BRB No. 99-0879

KENNETH MORRIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES GULF, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Marcus J. Poulliard (Seelig, Cosse', Frischhertz & Poulliard), New Orleans, Louisiana, for claimant.

Kathleen K. Charvet (McGlinchey Stafford), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-1696) of Administrative Law 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). 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 worked as a longshoreman on the riverfront for 34 years before he was injured on July 31, 1989, when he fell down a flight of stairs on board a ship he was loading. He initially sought treatment from Dr. McLachlan for back pain, who diagnosed a lumbar sprain and treated him conservatively with medication and physical therapy. Claimant

attempted to return to work in August 1989, but had to leave after experiencing leg pain. Objective tests reviewed by Dr. McLachlan showed no disc herniation, but did show pre-existing degenerative changes consistent with a man of claimant's age and work history. Claimant was referred to Dr. Steiner in September 1989, who, after examining claimant and reviewing the medical records, noted that the radiological studies showed no disc herniation or nerve root impingement, and released claimant to return to his regular work. Claimant underwent an independent evaluation by Dr. Williams in July 1990, who found no objective evidence of residual injury, opined that claimant's spinal degenerative changes were not related to trauma, and saw no reason claimant could not return to any type of work for which he was qualified. Thereafter, claimant sought treatment with Dr. Whitecloud in July 1990. After a discogram was performed on claimant, Dr. Whitecloud diagnosed an annular tear at the L3-4 level, and discussed surgery as an option, which claimant rejected. Dr. Whitecloud continued claimant on medication and therapy, and released claimant for sedentary work. Employer voluntarily paid claimant temporary total disability, permanent partial disability and temporary partial disability compensation for various periods from 1989 to 1997, based on an average weekly wage of $190.92. Claimant subsequently sought permanent total disability compensation under the Act, contending that the injury he suffered on July 31, 1989 aggravated his pre-existing back condition.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the presumption pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer established rebuttal of the presumption based on the opinion of Dr. Williams. The administrative law judge thereafter credited the opinions of Drs. Steiner and Williams over the contrary opinions of Drs. McLachlan and Whitecloud, and concluded that claimant's work accident of July 31, 1989, caused a back strain which resolved as of November 8, 1991, and did not cause any aggravation of his underlying back condition. Thus, the administrative law judge awarded claimant temporary total disability compensation from July 31, 1989 through November 8, 1991, *see* 33 U.S.C. §908(b), based on an average weekly wage of $256.39. Next, the administrative law judge determined that employer is not liable for the medical treatment provided by Dr. Whitecloud under Section 7 of the Act, 33 U.S.C. §907, as it was not required to consent to the services of another orthopedic surgeon.

On appeal, claimant challenges the administrative law judge's denial of benefits, contending that the administrative law judge erred in finding rebuttal of the Section 20(a) presumption, and in failing to find that claimant's present back condition is causally related to his July 31, 1989, work accident. Claimant further challenges the administrative law judge's calculation of his average weekly wage, contending that the administrative law judge erred in utilizing Section 10(c) of the Act, 33 U.S.C. §910(c), to calculate claimant's average weekly wage, as opposed to Section 10(b) of the Act, 33 U.S.C. §910(b). Alternatively, claimant contends that the administrative law judge failed to properly apply Section 10(c) in calculating his average weekly wage. Lastly, claimant asserts that the administrative law

judge erred in denying reimbursement for the medical treatment rendered by Dr. Whitecloud, pursuant to Section 7 of the Act, 33 U.S.C. §907.

We first address claimant's contention that the administrative law judge erred in failing to find that claimant's present back condition is causally related to his July 31, 1989, work accident. In the instant case, the administrative law judge properly invoked the Section 20(a) presumption as he found that claimant suffered a harm and that an accident occurred which could have aggravated his pre-existing condition. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Upon invocation of the presumption, the burden shifts to employer to rebut it with substantial countervailing evidence. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established, with claimant bearing the burden of persuasion. *See, e.g., Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114 (CRT)(8th Cir. 1997), *cert. denied*, 118 S.Ct. 1301 (1998); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

Claimant contends that the administrative law judge applied an incorrect legal standard in finding rebuttal of the Section 20(a) presumption, as he stated in his discussion of this issue that claimant's degenerative condition could have caused his disability, a finding which is insufficient to establish rebuttal. Nevertheless, in finding that employer rebutted the presumption, the administrative law judge specifically relied on the opinion of Dr. Williams. Dr. Williams, an independent medical examiner who examined claimant in July 1990, found no objective evidence of residual injury, and he opined that claimant's spinal degenerative changes were not related to trauma. Emp. Ex. 10. As Dr. Williams's opinion is sufficient to establish rebuttal, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See Prewitt*, 194 F.3d at 684, 33 BRBS at 187 (CRT); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). The presumption therefore drops out of the case, and claimant bears the burden of proving that his back condition was aggravated by his work injury. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997).

In weighing the evidence as a whole, the administrative law judge credited the opinions of Drs. Steiner and Williams over those of Dr. McLachlan and Whitecloud. In addition to Dr. Williams's opinion that claimant's condition is unrelated to trauma, Dr. Steiner stated in his January 29, 1990 report that claimant's soft tissue injury had healed, and that there were no objective physical findings. *See* Emp. Ex. 8. At his deposition, Dr. Steiner opined that claimant suffered from minor degenerative changes which were not

trauma related and not caused by any specific incident.[1] Emp. Ex. 18 at 63. The administrative law judge credited these opinions, finding that Dr. Whitecloud's opinion that claimant's annular tear was probably caused by the work accident was inconsistent with his testimony that such tears were part of the aging process. *See* Decision and Order at 16; Cl. Ex. 10 at 10. He further noted that claimant experienced little or no pain during his examinations by Dr. Whitecloud on November 1991 and January 1992. The administrative law judge found Dr. McLachlan's opinion that claimant's work accident aggravated his underlying back condition was based solely on the timing of the accident and the complaints of pain, which were not supported by the objective evidence. *See* Decision and Order 15. As the administrative law judge acted within his discretion in crediting the opinions of Drs. Williams and Steiner over those of Dr. McLachlan and Whitecloud, we affirm the administrative law judge's determination that claimant's current back condition is not causally related to his July 31, 1989, work accident. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

[1]After Dr. Steiner examined claimant on November 6, 1990, he restricted claimant from repetitive bending, stooping and lifting over 75 pounds, but stated this was due to the underlying degenerative disc disease. *See* Emp. Exs. 8, 18 at 14.

We next consider the issue of average weekly wage. In his decision, the administrative law judge awarded claimant temporary total disability compensation from July 31, 1989 through November 8, 1991,[2] based on an average weekly wage of $256.39. In a footnote, the administrative law judge found that employer's insurance adjuster, Patrick Benfield, correctly determined claimant's average weekly wage, and noted that it would be inappropriate to use the earnings of similar employees to calculate claimant's average weekly wage, since claimant had been suspended for 60 days due to an altercation with a co-worker during the year preceding his work accident and had trouble getting hired upon his return to the riverfront.[3] *See* Decision and Order at 6 n.2. On appeal, claimant concedes that he was consistently employed for only 27 weeks during the year prior to his injury and does not allege that Section 10(a), 33 U.S.C. §910(a), is applicable to the instant case.[4] Rather, claimant argues that the average earnings of a similar class of employees should have been used in determining claimant's average weekly wage pursuant to Section 10(b) of the Act. Claimant further challenges the administrative law judge's average weekly wage calculation under Section 10(c), specifically asserting that the administrative law judge did not take into account the earnings of other employees in the same or similar class as required by Section 10(c).

We hold that the administrative law judge's determination of claimant's average weekly wage cannot be affirmed since it fails to satisfy the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). Hearings of claims arising under the Act are subject to the APA, *see* 33 U.S.C. §919(d), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). An administrative law judge thus must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *see also Frazier v. Nashville Bridge Co.*, 13 BRBS 436 (1981). Failure to do so will violate the APA's requirement for a reasoned analysis. *Ballesteros*, 20 BRBS at 187; *see Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). In the instant case, the administrative law judge did not state how he calculated claimant's average weekly wage, or the specific subsection of

[2]The administrative law judge found this to be the date of maximum medical improvement.

[3]Mr. Benfield testified that he calculated claimant's average weekly wage by dividing by 52 claimant's gross earnings during the year prior to his injury, which totaled approximately $13,000. *See* Tr. at 108-109; Cl. Ex. 2.

[4]The payroll records submitted into evidence by claimant show that he earned $13,332.46 from August 8, 1998 through July 31, 1989. *See* Cl. Ex. 2.

Section 10 he applied.[5] We therefore vacate the administrative law judge's determination of claimant's average weekly wage, and remand the case to the administrative law judge to provide a complete analysis of the issue consistent with the APA. In calculating claimant's average weekly wage, the administrative law judge must determine which subsection of Section 10 is applicable, and must state the method by which claimant's average weekly wage is calculated.

Lastly, claimant challenges the administrative law judge's denial of reimbursement for medical expenses for the treatment rendered by Dr. Whitecloud. In his decision, the administrative law judge found that since Dr. McLachlan, an orthopedic surgeon, was claimant's initial choice of treating physician, and Dr. Whitecloud is of the same specialty, employer was not required to consent to the change to Dr. Whitecloud as treating physician. Thus, the administrative law judge found that employer is not liable for the treatment rendered by Dr. Whitecloud. On appeal, claimant contends that although Dr. McLachlan and Dr. Whitecloud are of the same specialty, employer should be held liable for Dr. Whitecloud's treatment as employer denied authorization for an MRI recommended by Dr. McLachlan, and thus, essentially refused treatment by claimant's treating physician.

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish

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[5]Section 10(b) of the Act, 33 U.S.C. §910(b), is applicable to injured workers who have not been employed for substantially the whole of the year preceding the injury; an average weekly wage is computed by using the wages of a worker in a similar employment class as the claimant. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(a), (b), can be reasonably and fairly applied, and it permits the use of earnings of a class of employees similar to claimant. *See Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

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). Section 7(d) of the Act, 33 U.S.C. §907(d), 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) 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 establish only 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.

In the instant case, it is undisputed that claimant sought treatment from Dr. McLachlan from August 1, 1989 until July 26, 1990. In his February 19, 1990 report, Dr. McLachlan stated that employer declined authorization for an MRI, which was performed on February 12, 1990. *See* Cl. Ex. 5; Emp. Ex. 7. Dr. McLachlan's report of May 22, 1990, and his notes, state that he referred claimant to Dr. Whitecloud, another orthopedic surgeon.[6] Cl. Ex. 5, 7. Dr. Whitecloud thereafter began treating claimant on July 23, 1990, and had claimant undergo a discogram. In his decision, the administrative law judge made no findings as to whether employer refused authorization for the MRI, or whether this constituted a refusal by

[6]The administrative law judge found that the record was not clear as to how claimant was referred to Dr. Whitecloud, noting Dr. McLachlan's records on this issue, but also noting claimant's testimony that he was referred to Dr. Whitecloud by a Dr. Haddad. *See* Tr. at 47. The administrative law judge determined that resolution of this inconsistency was not necessary, as employer was not required to consent to treatment by another orthopedic surgeon. *See* Decision and Order at 17, n.12.

employer for further treatment by Dr. McLachlan, which would relieve claimant of requesting prior authorization for treatment by another physician. *See Schoen*, 30 BRBS at 112; *Anderson*, 22 BRBS at 20. Based on the foregoing, the administrative law judge's denial of reimbursement for treatment provided by Dr. Whitecloud is vacated, and the case is remanded for reconsideration of this issue. In determining, on remand, whether claimant is entitled to reimbursement for Dr. Whitecloud's treatment, the administrative law judge must consider: whether employer declined authorization for the MRI suggested by Dr. McLachlan, whether this amounted to a refusal to treat claimant, and if so, whether the treatment rendered by Dr. Whitecloud was reasonable and necessary.

Accordingly, the administrative law judge's determination of claimant's average weekly wage, and his finding that claimant is not entitled to reimbursement for the treatment rendered by Dr. Whitecloud are vacated, and the case is remanded for reconsideration consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge