BRB No. 89-3505

WILLIAM H. ROMEIKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KAISER SHIPYARDS	)	DATE ISSUED:
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Peter W. Preston (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

Carrol J. Smith (SAIF Corporation), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (85-LHC-1348) of Administrative Law Judge Vivian Schreter-Murray 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).

This case is before the Board for the second time. Claimant was exposed to asbestos fibers during the course of his employment with employer from 1942 to 1945. He retired from gainful employment in 1973 due to hypertension, and was subsequently diagnosed as having coronary heart disease and arteriosclerosis. Additionally, claimant was found to have pleural thickening as of 1978 and was diagnosed with asbestos-induced pleural plaques by a pulmonary specialist, Dr. Lawyer, on March 25, 1983. Thereafter, claimant filed a claim under the Act for pulmonary disorders

attributable to asbestos exposure.[1]

At the hearing, the parties agreed that claimant was exposed to asbestos fibers during his maritime employment and that claimant had no impairment under the American Medical Association guidelines. Additionally, the parties agreed that claimant suffered from pleural plaques, pleural calcification and pleural thickening due to asbestos exposure. Claimant sought medical benefits in the nature of periodic x-rays and spirometry for the purpose of monitoring his condition. In her Decision and Order, the administrative law judge concluded that the evidence of record did not establish a compensable claim under the Act, and accordingly, denied claimant's request for medical benefits.

On appeal, the Board initially held that claimant's pleural plaques constitute a "harm" under the Act, and thus, reversed the administrative law judge's determination that claimant did not sustain an injury. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). The Board additionally held that the Section 20(a) presumption that claimant's harm is work-related is applicable to the instant case as a matter of law, and that employer failed to rebut the presumption. *Id;* 33 U.S.C. §920(a). Lastly, the Board vacated the administrative law judge's finding that claimant is not entitled to reimbursement for medical expenses for periodic monitoring of his work-related lung condition and remanded the case for the administrative law judge to consider whether claimant has complied with the requirements of 33 U.S.C. §907 so that employer will be liable for claimant's medical expenses. *Id.*

[1]The claim was originally for asbestosis, but claimant later conceded at the hearing that the medical evidence was insufficient to establish that he suffered from that particular malady.

On remand,[2] the administrative law judge found employer liable for the annual costs of medical monitoring of claimant's pulmonary status beginning on March 30, 1983, and ordered employer to reimburse claimant for the documented expenses of past medical monitoring from this date. Additionally, the administrative law judge found employer responsible for payment of all reasonable future annual medical monitoring expenses thereafter accrued by claimant.[3] Claimant now argues that the administrative law judge erred in finding that he is not entitled to reimbursement for the diagnostic testing performed prior to his request for medical services. Employer responds, urging affirmance.

Claimant argues that inasmuch as the diagnostic testing on November 4, 1982 was both reasonable and necessary in light of claimant's injury, he is entitled to reimbursement for those medical expenses, regardless of whether he sought prior authorization. Claimant maintains that the cases relied upon by the administrative law judge in finding that the medical expenses incurred prior to a request for medical expenses are not compensable under the Act, notably *Maryland Shipbuilding and Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (CRT)(4th Cir. 1979), *McQuillen v. Horne Brothers, Inc.*, 16 BRBS 10 (1983), and *Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982), are factually dissimilar and thus, inapplicable to the instant case.

Section 7(d) of the Act, 33 U.S.C. §907(d), permits an employee to recover necessary medical expenses for a work-related injury if he has first requested authorization prior to obtaining treatment, except in cases of refusal, neglect or emergency. *See* 20 C.F.R. §702.421; *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989); *McQuillen*, 16 BRBS at 10. The Board has held that the Section 7(d) requirements are very specific, *McQuillen*, 16 BRBS at 16, and the need for a prior request is not excused because claimant is not aware that his illness is work-related at the time he

[2]Prior to the issuance of the administrative law judge's Decision and Order on Remand, employer/carrier petitioned the United States Court of Appeals for the Ninth Circuit to review the Board's February 24, 1989 Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), moved to dismiss employer/carrier's appeal on the grounds that the Board's Order was not a final order of the Board subject to 33 U.S.C. §921(c). The Director's motion was granted by the court of appeals in an Order dated July 19, 1989.

[3]Employer/carrier again petitioned the United States Court of Appeals for the Ninth Circuit to review the administrative law judge's Decision and Order on Remand, and at that time elected not to file an appeal before the Board. The Director, this time joined by claimant, once again filed a motion to dismiss. On December 29, 1989, employer/carrier untimely filed a cross-appeal of the administrative law judge's Decision and Order on Remand. By Order dated February 8, 1990, the Ninth Circuit granted the Director's motion to dismiss for lack of jurisdiction and denied employer/carrier's contention that through its appeal, employer/carrier had tolled its time to appeal the case to the Board. Subsequently, by Order dated January 29, 1993, the Board summarily dismissed the cross-appeal for lack of jurisdiction, noting that the appeal was untimely filed. *Romeike v. Kaiser Shipyards*, BRB No. 89-3505A (January 29, 1993)(unpublished Order).

seeks treatment.[4] *Mattox*, 15 BRBS at 171-172.

Contrary to claimant's contentions, the Board's decision in *Mattox* is indistinguishable from the case at hand, as claimant is seeking reimbursement for medical services rendered before he was aware of the work-related nature of his condition. Regardless of his "awareness," claimant cannot be reimbursed for medical treatment under the provisions of the Act unless he requested prior authorization. *Id.* In the instant case, the administrative law judge's finding that no request for medical services occurred prior to the filing of claimant's state compensation claim on March 30, 1983 is undisputed.[5] Additionally, the administrative law judge properly determined that the exceptions to the Section 7(d) requirements are inapplicable to this case. Consequently, as claimant failed to seek prior authorization, we affirm the administrative law judge's denial of the medical expenses incurred by claimant for diagnostic testing prior to March 30, 1983. *See* 33 U.S.C. §907(d); 20 C.F.R. §702.421; *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Ranks*, 22 BRBS at 301; *Mattox*, 15 BRBS at 171-172.

Accordingly, the Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[4]In *Jenkins*, the United States Court of Appeals for the Fourth Circuit held that the requirement of Section 7(d) that a claimant seek prior authorization from employer applies both when claimant is seeking reimbursement of expenses he already paid and when he is seeking to have employer pay the medical provider directly.

[5]Claimant has never contended that a request for medical services of any kind had been made prior to the filing date of his state claim.