BRB Nos. 03-0829
and 05-0409

DEMETRIOUS W. GRAVES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 07/28/2005
AVONDALE INDUSTRIES, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits, Decision and Order on Modification, and Order Denying Claimant's Motion to Reconsider of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Demetrious W. Graves, Gulfport, Mississippi, *pro se.*

Donald P. Moore (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits, Decision and Order on Modification, and Order Denying Claimant's Motion to Reconsider (2002-LHC-2644) of Administrative Law Judge Larry W. Price 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). In an appeal filed by a claimant without representation, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a welder, injured his back, neck, right shoulder and arm at work on February 5, 2002. Since the work injury, claimant has had vision problems and headaches, and he alleges that these conditions, as well as seizures and a psychological condition, are work-related. Employer voluntarily paid claimant temporary total disability benefits from February 6, 2002, through March 16, 2003, and medical benefits. Claimant was released to return to work without restrictions on March 5, 2003. Claimant returned to work for employer on March 19, 2003, but was terminated from employment for failure to complete employer's drug screening test. Since that time, claimant has not applied for any job, but earns $200 or less per week selling merchandise he buys wholesale.

In a 2003 Decision and Order, the administrative law judge denied claimant additional benefits. The administrative law judge found that claimant's testimony is less than credible, that claimant reached maximum medical improvement on March 5, 2003, that claimant did not establish his *prima facie* case of total disability, and alternatively that employer established the availability of suitable alternate employment. He also found that claimant sustained no loss in his post-injury wage-earning capacity as he was able to return to his usual work post-injury at the same rate of pay as pre-injury and would still be on the job had he not been fired. He further found that employer was under no obligation to approve claimant's change in physician to Dr. Faison, and thus that employer is not responsible for the payment of Dr. Faison's bills.

Claimant appealed the administrative law judge's denial of benefits. BRB No. 03-0829. On February 6, 2004, claimant requested modification. 33 U.S.C. §922. The Board subsequently dismissed claimant's appeal in BRB No. 03-0829, and remanded the case to the Office of Administrative Law Judges for modification proceedings. On May 20, 2004, the administrative law judge issued an interim order awarding claimant temporary total disability benefits from February 6, 2002, through January 28, 2004. Employer's motion for reconsideration was denied.

In his Decision and Order on Modification, the administrative law judge awarded claimant temporary total disability benefits from February 6, 2002, through January 28, 2004. The administrative law judge denied claimant's motion to exclude Dr. Davis's report from the record. He found that claimant's vision problems and headaches are work-related, but that his seizures and psychological condition are not work-related, and he determined that claimant reached maximum medical improvement on January 28, 2004. He also concluded that claimant established his *prima facie* case of total disability, but that employer established the availability of suitable alternate employment at its own facility with no loss in wage-earning capacity. Alternatively, the administrative law judge found that employer established the availability of suitable alternate employment on the open market with a wage-earning capacity of $6.07 per hour, and that claimant did not establish diligence in seeking alternate employment. Claimant's motion for reconsideration was denied.

Claimant subsequently appealed the administrative law judge's decision on modification in BRB No. 05-0409, and requested reinstatement of his initial appeal. The Board reinstated claimant's initial appeal and consolidated the appeals for decision. *Graves v. Northrop Grumman Ship Systems*, BRB Nos. 03-0829, 05-0409 (March 2, 2005) (Order). On appeal, claimant challenges the administrative law judge's denial of additional benefits. Employer responds in support of the administrative law judge's initial denial of benefits, and alternatively, in support of the administrative law judge's decisions on modification.[1]

We first address the administrative law judge's denial of claimant's motion to exclude the report of Dr. Davis, who is employer's psychological expert. Dr. Davis, a clinical psychologist who saw claimant once to perform a neuropsychological evaluation, diagnosed claimant with depression and anxiety, but opined that his psychological condition was not work-related but resulted from claimant's sense of entitlement and victimization and caused no limitations or restrictions. REX 5. Claimant asserted in his motion that Dr. Davis was biased and falsified his records. The administrative law judge is afforded broad discretion in decisions concerning the admission of evidence, and he addressed the arguments in claimant's motion in weighing Dr. Davis's opinion against the other evidence of record. *Vonthronshohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990); Decision and Order on Modification at 10 n. 1; Order Denying Claimant's Motion to Reconsider at 1; REX 5. As the administrative law judge did not abuse his discretion in admitting Dr. Davis's opinion into evidence, we affirm the administrative law judge's denial of claimant's motion to exclude Dr. Davis's report. *See generally Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table); 20 C.F.R. §702.338.

The administrative law judge found that claimant's seizures were not work-related as claimant did not establish that, in fact, he had seizures. Dr. Barnes, claimant's treating osteopath who testified at the hearing, was the only doctor to diagnose work-related post-traumatic seizures. RX 11; 2004 Tr. at 57-58. The administrative law judge did not credit Dr. Barnes's opinion because neither Dr. Barnes nor any other doctor witnessed claimant have a seizure; claimant did not mention to his former physicians, Drs. Culveyhouse, Jackson, Danielson, and Connolly, that he had seizures; claimant did not allege that he had seizures at the first hearing; and the record contained no evidence as to why seizures would

[1] Employer also asserts that the administrative law judge's modification of the initial Decision and Order was improper because the new evidence submitted by claimant on modification supported an improvement in his condition and not a worsening of his condition. Emp. br. (BRB No. 05-0409) at 11-15. We need not address this assertion as employer did not file a cross-appeal and the issue raised is not in support of the administrative law judge's decisions below. *See Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002).

suddenly appear almost two years post-injury. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); Decision and Order on Modification at 13; RX 11; 2004 Tr. at 57-58, 69. Moreover, Dr. Barnes performed no objective testing to support his diagnosis of seizures, 2004 Tr. at 71-72, and Drs. Davis and Gasparrini stated that claimant was likely experiencing panic attacks and not seizures. REX 5 at 6; RCX 1 at 2. Consequently, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant does not have work-related seizures. *See generally Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

The administrative law judge also found that claimant's psychological condition is not work-related. Dr. Davis, a clinical psychologist, diagnosed depression with anxiety but did not relate it to claimant's work injury. REX 5. Rather, Dr. Davis opined that the diagnosed conditions resulted from claimant's sense of entitlement and victimization. *Id.* Dr. Gasparrini, also a clinical psychologist, opined that claimant has work-related depression. RCX 1. We affirm the administrative law judge's finding that Dr. Davis's opinion constitutes substantial evidence sufficient to rebut the Section 20(a) presumption as he stated that claimant's psychological condition is not work-related. 33 U.S.C. §920(a); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT)(5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); Decision and Order on Modification at 13-14; REX 5.

We also affirm the administrative law judge's crediting of Dr. Davis's opinion over that of Dr. Gasparrini because he found that Dr. Gasparrini's report contained inconsistencies.[2] *Calbeck*, 306 F.2d 693; *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); Decision and Order on Modification at 13-14; REX 5; RCX1. Contrary to claimant's specific assertion that Dr. Davis's opinion is based on incomplete testing and inaccurate reporting of answers, the interpretation of medical data is for the medical experts and the administrative law judge may not substitute his judgment for that of the physician. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Thus, as the administrative law judge's weighing of the evidence is rational, the administrative law judge's finding that claimant's psychiatric injury is not work-related is affirmed.

[2] Dr. Gasparrini stated that claimant's cognitive impairment might have been exacerbated by his head injury, but he previously reported that claimant did not appear to have a decline in cognitive abilities resulting from the accident and that claimant retained good memory, attention, and concentration skills. RCX 1 at 4, 6. Dr. Gasparrini also opined that claimant's cognitive limits (claimant has a full scale intelligence quotient of 78) will interfere with his capacity to work at any type of job other than simple labor, RCX 1 at 8, but in fact, claimant had successfully worked pre-injury and operated a private business post-injury and coached pee wee football and basketball. CX 11 at 8-9.

Two functional capacity evaluations, performed in 2003 and 2004, conclude that claimant is able to return to light to medium work.[3] EX 10; REX 2. Discussing the extent of claimant's disability resulting from his back, neck, right shoulder and arm, vision problems and headaches, the administrative law judge found that employer established the availability of suitable alternate employment at its facility paying the same wages claimant earned pre-injury. The administrative law judge reasonably relied on the affidavit of Mr. McBride, employer's production zone manager, stating that a modified welding job was and would have been available to claimant within the functional capacity evaluation restrictions had he not been terminated on March 19, 2003, for violation of employer's drug screening policy. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed.Appx. 126 (5th Cir. 2002); *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); Decision and Order on Modification at 16; REX 1. The administrative law judge also rationally found that claimant's post-injury earnings would have fairly represented his post-injury wage-earning capacity because there is no evidence that claimant could not have continued to earn his pre-injury wages, approximately, $15 per hour, had he not been terminated. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Arnold*, 35 BRBS 9; Decision and Order on Modification at 16. We therefore affirm the administrative law judge's findings that employer established the availability of suitable alternate employment at its facility at the same rate of pay post-injury as pre-injury.[4] Consequently, as claimant lost this job for reasons unrelated to his work injury, the administrative law judge's denial of additional disability benefits is affirmed. *Brooks*, 2 F.3d 64, 27 BRBS 100(CRT).

In his initial decision, the administrative law judge held that employer is not responsible for the payment of any expenses claimant incurred while treating with Dr. Faison. Claimant testified that he requested approval to see Dr. Faison, a family physician,

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[3] Claimant's assertion that Mr. Roll, the physical therapist who performed the 2003 functional capacity evaluation, was dishonest in that he recorded lower heart rates than what claimant actually performed is rejected. The administrative law judge found that Mr. Roll is a credible witness and this finding is affirmed as it is neither inherently incredible nor patently unreasonable. *Cordero v. Triple A Machine Shop*, 508 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); Decision and Order on Modification at 11; Order Denying Claimant's Motion to Reconsider at 1; Decision and Order Denying Benefits at 12; EX 10; 2004 Tr. at 21.

[4] In light of our affirmance of the administrative law judge's finding that employer established the availability of suitable alternate employment at its facility, we need not address the administrative law judge's alternative findings regarding suitable alternate employment on the open market.

and employer denied the request. The administrative law judge found that employer was under no obligation to approve the change in claimant's choice of family physician. Decision and Order Denying Benefits at 15-16; 2003 Tr. at 29, 54; 2004 Tr. at 45. Under Section 7(d) of the Act, 33 U.S.C. §907(d), claimant is entitled to recover medical benefits if he requests employer's authorization for treatment, employer refuses the request, and the treatment thereafter procured on claimant's own initiative is reasonable and necessary. *See Slattery Assocs., Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT) (D.C. Cir. 1984); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRS 20 (1989); 33 U.S.C. §907(d). In the instant case, employer asserted that claimant may continue to treat with any of the doctors that had been previously approved except Dr. Jackson who refused further treatment. Claimant testified that he already had treated with Dr. McNally, a family physician, for his work injury, but decided to stop seeing Dr. McNally and start seeing Dr. Faison instead. 2004 Tr. at 42-43; 2003 Tr. at 39.

We must remand the case for further consideration of this issue. The administrative law judge found that claimant requested authorization and employer refused to authorize treatment by Dr. Faison. The administrative law judge found that employer was under no obligation to approve claimant's change in physician because they authorized him to treat with any of the other physicians who previously had been authorized. Decision and Order Denying Benefits at 16. Because employer refused to authorize treatment by Dr. Faison following claimant's request therefore, the administrative law judge should have made findings as to whether Dr. Faison's treatment was reasonable and necessary for claimant's work-related injuries. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Anderson*, 22 BRBS 20. Thus, we vacate the administrative law judge's finding that employer is not liable for Dr. Faison's bills and remand this case to the administrative law judge for consideration of the reasonableness and necessity of Dr. Faison's treatment for claimant's work-related injuries.

Accordingly, we vacate the administrative law judge's finding that employer is not responsible for the cost of Dr. Faison's treatment and remand this case to the administrative law judge for further consideration of this issue. In all other respects, the administrative law judge's decisions are affirmed.[5]

SO ORDERED.

[5] Claimant is entitled to all reasonable and necessary medical expenses, including prescriptions, related to his work injury, including his right arm, in addition to those the administrative law judge specifically awarded for his neck, back, right shoulder, vision and headache problems. *See* Decision and Order on Modification at 11, 17.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge