BRB No. 90-294

ENRIQUE POLANCO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOUTHWEST MARINE, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
INDUSTRIAL INDEMNITY COMPANY, C/O HAMILTON-BALLARD, LTD.	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Robert J. Brissenden, Administrative Law Judge, United States Department of Labor.

William Turley, San Diego, California, for claimant.

William H. Taylor (Taylor, Wilson & Potter), Encinitas, California, for employer/carrier.

Before: STAGE, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (88-LHC-2288) of Administrative Law Judge Robert J. Brissenden 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 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)(3).

Claimant suffered a back injury on April 17, 1987, while in the course of his employment with employer. Claimant has not returned to work since the April 17, 1987 incident. Employer voluntarily paid claimant temporary total disability benefits from April 18, 1987 through June 8, 1987. 33 U.S.C. §908(b). Thereafter, claimant sought continuing temporary total disability benefits, pursuant to 33 U.S.C. §908(b), and medical benefits under Section 7 of the Act, 33 U.S.C. §907. Additionally, claimant challenged employer's refusal to authorize payment for diagnostic medical

procedures recommended by claimant's treating orthopedic surgeon, Dr. Dickinson.

In his Decision and Order, the administrative law judge determined that claimant reached maximum medical improvement on May 9, 1988, and, crediting the opinion of Dr. Freeman, concluded that claimant was capable of returning to his usual employment duties with employer as of that date; accordingly, the administrative law judge awarded claimant temporary total disability benefits from April 18, 1987 to May 9, 1988. Additionally, the administrative law judge found that while employer is responsible for claimant's reasonable medical expenses, including Dr. Dickinson's care, employer need not authorize or pay for the myelography or discography recommended by Dr. Dickinson, since, the administrative law judge determined, these procedures were not warranted.

On appeal, claimant contends that the administrative law judge committed reversible error by failing to order authorization of the provocation discography recommended by Dr. Dickinson;[1] additionally, claimant challenges the administrative law judge's determination that he is capable of resuming his usual employment duties with employer. Employer responds, urging affirmance.

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 . . . medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be assessed against employer, however, the expense must be both reasonable and necessary and must be related to the injury at hand. *See Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

In the instant case, claimant underwent magnetic resonance imaging (MRI) on August 26, 1987, which was interpreted as normal by both Dr. Janon, the radiologist who conducted the study, and Dr. Freeman, a neurological surgeon credited by the administrative law judge. Claimant was examined by Dr. Freeman and by Dr. Dodge, an orthopedic surgeon, both of whom reported that there were no objective findings to support claimant's continued complaints of pain, that claimant was able to return to his usual employment, and that future diagnostic procedures, including discography, are not indicated.[2] Subsequently, claimant unsuccessfully sought to have employer authorize the performance of provocation discography, a diagnostic procedure recommended by Dr. Dickinson, in which radiopaque dye is injected into claimant's disc in order to outline the disc architecture; the objective aspect of the procedure is the actual x-ray appearance of the disc, while the subjective aspect involves the determination of whether the irritation or pain resulting from the

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[1]Claimant limits his argument on appeal to the denial of authorization for discography, making no argument with respect to the myelography and enhanced CT Scan also recommended by Dr. Dickinson; our discussion therefore is confined to the issue of whether authorization for discography was properly denied.

[2]Additionally, Dr. Freeman testified that discography, in addition to being unnecessary in the instant case, could cause medical complications.

injection of the dye into the disc reproduces the pain symptoms which the patient had previously reported. In support of his recommendation that claimant undergo provocation discography, Dr. Dickinson, after acknowledging that claimant has no evidence of nerve root impingement, stated that this procedure would determine whether claimant has internal disc disruption, or intervertebral disc damage, which could cause claimant's back and leg pain.

In his Decision and Order, the administrative law judge, after setting forth and discussing the medical evidence of record, found the consensus of the medical evidence was that claimant did not have disc trouble and concluded that provocation discography is not warranted in the instant case. Specifically, the administrative law judge, relying on employer's experts, found that the discography was essentially subjective in nature and found that no evidence had been submitted in support of claimant's contention that the objective component of provocation discography is more probative than less invasive procedures, including an MRI. Thereafter, the administrative law judge declined to credit the opinion of Dr. Dickinson, who advocated the use of provocation discography. It is well established that the administrative law judge is entitled to evaluate the credibility of the medical evidence and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). It was, therefore, within the administrative law judge's discretionary authority as factfinder not to credit Dr. Dickinson's opinion that provocation discography is necessary, having previously credited Dr. Freeman's opinion that discography is not indicated, which is corroborated by the opinion of Dr. Dodge. *See McGrath*, 289 F.2d at 403; *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We therefore affirm the administrative law judge's determination that employer is not required to authorize or pay for the procedure of provocation discography sought by claimant, as that finding is rational and in accordance with law. *See generally Wheeler*, 21 BRBS at 35.

We further reject claimant's contention that in light of employer's refusal to authorize the discography sought by claimant, claimant should be found permanently totally disabled or, in the alternative, temporarily totally disabled until further diagnostic testing is conducted. It is claimant's burden to establish the nature and extent of his disability. *See Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (1985). To establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). An administrative law judge may properly find an employee capable of performing his usual work despite his complaints of pain where a physician finds no functional impairment. *See Peterson v. WMATA*, 13 BRBS 891 (1981). In the instant case, the administrative law judge's decision to credit the testimony of Dr. Freeman, who opined that claimant could return to his usual work, over the opinion of Dr. Dickinson, is supported by the negative MRI interpretations by Drs. Freeman and Janon and by the absence of any physical findings on examination. Thus, as the administrative law judge's credibility determination is rational, and as the opinion of Dr. Freeman constitutes substantial evidence to support the administrative law judge's finding that claimant is capable of performing his usual work with employer, we affirm the administrative law judge's determination that claimant was capable of resuming his usual employment duties with employer as of May 9, 1988. *See generally Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge