BRB No. 10-0618

LUGENE SIMS, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES GULF, INCORPORATED	)	DATE ISSUED: 03/31/2011
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-In-Interest	)	DECISION and ORDER

Appeal of the Order Denying Relief Sought By Employer and Cancelling Formal Hearing of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr., New Orleans, Louisiana, for claimant.

James M. Mesnard (Seyfarth Shaw, L.L.P.), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Order Denying Relief Sought By Employer and Cancelling Formal Hearing (2010-LHC-1183) of Administrative Law Judge C. Richard Avery 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 administrative law judge's findings of fact and conclusions of law if they 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).

Claimant injured his shoulder, arm, ribs, neck, and back during the course of his employment with employer on January 12, 1987. Employer paid temporary total disability benefits and medical benefits. Administrative Law Judge Mills heard the claim for additional benefits and awarded claimant on-going permanent partial disability benefits in a decision issued in 1989. Stip. 3. That decision was not appealed.

In March 2007, claimant was examined by Dr. Steiner at employer's request to determine the need for further therapy. On January 31, 2008, Dr. Steiner again examined claimant and agreed with claimant's treating physician, Dr. Adatto, that claimant needed surgery on his neck. Following the surgery, Dr. Steiner re-examined claimant on July 29, 2008, to monitor his progress. Employer next scheduled an examination to monitor claimant's condition on March 31, 2010, with Dr. Katz. Claimant objected on the ground that employer had chosen Dr. Steiner as its expert and could not change physicians, and he refused to attend the examination. Following a letter from the claims examiner agreeing with claimant's position, employer requested this case be transferred to the Office of Administrative Law Judges (OALJ). The administrative law judge found that claimant did not unreasonably refuse to submit to an examination by Dr. Katz, a doctor of employer's choosing. The administrative law judge, therefore, found that claimant's benefits are not to be suspended pursuant to Section 7(d)(4), 33 U.S.C. §907(d)(4). Employer appeals, and claimant responds, urging affirmance.[1] Employer contends the administrative law judge erred in failing to suspend claimant's benefits under Section 7(d)(4) and concluding that employer is limited to its chosen specialist absent a showing of good cause for a change in physicians.

On March 8, 2010, employer informed claimant it had scheduled an appointment for claimant with Dr. Katz. Claimant stated he would not attend the appointment on the basis that employer had already selected Dr. Steiner as its expert in orthopedics. On March 15, 2010, claimant sent a letter to the claims examiner asking him to clarify the position of the Office of Workers' Compensation Programs (OWCP) on employer's

[1]After employer filed its reply brief, claimant filed an "Opposition to Employer's Reply Brief." In response, employer filed a Motion to Strike claimant's opposition brief, asserting that the Board's rules do not permit filing a "sur reply," 20 C.F.R. §§802.211-802.213. Claimant thereafter filed an opposition to the motion to strike. We deny employer's motion to strike. 20 C.F.R. §802.215.

request for an examination or to schedule an informal conference. On March 16, 2010, employer submitted an opposition letter to the claims examiner, arguing there is nothing in the Act or regulations limiting an employer to its initial choice of physician in a specialty. The claims examiner wrote a letter to the parties stating that an employer is limited to its initial chosen specialist, and as employer had already chosen Dr. Steiner as its orthopedist, who remains available, there was no reasonable cause to grant a change of physicians. Therefore, the claims examiner stated that claimant was not required to attend the appointment with Dr. Katz.[2] Stips. 9-13; Exhs. 6-9 of Stips.

Employer filed a pre-hearing statement on March 26, 2010, asserting that claimant unreasonably refused to attend the examination with Dr. Katz and was in violation of Section 7(d)(4) of the Act. The district director transferred the case to the OALJ on March 31, 2010. On June 9, 2010, employer again scheduled an examination with Dr. Katz for July 28, 2010, and, on June 10, 2010, it filed a motion with the administrative law judge to compel claimant's attendance at the appointment. Claimant stated he would not keep the scheduled appointment with Dr. Katz but would be willing to attend an examination conducted by Dr. Steiner. Stips. 14-16; Exh. 10 of Stips.

On June 22, 2010, after this case had been transferred to the OALJ, claimant sent a general letter to the district director, making no reference to this particular case or employer, seeking the district director's opinion on the matter of an employer's seeking to have a claimant examined by a new physician. Stip. 17; Exh. 11 of Stips. The district director responded to claimant's counsel, also in a general letter. He stated that it is "the position of the New Orleans office of the OWCP that 20 C.F.R. §702.406, which requires employees to obtain the consent of the employer or the OWCP to a change in treating physicians, also applies to examinations scheduled by employers" as, the absence of a

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[2]The claims examiner stated:

> It is the position of the Department of Labor that the employer is entitled to an evaluation by a specialist, but the evaluations are limited to the specialist chosen by the employer in a certain specialty. In this particular case the employer has used Dr. Robert Steiner as its expert in the field of orthopedics and should not be entitled to change physicians without reasonable cause. Since no cause has been shown, the employee shall not be required to attend the evaluation by Dr. Katz.

Exh. 9 of Stips.

policy could lead to "doctor shopping."[3] Stip. 18; Exh. 12 of Stips. On June 24, 2010, the administrative law judge and the parties conferred by phone because the administrative law judge initially questioned his authority "to review on appeal the District Director's ruling denying Employer the relief sought." Order at 1. They agreed the parties would submit stipulations and attachments thereto to create a formal record. Upon receiving the stipulations,[4] the administrative law judge issued a short decision denying employer's requested relief pursuant to Section 7(d)(4) and cancelling the formal hearing.

The issues employer seeks to have addressed concern the propriety of the district director's "policy" regarding examinations by doctors selected by employers and whether claimant's benefits should have been suspended pursuant to Section 7(d)(4). As we shall explain, however, only one of those issues is properly before the Board.

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[3]The district director relied on Section 7(b) of the Act and Section 702.407 of the regulations which provide that the district directors are responsible for the active supervision of a claimant's medical care. He emphasized the portion of the regulation which states that the supervision includes "the determination of whether a change of physicians, hospitals, or other persons or locales providing treatment should be made[.]" 20 C.F.R. §702.407(c); Exh. 12 of Stips. Thereafter, the district director stated that the issue raised by the parties relates to the change of physicians and it is "our policy that both the employer/carrier and the claimant follow the guidelines set out in 20 C.F.R. §702.406 [which provides that a change will not be made without prior written consent and a showing of good cause]." Exh. 12 of Stips. He concluded:

> Based in large part on the Act and its implementing Regulations, we limit the Employer as well as the Claimant to 1 choice of physician in each specialty needed for the proper evaluation and treatment of a claimant's injury or condition. We do not allow either the claimant or the employer/carrier to select multiple physicians in the same specialty to minimize "doctor shopping" . . . . We will allow a change of physicians within a particular specialty group when there is a showing of good cause. The most common basis for this type of change request being granted is a showing that the original physician retired or moved out of the area.

Id.

[4]Among the stipulations are that the claims examiner and the district director wrote the letters described above. Stips. 13, 18; Exhs. to Stips. 9, 12.

It is axiomatic that only the Secretary, through the district directors, is authorized by statute to supervise a claimant's medical care. 33 U.S.C. §907(b); *L.D. [Dale] v. Northrop Grumman Ship Systems, Inc.*, 42 BRBS 1, *recon. denied*, 42 BRBS 46 (2008); *Jackson v. Universal Maritime Serv. Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring); 20 C.F.R. §702.407. Section 702.406 gives the district director the authority to consent to a claimant's request to change physicians as well as to order a change of physicians "when such a change is found to be necessary or desirable. . . ." 20 C.F.R. §702.406; *see Jackson*, 31 BRBS 103. Section 702.407 mandates active supervision of medical care by the district director, including: receiving periodic medical reports, determining "the necessity, character and sufficiency of any medical care furnished," determining whether a change of physicians or hospitals is warranted, and overseeing the "further evaluation of medical questions arising in any case under the Act, with respect to the nature and extent of the covered injury, and the medical care required therefore." 20 C.F.R. §702.407; *see Potter v. Electric Boat Corp.*, 41 BRBS 69 (2007) (choice of pharmacy is a discretionary question for the district director); *see also* 33 U.S.C. §907(d)(2); *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting) (only the Secretary has the authority to excuse a physician's failure to file a timely report). The district director also has the authority to appoint a qualified, independent, physician to examine the claimant. 20 C.F.R. §§702.408 – 702.410.

To the contrary, only the administrative law judge has the authority to address contested factual questions regarding medical care, including such issues as the necessity of and the employer's liability for medical care which may include: whether the claimant requested authorization for medical treatment, whether the employer refused medical treatment, and whether the treatment obtained or prescribed was necessary and reasonable. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *compare with McCurley v. Kiewest Co.*, 22 BRBS 115 (1989) (the administrative law judge has the authority to order payment for past and future medical expenses upon finding that there has been a work-related injury but he may not order ongoing treatment at a particular pain clinic).

Section 7(d)(4) allows either the administrative law judge or the district director to render a decision on whether compensation should be suspended due to a claimant's refusal to be examined by an employer's chosen physician. *See also* 20 C.F.R. §702.410(c). Section 7(d)(4) provides:

> If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal

> continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

Thus, while the district director is authorized to supervise medical examinations and make discretionary decisions, this section gives authority to address the discretionary issue of the reasonableness of a refusal to submit to an examination to both the administrative law judge and the district director. *See generally Dale*, 42 BRBS 1; *B.C. [Casbon] v. Int'l Marine Terminals*, 41 BRBS 101 (2007).

As the Act grants the administrative law judge the authority to address Section 7(d)(4) issues, and as this case was properly transferred to the administrative law judge's office upon employer's request, the issue of whether claimant's benefits should be suspended under Section 7(d)(4) was properly before the administrative law judge. *See generally Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994) (non-discretionary duty to transfer case to OALJ). In addressing this issue, the administrative law judge acknowledged the parties' stipulations and the attachments thereto as the evidence on which he would base his decision. The administrative law judge found that claimant did not unreasonably refuse to submit to an examination by Dr. Katz. The administrative law judge therefore declined to suspend claimant's benefits. We affirm the administrative law judge's decision.

Section 7(d)(4) requires the administrative law judge to make a dual inquiry: 1) whether the claimant's refusal to undergo a medical examination is unreasonable; and 2) if so, whether circumstances justified the claimant's refusal. *Casbon*, 41 BRBS 101; *Malone v. Int'l Terminal Operating Co.*, 29 BRBS 109 (1995); *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979) (Smith, J., dissenting); *see generally Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004). In this case, based on the stipulations presented to him, the administrative law judge rationally found that claimant's refusal to see Dr. Katz was not unreasonable, and, on appeal, employer has not demonstrated otherwise. The administrative law judge agreed with claimant's position that because Dr. Steiner remained capable and available, claimant did not unreasonably refuse to be seen by a second orthopedist selected by employer. Moreover, the administrative law judge reasonably could view employer's motion as "doctor shopping." *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995) (administrative law judge's reasonable inferences must be affirmed). Consequently, the administrative law judge did not err in rejecting employer's request for a suspension of benefits under Section 7(d)(4), and we affirm his decision.[5]

[5]We reject employer's argument that the administrative law judge's decision does not comport with the Administrative Procedure Act. The underlying facts were set out in the parties' stipulations, and the administrative law judge provided a rational reason for

See generally Methe, 396 F.3d 601, 38 BRBS 99(CRT); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

The question of the validity of the district director's "one-doctor" policy is not properly before the Board. The policy was issued pursuant to the district director's authority to supervise a claimant's medical care, as it goes to the character and sufficiency of such care. *See* 20 C.F.R. §702.407(d) (district director oversees the "further evaluation of medical questions arising in any case under the Act"). The administrative law judge has no authority to render a decision on a discretionary action of the district director. Issues involving discretionary actions of the district director must be directly appealed to the Board. *See, e.g., General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000); *Potter*, 41 BRBS 69; *Jackson*, 31 BRBS 103. In this case, employer did not appeal an order of the district director, and, in any event, no "orders" were issued by the district director.[6] Therefore, we decline to address the validity of the district director's policy.

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finding that Section 7(d)(4) is inapplicable. *See generally James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). Further, although the administrative law judge did not address employer's motion to compel, his decision makes it obvious that the motion was denied.

[6]The claims examiner issued a letter stating his opinion regarding the one-doctor/change-of-physician issue involved in this case. The Board does not take appeals from letters issued by the claims examiner. *See Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005) (Board noted that claimant cannot appeal claims examiner's recommendation because the district director did not issue an order embodying the recommendation). The district director issued a general letter stating his opinion of the policy, with no references to this particular case, and his letter was issued after the case was referred to the OALJ. As the case was not before the district director at the time the district director issued his opinion letter, it cannot be deemed an order relative to Section 7(d)(4), because he lacked jurisdiction to issue an order at the time. *See Dale*, 42 BRBS 1.

Accordingly, the administrative law judge's Order Denying Relief Sought By Employer and Cancelling Formal Hearing is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge