BRB No. 98-1571

MARGARET JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 8/18/99
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits and the Order Denying Claimant's Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

William T. Bailey, Sr., Lucedale, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Benefits and the Order Denying Claimant's Motion for Reconsideration (97-LHC-1100, 97-LHC-1101, 97-LHC-1102, 97-LHC-1103) of Administrative Law Judge James W. Kerr, Jr., rendered on claims 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a welder. During the course of her employment, she was injured four times, and she filed a claim for benefits for each injury. The administrative law judge determined that claimant is entitled to benefits for only one of those injuries, as claimant did not lose time from work or incur medical expenses as a result of the others. Therefore, the only injury at issue occurred on June 24, 1988, when claimant hurt her left arm, left shoulder and neck.

The administrative law judge awarded claimant disability and medical benefits for this injury.[1] With regard to medical benefits, the administrative law judge determined that claimant is entitled to reimbursement only for those expenses incurred for treatment by the authorized physicians, Drs. Rutledge and Bridges. Decision and Order at 23-29. The administrative law judge then denied claimant's motion for reconsideration, addressing her several contentions and stating that his findings were thoroughly analyzed and supported by the evidence. Claimant appeals the denial of certain medical benefits, and employer responds, moving for dismissal or, alternatively, urging affirmance.[2]

[1]The administrative law judge awarded temporary total disability benefits from June 25, 1988, through September 6, 1990, when employer first established the availability of suitable alternate employment, temporary partial disability benefits from September 7, 1990, through June 2, 1992, when claimant underwent a second neck surgery, and temporary total disability benefits from June 3, 1992, through February 3, 1993, when Dr. Wilkerson determined that claimant's condition reached maximum medical improvement. Thereafter, from February 4, 1993, through January 10, 1996, when employer again established the availability of suitable alternate employment, the administrative law judge awarded claimant permanent total disability benefits. Decision and Order at 23-29.

[2]Claimant does not challenge the administrative law judge's proper determination that employer is not liable for medical treatment related to injuries resulting from claimant's 1995 automobile accident. Decision and Order at 27-28.

Initially, we deny employer's motion to dismiss this appeal. Although claimant failed to file a Petition for Review as specified by Section 802.211 of the regulations, 20 C.F.R. §802.211, we note that such an omission is not fatal to the appeal, as it is within the Board's discretion to consider whether an appeal has been abandoned. 20 C.F.R. §802.211(d). As claimant filed a memorandum in support of her appeal, the appeal has not been abandoned. We also deny employer's motion to dismiss for failure to file a brief which identifies the issues raised on appeal. In this case, claimant filed a brief challenging two points of the administrative law judge's decision. Because we are unable to ascertain an issue from the first point of contention in claimant's argument, we shall not address it.[3] *Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). However, claimant's second point of contention, a challenge to the administrative law judge's denial of certain medical expenses, is identifiable and will be addressed.

Claimant contends the administrative law judge erred in denying reimbursement for medical treatment received from physicians other than Drs. Rutledge and Bridges. Specifically, she argues that treatment and/or evaluations by Drs. Giles, Wilkerson, Wicker, LaCour, McCloskey, Bass, Cunningham, Cannella, Voorhies, and treatment at the Ochsner Clinic were reasonable and necessary. Employer argues that this treatment was not authorized and it should not be held liable for the costs, especially in light of the fact that it never refused treatment from claimant's chosen physicians, Drs. Rutledge and Bridges.

Under Section 7, a claimant is required to request her employer's authorization for medical services performed by any doctor regarding a work-related injury. 33 U.S.C. §907; *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Shahady v. Atlas Tile & Marble*

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[3]Claimant's first point of contention, exactly as typed in the brief, states:

> Administrative Law Judge in error in not consideration of totality of back injury arising out of and in course of employment.
>
> > In any proceeding for the enforcement of a claim for compensation under this and it shall be presumed, in the absence of substantial evidence to the contrary.
> >
> > a) That this claim comes within the prevision of this act. *33USCS Section 920* (sic).

Brief for Claimant at 4.

Co., 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). However, where a claimant's request for authorization is refused, she is released from the obligation of seeking further approval. Thereafter, she need only establish that the treatment subsequently procured was necessary for the injury in order to be entitled to such treatment at her employer's expense. *Anderson*, 22 BRBS at 23; *see also 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). In order to ascertain whether the administrative law judge properly denied claimant certain medical benefits, we must consider the chronology of events. Therefore, we shall briefly summarize claimant's medical history.

Two weeks after claimant's June 1988 injury, she attempted to return to work but was unable to do so due to pain. She therefore sought medical attention from Dr. Rutledge, her treating orthopedic surgeon. Dr. Rutledge diagnosed claimant with biceps rotator cuff tendinitis in the left shoulder and restricted her work abilities. In 1989, after conservative treatment and numerous periods of work and non-work, claimant was referred to a neurosurgeon, Dr. Bridges. Dr. Bridges made several diagnoses, including central disc herniation at C3-4 with significant cord compression at C3-4 and C4-5. Claimant was taken off work, and on August 16, 1989, she underwent an anterior diskectomy at C3-4 and C4-5. Dr. Bridges released claimant to return to work with restrictions on November 27, 1989. Emp. Ex. 29.

At this juncture, claimant testified she sought a second opinion from Dr. Giles, an orthopedic surgeon. She requested authorization but was refused. Nevertheless, claimant continued to see Dr. Giles and those doctors to whom he referred claimant, including Dr. Wilkerson, a neurologist, for a short period of time. The opinions of these doctors were on par with those of claimant's treating physicians. Emp. Ex. 27. Thus, there was agreement that claimant could return to restricted duty work, and she so attempted.

Claimant testified that she continued to experience pain and also began experiencing numbness in her fingers and legs and a swallowing/choking problem in 1991. She testified that she returned to Dr. Rutledge. Tr. at 48-49; Emp. Ex. 27. An MRI of claimant's cervical spine dated June 1991 revealed significant disc changes, including herniation, protrusions and osteophyte formations. Emp. Ex. 27. Consequently, Dr. Rutledge referred claimant to Dr. Bridges. Dr. Bridges ordered a second MRI in December 1991 which showed the same abnormalities. He diagnosed cervical outlet syndrome and told claimant that she would just have to "live with" her problems. Emp. Ex. 29. Upon learning that Dr. Bridges would do no more for her, claimant testified she sought treatment from Dr. Wilkerson, but she did not request authorization from employer. Tr. at 48-50.

After a series of referrals beginning with Dr. Wilkerson, claimant was evaluated by Dr. Voorhies, a neurosurgeon, who believed that the osteophyte formations on claimant's cervical spine might be pressing on her esophagus, causing the swallowing/choking problem.

Dr. Voorhies stated that surgery would help, but not cure, the cause of claimant's pain, numbness and choking sensations. Emp. Ex. 42. Based on this information, on May 29, 1992, claimant sought employer's authorization to treat at the Ochsner Clinic with which Dr. Voorhies is associated. On June 3, 1992, Dr. Voorhies performed an anterior cervical diskectomy and fusion at C5-6 and C6-7, and he excised the large osteophytes. On June 11 and October 15, 1992, employer refused to authorize treatment at the clinic. Emp. Exs. 23, 42. Later evaluations by Drs. Voorhies and Wilkerson proved that claimant's second surgery had excellent long-term results, and Dr. Wilkerson determined that claimant's condition reached maximum medical improvement on February 3, 1993. Emp. Exs. 31, 42. In a letter dated November 28, 1995, Dr. Wilkerson confirmed that date and established claimant's work restrictions. Emp. Ex. 31.

In determining that claimant is not entitled to reimbursement for medical expenses other than those charged by her treating physicians, the administrative law judge noted that claimant was being treated by qualified specialists, an orthopedic surgeon, Dr. Rutledge, and a neurosurgeon, Dr. Bridges, and that there was no good reason to change physicians. Moreover, he stated that claimant's desire for a second opinion from Dr. Giles, also an orthopedic surgeon, was motivated solely by her discontent with her physicians' orders to return to work. Therefore, the administrative law judge denied reimbursement for all treatment and evaluations stemming from claimant's appointment with Dr. Giles, finding they were unauthorized and unnecessary. Decision and Order at 28-29.

However, in addition to the original request for authorization for treatment from Dr. Giles, the record contains evidence that claimant, on May 29, 1992, requested authorization from employer for treatment at the Ochsner Clinic after she learned she needed additional surgery and after her authorized doctors told her she should just "live with" her problems. On June 3, 1992, claimant underwent surgery, which was reportedly successful, and employer refused to cover the costs. Emp. Ex. 23. Because the two requests occurred at different times, preceded and succeeded by different events, the administrative law judge should have analyzed the situations surrounding both requests before summarily denying all treatment from doctors other than Drs. Rutledge and Bridges. 33 U.S.C. §907(d).

After the initial request for authorization for a second opinion from Dr. Giles, claimant was evaluated by Dr. Giles and others to whom he referred claimant even though she was still under the care of Dr. Rutledge. Dr. Giles believed that claimant could not return to her usual work and that she needed permanent work restrictions established. Dr. Rutledge agreed and deferred to those restrictions established by Dr. Bridges. Thus, as Dr. Giles recommended no change in treatment and a release to restricted duty, his services and opinions duplicated those already provided by Drs. Rutledge and Bridges and were unnecessary. Moreover, as Dr. Rutledge and Bridges are specialists appropriate for the treatment of claimant's condition, and as claimant was still permitted to treat with them, it was unnecessary for employer to consent to duplicative treatment from Dr. Giles, *et al.* Therefore, we agree with the administrative law judge's assessment that claimant is not entitled to reimbursement for medical expenses for treatment obtained from Dr. Giles, *et al.*,

following the original request for authorization for a second opinion. *See generally Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988); 20 C.F.R. §702.406(a). We therefore affirm the denial of medical benefits related to the treatment claimant received from Dr. Giles, *et al.*, between 1989 and her second request for treatment in 1992. *Id.*

In 1991, claimant's symptoms allegedly worsened and altered, and her chosen doctors, specifically Dr. Bridges, told her he could do nothing and that she would just have to "live with" the problems. As claimant testified, and the medical reports indicate, her doctors were unwilling to help her any further and she sought treatment from Dr. Wilkerson, *et al.* Upon learning that surgery could help her condition, claimant again requested authorization for treatment, and again employer refused claimant's request. Employer is liable for treatment claimant procured after this request if that treatment is reasonable and necessary for the care of her work-related condition. *Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT); *Beynum v. Washington Metropolitan Area Transit Authority*, 14 BRBS 956 (1982). If credited, there is evidence of record which would demonstrate that claimant's treatment after May 29, 1992, was both reasonable and necessary for the care of her work-related condition. Emp. Exs. 31, 42; Tr. at 118-119; *see Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989); *Anderson*, 22 BRBS at 23; *Jackson v. Navy Exchange Service Center*, 9 BRBS 437 (1978). Because there was a second request for, and a subsequent refusal of, treatment, the administrative law judge should have considered separately from the first request whether the treatment claimant procured following this second request was reasonable and necessary. Therefore, we vacate the administrative law judge's denial of medical benefits after May 29, 1992. On remand, the administrative law judge must reconsider whether treatment following the May 29, 1992, request was both reasonable and necessary to treat claimant's work-related condition. If the administrative law judge determines that the care claimant subsequently procured on her own was reasonable and necessary, then employer is liable for claimant's medical expenses related to this treatment. *Hite*, 22 BRBS at 92.

Accordingly, the administrative law judge's denial of medical benefits after May 29, 1992, for treatment claimant received from Dr. Wilkerson, *et al.*, is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the decisions are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge