BRB No. 92-1022

ELTON PORTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NACIREMA, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order, and Order Denying Motion for Reconsideration and to Reopen Record of Theodore P. Von Brand, Administrative Law Judge, United States Department of Labor.

Elton Porter, Hampton, Virginia, *pro se*.

Robert A. Rapaport (Knight, Dudley, Dezern & Clarke), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order, and Order Denying Motion for Reconsideration and to Reopen Record (87-LHC-1090) of Administrative Law Judge Theodore P. Von Brand 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).

On September 29, 1986, claimant slipped and injured his right groin in the course of his employment for employer. He had previously injured his right groin in December 1979 and in November 1982. After receiving treatment from Dr. Clardy, he was cleared to return to his usual work on December 8, 1986, but quit after working only seven and one-

*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).

half hours due to alleged groin pain. Claimant again attempted to return to work on January 28,

1987, but was only able to work 5 and one-half hours, allegedly due to his groin pain. He has not returned to work since that time. Employer voluntarily paid claimant temporary total disability compensation from September 30 to December 7, 1986. *See* 33 U.S.C. §908(b). Claimant sought additional temporary total disability compensation for September 29, 1986, the date of his injury, and for the period from December 9, 1986 until January 27, 1987. He also sought temporary total disability compensation from January 29, 1987, through August 19, 1987, and permanent total disability compensation thereafter as well as reimbursement of medical expenses and an assessment of additional compensation pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e).

The administrative law judge denied the claims for continuing disability compensation after December 7, 1986, based on the medical opinions of Drs. Byrd and Williamson that claimant was capable of returning to his usual longshore employment. The administrative law judge also found that claimant remained entitled to appropriate medical care for the treatment of his work-related symptoms and for reimbursement for the medical treatment provided by Dr. Clardy, his treating physician. He denied claimant reimbursement for the medical treatment provided by Dr. Lind, however, because claimant had not requested employer's prior authorization pursuant to Section 7(d) of the Act, 33 U.S.C. §907(d). Finally, the administrative law judge declined to determine whether claimant was entitled to a Section 14(e) assessment and whether claimant was entitled to temporary total disability compensation on September 29, 1986, essentially concluding that the record was not sufficiently clear to allow him to resolve these issues.[1]

Subsequently, in an Order Correcting Error, the administrative law judge accepted the parties' amended stipulation that the date of claimant's injury was September 29, 1986, rather than September 28, 1986, as had initially been stipulated. Finally, in an Order Denying Motion for Reconsideration and to Reopen Record, the administrative law judge denied claimant's request that the denial of additional compensation be reconsidered based on newly obtained medical evidence.

Claimant, appearing without benefit of counsel, appeals the administrative law judge's findings. Employer responds, urging affirmance. As claimant is without benefit of counsel, we will review the administrative law judge's findings under our general standard to determine if they are rational, supported by substantial evidence, and in accordance with applicable law. *See O'Keeffe*,

[1]With regard to the claim for temporary total disability compensation on September 29, 1986, the administrative law judge indicated that it was unclear from the existing record whether claimant received his normal wages on this date and that if claimant had clarifying documentation, it could be submitted in a timely motion for reconsideration. As for the Section 14(e), 33 U.S.C. §914(e), claim, the administrative law judge noted that although claimant was seeking a Section 14(e) assessment based on employer's alleged failure to pay temporary total disability compensation for the period from September 30, 1986 until December 7, 1986, employer's LS-208 indicated that the first payment was made on October 23, 1986. In light of the discrepancy, the administrative law judge determined that the record should be clarified on this question before a decision is made and suggested that the parties initially attempt to resolve this question at the deputy commissioner level.

380 U.S. at 362.

The administrative law judge's denial of continuing disability compensation after December 7, 1986, contained in the initial Decision and Order, is affirmed. To establish a *prima facie* case of total disability, claimant must show that he cannot return to his usual employment due to his work-related injury. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53, 56 (1992). In considering whether claimant met this burden, the administrative law judge noted that four physicians rendered relevant opinions. Drs. Clardy and Lind opined that claimant is limited to sedentary employment, despite a lack of objective findings, based on his subjective complaints of groin pain. Conversely, Drs. Byrd and Williamson opined that claimant could return to his usual work in light of the absence of objective medical findings to support his complaints.

In weighing this medical evidence, the administrative law judge noted that the tests and observations of Dr. Williamson in January and October 1987, conflicted with claimant's complaints of disabling pain from the groin injury. Although Dr. Williamson diagnosed adductor tendinitis based on claimant's complaints of tenderness in that area when he first examined claimant in January 1987, at the October 1987 examination Dr. Williamson indicated that claimant complained of localized groin pain in an area three inches anterior to the pain he had previously reported, and that this pain did not seem to have any relationship to a strain or sprain of the groin muscles. Because of the lack of objective findings to indicate a permanent disability, Dr. Williamson performed a "sham" test in which he was able to elicit a non-physiological pain response in claimant's groin from manipulation of his great toe. Dr. Williamson indicated further that claimant's complaint of increased pain upon crossing his legs and the fact that claimant did not exhibit atrophy or hypertrophy was inconsistent with a groin strain.

Although claimant's credible complaints of pain may be sufficient to establish his *prima facie* case, the administrative law judge acted within his discretion in finding that claimant's testimony of disabling pain was not persuasive in light of Dr. Williamson's findings. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944, 25 BRBS 78, 80 (CRT)(5th Cir. 1991). He further determined that as the medical opinions of Drs. Clardy and Lind were based primarily on claimant's complaints, these opinions were not as persuasive as Dr. Williamson's contrary opinion, which was corroborated by that of Dr. Byrd. Inasmuch as the medical opinions of Drs. Williamson and Byrd constitute substantial evidence from which the administrative law judge could rationally conclude that claimant was able to return to his usual employment after December 7, 1986, the denial of disability compensation after this date contained in the initial Decision and Order is affirmed. *See Avondale Shipyards v. Kennel*, 914 F.2d 88, 90-91, 24 BRBS 46, 47-48 (CRT)(5th Cir. 1990).

The administrative law judge's determination that claimant is not entitled to reimbursement of medical expenses for the treatment rendered by Dr. Lind is also affirmed. Section 7(d) requires that an employee request employer's prior authorization for the medical services performed by any physician, including claimant's initial free choice. *See Shahady v. Atlas Tile & Marble Co.*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). If claimant's request for authorization is refused by employer, claimant may still

establish entitlement to medical treatment at employer's expense if he establishes that the treatment he subsequently procured on his own initiative was necessary for treatment of the injury. *See generally Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In the instant case, however, as there is no record evidence which indicates that claimant ever requested employer's authorization for Dr. Lind's treatment, the administrative law judge's denial of reimbursement for these medical expenses was proper. *See generally Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in part and rev'd in part on other grounds sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159(CRT)(9th Cir. 1989)

The last two issues raised by claimant before the administrative law judge in his initial Decision and Order were his entitlement to compensation on September 29, 1986, and Section 14(e) penalties, 33 U.S.C. §914(e). Although the administrative law judge erred in abdicating his responsibility by refusing to resolve these issues based on his determination that the record was unclear, *see Hoodye v. Empire/United Stevedores*, 23 BRBS 341, 343-344 (1990); *see also* 33 U.S.C. §919(c); 20 C.F.R. §702.348, this error was harmless on the facts presented because there is uncontradicted evidence of record which mandates a denial of these benefits as a matter of law.

Claimant is not entitled to compensation on September 29, 1986, the stipulated date of his injury, because the evidence of record is uncontradicted that claimant first lost pay due to the September 29, 1986 work injury on September 30, 1986. Both Employer's Notice of Final Payment or Suspension of Compensation Payments (LS-208) and its Payment of Compensation Without Award (LS-206), which claimant submitted into evidence at the hearing, state *inter alia*, that claimant was injured on September 29, 1986, that he first lost pay due to the injury on September 30, 1986, and that employer commenced voluntary payment of compensation on that date. *See* CX. 46-47. Although the administrative law judge indicated in his original Decision and Order that it was not clear from the aforementioned evidence whether claimant had, in fact, been paid his regular wages on September 29, 1986, this finding was premised on the assumption that claimant's injury occurred on September 28, 1986, which he subsequently corrected pursuant to the parties' amended stipulation in his Order dated March 22, 1990. Accordingly, as the evidence of record is uncontradicted that claimant first lost pay due to the September 29, 1986 work injury on September 30, 1986, claimant is not entitled to temporary total disability compensation on September 29, 1986 as a matter of law. *See, e.g., Burson v. T. Smith & Son, Inc.*, 22 BRBS 124, 126 (1989).

Claimant is also not entitled to a Section 14(e) assessment. Claimant alleged that he was entitled to a Section 14(e) assessment of $272.86 on the temporary total disability compensation owed from September 30, 1986, until December 7, 1986, inasmuch as employer did not commence voluntary payment of compensation until December 15, 1986. In declining to resolve the issue, the administrative law judge found that the record on this point was unclear as employer's LS-208 indicated that voluntary payment of compensation commenced as of October 23, 1986. Contrary to the administrative law judge's determination, however, the record is not unclear; it contains evidence which belies claimant's argument. The record is uncontradicted that claimant reported his injury to employer on September 29, 1986, the date of his injury. *See* CX 45. It is also uncontradicted that employer commenced the voluntary payment of compensation on October 23, 1986 *i.e.*, within 28 days from the date of injury as is required pursuant to Section 14(b) of the Act, 33 U.S.C. §914(b). *See* 33 U.S.C. §914(b),(d); *See also Browder v. Dillingham Ship Repair*, 24 BRBS 217, 220, *aff'd on recon.* 25 BRBS 88 (1991). Accordingly, we hold that on the facts presented, claimant is not entitled to a Section 14(e) assessment as a matter of law.

The administrative law judge committed reversible error, however, in denying claimant's motion for modification. By motion dated March 31, 1990, claimant requested that the record be reopened for submission of additional medical evidence and that the administrative law judge's initial Decision and Order be reconsidered based on this evidence. The administrative law judge determined that although claimant's motion was phrased as a request for reconsideration, he was actually seeking modification pursuant to 33 U.S.C. §922 based on new evidence, the results of a medical examination not performed until March 29, 1990, well after the issuance of the initial Decision and Order. The administrative law judge denied claimant's motion, however, based on his erroneous determination that modification must be originated at the district director level. *See Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66, 69 (1986), *aff'd. mem.* No. 89-1339 (1st Cir. Sept. 19, 1990); *see also Duran v. Interport Maintenance Corp.*, 27 BRBS 8, 14 n.8 (1993). Section 22 was intended to displace traditional notions of *res judicata* and to allow the factfinder "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection of the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972). Moreover, the Board has previously recognized that the administrative law judge abuses his discretion when he fails to consider new evidence submitted in a modification proceeding. *See Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174, 176 (1988). Accordingly, as the administrative law judge had the authority to entertain claimant's modification request but failed to do so, we vacate his denial of claimant's modification request. On remand, the administrative law judge should reopen the record for submission of claimant's newly discovered evidence, reconsider the extent of claimant's disability in light of both the old evidence and the new evidence submitted, and grant modification if doing so would render justice under the Act. *See Duran*, 27 BRBS at 14-15.

Accordingly, the administrative law judge's Decision and Order is modified to reflect that claimant is not entitled to temporary total disability compensation on September 29, 1986, or an assessment under Section 14(e), but is, in all other respects, affirmed. The administrative law judge's denial of claimant's modification request contained in the Order Denying Motion for

Reconsideration and to Reopen Record is vacated, and the case is remanded for further proceedings pursuant to Section 22 of the Act consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge