BRB No. 13-0322

MONIQUE SHIMABUKURO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHUGACH MANAGEMENT SERVICES, INCORPORATED	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	DATE ISSUED: Mar. 10, 2014
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Compensation Order and the Decision Re: Claimant's Motion for Reconsideration of R. Todd Bruininks, District Director, United States Department of Labor.

Patrick B. Streb (Weltin, Streb & Weltin, LLP), Oakland, California, for claimant.

Keith L. Flicker and Daniel J. Louis (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Compensation Order and the Decision Re: Claimant's Motion for Reconsideration (OWCP No. 15-052094) of District Director R. Todd Bruininks 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the determinations of the district director unless the challenging party shows them to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Jenkins v. Puerto Rico Marine, Inc.*, 36 BRBS 1 (2002).

Claimant, originally from North Las Vegas, Nevada, began working for employer on August 28, 2009, on Kwajalein Atoll in the Republic of the Marshall Islands. On October 10, 2009, claimant injured her right ankle. Claimant initially received medical treatment on Kwajalein but was referred on January 22, 2010, to Honolulu, Hawaii, for evaluation and probable surgical repair. Her stay was anticipated to be short; however, medical complications ensued. Claimant underwent two surgeries to repair the right foot Achilles tendon rupture, and she underwent extensive physical therapy. Although claimant initially stayed with friends in Honolulu, she later moved among apartments and hotels, due to her prolonged recovery.

On January 21, 2011, the district director convened an informal conference regarding disputes over claimant's medical treatment and the payment of claimant's disability benefits. In his January 21, 2011 memorandum of the informal conference, the district director, *inter alia*, recommended that employer pay: 1) for customized orthopedic shoes; 2) the federal per diem rates for Honolulu in the amount of $177 for lodging and $85 for meals; and 3) the outstanding subsistence amounts. Emp. Br. ex G. The recommendation for the per diems was based on the facts that claimant required medical care that could not be provided on Kwajalein, and that claimant's stay in Honolulu was expected to be relatively short and to conclude with claimant's return to work on Kwajalein. *See* 33 U.S.C. §907(a); 20 C.F.R. §702.401(a). Employer controverted the recommendation, and on March 2, 2011, the district director issued a compensation order pursuant to Section 7, 33 U.S.C. §907, ordering that employer pay claimant's per diem until such time as her doctor released her to return to work on Kwajalein. Emp. Br. ex K at 4. Employer subsequently paid claimant according to the terms of the district director's order. However, employer later ceased making the per diem payments, and claimant sought a default order from the district director. *See* 33 U.S.C. §918(a). In response, employer sought to terminate its liability for the per diem payments on the ground that they were no longer necessary.

In an Order dated February 12, 2013, the district director terminated employer's liability for claimant's lodging and subsistence as of September 30, 2012. Specifically, the district director found it was no longer necessary that claimant be treated in Honolulu, as her employment on Kwajalein had been terminated and her return to work there thus was no longer imminent. He further found that there were no factual disputes as to the work-relatedness of claimant's condition, the status of her employment, or the availability in Nevada of appropriate medical professionals to treat claimant's injury. Claimant moved for reconsideration, and the district director denied the motion on March 19, 2013, rejecting claimant's contention that there were disputed issues of fact that precluded his issuing the order. Emp. Br. ex P. Claimant appeals the district director's orders.

On appeal, claimant contends the district director had no authority to issue the February 2013 Compensation Order because there were disputed issues of fact requiring that the case be transferred to an administrative law judge. Claimant further contends the district director improperly terminated benefits retroactively as of September 30, 2012. Employer responds urging affirmance and argues, in the alternative, that if the district director did not have the authority to issue the February 2013 Order, then he did not have the authority to issue an Order in March 2011 in the first instance.[1] The Director, Office of Workers' Compensation Programs (OWCP) (the Director) responds, urging affirmance of the district director's order terminating the per diem payments. Claimant replied to the Director's response, and employer also filed a reply brief.

A claimant's entitlement to medical benefits is governed by Section 7 of the Act. 33 U.S.C. §907. The Secretary of Labor, through the district directors, is authorized to supervise a claimant's medical care. 33 U.S.C. §907(b);[2] *see, e.g., L.D.* [*Dale*] *v.*

[1] We decline to address employer's assertion that the district director did not have the authority to issue the March 2011 Order. No party appealed the district director's March 2011 Order, and it is now final. *See* 33 U.S.C. §921(a); 20 C.F.R. §§702.350, 802.205. Moreover, as the Director now asserts, employer acquiesced in the Order, made the per diem payments, and did not contest liability for the per diems when the case was before the Office of Administrative Law Judges on an ancillary issue. Therefore, the only issue properly before the Board is whether the district director had the authority to issue the February 2013 Order and to terminate per diem benefits as of September 30, 2012.

[2] Section 7(b) provides in relevant part:

> The Secretary shall actively supervise the medical care rendered to injured employees, shall require periodic reports as to the medical care being

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 702.407 of the regulations mandates active supervision of medical care by the district director, including his: receiving periodic medical reports; determining "the necessity, character and sufficiency of any medical care furnished or to be 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).

Notwithstanding this supervision by the district directors, administrative law judges have the authority to address contested factual questions regarding medical care. Such issues may include: the necessity of, and the employer's liability for, medical care; 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 for the treatment of the work injury. 33 U.S.C. §907(d); *see, e.g., Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005); *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). However, a party does not have an absolute right to a hearing before an administrative law judge on issues that are left to the discretion of the district director. *Healy Tibbits Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000).

Claimant contends the district director did not have the authority to terminate employer's liability for the per diem payments. Specifically, claimant argues that the issue of her entitlement to an employer-paid per diem should have been forwarded to an

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> rendered to injured employees, shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished, and may, on his own initiative or at the request of the employer, order a change of physicians or hospitals when in his judgment such change is desirable or necessary in the interest of the employee or where the charges exceed those prevailing within the community for the same or similar services or exceed the provider's customary charges.

33 U.S.C. §907(b).

administrative law judge because the parties disputed the following "facts:" 1) whether claimant could obtain necessary medical care in Las Vegas; 2) whether claimant may eventually be able to work on Kwajalein Atoll; and 3) whether OWCP vocational services would be delayed if she were forced to relocate. We reject claimant's contention that these facts are material to the district director's determination and thus require a hearing before an administrative law judge.

The district director's 2013 Order is based on the undisputed fact that claimant's return to Kwajalein was no longer imminent because her employment had been terminated. As the district director explained, he originally ordered per diem payments in March 2011 because it was necessary to have claimant's medical care performed in Hawaii given that she was expected to make a quick recovery and return to work on Kwajalein. However, claimant's recovery had taken longer than predicted and, two-and-a-half years after her injury, her return to Kwajalein was no longer possible because her employment had been terminated. As there was no longer any medical need to keep claimant in relatively close proximity to Kwajalein, the district director determined that it was no longer reasonable or necessary for employer to pay housing and meal per diems for claimant to stay in Honolulu.

With respect to the availability of appropriate medical care in Nevada, the district director properly observed that claimant is not obligated to move to Nevada or to any place in particular.[3] Employer remains liable for reasonable and necessary medical treatment wherever claimant resides. *See* 33 U.S.C. §907(a). Moreover, claimant's assertion that appropriate care may not be available in Nevada is unsupported by any evidence. In this regard, the district director noted that claimant had to travel to California for treatment that could not be provided in Honolulu; thus, claimant cannot assert that specialized care is available only in Honolulu. Finally, the district director stated that if claimant moved to a new locale, her vocational rehabilitation plan would be forwarded to a new counselor for the continuation of the existing plan. *See* 20 C.F.R. §702.501 *et seq.*

None of the "disputed facts" raised by claimant below, and again on appeal, formed the basis of the district director's decision. Thus, referral of the claim to an administrative law judge for the resolution of factual disputes is not required. *Potter*, 41 BRBS 69. Moreover, as claimant's return to Kwajalein is no longer anticipated due to the termination of her employment, claimant has not established that the district director abused his discretion in terminating the per diem payments when the reason such payments were necessitated ceased to exist. *See generally Jackson*, 31 BRBS 103.

[3] The district director observed that employer agreed it was contractually obligated to pay for claimant's return to her home of record. Order on Recon. at 5.

Therefore, we affirm the district director's finding that employer's liability for the per diem payments terminated.[4] 20 C.F.R. §702.407.

Claimant also contends the district director's order improperly terminated her compensation retroactively. In support, claimant cites *Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993). In *Parks*, the Board held that the administrative law judge's retroactive termination on modification of the claimant's compensation was not authorized by the Act, and it reversed the retroactive termination of the claimant's award. However, *Parks* was overruled by *Ravalli v. Pasha Maritime Services*, 36 BRBS 47, 51 n.7, *recon. denied*, 36 BRBS 91 (2002). In *Ravalli*, the Board held that "a modifying order terminating compensation based on a change in the claimant's physical and/or economic condition may be effective from the date of the change in condition," so long as the claimant is not required to repay benefits he received before the modifying order was issued. *Ravalli*, 36 BRBS at 50 (citing *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001)).

In this case, the district director issued an order in February 2013 formally terminating employer's obligation to pay per diems as of September 30, 2012. Prior to September 30, 2012, however, the district director issued an informal conference recommendation in July 2012 stating his intention to terminate the per diems, but that he would allow a 60-day transition period that kept the payments in effect until September 30. Employer agreed to the district director's recommendation. The district director's order in this case is consistent with *Ravalli*, as the district director terminated claimant's per diem payments effective 60 days after the date he determined her condition had changed. Therefore, the district director did not "retroactively" terminate benefits, and he acted within his discretion in terminating claimant's per diems as of September 30, 2012.[5] As claimant has not established that the district director's orders rest on an abuse

[4] Employer remains liable for medical benefits "for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. §907(a).

[5] We note that although the parties and the district director refer to the "change in condition" language of Section 22 of the Act, 33 U.S.C. §922, as the basis for the district director's decision, Section 22 is not applicable to medical benefits, as they are not "compensation" within the meaning of that section. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir.), *cert. denied*, 132 S.Ct. 757 (2011). As the termination of the per diem payments accords with law arising under Section 22, we need not address whether a retroactive termination of medical benefits and ancillary payments is permissible.

of his discretion or are not in accordance with law, we affirm the termination of employer's liability for the per diem payments.

Accordingly, the district director's Compensation Order and the Decision Re: Claimant's Motion for Reconsideration are 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