BRB No. 03-0376

ROBERT RODRIGUEZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COLUMBIA GRAIN, INCORPORATED	)	DATE ISSUED: Feb. 23, 2004
	)	
and	)	
	)	
LIBERTY NW INSURANCE GROUP	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITEDSTATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order to Compel Appearance at Medical Examination of Donald B. Jarvis, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston Bunnell & Stone, LLP), Portland, Oregon, for claimant.

Delbert J. Brenneman (Hoffman, Hart & Wagner, LLP), Portland, Oregon, for employer/carrier.

Peter B. Silvain, Jr. (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Order to Compel Appearance at Medical Examination (2002-LHC-02438) of Administrative Law Judge Donald B. Jarvis 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).

On November 28, 2000, claimant sustained a work-related injury to his back. As a result of his ongoing low back pain, claimant underwent physical therapy, and was subsequently diagnosed with a lumbar strain superimposed on a pre-existing degenerative disc at the L4-5 level. In March 2001, claimant was evaluated at employer's request by Dr. DiPaola, who thereafter suggested that employer have claimant examined by a medical panel consisting of an orthopedic surgeon, a neurosurgeon, and a psychologist or neuropsychologist. On December 4, 2001, employer sent a letter to the claims examiner requesting that such a panel examination be undertaken by claimant. In response, the claims examiner agreed that claimant should attend the recommended examination once Dr. DiPaola confirmed his recommendation in writing. Such a written recommendation from Dr. DiPaola was not forthcoming from employer.

On June 28, 2002, claimant filed an LS-18, Pre-Hearing Statement, wherein he listed the facts of his claim as involving an injury to his back. On July 22, 2002, the claim was transferred to the Office of Administrative Law Judges. On January 2, 2003, employer notified claimant that it had scheduled him for a medical panel examination, to be conducted by an orthopedic surgeon, a neurosurgeon, and a psychiatrist, on January 28, 2003. The next day, January 3, 2003, employer informed claimant that it had replaced the scheduled panel's psychiatrist with a neuropsychologist. On January 7, 2003, claimant informed employer that he would not attend the aforementioned panel examination since it involved a psychological component.

On January 8, 2003, employer filed a motion with the administrative law judge seeking an order compelling claimant to attend the scheduled medical panel examination. In support of its motion, employer averred that it would be unfairly prejudiced in the preparation of its defense of claimant's claim under the Act if it was not allowed to examine claimant. Claimant, in response to employer's motion, argued that no authority exists for an administrative law judge to compel a psychiatric examination in a case such as the one at bar wherein a claim for benefits under the Act is based upon a purely physical injury.

On January 24, 2003, the administrative law judge issued an Order to Compel, summarily stating that while he recognized claimant's reluctance to submit to a psychological evaluation, he found the requested medical panel examination to be an appropriate and reasonable method of discovery for employer. Accordingly, the administrative law judge directed claimant to attend the January 28, 2003, medical panel examination scheduled for him by employer. Claimant declined to attend the scheduled examination and immediately appealed the administrative law judge's Order to Compel to the Board.[1]

On appeal, claimant challenges the administrative law judge's Order directing him to attend a medical panel examination which contains a psychological evaluation. Employer responds, urging the Board to uphold the administrative law judge's Order. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in support of claimant's position on appeal.

We initially reject claimant's contention that an administrative law judge adjudicating a claim under the Act is not authorized to compel claimant's attendance at an employer-arranged medical examination. It is well-established that an administrative law judge has broad discretion to direct and authorize discovery in support of the adjudication process. *See* 33 U.S.C. §927(a); 5 U.S.C. §556(c); 29 C.F.R. §18.14 *et seq.*; 20 C.F.R. §§702.338-341; *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003). Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), establishes sanctions where an "employee unreasonably refuses to submit to an examination by a physician selected by an employer." It is implicit in this provision that an employer has the right to have claimant examined by its physician, and the administrative law judge thus has the authority to order such an examination. Section 702.338 of the Act's regulations, 20 C.F.R. §702.338, provides that an administrative law judge has the duty to inquire fully into matters at issue before him, while Section 702.339, 20 C.F.R. §702.339, provides that the administrative law judge should conduct proceedings in such a manner as to best ascertain the rights of the parties. *See also* 33 U.S.C. §§919(d); 927(a); *Tignor v. Newport News Shipbuilding & Dry Dock Co.,* 29 BRBS 135 (1995). While the Act and its regulations do not specifically address the procedures for an employer to obtain an examination of claimant, Section 18.19(a)(3) of the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (OALJ Rules)[2] states that any party may serve upon any other party a request to submit to a physical or mental examination by a physican. 29 C.F.R. §18.19(a)(3). Should a party upon whom a request for such an examination is served either fail to respond adequately or object to the request, the discovering party may move the administrative law judge for an order

[1] Following claimant's appeal to the Board, employer filed a motion to dismiss the appeal, asserting that it was interlocutory. On May 23, 2003, the Board issued an Order denying employer's motion to dismiss and granting interlocutory review in this case.

[2] The OALJ Rules apply unless they are inconsistent with the Act's provisions or its regulatory requirements. 29 C.F.R. §18.1(a).

compelling a response or inspection in accordance with the request. *See* 29 C.F.R. §18.21(a). Thus, contrary to the position initially espoused by claimant on appeal, the Act and the OALJ Rules provide an administrative law judge with the authority to issue an order to compel a claimant to attend a physical or mental examination scheduled by employer.

We agree with claimant and the Director, however, that the administrative law judge's Order to Compel in the instant case cannot be affirmed, and that the case must be remanded to the administrative law judge for further consideration and explanation. In his Order, the administrative law judge summarily approved employer's motion to compel claimant's attendance at a medical panel examination, which included a psychological component, based solely on his finding that the requested examination "is an appropriate and reasonable method of discovery for the employer." *See* Order to Compel at 1. However, the general discovery provision of Section 18.14(a) of the OALJ Rules, 29 C.F.R. §18.14(a),[3] mandates that matters sought to be discovered be relevant to the subject matter involved in the proceeding.[4] The administrative law judge's summary conclusion in his Order does not sufficiently explain how the psychological component of the examination is relevant to these proceedings. Moreover, claimant specifically raised this question below, asserting that since his claim for benefits under the Act is based upon a physical injury alone, an employer-sponsored psychological examination is not relevant to his claim of a work-related back injury. The administrative law judge did not discuss claimant's arguments in this regard or explain how the psychological evaluation of claimant is relevant to his claim. As the administrative law judge did not address claimant's assertions, which go directly to the relevancy of employer's discovery request, the case must be remanded. *See Ballesteros v. Willamette W. Corp.,* 20 BRBS 184 (1988).

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[3] Section 18.14(a) states:

> Unless otherwise limited by order of the administrative law judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

29 C.F.R. §18.14(a).

[4] It is not ground for objection to proposed discovery, however, that the information sought will not be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *See* 29 C.F.R. §18.14(b).

Claimant and the Director additionally aver that case law developed under Section 7(d)(4)[5] provides additional guidance to the administrative law judge in reviewing employer's request.[6] In conjunction with the general requirement in Section 18.14(a) that the matter to be discovered be relevant, Section 7(d)(4), which provides for the suspension of benefits where a claimant unreasonably and without justification refuses to attend an examination by a physician selected by an employer, leads to a similar conclusion with regard to the findings to be made by the administrative law judge in addressing the motion herein.[7] Under Section 7(d)(4), the Board has held that claimant's refusal to attend an examination must be "unreasonable" and not "justified" by the circumstances in order to be sanctioned. *See Malone v. Int'l Terminal Operating Co., Inc.*, 29 BRBS 109 (1995); *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1978)(Smith, J., dissenting). Under this standard, an examination is "reasonable" where employer shows that it would be of aid in the administrative law judge's determination of

[5] Although the Director acknowledges that Section 7(d)(4) is a provision for sanctioning a claimant who fails to attend an examination rather than specifically addressing when such attendance may be mandated, he argues that the standards in that provision provide guidance because a claimant's failure to attend an employer-requested examination would be sanctionable only if those standards are met.

[6] We note that the Director seeks deference for his statutory interpretation of the language of Section 7(d)(4) governing the compulsion and sanction of claimant to attend an examination arranged by the employer. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has concluded that the Director's interpretation of the Act is entitled to deference if it is contained either in a regulation or in the Director's litigation position within an agency adjudication, so long as the interpretation is reasonable. *Gilliland v. E.J. Bartells Co., Inc.*, 270 F.3d 1259, 35 BRBS 103(CRT)(9th Cir. 2001); *see also Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT)(9th Cir. 1991).

[7] Claimant and Director also assert that the administrative law judge should apply Rule 35(a) of the Federal Rules of Civil Procedure, which provides that where the physical or mental condition of a party is in controversy, the court may, upon a showing of good cause, order an examination. However, the OALJ Rules specifically incorporate the Federal Rules only "in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R. §18.1(a); *see Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993). As the relevancy requirement of Section 18.14(a) of the OALJ Rules applies, in addition to the guidance of Section 7(d)(4), application of Rule 35 is not necessary in this case.

the pending issues, and it is "justified" when he concludes, after considering claimant's arguments, that the circumstances justify compelling the requested examination.[8]

In this case, as the administrative law judge did not make the requisite findings that a psychological examination is relevant to the claim or specifically discuss claimant's defense to employer's request for a motion to compel his appearance at a psychological evaluation, we must vacate the administrative law judge's Order to Compel. The case is remanded for the administrative law judge to fully address the issue of whether the psychological evaluation requested by employer is in fact relevant to the issues presented by claimant's claim for benefits under the Act, to make appropriate findings, and to give a written explanation of the reasons and bases for his ultimate determination on this issue. 5 U.S.C. §557(c)(3)(A), incorporated by 33 U.S.C. §919(d).

Accordingly, the administrative law judge's Order to Compel Appearance at Medical Examination is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[8] In this regard, the Board has affirmed an administrative law judge's suspension of benefits pursuant to Section 7(d)(4) based upon a finding that claimant's refusal to undergo a scheduled evaluation was unreasonable and unjustified since claimant based his refusal to attend the examination, in part, upon the erroneous belief that he has the right to determine the alleged independence and choice of any physician employer chooses to conduct its examination. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002). Thus, claimant's objection here on a similar basis may be rejected.