

BRB No. 08-0630

F.D.)
)
 Claimant-Petitioner)
)
 v.)
)
 WEEKS MARINE, INCORPORATED) DATE ISSUED: 01/28/2009
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Marc S. Jacobs (Galf and Berger), Philadelphia, Pennsylvania, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judges, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2007-LHC-01136) of Administrative Law Judge Janice K. Bullard 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, on May 1, 2006, sustained an injury to his back during the course of his employment for employer. Employer voluntarily paid claimant temporary total disability and medical benefits from May 5, 2006 to August 14, 2006. 33 U.S.C. §§908(b), 907.

Claimant returned to work for a different employer on June 4, 2007, and sought disability benefits from August 14, 2006, to June 4, 2007, as well as medical expenses allegedly related to his work injury.

In her Decision and Order, the administrative law judge found that claimant sustained no work-related disability subsequent to August 14, 2006. Accordingly, the administrative law judge concluded that claimant is not entitled to additional disability or medical benefits beyond those provided by employer.

On appeal, claimant challenges the administrative law judge denial of his claim for additional compensation benefits from August 14, 2006, to June 4, 2007, as well as the reimbursement for various medical expenses. Employer responds, urging affirmance of the administrative law judge's decision.

Extent of Disability

It is well established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In order to establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual work due to the injury. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). In the instant case, the administrative law judge credited the opinions of Drs. Leatherwood and Scogna, in part based upon their superior credentials, as well as that of Dr. Lee, rather than the opinion of Dr. Pickard and the testimony of claimant, in concluding that claimant did not sustain a compensable disability subsequent to the termination of employer's voluntary payment of benefits on August 14, 2006.

We affirm the administrative law judge's decision. The administrative law judge initially credited the testimony of Dr. Leatherwood, a Board-certified orthopedic surgeon. Dr. Leatherwood's August 9, 2006, examination of claimant revealed no abnormalities in claimant's extremities, thoracic or lumbar spine, a 25 percent deficit on forward flexion, and full motor strength. After acknowledging that claimant's MRI revealed a small disc herniation at T7-8, Dr. Leatherwood opined that this protrusion caused no impact on any of claimant's neural structures. Dr. Leatherwood concluded that claimant had recovered from any injury that he had sustained to his thoracic or lumbar spine, that claimant did not require additional testing or treatment of his spine, including a back brace or epidural injections, and that claimant was capable of resuming his employment without limitations. EX 15 at 41-45. The administrative law judge found Dr. Leatherwood's opinion to be supported by Dr. Scogna, who is Board-certified in neurological surgery

and stated that his examination of claimant on September 20, 2006, revealed good strength in all four extremities. Although Dr. Scogna recommended that claimant undergo epidural injections for his complaints of thoracic pain, he released claimant to return to work so long as claimant utilized a back brace. CX 6. Additionally, the administrative law judge credited the testimony of Dr. Lee, a physician to whom claimant was referred by the Department of Labor, who performed a comprehensive, independent orthopedic examination of claimant on January 22, 2007. Dr. Lee found claimant's examination to be essentially unremarkable with no evidence of any residuals of injuries to claimant's thoracic spine, that claimant's small disc herniation results in no neurological complication, and that claimant does not require either epidural injections or a back brace. Dr. Lee thus concluded that claimant's back condition had resolved, and that claimant was capable of returning to his pre-injury work. CX 8.

In contrast, in declining to rely upon the opinion of Dr. Pickard, who is Board-certified in Family Practice, the administrative law judge specifically found Dr. Pickard's opinion was not well-reasoned or documented and his response to Dr. Leatherwood's opinion was conclusory. Additionally, the administrative law judge found Dr. Pickard's opinion was compromised by his inexplicable rejection of the opinion of Dr. Scogna, the neurosurgeon to whom Dr. Pickard had referred claimant. While the administrative law judge accorded some credibility to claimant's ongoing complaints of pain, she found that insufficient to establish that claimant remained disabled in view of the credited medical opinions that he could return to work. She also found claimant's credibility was compromised by his months-long delay in arranging for the treatment recommended by Dr. Scogna and his failure to provide medical evidence to his employer or union

In adjudicating a claim, it is well established that an administrative law judge is entitled to weigh the medical evidence and is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, the administrative law judge acted within her discretion in crediting the opinions of Drs. Leatherwood, Scogna and Lee, rather than the contrary opinion of Dr. Pickard and the testimony of claimant. As these credited opinions constitute substantial evidence to support the administrative law judge's determination that claimant sustained no impairment subsequent to August 14, 2006, it is affirmed. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962); *Donovan*, 300 F.2d 741.

Medical Expenses

Claimant next argues that the administrative law judge erred in failing to find employer liable for various medical expenses incurred subsequent to July 14, 2006. Section 7(a) of the Act, 33 U.S.C. §907(a), states that, "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette W.*

Corp., 20 BRBS 184 (1988). Where, as in this case, a claimant is not entitled to disability benefits, employer may still be liable for medical benefits for a work-injury. See *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. See *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. While a claimant may establish his *prima facie* case for compensable medical treatment when a qualified physician indicates that treatment is necessary for a work-related condition, see *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989), whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. See *Weikert v. Universal Maritime Serv. Corp.*, 36 BRBS 38 (2002); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

In her decision, the administrative law judge found that claimant failed to establish that the treatment he received subsequent to July 14, 2006, including passive therapy and prescriptions for a back brace, moist heating pad, massage chair, narcotic medications, and epidural injections, was reasonable and necessary. In making this determination, the administrative law judge initially accorded substantial weight to the opinion of Dr. Best, a certified disability examiner and orthopedic surgeon, regarding the proper use of physical therapy in treating claimant's back condition. Dr. Best stated that the standard of care for claimant's injury indicated active physical therapy for a period of six weeks; the administrative law judge found Dr. Best's opinion was supported by the testimony of Dr. Leatherwood who, on June 13, 2006, recommended that claimant discontinue passive treatment and narcotic pain medication. In declining to rely upon the testimony of Dr. Pickard, who opined that his passive therapy was appropriate for claimant's condition, the administrative law judge found that Dr. Pickard testified that this treatment was palliative in nature, that his treatment notes were incomplete regarding claimant's test results and his discussions with claimant, and that Dr. Pickard's treatment notes did not reflect the type of therapy recommended by Drs. Leatherwood and Best. The administrative law judge concluded that claimant did not demonstrate that the passive therapy performed by Dr. Pickard after July, 14, 2006, the date upon which employer withdrew its authorization for such treatment, was reasonable and necessary. Decision and Order at 31–33.

The administrative law judge further found that as Dr. Pickard testified that he did not keep records regarding the relationship between claimant's functional test results and his treatment and Dr. Pickard did not provide a well-documented or well-reasoned explanation for his decision to prescribe the use of a massage chair, claimant failed to establish that those tests and the massage chair were reasonable and necessary to his

treatment.¹ *Id.* at 33. Relying on the opinion of Dr. Best, who found no medical literature showing the benefits of moist heat over dry heat, and the opinions of Drs. Leatherwood and Best that claimant's thoracic condition would not benefit from the use of a back brace, the administrative law judge denied claimant reimbursement for those two appliances. *Id.* The administrative law judge similarly declined to reimburse claimant for the use of narcotic medications subsequent to May 18, 2006, relying on the opinion of Dr. Levy, as supported by the testimony of Drs. Best and Leatherwood, rather than that of Dr. Pickard, as the administrative law judge found Dr. Pickard did not adequately explain his continued prescription of narcotic pain medication for claimant. Lastly, the administrative law judge found that claimant did not request reimbursement for the epidural injections he received. *See id.* at 34. Assuming, *arguendo*, that claimant did seek reimbursement for those injections, the administrative law judge determined that the preponderance of the evidence, specifically the testimony of Drs. Leatherwood, Best and Lee, established that those injections were not necessary to effect a cure or improve claimant's condition.² *Id.*

We reject claimant's challenge to the administrative law judge's decision to deny claimant reimbursement for his narcotic medication subsequent to May 18, 2006, and the medical treatment and services which he obtained subsequent to July 14, 2006. In her decision, the administrative law judge properly addressed the medical expenses submitted by claimant and evaluated the evidence of record, and claimant has established no reversible error in her findings. Accordingly, as the administrative law judge's findings on this issue are supported by substantial evidence, we affirm her determination that employer is not liable for the additional medical expenses documented by claimant, as that finding is rational and in accordance with law.³ *See Donovan*, 300 F.2d 741; *Wheeler*, 21 BRBS at 35.

¹ In his post-hearing brief, claimant conceded that the functional capacity evaluations performed by Dr. Pickard were not reasonable and necessary. *See Cl. Post-Hearing Br.* at 32.

² Regarding the issue of claimant's epidural steroid injections, Drs. Lee and Leatherwood opined that claimant was not in need of epidural injections. *See EXS 7* at 4; 15 at 41-45. Dr. Best, however, did not address the appropriateness of claimant's epidural injections. *See EXs 9, 16.*

³ We decline claimant's summary request that employer be held liable for the cost of his EMG and the examination performed by Dr. Scogna. Claimant did not present these allegedly disputed charges to the administrative law judge for consideration, *see CX 12*, and on appeal he has failed to adequately brief his contentions of error. *See Cl. Br.* at 28-33.

Accordingly, the administrative law judge's Decision and Order is affirmed.
SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge