BRB No. 99-1032

ANDREW DOMINIC FERRARI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SAN FRANCISCO STEVEDORING COMPANY	)	DATE ISSUED: June 29, 2000
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision on Claimant's Motion for Reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Sally Harms (Lieberman & Harms), San Francisco, California, for claimant.

B. James Finnegan (Finnegan, Marks & Hampton), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision on Claimant's Motion for Reconsideration (95-LHC-490, 1114, 1115) of Administrative Law Judge Alfred Lindeman 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).

Claimant, a longshoreman, suffered a work-related back injury on October 13, 1984,

when a shuttle bus he was driving was involved in an accident. Claimant, who thereafter filed a claim for benefits under the Act against Stevedoring Services of America (SSA), was diagnosed with a lumbar strain which aggravated a pre-existing spondylolisthesis condition, and returned to part-time work in July 1987. In November 1987 and September 1988, claimant experienced two additional work-related injuries to his back. Claimant stopped working altogether in September 1988. In his Decision and Order - Awarding Benefits, issued on October 2, 1990 (the 1990 Decision and Order), the administrative law judge found that claimant's 1987 and 1988 events were intervening injuries that did not flow naturally from his October 1984 injury. Therefore, the administrative law judge awarded claimant temporary total disability compensation due to the 1984 injury, 33 U.S.C. §908(b), from October 14, 1984 through January 9, 1986, and permanent partial disability compensation thereafter. 33 U.S.C. §908(c)(21).

On May 21, 1991, claimant filed claims against SSA for the November 1987 injury, and against an unnamed employer regarding the September 1988 injury. On August 31, 1994, claimant filed a motion for modification of the 1990 Decision and Order on the grounds of a mistake of fact, contending that he is permanently and totally disabled as a result of the October 13, 1984, accident. On August 1, 1995, claimant filed a claim against SSA, Marine Terminals Corporation, San Francisco Stevedoring Company (employer), and Pasha Maritime, alleging that he suffered cumulative trauma to his back due to his employment from July 1987 through September 15, 1988.

On March 4, 1999, the administrative law judge issued a Decision and Order on Petition for Modification and Claims Regarding Injuries on November 16, 1987, September 9, 1988, and "Cumulative Trauma" From July 1987 Through September 15, 1998 (the 1999 Decision and Order), wherein the administrative law judge denied claimant's petition for modification, finding that claimant's disability had not increased at the time he stopped working on September 15, 1988. With regard to claimant's new claims, the administrative law judge dismissed the claims arising out of the alleged injuries on November 16, 1987 and September 9, 1988, as he found that claimant did not suffer an aggravation of his underlying back condition or any loss of wage-earning capacity as a result of these injuries. With regard to the claim of cumulative trauma, the administrative law judge found that employer was the responsible employer for any potential liability, as claimant's last day of work, September 15, 1988, involved driving a tractor for employer. The administrative law judge then determined, however, that Section 12 of the Act, 33 U.S.C. §912, and Section 13 of the Act, 33 U.S.C. §913, barred claimant's claim for benefits. Next, the administrative law judge found that claimant was entitled to be reimbursed pursuant to Section 7 of the Act, 33 U.S.C. §907, for the treatment provided by Dr. Kucera in the amounts of $180 and $867, and the treatment provided by West Marin Physical Therapy Group between September 15, 1988 and March 16, 1994. Lastly, the administrative law judge determined that claimant's counsel was entitled to an award of an attorney's fee, and allowed counsel the opportunity to file an attorney's fee

petition.

Subsequent to the issuance of the 1999 Decision and Order, employer filed a motion for reconsideration, requesting that the award of medical benefits to claimant be vacated as claimant did not comply with the requirements of Section 7(d) of the Act, 33 U.S.C. §907(d). In his Decision on Motion for Reconsideration, the administrative law judge found that claimant failed to comply with Section 7(d), as the record showed that claimant did not request authorization for treatment and no reports of the treatments were ever filed. *See* 33 U.S.C. §907(d)(1), (2). Accordingly, the administrative law judge granted employer's petition for reconsideration and vacated his previous award of medical benefits. Moreover, as a consequence of this ruling, the administrative law judge nullified his previous award of an attorney's fee.

Claimant thereafter filed a motion for reconsideration of the administrative law judge's Decision on Motion for Reconsideration. In his Decision on Claimant's Motion for Reconsideration, the administrative law judge rejected claimant's contention that the applicability of Section 7(d) was a new issue which had not been previously raised. Specifically, the administrative law judge found that this issue was a necessary and integral component of claimant's claim for medical benefits. The administrative law judge reaffirmed his finding that claimant had not satisfied the mandatory requirements of Section 7(d) of the Act, and accordingly, denied claimant's motion.

On appeal, claimant challenges the administrative law judge's denial of reimbursement for medical expenses as contained in the Decision on Claimant's Motion for Reconsideration. Specifically, claimant asserts that the issue of compliance with the requirements of Section 7(d) was not raised at the hearing, and therefore, it was error on the part of the administrative law judge to rule on this issue subsequent to the 1999 Decision and Order without providing him with an opportunity to submit evidence relevant to this issue.[1] Employer responds,

[1] Claimant asserts that evidence with regard to his 1995 state workers' compensation case would have established that he requested authorization from employer for medical treatment. Claimant also contends that the Department of Labor's Memorandum of Informal Conference in 1997, and his potential testimony regarding negotiations with employer in which demands for authorization and payment for medical expenses were made, would establish compliance with Section 7(d) of the Act. *See* Claimant's Brief at 8.

urging affirmance. For the reasons set forth below, we vacate the administrative law judge's Decision on Claimant's Motion for Reconsideration and remand the case for reconsideration.

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." Thus, even where a claimant is not entitled to disability benefits, employer may still be liable for medical benefits for a work-related injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). In the instant case, the administrative law judge, in the 1999 Decision and Order, determined that employer was liable for the treatment rendered by Dr. Kucera and the West Marin Physical Therapy Group from September 15, 1988 through March 16, 1994, as those treatments were reasonable and necessary to treat the effects of claimant's exposure to cumulative trauma during his employment through September 15, 1988. However, in his subsequent Decision on Motion for Reconsideration, the administrative law judge agreed with employer's contention that the 1999 Decision and Order was deficient in failing to consider the requirements of Section 7(d) of the Act.[2] The administrative law judge then found that the evidence showed that claimant failed to request authorization from employer for the treatment rendered by Dr. Kucera and the West Marin Physical Therapy Group, and therefore, employer neither refused nor neglected to authorize such treatment. Further, the administrative law judge determined that no reports of such treatment were filed, and no request to the Secretary of Labor was made to excuse such failure. Accordingly, the administrative law judge concluded that claimant failed to meet the requirements of Section 7(d)(1) and (2) of the Act, 33 U.S.C. §907(d)(1, (2), and vacated his award of medical benefits. *See* Decision on Motion for Reconsideration at 2. In addition, the administrative law judge nullified the section of the 1999 Decision and Order wherein he found employer liable for claimant's reasonable attorney's fee, finding that employer's request for leave to respond to claimant's attorney's fee petition moot. *Id.* at 3 n.1. In his Decision on Claimant's Motion for Reconsideration, the administrative law judge rejected claimant's contention that a new issue was improperly raised, finding that Section 7(d) was a "necessary and integral component of claimant's claim for reimbursement of self-procured medical expenses," the issue of which was raised by claimant. *See*

[2] In his initial Pre-Hearing Statement, claimant listed "Section 7 medical expenses" as an issue for resolution. *See* Cl. Ex. K. SSA listed the "need for medical care" as an issue for resolution in its Pre-Hearing Statement. *See* SSA Ex. 5. Marine Terminals Corporation controverted the issue of "self-procured medicals." *See* MTC Ex. 1. Its Pre-Hearing Statement, however, is not contained in the record. In his opening statement at the hearing, counsel for employer raised the issues of Sections 12 and 13 statutes of limitations and responsible employer, but did not raise the issue of compliance with Section 7(d). *See* Tr. at 13-16.

Decision on Claimant's Motion for Reconsideration at 2.

Section 7(d) of the Act sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. The Board has held that Section 7(d)(1) 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 Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 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 he subsequently procured on his own initiative was reasonable and necessary for his injury in order to be entitled to such treatment at employer's expense. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). An employer must consent to a change of physician where claimant has been referred by his treating physician to a specialist skilled in treating claimant's injury. *See generally Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992)(Smith, J., dissenting on other grounds); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988); 20 C.F.R. §702.406(a). However, where a claimant receives medical treatment from his initial choice of physician, and employer does not refuse further treatment from that authorized physician, employer is not required to consent to a change of physicians where the treatment sought is duplicative of the treatment he was already receiving. *See Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); *Senegal*, 21 BRBS at 8. Based on these principles, we hold that Section 7(d) concerns issues of fact and law that are separate and distinct from the request for medical benefits itself, and thus, the issue of compliance with Section 7(d) is not raised automatically by a claim for medical benefits. Accordingly, any consideration of the issue of Section 7(d) compliance by the administrative law judge must be in accordance with regulatory procedural standards.

In this regard, Section 702.336(a) of the regulations, 20 C.F.R. §702.336(a), allows the administrative law judge to expand the hearing to include new issues which arise during the course of the hearing. Section 702.336(b), 20 C.F.R. §702.336(b), permits the administrative law judge to consider "[a]t any time prior to the filing of the compensation order in the case," any new issue upon the application of a party, but requires that he give the parties "not less than 10 days' notice of the

hearing on such new issue."[3] *See generally Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984). In the instant case, the issue of Section 7(d) compliance was not raised by employer at the hearing below, nor was it raised by employer in its post-hearing brief. Rather, the administrative law judge considered employer's argument that claimant did not comply with the requirements of Section 7(d) after he had issued his 1999 Decision and Order in which he had awarded medical expenses, without providing claimant the opportunity to submit evidence relevant to this issue. Inasmuch as the administrative law judge determined, subsequent to the hearing, that Section 7(d) was an issue in this case, the parties were entitled to reasonable notice and an opportunity to submit evidence on this issue. *See Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999); *Klubnikin*, 16 BRBS at 182. We therefore remand the case for the administrative law judge to re-open the record in order to reconsider the issue of Section 7(d) compliance.[4] If, on

[3] Section 702.350 of the regulations, 20 C.F.R. §702.350, provides that a compensation order becomes final when filed in the office of the district director, unless a party timely institutes proceedings for suspension or setting aside of the order.

[4] On remand, the administrative law judge does not have the authority to consider whether claimant is excused from complying with the requirements of Section 7(d)(2). Under Section 7(d)(2), an employer is not liable for medical expenses unless, within 10 days following the first

remand, the administrative law judge determines that employer is liable for the treatment rendered by Dr. Kucera and the West Marin Physical Therapy Group, the administrative law must reconsider the issue of claimant's attorney's fee.

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treatment, the physician rendering such treatment provides the employer with a report of that treatment. The Secretary may excuse the failure to comply with the provisions of this section in the interest of justice. 33 U.S.C. §907(d)(2)(1994); *see 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); *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in pertinent part*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991); *Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997); 20 C.F.R. §702.422. The Board has held that 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 his delegates, the district directors. *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994)(McGranery, J., dissenting); *see also Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994)(McGranery, J., dissenting). Thus, the district director, not the administrative law judge, has the authority to determine whether non-compliance with Section 7(d)(2) should be excused. *See Toyer*, 28 BRBS at 353. If the administrative law judge finds that claimant requested authorization on remand, then the case must be remanded to the district director for consideration of Section 7(d)(2).

Accordingly, the administrative law judge's Decision on Claimant's Motion for Reconsideration is vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge