BRB No. 02-0252

KEITH KENDRICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FIRST WAVE MARINE, INCORPORATED/ NEWPARK SHIPBUILDING & REPAIR, INCORPORATED	)	DATE ISSUED: Dec. 16, 2002
	)	
and	)	
	)	
TEXAS WORKERS= COMPENSATION INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Stephen M. Vaughan (Mandell & Wright, P.C.), Houston, Texas, for claimant.

Mark Clark (Fowler, Rodriguez & Chalos, L.L.P.), Houston, Texas, for employer/carrier.

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

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order - Awarding Benefits (2000-LHC-02056) of Administrative Law Judge James W. Kerr, Jr., 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 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, a welder/fitter, injured his back at work on February 2, 1999. Employer voluntarily paid claimant temporary total disability benefits from February 3 through May 9, 1999. Claimant returned to work with employer on July 6, 1999, in a clerical position, but was laid off in December 1999. Later in December 1999, claimant returned to work with employer in a modified welder position. On January 2, 2000, claimant stated that he was unable to perform this job. Claimant again attempted to return to work with employer in the modified welder position on February 4, and on February 24, 2000, but left because he asserted he was unable to perform the work. Claimant did not return to work with employer after February 2000. Subsequently, claimant worked as a driver for Southeast Texas Auto Paint and Equipment and Galveston Limousine Service.

The administrative law judge awarded claimant temporary total disability benefits from February 2 through July 5, 1999. He denied claimant partial disability benefits thereafter because claimant earned the same wage rate in the clerical position as he had earned prior to the injury. The administrative law judge found that claimant reached maximum medical improvement on October 19, 1999, and that as of that date claimant could return to his usual work as a welder/fitter. The administrative law judge also found that claimant is not entitled to a referral to a spine specialist recommended by his treating orthopedist.

On appeal, claimant challenges the administrative law judge=s finding that he is not entitled to a referral to a spine specialist as recommended by his treating orthopedist, Dr. Allen. Claimant also asserts that this error resulted in the administrative law judge=s denial of additional disability and medical benefits after October 19, 1999. Employer responds in support of the administrative law judge=s decision.

Claimant contends that the administrative law judge erred in finding that he is not entitled to a referral to a spine specialist. Section 7(b) of the Act, 33 U.S.C. '907(b), provides in relevant part:

> The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care . . . . Change of physicians at the request of employees shall be permitted in accordance with regulations of the Secretary.

Pursuant to this provision, the Secretary promulgated 20 C.F.R. '702.406(a), which states:

> Whenever the employee has made his initial, free choice of an attending physician, he may not thereafter change physicians without the prior written consent of the employer (or carrier) or the district director. Such consent shall be given in cases where an employee=s initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

See Slattery Assocs. Inc. v. Lloyd, 725 F.2d 780, 16 BRBS 44(CRT)(D.C. Cir. 1984); *Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000). Dr. Allen first requested that claimant be referred to a spine specialist on August 20, 1999. Employer refused Dr. Allen=s request as early as August 31, 1999. Cl. Ex. 10 at 90, 93, 94, 106. Dr. Allen again sought the referral on September 30, October 6, November 10, and December 15, 1999, as well on January 18, May 4, and August 9, 2000. Cl. Ex. 10 at 87, 102, 107, 119, 121, 145, 167, 171; Emp. Exs. 7 at 32, 34, 35, 43, 44, 51, 52; 36 at 39. In his deposition taken on October 12, 2000, Dr. Allen again reiterated his request for a referral to a spine specialist. Cl. Ex. 14 at 4-5, 24, 64. Dr. Allen=s reasons for seeking the referral were that he has no competence in spine surgery and thus is unsure whether claimant=s extruded herniated nucleus pulposis is justification for surgery and his concern about claimant=s muscle spasm. Cl. Ex. 14 at 4-5, 45-46, 64.

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[1]This regulation is based upon Section 7(c)(2) of the Act, 33 U.S.C. '907(c)(2), which provides in relevant part:

> An employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent for such change. Such consent shall be given in cases where an employee=s initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

[2]2Dr. Allen recommended that claimant be seen by his partner, Dr. Muffeletto, or another spine specialist with whom he was familiar. Cl. Ex. 14 at 5, 64.

Because Dr. Allen sought consultation with a spine specialist for claimant=s herniated disc and recurring muscle spasm, which the administrative law judge found are not related to the work injury, employer argues that claimant has not shown that he requires consultation with a spine specialist for treatment of the work injury. Employer=s argument is circular because the administrative law judge expressly relied on the opinions of spine specialists to determine that these continuing problems are unrelated to the work injury. Furthermore, the administrative law judge did not base his denial of claimant=s request for consultation with a spine specialist upon a finding that the opinion of a spine specialist was unnecessary to evaluate claimant=s work injury. The administrative law judge found that it was unnecessary for claimant to be seen by an additional spine specialist, as claimant had been seen by Drs. Hanson and Pennington, Board-certified orthopedic surgeons specializing in spine injuries, retained by the Department of Labor (DOL) and employer, respectively. The administrative law judge further noted that Dr. Allen=s only objection to these specialists was that he was not familiar with their work.

We reverse the administrative law judge=s finding that claimant is not entitled to the referral requested by his treating orthopedist, Dr. Allen. First, at the time Dr. Allen initially requested the referral, in August 1999, claimant had not been seen by any spine specialists. It is disingenuous for the administrative law judge to rely on claimant=s subsequent examinations by Drs. Hanson and Pennington, on behalf of DOL and employer, to deny claimant=s prior request for a referral. Second, Dr. Hanson, the specialist retained by DOL, stated that Dr. Allen=s referral to a spine specialist was appropriate if he did not feel comfortable treating a spinal problem. Emp. Ex. 10 at 31; Decision and Order at 9. Most importantly, the Act and regulations require authorization for a referral under the facts herein. 33 U.S.C. '907(c)(2); 20 C.F.R. '702.406(a). Although Dr. Allen is a Board-certified orthopedic surgeon, he testified that he is not a specialist in spine disorders. *See* Cl. Ex. 14 at 4-5. Where claimant=s treating physician is not Aa specialist whose services are . . . appropriate to the proper care and treatment of the compensable injury . . .,@ employer=s consent to a change of physicians Ashall be given. . . .@ 33 U.S.C. '907(c)(2); 20 C.F.R. '702.406(a); *see generally Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992) (Smith, J., dissenting on other grounds); *Senegal v. Strachan*

[3]In addition, Dr. Pennington stated that Dr. Allen=s request was not Ainappropriate or unusual,@ although he stated it was unnecessary in his opinion as claimant had recovered. Ex. 4 to Cl. Ex. 14; Emp. Ex. 7 at 40-41; Emp. Ex. 9 at 63.

Shipping Co., 21 BRBS 8 (1988)*; see also Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). The law is clear that the employee=s Aright to choose an attending physician@ is restored when his chosen physician ceases to be appropriate. 33 U.S.C. '907(b). Thus, the administrative law judge erred in holding that claimant=s right to an appropriate specialist was satisfied by the examinations provided by employer and DOL. Consequently we reverse the administrative law judge=s finding that claimant is not entitled to a referral to a spine specialist recommended by his treating orthopedist.

Claimant also contends that the administrative law judge erred in denying him compensation and medical care after October 19, 1999, in light of the administrative law judge=s erroneous finding that claimant is not entitled to the requested referral to a spine specialist. On remand, the administrative law judge must reconsider the nature and extent of claimant=s disability in light of the opinion of this specialist in conjunction with the other medical evidence of record, as well as claimant=s entitlement to additional medical benefits. As claimant does not challenge any other aspect of the administrative law judge=s current decision, it is affirmed. 20 C.F.R. '802.211(b); *see Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214, 281 (1988); *Carnegie v. C & P Telephone Co.*, 19 BRBS 57, 58-59 (1986).

Accordingly, the administrative law judge=s finding that claimant is not entitled to a referral to a spine specialist of his choice is reversed, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge=s decision is affirmed.

SO ORDERED.

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[4]4We affirm as unchallenged on appeal the administrative law judge=s denial of disability benefits from July 6, 1999, through October 19, 1999.

[5]5We express no opinion as to employer=s liability for any continuing treatment recommended or rendered by the spine specialist. Employer=s liability therefor is governed by the reasonableness and necessity of such treatment for the work-related injury. *See* 33 U.S.C. '907; 20 C.F.R. '702.401.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent and would affirm the decision of the administrative law judge in all respects. On the facts of this case, it is my opinion that the administrative law judge appropriately considered the applicable regulatory criteria and rationally considered all the evidence of record including Dr. Allen=s reluctance to offer an opinion whether maximum medical improvement had been reached and appropriately found that the request for additional referral to be unnecessary. The administrative law judge rationally found that an additional referral to another spine specialist was not necessary or appropriate as claimant had been seen by two other appropriate specialists, Drs. Hanson and Pennington, and that these physicians stated claimant=s work injury had resolved. Cl. Exs. 13, 14 at ex. 4; Emp. Exs. 7 at 40-41, 9 at 63. Employer is not liable for unnecessary treatment or for treatment that is duplicative of services being provided. *See generally Hunt v. Newport News Shipbuilding & Dry Dock Co.,* 28 BRBS 364 (1994), *aff=d mem.*, 61 F.3d 900 (4th Cir. 1994)(table). Consequently, as claimant does not specifically challenge any other finding, I would affirm the administrative law judge=s decision in all respects.

NANCY S. DOLDER, Chief
Administrative Appeals Judge