

BRB Nos. 92-2291
and 92-2291A

KARL REUTHER)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	DATE ISSUED:
)	
ARMY & AIR FORCE)	
EXCHANGE SERVICE)	
)	
and)	
)	
CIGNA/ESIS)	
)	
Employer/Carrier-)	
Respondents)	
Cross-Petitioners)	DECISION and ORDER

Appeals of the Decision and Order - Denying Payment of Medical Expenses for Treatment
Rendered by Dr. John Dotti, D.C., of Richard K. Malamphy, Administrative Law
Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

Gerard E. W. Voyer (Taylor & Walker, P.C.), Norfolk, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative
Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order - Denying Payment of Medical Expenses for Treatment Rendered by Dr. John Dotti, D.C. (91-LHC-2270) of Administrative Law Judge Richard K. Malamphy 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). The administrative law judge's Decision and Order must be affirmed if it is 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).

Claimant, a safety security technician, was injured on March 16, 1988, when he fell during

the course of his employment with employer, fracturing his left wrist, sternum, and T-11 vertebrae, as well as suffering trauma to his kidneys. Following this incident, claimant was treated by Dr. Nevins, an orthopedic surgeon, who, on June 15, 1988, released claimant to return to work in a limited capacity. Claimant, although continuing to complain of headaches and back pain, returned to work in June 1988 and continued to work for employer through the date of the formal hearing. Although Dr. Nevins continued to treat claimant, he released claimant for unrestricted work activity on October 19, 1988. On July 5, 1990, after noting that he could provide no other treatment for claimant, Dr. Nevins recommended that claimant either find a position more compatible with his physical condition or seek help at a pain clinic. Claimant subsequently commenced treatment for pain in his spine, shoulder and arm with Dr. Dotti, a chiropractor, in August 1990. In September 1990, employer's carrier refused to pay Dr. Dotti's bill for services rendered to claimant.

The sole issue before the administrative law judge was whether employer was responsible for the charges associated with the medical treatment provided by Dr. Dotti. In his Decision and Order, the administrative law judge initially determined that employer had refused further medical treatment to claimant and that claimant was therefore entitled to payment of subsequently obtained medical treatment if such treatment was necessary and related to his work injury. The administrative law judge next concluded, however, that the chiropractic treatment provided by Dr. Dotti was not necessary; thus, the administrative law judge rejected claimant's application for reimbursement of the medical expenses which he incurred by treating with Dr. Dotti.

On appeal, claimant contends that the administrative law judge erred in concluding that Dr. Dotti's treatment was not necessary. In its cross-appeal, employer asserts that the administrative law judge erred in finding that employer had refused further treatment for claimant, and had, therefore, released claimant from further obligation to obtain employer's written consent to a change of physicians.

The issues raised by both parties on appeal are covered by Section 7(d) of the Act, 33 U.S.C. §907(d), which states the prerequisites for employer's liability for payment or reimbursement of medical expenses incurred by claimant. *See Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 574 F.2d 404, 10 BRBS 1 (4th Cir. 1979). Section 7(d) requires that a claimant request his employer's authorization for medical services performed by any physician, including the claimant's initial choice. *See Maguire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Title & Marble Co.*, 13 BRBS 1007 (1981)(Miller, J., dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Where a claimant's request for authorization is refused by the employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment subsequently procured was necessary for the injury in order to be entitled to such treatment at employer's expense. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). When an employer sends claimant to a physician, the physician's actions may constitute a refusal of treatment by employer. *See Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986). Section 7(d) further states that no claim for medical or surgical treatment shall be valid against an employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the Secretary a report

of such injury or treatment; failure to furnish the required report within the ten day period may, however, be excused if it is found to be in the interest of justice to do so. *See Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994)(McGranery, J., dissenting).

We first address employer's contention that the administrative law judge erred in finding that claimant sought prior authorization for Dr. Dotti's treatment, which was refused, thus allowing claimant to seek further medical treatment without employer's consent. The administrative law judge found that through Dr. Nevins' release of claimant from further medical treatment, employer had, in effect, refused further medical treatment to claimant. Moreover, the administrative law judge determined that, although a controversy existed as to whether claimant specifically requested authorization for treatment by Dr. Dotti prior to commencing that treatment, it was undisputed that within 45 days of claimant's initial treatment, Dr. Dotti submitted a request for payment to employer and that request was denied. *See* EXS 14, 17; Decision and Order at 12. Based upon these findings, the administrative law judge concluded that authorization had been sought by claimant and refused by employer and, therefore, claimant was entitled to payment of Dr. Dotti's expenses if his treatment was necessary.

After review of the record, we hold that the administrative law judge's conclusion that authorization had been sought by claimant and denied by employer is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe*, 380 U.S. at 359; *see generally Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44 (D.C. Cir. 1984). Specifically, we note that it is uncontroverted that employer, on September 25, 1990, effectively denied authorization when it declined to pay Dr. Dotti's bill. *See* EX 17. Moreover, it is uncontested that claimant, on July 5, 1990, was released by Dr. Nevins, who opined that there was no further medical treatment which would be of any help to claimant's condition. As both of these events constitute substantial evidence to support the administrative law judge's determination that authorization was requested by claimant and refused by employer, we affirm the administrative law judge's determination that claimant is entitled to reimbursement for the expenses of Dr. Dotti so long as that physician's treatment was necessary. *See Anderson*, 22 BRBS at 22.

Claimant, in his appeal, challenges the administrative law judge's subsequent finding that the treatment provided by Dr. Dotti was not necessary.¹ In his decision, the administrative law judge denied claimant's request for reimbursement of Dr. Dotti's medical charges based upon his conclusion that the record did not substantiate a finding that there had been a misdiagnosis by Dr. Nevins which required the treatment rendered by Dr. Dotti. Whether treatment is compensable, however, is not dependent on whether there has been a misdiagnosis by a prior physician; rather the question to be addressed is whether the treatment was necessary. *See Anderson*, 22 BRBS at 20. As such, whether such treatment obtained by claimant was necessary is a factual issue within the

¹We note that Section 702.404, 20 C.F.R. §702.404, provides that chiropractors are included in the definition of the term "physician" within the meaning of Section 7, subject to the limitation that their services are reimbursable only for "treatment consisting of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings." *See* 20 C.F.R. §702.404.

administrative law judge's authority to resolve. *See Wheeler v. Interocean Stevedoring Co.*, 21 BRBS 33 (1988).

In the instant case, although the administrative law judge set forth claimant's testimony that Dr. Dotti's treatment provided relief and enabled him to continue working, *see* Decision and Order at 7, the administrative law judge did not address this testimony in considering this issue. Moreover, the administrative law judge did not discuss whether claimant had a subluxation of the spine and whether Dr. Dotti's treatment was necessary for such a condition. Rather, the administrative law judge based his conclusion solely on a finding that no misdiagnosis had been rendered by Dr. Nevins prior to the commencement of Dr. Dotti's treatment. We hold that the administrative law judge erred in utilizing this improper standard. The administrative law judge's finding on this issue must be vacated, and the case remanded to the administrative law judge to determine if Dr. Dotti's treatment was reasonable and necessary using the proper standard. If, on remand, the administrative law judge concludes that Dr. Dotti's treatment was necessary, he must also determine for which part of Dr. Dotti's bill employer may be responsible as, under the Act, an employer is only responsible for a chiropractic's manipulations for a spinal subluxation. *See* 20 C.F.R. §702.404.

Lastly, employer contends that no claim is valid against it because Dr. Dotti failed to furnish to it a report of claimant's injury and treatment. Section 7(d)(2) of the Act states that an employer is not liable for medical expenses unless, within 10 days following the first treatment, the physician rendering such treatment provides the employer with a report of that treatment. *See* 33 U.S.C. §907(d)(2) (1988). However, in the interest of justice, the Secretary may excuse the failure to comply with the provisions of this section. 33 U.S.C. §907(d)(2) (1988); *see generally* *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in part*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991). The Board has adopted the Director's interpretation that, under Section 7(d)(2) and its implementing regulation, Section 702.422(b), 20 C.F.R. §702.422(b)(1994), the Secretary's authority to determine whether "the interest of justice" warrants excusing the failure to comply with the provisions of Section 7(d)(2) is delegated solely to the Director and her delegates, the district directors. *See Toyer*, 28 BRBS at 347. Therefore, the Board held that the district director, and not the administrative law judge, has the authority to determine whether non-compliance with Section 7(d)(2) should be excused. *Id.*

In the instant case, the administrative law judge did not address employer's contention, raised below, that Dr. Dotti failed to comply with the reporting requirements of Section 7(d)(2). Should the administrative law judge on remand find that claimant is entitled to reimbursement of Dr. Dotti's charges but that the required reports were not filed, the case must be further remanded to the district director to determine if such a failure should be excused under the terms of Section 7(d)(2) of the Act and Section 702.422(b) of the regulations. *See Krohn v. Ingalls Shipbuilding, Inc.*, BRBS , BRB No. 91-1744 (Dec. 28, 1994)(McGranery, J., dissenting); *Toyer*, 28 BRBS at 347.

Accordingly, the administrative law judge's Decision and Order - Denying Payment of Medical Expenses for Treatment Rendered by Dr. John Dotti, D.C., is affirmed in part, vacated in

part, and remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge