BRB No. 10-0313

FORREST J. HATCHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DYNAELECTRIC COMPANY	)	DATE ISSUED: 12/15/2010
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Claim and the Decision and Order Denying Claimant's Petition for Reconsideration of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Forrest J. Hatcher, Falls Church, Virginia, *pro se.*

David D. Hudgins and Kathleen Wynn (Hudgins Law Firm, P.C.), Alexandria, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Claim and the Decision and Order Denying Claimant's Petition for Reconsideration (2006-DCWC-00008) of Administrative Law Judge Robert B. Rae 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973)(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 to determine if they are rational, supported by substantial evidence, and in accordance with

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

On October 6, 1976, claimant sustained a back injury while working for employer as an electrician. Employer voluntarily paid claimant temporary total disability benefits for approximately three weeks, after which time claimant returned to work. Claimant thereafter sought, and employer paid for, chiropractic care in an effort to alleviate his ongoing back pain. On July 2, 1996, employer filed a Notice of Controversion contesting the reasonableness of claimant's ongoing chiropractic treatment. In a Decision and Order dated January 5, 1999, Administrative Law Judge Miller held employer liable to claimant, pursuant to 33 U.S.C. §907, for medical expenses arising as a result of claimant's work-related injury and, *inter alia*, one chiropractic treatment per week. Subsequently, a dispute arose regarding the scope of employer's responsibility for reimbursement to claimant for various expenses allegedly related to claimant's work-injury. Specifically, claimant sought reimbursement for travel expenses related to attending his medical appointments, mattresses, and the costs associated with the installation and yearly maintenance of a hot tub and dehumidifier in his home.

In his Decision and Order, Administrative Law Judge Rae (the administrative law judge) found that claimant had not met his burden of establishing that the items purchased were reasonable and necessary for the treatment of his work-related condition and, thus, that employer is not liable for the cost of claimant's hot tub, dehumidifier, or mattresses. The administrative law judge also denied claimant's request for reimbursement of his travel expenses. In addition, after finding that the qualifying conditions set forth by Judge Miller in awarding claimant ongoing chiropractic treatment no longer existed, the administrative law judge concluded that employer was not required to reimburse claimant for expenses associated with his chiropractic treatment.[1] Claimant's petition for reconsideration was denied by the administrative law judge.

On appeal, claimant, representing himself, challenges the administrative law judge's finding that employer is not liable for his alleged work-related medical expenses. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

[1] Judge Miller awarded claimant up to one chiropractic treatment per week, payable by employer, until such time as claimant's spinal subluxation was corrected or claimant's job no longer required him to perform strenuous physical labor. *See* January 5, 1999 Decision and Order at 10-11. Finding that these two prerequisites were no longer present, the administrative law judge determined that employer was not obligated to pay for claimant's chiropractic treatments.

Section 7 of the Act, 33 U.S.C. §907, generally describes an employer's duty to provide medical and related services and costs necessitated by its employee's work-related injury, employer's rights regarding control of those services, and the Secretary's duty to oversee them. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In this regard, Section 7(a) of the Act states that:

> [t]he employer shall furnish such medical, surgical, and other attendance or treatment, ... medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a); *see Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be assessed against employer, the expense must be reasonable and necessary for the treatment of the work injury. *See, e.g., Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); 20 C.F.R. §702.402 (1974).

In his decision, the administrative law judge found that claimant failed to establish that the three mattresses he purchased were reasonable and necessary for the treatment of his work injury.[2] The administrative law judge found that claimant did not provide documentary evidence sufficient to establish employer's liability for these purchases. Decision and Order at 6-7. In making this determination, the administrative law judge found Dr. Piorkowski's November 1, 2001, "prescription letter" to be unpersuasive since it was not based upon medical testing or objective medical criteria and since the chiropractor stated that everyone benefits from a better mattress. *See* EX B; Tr. at 87-90. The administrative law judge also found that claimant did not establish that the expenses sought for the purchase, installation, and yearly maintenance of a hot tub and a dehumidifier in his home were related to his work-related condition;[3] specifically, the administrative law judge found that claimant provided no receipts for these purchases nor did he provide substantial documentation establishing the medical necessity of these items. Decision and Order at 7-9.

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[2] Claimant initially sought $6,294.32 for a full size Tempurpedic mattress, a queen size Tempurpedic mattress, and a queen size mattress unit, *see* CX 1; claimant subsequently amended his request to $3,815.99. *See* Tr. at 56-59.

[3] Claimant sought $17,029 in expenses related to a hot tub, representing $3,379 for the purchase of the hot tub, $11,250 for renovations to his home to accommodate the hot tub, and eight years of maintenance costs at $25 per month. Claimant additionally sought $1,371.90 in expenses for a dehumidifier, representing $1,307.33 for the purchase and installation of the dehumidifier, and $64.57 in tax. *See* CX 1.

The administrative law judge, as the trier-of-fact, is entitled to weigh the evidence and draw his own inferences therefrom. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Here, the administrative law judge rationally evaluated the minimal evidence of record, and there is no reversible error in his ultimate findings that claimant did not establish the medical necessity of the items at issue. We therefore affirm the administrative law judge's determination that employer is not liable for the expenses incurred by claimant in the purchase, installation, and maintenance of three mattresses, a hot tub, and a dehumidifier, as that finding is rational and in accordance with law. *See generally Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

We cannot affirm, however, the administrative law judge's decision to terminate employer's liability for claimant's continuing chiropractic treatment as the parties were unaware that the administrative law judge would address this issue. It is well-established that if, during the course of a hearing, the evidence presented warrants consideration of an issue or issues not previously considered, the hearing may be expanded to include the new issue. 20 C.F.R. §702.336(a); *see Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990). Moreover, Section 702.336(b) of the regulations, 20 C.F.R. §702.336(b), states, in part, that "At any time prior to the filing of the compensation order in the case, the administrative law judge may in his discretion, upon the application of a party or upon his own motion, give notice that he will consider any new issue. The parties shall be given not less than 10 days' notice of the hearing on such new issue." In this case, claimant listed the issues to be addressed as consisting of employer's reimbursement for specific itemized expenses allegedly incurred by claimant as a result of his work-related back condition. *See* Cl. Form LS-18 dated July 28, 2006. Employer, in response, agreed that the issues to be presented for resolution at the formal hearing involved claimant's claim for reimbursement for the costs associated with the specific purchases made by claimant, *see* Emp. Form LS-18 dated August 31, 2006, and the administrative law judge specifically acknowledged these positions in his Statement of the Case. *See* Decision and Order at 4. Consequently, as the record establishes that the issue of employer's continuing obligation to pay for claimant's ongoing chiropractic treatments, pursuant to Judge Miller's January 5, 1999 Decision and Order, was not raised prior to or at the hearing by either party, the administrative law judge could not properly address this new issue in his decision without giving the parties prior notification that he intended to do so. *See Cornell University v. Velez*, 856 F.2d 402, 21 BRBS 155(CRT) (1st Cir. 1988); 20 C.F.R. §702.336. We therefore vacate the administrative law judge's finding that employer, as of January 28, 2009, is no longer liable for claimant's chiropractic treatment, and we remand the case to the administrative

law judge for further consideration after notice to all parties that this issue will be considered.[4] *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984).

Claimant also sought reimbursement for the travel expenses he allegedly incurred commuting to and from his chiropractic appointments. In support of his request, claimant submitted into evidence a document seeking $705, representing "approximately" 100 round trips of 15 miles at a rate of forty-seven cents per mile. *See* CX 1. Although employer acknowledged its responsibility for these costs in its Form LS-18, the administrative law judge declined to hold employer liable for these expenses, finding that claimant did not request reimbursement from employer and, thus, employer "cannot be expected to pay for a non-existent and/or non-supported claim." *See* Decision and Order at 8.

Under the Act, an employer is liable for all reasonable and necessary medical expenses related to an employee's work injury. 33 U.S.C. §907(a); *see Ballesteros*, 20 BRBS 184. Claimant's entitlement to payment of his travel expenses is ancillary to his medical appointments; thus costs incurred for transportation for medical purposes are recoverable under Section 7(a) of the Act. *See Day v. Ship Shape Maintenance Co.*, 16 BRBS 38 (1983); *Castagna v. Sears, Roebuck & Co.*, 4 BRBS 559 (1976), *aff'd mem.*, 509 F.2d 1115 (D.C. Cir. 1978). In this case, contrary to the administrative law judge's statement that claimant did not request that employer reimburse him for his travel expenses, employer submitted into evidence a letter from claimant dated September 15, 2004, in which claimant made such a request. *See* EX A. Based upon the foregoing, we vacate the administrative law judge's denial of reimbursement for the travel costs claimant incurred in traveling to his chiropractic treatment. On remand, the administrative law judge must reconsider claimant's claim for the travel costs associated with his chiropractic treatments.

[4] Reimbursable services of a chiropractor "are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings." 20 C.F.R. §702.404 (1984); *see also R.C. [Carter] v. Caleb Brett, L.L.C.*, 43 BRBS 75 (2009).

Accordingly, the administrative law judge's findings that employer is not liable for both claimant's chiropractic treatment and claimant's travel expenses are vacated, and the case is remanded for further consideration of these issues consistent 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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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge