

R.D.)
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 Claimant-Petitioner)
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 v.)
)
 CROWN CENTRAL PETROLEUM) DATE ISSUED: 02/20/2008
 CORPORATION)
)
 and)
)
 LIBERTY MUTUAL INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kennington,
Administrative Law Judge, United States Department of Labor.

R.D., Houston, Texas, *pro se*.

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

PER CURIAM:

Claimant, without counsel, appeals the Decision and Order on Remand (1997-LHC-01408) of Administrative Law Judge Clement J. Kennington 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).¹ 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 in order to determine whether if they are supported by

¹ Claimant filed a notice of appeal with the administrative law judge on July 19, 2006. The administrative law judge forwarded this appeal to the Board by Order dated April 3, 2007, and the appeal was acknowledged by the Board in an Order dated May 2, 2007.

substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case has been before the Board previously and has a lengthy procedural history. *[R.D.] v. Crown Central Petroleum Corp.*, BRB No. 04-0922 (Aug. 26, 2005) (unpub.); *[R.D.] v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002); *[R.D.] v. Crown Central Petroleum Corp.*, BRB No. 02-0821 (Aug. 7, 2003)(unpub.); *[R.D.] v. Crown Central Petroleum Corp.*, BRB No. 98-1302 (June 25, 1999)(unpub.). To briefly recapitulate the facts, on October 24, 1995, claimant, a pumper/dock standby, stated that he experienced pain in his right knee during the course of his employment duties.

Ultimately, the administrative law judge awarded claimant temporary partial disability benefits from October 25, 1995 to January 16, 1996, temporary total disability benefits from February 6, 1996 until October 25, 1996, and permanent total disability benefits thereafter. However, the administrative law judge suspended claimant’s benefits pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), because of claimant’s refusal to be examined by a physician of employer’s choosing. In addition, the administrative law judge found that employer is not liable for the cost of claimant’s pain management during the period he refused to be examined. The Board affirmed the administrative law judge’s finding that claimant’s refusal to be examined by Dr. Axelrad was unreasonable, and thus affirmed the suspension of benefits and payment for pain management treatment for the period during which claimant refused to be examined. *[R.D.]*, 36 BRBS at 89.

Employer’s subsequent motion for modification of claimant’s award was denied by the administrative law judge. Claimant, however, contended that his benefits should be resumed because he was examined by Dr. Scarano in place of Dr. Axelrad. The administrative law judge found that the suspension of benefits should be lifted as of January 20, 2004, the date of the examination by Dr. Scarano. Claimant appealed, contending that the suspension should be lifted at an earlier date, when he agreed to be examined by Dr. Axelrad even though such examination did not take place. The Board vacated the administrative law judge’s finding and remanded the case for him to clarify when claimant agreed to be examined by a physician of employer’s choosing, stating that the suspension of benefits should be lifted as of that date. *[R.D.]*, BRB No. 04-0922, slip op. at 4.

On remand, the administrative law judge rejected claimant’s contention that he agreed to be examined by Dr. Axelrad in June 2003. The administrative law judge found

that at that time claimant improperly conditioned his agreement to be examined.² The administrative law judge found that on August 27, 2003, claimant agreed to be examined by Dr. Axelrad, without any conditions. Thus, the administrative law judge found that the suspension of benefits should be lifted as of August 28, 2003. Claimant appeals the administrative law judge's decision. Employer has not responded to this appeal.

We affirm the administrative law judge's finding that the suspension of compensation was lifted only as of August 28, 2003, as it is rational, supported by substantial evidence, and in accordance with law. Section 7(d)(4) of the Act provides that the administrative law judge may, by order, suspend the payment of compensation to an employee who unreasonably refuses to submit an examination by employer's chosen physician, "for such time as such refusal continues" unless the circumstances justified the refusal.³ The Board has held that a claimant may not control the circumstances under which he will be examined by a physician of employer's choosing. *B.C. v. Int'l Marine Terminals*, 41 BRBS 101 (2007); *see also Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979). Thus, in this case, the administrative law judge rationally found that claimant's refusal to be examined continued until August 27, 2003, due to claimant's placing unreasonable preconditions on his agreement to be examined by Dr. Axelrad. The administrative law judge noted that the Board had affirmed his finding that claimant was not entitled to be reimbursed for treatment with Dr. Suchoviesky during the period claimant refused to be examined. [*R.D.*], 36 BRBS at

² Claimant's conditions included: (1) that he be provided with copies of all communications to Dr. Axelrad; (2) the provision of copies of Dr. Axelrad's diagnosis to claimant, Dr. Suchoviesky and Dr. Garcia; (3) that the purpose/goals of the examination be stated in full prior to the exam; (4) that federal law be observed; (5) that proper compensation to claimant be started the day after the examination; (6) that Dr. Suchoviesky be paid in full for his services as allegedly ordered by the administrative law judge on remand; and (7) that the administrative law judge schedule a hearing after claimant's examination to rule on the results of the examination.

³ Specifically, Section 7(d)(4) states:

If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

33 U.S.C. §907(d)(4); *see also* 20 C.F.R. §702.410(c).

89; 18 C.F.R. §18.6(d)(2). The administrative law judge also rationally found that employer is not required to provide copies of its correspondence with Dr. Axelrad or of Dr. Axelrad's report to claimant or to other physicians. As claimant unreasonably refused to be examined until August 27, 2003, when he agreed to see Dr. Axelrad without any conditions, the administrative law judge properly rejected claimant's contention that the suspension should be lifted as of June 2003.⁴ *B.C.*, 41 BRBS at 104-105.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁴ Although it was not addressed by the administrative law judge, we note that the suspension of payments for pain management also ended as of August 28, 2003, as that suspension similarly was premised on claimant's unreasonable refusal to undergo an examination. *See [R.D.]*, 36 BRBS at 89.