BRB No. 13-0160

MARY STANLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRINITY YACHTS	)	DATE ISSUED: 11/12/2013
	)	
and	)	
	)	
GREAT AMERICAN INSURANCE COMPANY OF NEW YORK	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and Order on Cross-Motions for Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Order on Cross-Motions for Reconsideration (2010-LHC-1926, 2010-LHC-2275) of Administrative Law Judge Patrick M. Rosenow 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 had a trip and fall accident while working for employer on January 6, 2010, during which she sustained a right knee contusion, as well as an aggravation of a back injury suffered at home on October 29, 2009. Claimant's family nurse practitioner,

J.P. Fero, and Drs. Hull and Hudson each assessed claimant as having sustained a right knee contusion and a lumbar strain consistent with her description of the January 6, 2010 fall. Additionally, Dr. Hull informed claimant that she could return to work with temporary restrictions, including that she work only while seated, with which both Mr. Fero and Dr. Hudson concurred. Claimant returned to light-duty work with employer on January 8, 2010 and continued in this capacity until she was terminated on May 11, 2010, for reasons unrelated to her January 6, 2010 accident and/or her physical ability to perform her job.

In April 2010, Mr. Fero referred claimant to a neurosurgeon, Dr. Nader, who, upon determining that claimant was not a surgical candidate, referred claimant to a neurologist, Dr. Grow. Dr. Nader also recommended that claimant be referred to pain management for possible epidural steroid injections and for chiropractic care. Dr. Grow diagnosed lumbar myofascial sprain and lumbar spasms and opined that claimant reached maximum medical improvement for those conditions on May 13, 2010. Employer arranged for an examination by a neurosurgeon, Dr. Smith, who, on November 30, 2010, opined that he had no reason to believe that claimant sustained any significant injury as a result of the January 6, 2010 fall at work. Dr. Smith added that claimant's complaints "are out of proportion" to any objective findings, and that claimant should have been able to return to regular work without any restrictions within four to six weeks of the January 6, 2010 incident, or by March 1, 2010. Claimant continued to seek additional treatment from a chiropractor, Dr. Lemon, as well as from other physicians, notably Drs. Overstreet, Barnes, Tanious and Howard. Claimant, thereafter, filed her claim seeking temporary total disability benefits, as well as past and future medical benefits, including mileage reimbursement. Employer controverted the claim.

In his decision, the administrative law judge found that claimant established work-related injuries to her right knee and back as a result of the January 6, 2010 accident. The administrative law judge found that claimant was unable to return to her usual employment from January 6, 2010 until she reached maximum medical improvement, with no residual physical restrictions, on May 13, 2010, but that employer established suitable alternate employment by providing claimant with modified work at her usual wages from January 8 to April 26, 2010, and then at reduced wages from April 26, 2010 until her termination, for reasons unrelated to her work injuries, on May 11, 2010. The administrative law judge thus concluded that claimant is entitled to temporary total disability benefits for January 7, 2010, and to temporary partial disability benefits from April 26 through May 13, 2010. With respect to continuing medical benefits after the date of maximum medical improvement, the administrative law judge held employer liable for treatment in the form of a back brace, a TENS unit, referral to a pain management specialist and chiropractic care provided by Dr. Lemon. The parties' motions for reconsideration were denied.

On appeal, employer challenges the administrative law judge's finding that claimant is entitled to medical treatment after May 10, 2010. Claimant has not responded.

Employer contends that the administrative law judge's acknowledgment of claimant's "significant" lack of credibility, coupled with the absence of any objective findings to support claimant's continued complaints of pain, establish that the administrative law judge's award of additional medical benefits is unsupported by the record. Employer thus requests that the administrative law judge's finding that it is liable for pain management and chiropractic care related to claimant's January 6, 2010 work injuries be reversed as it is contrary to the overwhelming weight of the evidence. Alternatively, employer requests that the continued treatment be limited to a specific length of time for pain management to wean claimant off narcotics and, if any, to a limited number of chiropractic visits.

The administrative law judge divided claimant's medical treatment into two time periods, i.e., pre- and post- May 13, 2010, the date she attained maximum medical improvement with regard to her work injuries. Specifically, the administrative law judge determined that as of May 13, 2010, claimant's medical treatment, found reasonable and necessary by her treating physicians, included: 1) Mr. Fero's having prescribed pain medication, a TENS unit and back brace; 2) Dr. Nader's recommending referral to a pain management specialist for possible epidural steroid injections and to a chiropractor for additional care; and 3) Dr. Grow's recommending continuing with the TENS unit, a lumbar support brace, additional medications, and a nerve conduction study and EMG, both of which were returned negative. The administrative law judge also found that claimant attended physical therapy from January 20 through February 25, 2010. After May 13, 2010, the administrative law judge found that claimant continued to seek treatment with Drs. Overstreet, Lemon, Howard, Barnes, Tanious, and Grow.

The administrative law judge found that the treating physicians who saw claimant before her termination appeared to be in agreement that claimant needed to continue her pain medication, and that physical therapy and chiropractic treatment might be beneficial to reduce her pain. The administrative law judge determined, however, that any additional physical therapy would not be reasonable or necessary inasmuch as claimant stated that her prior physical therapy had not helped her and because the record shows that she discontinued it before the end of the prescribed period. Decision and Order at 39. Additionally, the administrative law judge reasoned that further diagnostic tests are not reasonable and/or necessary, given that claimant's multiple MRIs and nerve conduction studies had all revealed nothing. Moreover, the administrative law judge concluded that claimant's post-termination visits to Drs. Overstreet, Howard, Barnes, Tanious, and Grow were not reasonable and necessary because claimant had already reached maximum improvement without restrictions with regard to her work injuries; the evidence suggests that claimant sought the opinions of these doctors only because she

was dissatisfied with the first set of diagnoses and conservative treatment, and because these physicians offered nothing new in terms of a diagnosis or treatment regimen. *Id.*

In contrast, the administrative law judge credited claimant's initial treating physicians and held employer liable for a back brace, a TENS unit, as well as pain management and chiropractic care. In particular, the administrative law judge found that a referral to a pain management specialist is reasonable and necessary given the length of time claimant has been on narcotic pain medication. The administrative law judge also determined that Dr. Lemon's post-termination chiropractic care represented reasonable and necessary treatment, because the record establishes that chiropractic therapy was prescribed by Dr. Nader before, but not received until after, claimant's May 11, 2010 termination. Decision and Order at 39.

As employer argues, the administrative law judge acknowledged the significance of claimant's credibility[1] to a determination of the extent of her work injuries, and he was keenly aware that claimant's "treating doctors were forced to rely on her subjective complaints of pain when they could find no objective evidence of an injury." Decision and Order at 34. Nonetheless, the administrative law judge found that claimant's physicians "seemed to take her complaints of pain seriously," and they concluded, given the lack of objective evidence to support claimant's complaints, that other than physical therapy, pain management and chiropractic care, "there was nothing medically that could be done for her." Decision and Order at 34, 38.

In his report dated April 29, 2010, Dr. Nader stated that claimant "is presenting with lower back pain, which is likely musculoskeletal in nature." EX 12. Dr. Nader based this diagnosis on the fact that he did not "see any structural pathology on the MRI which would warrant any type of neurosurgical intervention." *Id.* Dr. Nader recommended conservative management of claimant's symptoms to include a referral to pain management for possible epidural steroid injections, as well as for chiropractic care, further assessment of claimant's leg symptoms by a neurologist, Dr. Grow, and that claimant wear a back brace. *Id.* Dr. Grow recommended a TENS unit and a back brace on April 30, 2010, and did not disagree with the recommendation for pain management

[1]The administrative law judge explicitly observed that "because of the subjective nature of her complaints, claimant's credibility is of paramount importance," Decision and Order at 33, and found that claimant was not credible "in light of her presentation at hearing, her tendency to contradict herself, and her frequent habit of providing questionable explanations for prior testimony when it seemed advantageous." *Id*. Moreover, the administrative law judge stated that "credible evidence was offered that indicated claimant was willing to engage in deceit to further her interests. I found her testimony to be highly unreliable and of very limited probative value." *Id.*

and chiropractic care.[2] EX 14 at 45. The administrative law judge awarded claimant a back brace, TENS unit, referral to a pain management specialist and chiropractic treatment.

Section 7(a) requires an employer to pay for all reasonable and necessary medical expenses arising from a work-related injury "for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. §907(a). While a claimant may establish her prima facie case for compensable medical treatment when a qualified physician indicates that treatment is necessary for a work-related condition, *see Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Romeike v. Kaiser Shipyards,* 22 BRBS 57 (1989), whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Weikert v. Universal Maritime Serv. Corp*., 36 BRBS 38 (2002); *Wheeler v. Interocean Stevedoring, Inc.,* 21 BRBS 33 (1988). The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

In this case, the administrative law judge relied on the recommendations made by claimant's pre-termination medical providers that claimant would benefit from chiropractic care, as well as pain management for possible epidural steroid injections. In reaching this conclusion, the administrative law judge fully considered claimant's lack of credibility, Decision and Order at 33-34, but relied on his determination that all of claimant's treating physicians "seemed to take her complaints of pain seriously." As the administrative law judge's finding that claimant is entitled to medical benefits for pain management and chiropractic care is rational and supported by substantial evidence of record, it is affirmed. *Baker*, 991 F.2d 163, 27 BRBS 14(CRT). However, we clarify the administrative law judge's award of medical benefits relating to pain management to reflect that it is limited to Dr. Nader's specific recommendation that such treatment is for

[2]Mr. Fero and Dr. Grow each questioned claimant's subjective complaints at the time of their depositions. EXs 8, 14. Mr. Fero stated that watching claimant's movements in the surveillance video gave him cause to be suspicious of her motives; he thought that she might be exaggerating her complaints. EX 8 at 38. Nonetheless, Mr. Fero testified that a referral to a chiropractor would be reasonable in this case. *Id.* at 49-50. Dr. Grow opined that based upon a reasonable degree of medical probability, there is no reason to refer claimant for chiropractic care, pain management, or physical therapy. EX 14 at 47. Dr. Grow, however, also stated that she "won't disagree" with other physicians who treated claimant and referred her for pain management and chiropractic care. *Id*. at 45.

an evaluation for possible epidural steroid injections. Consequently, the administrative law judge's finding that employer is liable for the pain management, limited to possible epidural steroid injections, and chiropractic care recommended by Dr. Nader and provided in association with claimant's work-related injuries is affirmed.[3] *See* 33 U.S.C. §907(a); *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997).

Accordingly, we modify the administrative law judge's decisions to reflect that employer's liability for medical benefits relating to pain management is limited to expenses associated with possible epidural steroid injections. In all other regards, the administrative law judge's decisions are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[3]With regard to chiropractic care, "reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings." 20 C.F.R. §702.404; *Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (1998); *see also N.T. [Thompson] v. Newport News Shipbuilding & Dry Dock Co.*, 43 BRBS 71 (2009).