasonable and necessary medical benefits provided by Drs. Provenza and Gupta associated with his work-related injuries at employer's expense. *Schoen*, 30 BRBS at 112; *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

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 his claim for medical benefits. *Schoen*, 30 BRBS at 112. Among those elements is that claimant must establish that the care is reasonable and necessary for treatment of the work-related injury. *Id.* In the instant case, the administrative law judge has yet to determine whether claimant's cervical complaints are work-related, and thus, whether all of the treatment offered by Drs. Provenza and Gupta is reasonable and necessary for treatment of claimant's work-related injuries. We, therefore, vacate the administrative law judge's award of medical benefits related to any treatment, past or future, provided by Drs. Provenza and Gupta and remand the case for further consideration of this issue. *See generally Hite*, 22 BRBS at 87. On remand, the administrative law judge must explicitly consider whether any of the past treatment was or proposed future treatment is reasonable and necessary to treat claimant's work-related injuries. *Schoen*, 30 BRBS at 112.

Accordingly, the administrative law judge's award of medical benefits is vacated, and the case is remanded for further consideration consistent with this opinion. In addition, the case is remanded for consideration of the causation issue with regard to claimant's cervical condition based on the evidence as a whole. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge