BRB No. 01-0420

ADELINE COTTON	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Jan. 24, 2002
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Adeline Torain Cotton, Franklin, Virginia, *pro se*.

Lawrence P. Postal (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand - Denying Benefits (85-LHC-515) of Administrative Law Judge David W. Di Nardi 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). 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b); 20 C.F.R. §§802.211(e), 802.220. If they are, they must be affirmed.

This case is on appeal to the Board for the third time. Claimant was injured during the course of her employment as a tank tester on July 27, 1977, when a metal plate fell, striking her on her right shoulder and chest. Claimant attempted to return to work in September 1977 and January 1978, but was let go by employer on January 19, 1978, for violating the union contract requiring that she call employer once every five days when she is absent from work.

Employer voluntarily paid claimant temporary total disability benefits from July 29, 1977, to September 7, 1977, and from September 29, 1977, to December 4, 1977. Initially, Administrative Law Judge Peter McC. Giesey, since deceased, determined that claimant had no continuing physical or mental disability which arose out of her work injury and that, therefore, she was entitled to no further compensation under the Act. In *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990), the Board, after holding that Judge Giesey did not fully discuss the relevant medical evidence of record, vacated his decision and remanded the case for him to discuss and weigh all of the medical evidence regarding claimant's alleged physical and psychological disabilities.[1] Additionally, the Board instructed Judge Giesey on remand to specifically consider claimant's entitlement, if any, to medical benefits for treatment of both her physical and psychological injuries pursuant to Section 7 of the Act, 33 U.S.C. §907. *Cotton*, 23 BRBS at 383-388.

On remand, Judge Giesey found that the physical effects from claimant's July 1977 work injury had healed and that any psychological disability which claimant may have did not render her incapable of performing gainful employment. Claimant's claim for compensation benefits was thus denied. In *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 92-2333 (November 29, 1995) (unpublished), the Board affirmed Judge Giesey's finding that claimant sustained no impairment subsequent to 1982, but vacated his determination that claimant sustained no impairment between December 4, 1977 and 1982, and remanded the case for specific findings regarding this period of alleged disability.[2] The Board also held that the administrative law judge did not comply with the Board's remand order that he consider whether claimant is entitled to medical benefits for the treatment of both her physical and psychological injuries. The case was assigned to Administrative Law Judge David Di Nardi (the administrative law judge), upon Judge Giesey's death.

[1]Claimant was represented by counsel in her initial appeal to the Board.

[2]Claimant was not represented by counsel in this appeal.

On second remand, the administrative law judge found that claimant sustained no impairment between December 1977 and 1982, and that, in any case, she is barred from eligibility for compensation from November 21, 1977, until November 8, 1985, under Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), for unreasonably refusing to submit to a physical examination. He also determined that she is not entitled to any additional medical benefits beyond those already paid by employer for either physical or psychological problems. The administrative law judge therefore denied benefits.[3] Claimant, without the assistance of counsel, appeals this decision to the Board. Employer responds, urging affirmance.

It is claimant's burden to establish that she is unable to perform her usual work due to her work injury. *See generally* *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). In remanding the case on claimant's second appeal, the Board specifically cited certain medical evidence the administrative law judge was to consider. The administrative law judge addressed this evidence, and rejected the opinion of Dr. Verdirame, CX 20, EX 8D, that claimant avoid all lifting and other activities for two weeks, because he had not examined claimant until more than six months after her injury, and relied on x-rays taken at that time. The administrative law judge also rejected the opinion of Dr. Felsenburg, EX 11, assigning claimant a 25 percent permanent partial impairment rating to her chest wall, because the opinion was not well-documented or well-reasoned.

The administrative law judge instead relied on the opinions of Drs. Rashti, Harmon, Grinnan, Macht and Filtzer. Dr. Rashti examined claimant less than two months after her injury, stated that the neurologic exam was entirely within normal limits and there was no evidence of an organic basis for claimant's complaints, and felt that claimant could resume her usual activities. EX 8. Dr. Harmon, a specialist in occupational medicine, did not believe that claimant fractured her sternum, sustained a permanent impairment, or is subject to permanent work restrictions. EX 66 at 29, 46, 59. Dr. Macht similarly opined that claimant did not fracture her sternum and was able to work. EXs 14, 46. Dr. Grinnan opined that claimant had no major problems, and he did not assign any work restrictions or recommend medical treatment. EX 9A. Finally, Dr. Feltzer stated claimant could work full-time in any heavy duty capacity. CX 26; EXs 30, 31, 34, 36, 37, 57.

[3]Judge Di Nardi issued his decision on the January 2, 2001, on the record, without holding a hearing.

The administrative law judge thoroughly discussed the voluminous medical evidence of record, including that specified by the Board, and he determined that claimant did not establish that she has any residual impairments that prevented her return to her usual work after December 1977. Decision and Order at 21. The administrative law judge is entitled to weigh the evidence and is not required to credit the opinion of any particular medical examiner. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge's weighing of the medical evidence in this case is rational, and his finding is supported by substantial evidence. Thus, his finding must be affirmed. *See O'Keeffe*, 380 U.S. 359. As claimant did not establish her inability to perform her usual work due to her work injury after December 1977, we affirm the denial of additional disability compensation.[4] *See generally Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

The administrative law judge also found that claimant's physical condition did not necessitate medical treatment beyond the date employer provided it, *i.e.*, the end of 1977. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the

[4]As the administrative law judge found that claimant had no residual impairment and was not disabled from performing her usual work, we need not address the administrative law judge's alternative finding that employer established the availability of suitable alternate employment. In addition, we note that the administrative law judge also found that any entitlement to compensation from November 21, 1977, until November 8, 1985, would have been suspended on the alternate ground that claimant unreasonably refused to submit to medical treatment, *i.e.*, an examination which employer scheduled with Dr. Winfrey, pursuant to Section 7(d)(4). The administrative law judge found that claimant's refusal to undergo an evaluation by Dr. Winfrey was unreasonable, because she continued to complain of problems yet refused to be examined by a board-certified thoracic surgeon, and that claimant failed to present evidence that justified her refusal to be examined, as she missed her first appointment on November 21, 1997, due to alleged car problems and then declined employer's offer to provide transportation from the shipyard to the doctor's office. The administrative law judge's finding that claimant's refusal to undergo employer's scheduled examination was unjustified is rational and within his discretionary authority, and provides an additional ground for affirming the finding that claimant is not entitled to compensation benefits during this period. *See* 20 C.F.R. §702.410(b)*;* C*audill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 98 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

process of recovery may require." Thus, even where a claimant is not entitled to disability benefits, employer may still be liable for medical benefits for a work-related injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78, 80 (2000).

The administrative law judge concluded that although claimant continued to complain of pain, the evidence did not reflect physical findings to support her subjective complaints. In rendering this finding, he credited what he found were the well-reasoned and well-documented opinions of Dr. Harrison, who found no need for further treatment and discharged claimant from his care on December 29, 1977, and Dr. Rashti, who found no neurological problems as early as September 6, 1977, as well as Dr. Kan's opinion, that any further treatment of claimant would be of no value. EXs 3F at 10, 8, 58, 76. The administrative law judge summarized his reasoning for finding that claimant was not in need of further medical treatment as follows:

> Although several doctors who examined or treated the Claimant recommended pain medication or heat applications, again **solely** based on her subjective complaints, I credit the opinions of all of the other doctors, whose well reasoned and well documented reports have been summarized above, who found that Claimant did not require medical treatment. Several doctors made no mention of treatment , and for the most part found nothing wrong with the Claimant. I infer from this that no treatment was necessary, because they found no organic problems requiring treatment.

Decision and Order at 27 (emphasis in original). As the credited medical reports provide substantial evidence for the administrative law judge's determination that claimant did not require medical care after December 1977, this finding is affirmed.[5] *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

[5]The administrative law judge found that, in any case, claimant submitted no evidence that the medical services for which she submitted the outstanding medical bills were authorized by employer. We need not address this finding in light of our affirmance of the administrative law judge's determination that further medical treatment was not necessary.

We also affirm the administrative law judge's finding that claimant requires no further treatment for any work-related psychological condition. Where relevant evidence establishes that claimant's psychological condition was caused, at least in part, by her work injury, and that she was treated for her work-related condition, claimant is entitled to benefits for this treatment. *Cotton,*, 23 BRBS at 388 n.5; *Kelley v. Bureau of Nat'l Affairs*, 20 BRBS 169 (1988). The administrative law judge found that claimant did not need further psychiatric care after March 15, 1982, when Dr. Ascher assigned her a permanent impairment rating. Decision and Order at 27. The administrative law judge credited the opinion of Dr. Siebert, an independent evaluating psychiatrist, who did not specifically recommend psychiatric treatment but did opine that getting back to work would be therapeutic for claimant. EXs 75, 87 at 48, 84, 87 at 84. As the record contains no definitive medical statement that further psychological treatment is necessary, the administrative law judge's determination that employer is not liable for further psychological treatment is affirmed.[6]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[6]The administrative law judge denied additional treatment on the alternate ground that claimant's physicians did not submit an attending physician's report within 10 days of first treatment as required under Section 7(d)(2) and that claimant did not present any evidence to show that in the interest of justice submission of the required reports should be excused. In light of our disposition of the issue of medical treatment for claimant's psychological condition, we do not need to reach this issue. *But see Toyer v. Bethlehem Steel Corp.*, 28 BRBS 437 (1994) (McGranery, J., dissenting) (determinations under Section 7(d)(4) may be made only by the Secretary and her delegates, the district directors).

BETTY JEAN HALL
Administrative Appeals Judge