

BRB Nos. 88-4072
and 89-2164

DANNY COOPER)
)
 Claimant-Petitioner)
)
 v.)
)
 DELTA ENGINEERING CORPORATION)
)
 and)
)
 UNITED STATES FIDELITY &)
 GUARANTY INSURANCE COMPANY)
)
 Employer/Carrier) DATE ISSUED:
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION AND ORDER

Appeals of the Decision and Order Upon Reconsideration,
Denial of Motion for Further Reconsideration, and Order
Denying Modification of Eric Feirtag, Administrative Law
Judge, United States Department of Labor.

Atreus M. Clay, Houston, Texas, for claimant.

Richard J. White (Clann, Bell & Murphy), Houston, Texas, for
employer/carrier.

Marianne Demetral Smith (Marshall J. Breger, Solicitor of
Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop,
Counsel for Longshore), Washington, D.C., for the
Director, Office of Workers' Compensation Programs,
United States Department of Labor.

Before: SMITH and BROWN, Administrative Appeals Judges, and
LAWRENCE, Administrative Law Judge.*

PER CURIAM:

*Sitting as a temporary Board member by designation pursuant to
the Longshore and Harbor Workers' Compensation Act as amended in
1984, 33 U.S.C. §921(b)(5)(1988).

Claimant appeals the Decision and Order on Reconsideration, Denial of Motion for Further Consideration, and Order Denying Modification (83-LHC-2785) of Administrative Law Judge Eric Feirtag denying claimant additional medical expenses pursuant to Section 7, 33 U.S.C. §907, 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), as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 et seq. We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case, which is on appeal to the Board for the second time, has a lengthy procedural history. Claimant injured his back on November 27, 1977, while working for employer as a pipe welder aboard a fixed platform on the outer continental shelf. Employer voluntarily paid temporary total disability benefits from the date of the injury through August 25, 1978, and medical benefits from the date of the injury through February 14, 1979. In the original Decision and Order, the administrative law judge awarded claimant temporary total disability benefits from August 26, 1978 through January 4, 1979, based on the January 1979 opinions of Drs. Moldovan and Barnes, but made no findings on the question of claimant's entitlement to medical benefits. Claimant's motion for reconsideration was subsequently denied. Claimant appealed the administrative law judge's Decision and Order to the Board, contending that the administrative law judge erred in failing to award him medical expenses pursuant to Section 7. The Board, on appeal, agreed with claimant that the administrative law judge erred in failing to address claimant's right to medical benefits and remanded the case to the administrative law judge for consideration of this issue. Cooper v. Delta Engineering Corp., BRB No. 84-2063 (Feb. 18, 1988) (unpublished).

Initially, in his Decision and Order Upon Remand, the administrative law judge awarded claimant medical expenses based on a statement dated April 29, 1988, submitted by claimant stating that he required further treatment from Dr. Barnes. Thereafter, on June 24, 1988, employer requested reconsideration, arguing that the provision of additional medical treatment by Dr. Barnes was unwarranted inasmuch as the January 1979 opinions of Drs. Moldovan and Barnes, upon which the administrative law judge relied in finding that claimant was no longer disabled as of January 4, 1979, also provide conclusive evidence that claimant had fully recovered without residual impairment from the subject work injury.

In his Decision and Order Upon Reconsideration dated September 14, 1988, the administrative law judge, relying on the

findings made in his initial Decision and Order that claimant's work-related injury had resolved and the January 16, 1979 opinion of Dr. Barnes that further treatment did not seem necessary, granted employer's reconsideration request and vacated his earlier ruling that claimant was entitled to additional medical expenses.

Claimant's motion for further reconsideration was subsequently denied on October 31, 1988. Claimant appealed the administrative law judge's Decision and Order Upon Reconsideration and the Denial of Motion for Further Reconsideration to the Board. BRB No. 88-4072.

Claimant subsequently requested modification of the administrative law judge's decision pursuant to Section 22, 33 U.S.C. §922. Upon learning of the pending motion for modification before the administrative law judge, the Board issued an Order dated May 31, 1989, dismissing claimant's appeal in BRB No. 88-4072 and remanding the case to the administrative law judge for modification proceedings. At the time that Order was issued, however, the Board was unaware that the administrative law judge had issued an Order dated May 19, 1989, denying modification. Accordingly, in an Order dated November 16, 1989, claimant's appeal in BRB No. 88-4072 was reinstated and consolidated for purposes of decision with claimant's appeal of the administrative law judge's May 26, 1989 Order denying claimant's petition for modification. BRB No. 89-2164.

The only issue presented for resolution in these consolidated appeals is whether claimant is entitled to additional medical benefits as a result of his work-related back injury. In both appeals, claimant contends that medical reports generated when claimant was able to see Dr. Barnes for a short period of time in 1988 pursuant to the Decision and Order on Remand demonstrate that he has a continuing need for medical care due to his work-related injury. With regard to both appeals, claimant also contends that because the administrative law judge failed to independently analyze and evaluate all of the relevant medical evidence, his denial of additional medical benefits should be reversed.

In addition, in his appeal of the decision on modification, claimant contends that the 1988 medical reports of Dr. Barnes, indicating that additional medical care is required, demonstrate that a change in claimant's condition or a mistake in fact occurred since the time of the administrative law judge's original Decision and Order. Moreover, claimant contends that the negative objective test results contained in Dr. Barnes July 19, 1988 report, to which the administrative law judge alluded in denying modification, do not support a denial of his right to medical benefits as this testing was conducted solely to determine whether claimant had any surgically correctable pathology.¹ Director

¹In his appeal of the decision and order on reconsideration,

responds, agreeing with claimant. Employer also responds, urging that the denial of additional medical benefits be affirmed.

There are three 1988 reports central to claimant's arguments on appeal. In a report dated July 19, 1988, Dr. Barnes indicates that claimant was having significant lumbar pain, probably due to chronic lumbar strain. In addition, Dr. Barnes' August 23, 1988, report indicates that claimant had been seen on August 2, 1988, and was provided with a back support; this report also states that although TENS therapy appeared to have helped his condition somewhat, he was still unable to return to work and was to continue with the therapy and medication. Finally, in a report dated September 20, 1988, Dr. Barnes reiterated that physical and TENS therapy and Soma medication appeared to be helping claimant's condition, but that he remained unable to return to work and was to continue with the aforementioned treatment.²

Section 7(a) of the Act, 33 U.S.C. §907(a), provides 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." Section 7 does not require that an injury be economically disabling in order for a claimant to be entitled to medical expenses, but only that the injury be work-related. Brooks v. Newport News Shipbuilding and Dry Dock Co., 26 BRBS 1, 7 (1992); Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168 (1984). Section 22 provides that

claimant cites the fact that Dr. Barnes' February 14, 1979 report indicates that he prescribed medication for claimant and the fact that claimant made another appointment with Dr. Barnes thereafter prior to his two year incarceration with the Texas Department of Corrections as further evidence of claimant's continuing need for medical care.

²Employer's contention, raised in its response brief in BRB No. 88-4072, that claimant's Petition for Reconsideration filed on October 11, 1988 was untimely because it was filed 13 days after the administrative law judge's Decision and Order on Reconsideration was filed with the deputy commissioner on September 28, 1988 is rejected. This 13 day time period included three days, a Saturday, Sunday and a federal holiday, which are discounted for purposes of calculating the 10 day filing period pursuant to 20 C.F.R. §802.206(b)(1). Employer's contention that claimant's December 8, 1988 Notice of Appeal was untimely under 20 C.F.R. §702.350 because it was filed more than 30 days after the filing of the Decision and Order on Reconsideration, is also without merit. The 30-day period for filing the notice of appeal commenced November 16, 1988, when the administrative law judge's Denial of Motion for Further Reconsideration was filed with the deputy commissioner. 20 C.F.R. §§802.205, 802.206(e).

upon his own initiative, or upon the request of any party, the factfinder may, at any time prior to one year after denial of a claim or the last payment of benefits, reconsider the terms of the award or denial of benefits based on the ground of a change in condition or a mistaken determination of fact. 33 U.S.C. §922; See Jourdan v. Equitable Equipment Co., 25 BRBS 317, 320 (1987). The change in condition may consist of a physical change or a change in claimant's wage-earning capacity. Fleetwood v. Newport News Shipbuilding and Dry Dock Co., 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985); See Ramirez v. Southern Stevedores, 25 BRBS 261 (1992).

With regard to claimant's appeal of the administrative law judge's Decision and Order Upon Reconsideration and Denial of Motion for Further Reconsideration, claimant contends that Dr. Barnes' February 1979 letter indicates that claimant was in need of further treatment, as it states that claimant was prescribed medication for continuing pain. In its decision remanding the case, the Board noted that an injury need not be economically disabling in order for claimant to receive medical benefits. The administrative law judge was to determine on remand whether medical treatment was necessary for claimant's back pain, notwithstanding his ability to return to work in January 1979. In denying medical benefits, the administrative law judge simply referred to Dr. Barnes' January 1979 letter stating that "further treatment did not seem necessary" without mentioning the later report in February 1979 indicating that while claimant was able to work, he continued to receive treatment in the form of medication. Moreover, the administrative law judge also relied upon his prior finding that the "injury had resolved itself;" however, this conclusion was reached in the context of a discussion of the absence of disability based on opinions that claimant could return to work.

In addition, prior to issuance of the Decision and Order on Reconsideration in September 1988, claimant filed Dr. Barnes' July 1988 report with a cover letter seeking the administrative law judge's consideration of this report pursuant to Section 22. The administrative law judge did not address this additional evidence in either of his subsequent reconsideration orders. Moreover, claimant formally requested modification of the administrative law judge's decision by filing an April 1989 petition under Section 22, with the three 1988 reports of Dr. Barnes attached. Decisions rendered under the Act are required pursuant to the Administrative Procedure Act (APA) to include a statement of "findings and conclusions, and the reasons therefor, on all material issues of fact, law, or discretion presented in the record." 5 U.S.C. §557(c)(3)(A). Under the APA, the administrative law judge must analyze and discuss the relevant medical evidence of record, and explicitly set forth his reasons as to why he has accepted or rejected such evidence. See Cotton v. Newport News Shipbuilding

and Dry Dock Co., 23 BRBS 380 (1990).

The administrative law judge in this case has not complied with the Administrative Procedure Act in addressing relevant evidence. His failure to reconsider the medical evidence as a whole in resolving whether claimant required medical treatment for his back pain requires that we vacate his Decision and Order Upon Reconsideration and Order Denying Further Consideration. See Ballestros v. Willamette Western Corp., 20 BRBS 184, 187 (1988). The case must be remanded for reconsideration. On remand, the administrative law judge should reconsider claimant's entitlement to medical benefits and address all relevant evidence in accordance with the APA. See Cotton, 23 BRBS at 383-384.

Similarly, the administrative law judge's Order denying modification is also vacated. The aforementioned 1988 medical reports of Dr. Barnes which were submitted with claimant's modification request were not explicitly weighed or considered by the administrative law judge in denying modification. As claimant and Director aver, these reports, could, if credited, establish a change in claimant's physical condition sufficient to support modification under Section 22. The administrative law judge erred in summarily denying modification by referring to his prior decision. As his failure to consider the evidence in denying modification violates the APA, we vacate the administrative law judge's Order Denying Modification. Accordingly, on remand, the administrative law judge should also consider whether Dr. Barnes' 1988 reports provide a proper basis for modification in determining claimant's entitlement to further medical benefits consistent with the APA.

Accordingly, the administrative law judge's Decision and Order on Reconsideration, Denial of Motion for Further Reconsideration, and Order Denying Modification are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge