BRB No. 01-0570

DANIEL PATILLO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: March 21, 2002
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order of Dismissal and Order Granting Respondent's Motion for Summary Judgment of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Daniel C. Patillo, Saginaw, Michigan, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order of Dismissal and Order Granting Respondent's Motion for Summary Judgment (2000-LHC-0237) of Administrative Law Judge Daniel J. Roketenetz 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 by a *pro se* claimant, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed.

Claimant was injured during the course of his employment with Houston Ship, Incorporated, when he fell approximately 30 feet while working in the hold of a ship. He sustained serious injuries to his head, back, arm and leg, and treatment included four surgeries on his inner ear and psychological counseling. In a Decision and Order dated

December 1, 1995, Administrative Law Judge Alfred Lindeman awarded claimant permanent total disability and medical benefits, holding claimant's uninsured employer and its officers jointly and severally liable for claimant's benefits. Thereafter, he denied employer's motion for reconsideration. These decisions were not appealed. Because employer filed for bankruptcy, the Secretary of Labor assumed liability for claimant's benefits, and payments were made out of the Special Fund. *See* 33 U.S.C. §918(b); 20 C.F.R. §702.145(f).

In 1998, claimant sought to increase the benefits he was receiving and obtain reimbursement for certain medical, dental and legal expenses, so he filed a claim against the Director, Office of Workers' Compensation Programs (the Director). Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) was assigned the case, and he granted the Director's motion for summary judgment. He found that Judge Lindeman did not make a mistake in calculating claimant's average weekly wage, as the record supports Judge Lindeman's finding that claimant was a five-day per week worker and not a seven-day worker. Accordingly, the administrative law judge concluded there was no mistake in the determination of a fact warranting modification pursuant to Section 22 of the Act, 33 U.S.C. §922. Order of Dismissal at 4-5. Additionally, the administrative law judge found that the Special Fund is not liable for the costs of a massage therapist, which he termed an "alternative" treatment excluded from coverage by Section 702.404 of the regulations, 20 C.F.R. §702.404. He also found that the Director reimbursed claimant over $12,000 in out-of-pocket medical expenses and that the Special Fund has been paying for claimant's chiropractic treatment. Order of Dismissal at 5-6. The administrative law judge rejected claimant's post-hearing request for dental costs, finding there is no evidence to establish that claimant's work-related injury requires dental treatment, and he denied reimbursement of legal fees and expenses, finding that only an attorney, and not claimant, can request legal fees. The administrative law judge also found that there is no credible evidence of unnecessary delay in processing claimant's claim, and any delay there may have been was not deliberate or malicious; thus, there is no evidence to support claimant's claim for compensation for a processing delay. Nor did he find any evidence to support claimant's claim of discrimination, racial or otherwise, in this case.[1] Order of Dismissal at 6-8. Claimant appeals. The Director has not responded.

[1]Claimant testified that he was discriminated against because his claim took too long to process, his attorneys failed to get him all the medical benefits he sought and they were somehow controlled by the Department of Labor.

First, claimant argues that the administrative law judge improperly granted the Director's motion for summary judgment. It is proper to grant a motion for summary decision if there are no factual disputes, when all reasonable inferences are made in favor of the non-moving party.[2] *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §18.41(a). The party opposing a motion for summary judgment, in this instance, claimant, must "set forth specific facts showing that there is a genuine issue of fact for the hearing" in order to defeat the motion. 29 C.F.R. §18.40(c). Because the administrative law judge addressed each issue individually to determine whether the Director was entitled to summary judgment for that issue, we shall do likewise. Thus, we will consider each argument to ascertain whether claimant established a genuine issue of fact, viewing all inferences in the light most favorable to claimant.

Claimant contends modification of Judge Lindeman's award is warranted. He argues that Judge Lindeman made a mistake in the determination of claimant's average weekly wage. Section 22 of the Act permits the modification of a final award if the party seeking to alter the award can establish either a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo,* 515 U.S. 291, 30 BRBS 1(CRT) (1995). If a mistake in the determination of a fact is asserted, the administrative law judge has great discretion to correct any mistakes of fact and may consider wholly new evidence, cumulative evidence, or may further reflect on evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). In this case, claimant does not allege a change of conditions but only that there was a mistake in calculating his average weekly wage. The record reveals that Judge Lindeman fully considered claimant's assertion at the original hearing that he worked a seven-day week and discredited claimant's testimony on this matter. Judge Lindeman found that the most reasonable approximation of claimant's wage was based on a five-day work-week pursuant to claimant's claim for compensation form dated December 16, 1988. Lindeman Dec. at 3; Admin. Ex. 2. On modification, Judge Roketenetz possessed broad discretion in reviewing evidence and determining whether a mistake has been made. In this case, he stated that, other than bare assertions, claimant has offered no additional or new evidence to support his claim that his average weekly wage should be based on a seven-day work-week. Accordingly, Judge Roketenetz reaffirmed Judge Lindeman's credibility determinations, as is within his

[2]Although claimant filed a cross-motion for summary judgment, the administrative law judge addressed the Director's motion first and viewed the evidence in the light most favorable to claimant. Order of Dismissal at 3-4.

discretion. Therefore, it was rational for Judge Roketenetz to find that Judge Lindeman made no mistake in calculating claimant's average weekly wage. As claimant has not shown any mistake in the determination of a fact, Section 22 does not apply and his award cannot be modified. As there is no genuine issue of fact remaining with regard to claimant's average weekly wage, the administrative law judge properly granted the Director's motion for summary judgment on this issue. *Brockington*, 903 F.2d 1523; 29 C.F.R. §18.40(c).

Claimant also asserts that the administrative law judge erred in denying him additional medical benefits and reimbursement of his out-of-pocket medical expenses. Claimant specifically argues that he is entitled to coverage of his chiropractic care, massage therapy as recommended by his chiropractor, and recommended dental work. Section 7 of the Act, 33 U.S.C. §907, authorizes coverage of medical expenses for the reasonable and necessary treatment of a claimant's work-related injury.[3] The claimant has the burden of establishing the elements of a claim for medical benefits. *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996).

Claimant contends he is entitled to additional medical benefits to cover the costs of Dr. Malochleb's chiropractic care. However, Dr. Malochleb testified that she has been reimbursed, and is continuing to be reimbursed, for claimant's treatment. Tr. at 33. Moreover, the administrative law judge found that the Special Fund reimbursed claimant $12,827.68 on August 13, 2000, for medical expenses, including chiropractic care, which claimant incurred. Order of Dismissal at 5. Consequently, the administrative law judge found there is no evidence to support claimant's assertion that the Special Fund has not paid

[3]Section 7(a) of the Act, 33 U.S.C. §907(a), states:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

for claimant's chiropractic care.[4] In light of this evidence, we affirm the administrative law judge's finding and his decision to grant the Director's motion for summary judgment on this issue.

[4]Although Dr. Malochleb is authorized to treat claimant's condition, chiropractors are considered "physicians" under the Act "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation. . . ." 20 C.F.R. §702.404; *see Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (1998). Nevertheless, Dr. Malochleb does not dispute the payments she has received.

Claimant next alleges he is entitled to have the Special Fund pay for his massage therapy, which is recommended by his chiropractor. Dr. Malochleb testified that she recommended massage therapy, including cranial sacral therapy, for claimant's work-related condition because his muscles are often tense or immobile when he arrives for spinal manipulation. She stated that he is not improving as quickly as she would like and that the massage therapy would help relax claimant's muscles thereby holding the spinal adjustments better, so claimant's need for chiropractic care would be reduced in the long term.[5] Tr. at 34-36, 38-39. Dr. Malochleb further testified that the massage therapy would not be performed by her but would be done by a trained massage therapist whose hourly fees would be lower than hers. *Id.* at 37.

The administrative law judge, without discussion, determined that massage therapy is "a type of alternative treatment falling within 20 C.F.R. §702.404 and reimbursement of such is prohibited under the regulations." Order of Dismissal at 6. Section 702.404 of the regulations defines the term "physician" and specifically limits that term to: "doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners. . . ." 20 C.F.R. §702.404. Specifically excluded are: "Naturopaths, faith healers, and other practitioners of the healing arts which are not listed herein. . . ." *Id.* As the administrative law judge stated, massage therapists are not among those practitioners included as "physicians." However, medical care is not limited to only those services performed by a physician. Section 702.401(a) defines "medical care" as including:

> medical, surgical, and *other attendance or treatment*, nursing and hospital services, laboratory, X-ray and *other technical services*, medicines, crutches, or other apparatus and prosthetic devices, and *any other medical service* or supply, including the reasonable and necessary cost of travel incident thereto, *which is recognized as appropriate by the medical profession for the care and treatment of the injury or disease.*

20 C.F.R. §702.401(a) (emphasis added). Thus, the Act covers a wide variety of services, including those performed by a non-physician under the treating doctor's supervision.

[5]As of the date of the hearing, claimant was receiving chiropractic treatments four times per week. Tr. at 36.

Among commonly included treatment is physical therapy recommended by a claimant's physician. *See Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (1998);[6] *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). In *Barbour*, the Board reversed the administrative law judge's denial of the claim for medical expenses for biofeedback therapy. The Board held that the treating physician's prescription for biofeedback therapy was sufficient to demonstrate that such therapy was appropriate for the claimant's injury, and it was unnecessary for the claimant to show that the treatment was "medically accepted." *Barbour*, 16 BRBS at 302-303. Moreover, the fact that a "biofeedback therapist" is not included as a "physician" played no role in the Board's decision; rather, what was important was that the course of therapy was to be followed by the claimant's physician. *Id.* at 303.

[6]In *Bang*, based on the plain language of Section 702.404 which limits the reimbursable services of a chiropractor to those involving manual manipulation of the spine, the Board held that the employer was not liable for the cost of physical therapy performed by the chiropractor. It acknowledged, however, the incongruity of the situation in that a physical therapist or other non-physician medical professional would be reimbursed for prescribed physical therapy services. *Bang*, 32 BRBS at 185. Indeed, physical therapy is routinely a part of the treatment of claimants under the Act. *See generally Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000); *Diosdado v. Newpark Shipping & Repair, Inc.*, 31 BRBS 70 (1997); *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24, 25 n.1 (1993).

In this case, claimant's physician, a chiropractor, recommended massage therapy, including cranial sacral massage, as treatment for claimant's work-related injury. Tr. at 34-36. Testimony reveals that this treatment would be performed by a massage therapist and progress would be followed by the chiropractor.[7] Tr. at 37-38. Because the Act covers "any other medical service or supply . . . which is recognized as appropriate by the medical profession for the care and treatment of the injury or disease[,]" 20 C.F.R. §702.401(a), and the massage therapy at issue here was prescribed by a treating physician, we hold that the administrative law judge erred in granting summary decision on the ground that the massage treatment is an "alternative treatment" for which reimbursement is prohibited under the Act. Rather, there is a genuine issue of fact as to whether the massage therapy recommended by Dr. Malochleb is indeed an "alternative treatment," and if not, if it is reasonable and necessary for the treatment of claimant's work injury.[8] Accordingly, we vacate the administrative law judge's grant of summary judgment on this issue and his denial of medical benefits for massage therapy, and we remand the case for further consideration of this matter.

Claimant also seeks reversal of the administrative law judge's denial of dental expenses. While dental treatment is authorized under Section 7 of the Act and Section 702.404 of the implementing regulations, such treatment must be necessitated by the work injury. In this case, the administrative law judge found that claimant has not shown that dental work is either reasonable or necessary for treatment of the injuries sustained in 1988. While he acknowledged that the evidence demonstrates there was an injury to claimant's jaw in 1988, he found there is nothing in the record between 1988 and 2000 regarding any

[7]In a "Declaration" by District Director Thomas Hunter regarding the compensability of the medical services claimed, the District Director states that one of the massage therapists is an "LMT," a licensed massage therapist, and the other is an "LPN," a licensed practical nurse. EX 5.

[8]We note that the record indicates that when claimant lived in Oregon, a medical doctor, Dr. Rung, prescribed craniosacral therapy for claimant. EX 2. This therapy, along with other physical therapy modalities, was performed by a physical therapist at the Corvallis Clinic. *Id.*

damage to claimant's teeth that would warrant the recommended dental work which includes, among other things, a root canal, a crown, and replacement teeth. Order of Dismissal at 6; Cl's Post-Hearing "List" at Exh. A. Because the request for this treatment was made twelve years after the work-related injury with no previous evidence of tooth damage, the administrative law judge rationally found that claimant has not established the necessity of this treatment. *See generally Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001). We, therefore, affirm the grant of summary judgment and the denial of dental expenses.

Claimant next requests reimbursement of over $100,000 for payments he made to various attorneys for legal services rendered as well as his own out-of-pocket expenses in pursuing his civil and administrative claims. In support of this request, claimant submits only his testimony as to the amounts he has paid. The administrative law judge denied reimbursement of any money spent on legal services, stating that some of the expenses are not compensable and that the remaining legal fees may only be requested by claimant's legal representative and not by claimant himself. 20 C.F.R. §702.132; Order of Dismissal at 6-7. We affirm the grant of summary judgment and the determination that claimant is not entitled to reimbursement of the alleged legal expenses. Section 28, 33 U.S.C. §928, provides for an attorney's fee when the attorney is successful in obtaining benefits under the Act for the claimant. Section 28 is not applicable to fees generated by claimant's attorneys in civil litigation or under some other statute, and, in any event, it is the attorney, and not the claimant, who is to file a petition for an attorney's fee. 33 U.S.C. §928; 20 C.F.R. §702.132. To the extent any of the requested reimbursement is to cover claimant's efforts on his own behalf in pursuing his claim under the Act, we affirm the denial of a fee, as a *pro se* claimant is not entitled to an attorney's fee. *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001). Moreover, the Special Fund, the only possible source of reimbursement in this case, cannot be held liable for an attorney's fee under either Section 28 or Section 26 of the Act. 33 U.S.C. §§926, 928; *Director, OWCP v. Robertson*, 625 F.2d 873, 12 BRBS 550 (9th Cir. 1980); *Terrell v. Washington Metropolitan Area Transit Authority*, 34 BRBS 1 (2000). As claimant has not demonstrated a genuine issue of fact, we affirm the administrative law judge's grant of summary judgment on this issue and his denial of an attorney's fee.

Finally, claimant asserts that he has suffered discrimination, both racial and otherwise, during the course of the administrative process, and he seeks to invoke Section 49 of the Act, 33 U.S.C. §948a, in this regard. The administrative law judge rejected the contention, finding no evidence to support the allegations. The administrative law judge's finding is supported by the record. Further, Section 49 of the Act prohibits *an employer* from discharging or discriminating against an employee based on his involvement in a claim under the Act, and if the employee can show he is the victim of such discrimination, he is entitled to reinstatement and back wages. 33 U.S.C. §948a. None of the requirements for invoking Section 49 is satisfied in this case, as claimant does not allege discrimination by employer

due to his filing of a claim, and Section 49 does not apply to the Director, OWCP. *Id.*; 20 C.F.R. §702.271. As the record is devoid of evidence of discrimination, Section 49 is inapplicable to this case. We affirm the administrative law judge's findings, and we hold that he properly granted the Director's motion for summary judgment on this issue as claimant has shown no genuine factual dispute.[9]

[9]Claimant also contends he is entitled to reimbursement from the Department of Labor for unnecessary delay in processing his case. The administrative law judge found there was no credible evidence that the processing of claimant's claim was unreasonably delayed. He also found that if there was a delay, as there is in many cases, the delay was not deliberate, willful or malicious, and claimant is not entitled to recompense. Order of Dismissal at 7. The administrative law judge's determination is rational, as there is nothing in the Act which allows a claimant to be compensated due to a delay in the processing of his claim. The Act provides for compensation only for work-related injuries. 33 U.S.C. §901 *et seq.*

Accordingly, the administrative law judge's denial of medical benefits for massage therapy is vacated, and the case is remanded for further consideration of that issue consistent with this opinion. In all other respects, the Order of Dismissal and Order Granting Respondent's Motion for Summary Judgment is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge