BRB No. 08-0372

L.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAKE CHARLES FOOD PRODUCTS, L.L.C.	)	DATE ISSUED: 10/29/2008
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Modification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Harry K. Burdette (Glen Armentor Law Corporation), Lafayette, Louisiana, for claimant.

Alan G. Brackett and Jon B. Robinson (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Modification (2007-LHC-1143) of Administrative Law Judge Clement J. Kennington 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 was injured on October 30, 2003, when a fellow employee backed up a forklift and knocked claimant to the ground, causing injuries to his right hip, leg, elbow, and lower back. In his Decision and Order Awarding Benefits, issued September 21, 2006, the administrative law judge found that employer remained liable for claimant's injuries despite a subsequent automobile accident. The administrative law judge awarded claimant temporary total disability compensation from the date of injury and continuing, as well as related and necessary medical expenses, excluding a discogram and a referral to Dr. McDonnell for treatment. The Board and the United States Court of Appeals for the Fifth Circuit affirmed the administrative law judge's decision. *L.B. v. Lake Charles Food Products, L.L.C.*, BRB No. 07-0153 (Aug. 24, 2007), *aff'd*, No. 07-60818, 2008 WL 3820861 (5th Cir. Aug. 15, 2008).

Subsequent to the administrative law judge's decision, claimant filed a motion for modification under Section 22 of the Act. 33 U.C.S. §922. Claimant alleged that his condition had worsened and that a discogram and treatment by Dr. McDonnell and Dr. Juneau are necessary. The administrative law judge denied claimant's motion, finding that claimant did not establish that his condition has deteriorated such that a discogram is required.

Claimant appeals, contending that the administrative law judge erred in finding that his condition has not deteriorated. Claimant also contends that the administrative law judge erred in not authorizing the discogram recommended by Drs. Staires, Heard and Juneau. Employer responds, urging affirmance of the administrative law judge's decision. Employer also has filed three motions: a Motion to Dismiss Appeal, a Motion to Vacate, and a Motion to Strike.

The first two of employer's motions, the Motion to Vacate and the Motion to Dismiss Appeal, both focus upon the validity of claimant's Notice of Appeal and the Order of the Clerk of the Board accepting claimant's Petition for Review and Brief as his Notice of Appeal.[1] Employer argues, in essence, that the Clerk of the Board overstepped his authority in accepting claimant's Petition for Review as a Notice of Appeal, noting that claimant did not file a separate notice of appeal containing the information required

[1] By Order dated May 27, 2008, the Board acknowledged receipt of claimant's Petition for Review, considered it to be claimant's Notice of Appeal and Petition for Review and brief, and found it was timely filed. 20 C.F.R. §§802.205, 802.211. *See* 33 U.S.C. §921.

by 20 C.F.R. §802.208(a). Employer contends that claimant's other filings are insufficient to constitute a notice of appeal as they contain inaccurate information.[2]

Employer asserts that the actions of the Clerk of the Board violated Section 802.219(g), 20 C.F.R. §802.219(g),[3] because he does not have the authority to extend the time for filing a notice of appeal. We reject this contention. Initially, the clerk did not extend the time for filing a notice of appeal but accepted claimant's Petition for Review and brief, filed within the 30-day period for an appeal, as his notice of appeal.[4] We reject the contention that he erred in doing so. Notwithstanding the formal requirements for the contents for a Notice of Appeal contained in Section 802.208(a), Section 802.208(b) provides that "any written communication which reasonably permits the identification of the decision being appealed and the parties affected or aggrieved thereby" is sufficient as a notice of appeal. 20 C.F.R. §802.208(b); *see Tucker v. Thames Valley Steel*, 41 BRBS 62 (2007). The Board's Order, dated May 27, 2008, acknowledged claimant's Petition for Review and brief as claimant's notice of appeal, which is within the Clerk's authority. *See* 20 C.F.R. §802.210. That employer was served with the documents at an incorrect address initially is an insufficient basis on which to conclude that claimant's Petition for Review and brief cannot serve as a notice of appeal pursuant to Section 802.208(b) as the documents permit identification of the decision being appealed and the parties to the action. Moreover, employer does not specify how it was prejudiced in this regard. Despite the delay in receiving notification of claimant's appeal, employer filed an extensive brief opposing claimant's Petition for Review as well as these three motions, all of which were accepted by the Board. Accordingly, employer's Motion to Dismiss Appeal and Motion to Vacate are denied.

However, we agree with employer that the Board may not consider the new evidence submitted by claimant with his appeal. Claimant attached to his brief a report

---

[2] Claimant's submissions listed the address of employer's legal representative as Gonzales, Louisiana, which was a temporary address following the evacuation of New Orleans in the wake of Hurricane Katrina from mid-September to mid-October 2005. Employer's legal firm had returned to its former address in New Orleans approximately two years prior to this litigation.

[3] Section 802.219(g) states that the Clerk of the Board may enter orders on behalf of the Board in procedural matters, including but not limited to: (1) First motions for extensions of time…; (2) Motions for voluntary dismissals…; (3) Orders to show cause…; (4) Unopposed motions which are ordinarily granted as of course.

[4] Employer does not contend that claimant's filing of his Petition for Review and brief was untimely but challenges only acceptance of this document as a notice of appeal.

from Dr. Heard dated January 7, 2008, which post-dates the administrative law judge's decision and thus was not submitted to the administrative law judge. Therefore, this report cannot be considered by the Board. 20 C.F.R. §802.301(b); *Meinert v. Fraser, Inc.*, 37 BRBS 164(2003). We grant employer's motion to strike the document.

We now address claimant's appeal of the administrative law judge's denial of his motion for modification. Claimant sought modification based on a change in condition, alleging that his back condition has worsened. Claimant also contended that a discogram is now warranted. The administrative law judge found that claimant failed to establish a change in his physical condition. The administrative law judge also found that discography is a controversial procedure and that claimant failed to establish the necessity of a discogram. Claimant contends that the administrative law judge erred in this regard, arguing that the medical evidence reflects that claimant's back condition is deteriorating and that a discogram and possibly surgery are necessary for its treatment.

We cannot affirm the administrative law judge's decision, as he did not adequately address the issue presented to him for resolution. Claimant sought authorization for a discogram, which, he alleged, has been recommended by three physicians since the time the administrative law judge issued his first decision. Whether claimant's physical condition has in fact deteriorated is not necessarily determinative of whether claimant has established a change in his need for medical treatment. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." Claimant must, however, establish that the treatment procured or anticipated is necessary for his injury in order for employer to be liable for it. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989). Thus, the issue before the administrative law judge is whether claimant has demonstrated that a discogram is now necessary for the treatment of claimant's injury.[5] Resolution of this issue requires that the administrative law judge weigh the relevant evidence regarding the necessity of this treatment.

[5] In general, as medical treatment is never time-barred, a claimant who has established entitlement to medical benefits may seek new or additional treatment without complying with the requirements of Section 22. Thus, the need for treatment must be addressed whenever claimant requests payment for treatment he asserts he needs. In the context of Section 22, "change in condition" is not limited to physical condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Thus, where specific medical treatment is at issue, claimant may establish that the need for certain treatment has changed even if his physical condition has not worsened, particularly where, as here, his condition has not improved and further treatment may be necessary. Also under Section 22, a claimant's evidence regarding the

In his prior decision, the administrative law judge credited the opinion of employer's expert, Dr. Foster, that a discogram was not necessary for the treatment of claimant's injury. The administrative law judge rejected the opinion of Dr. McDonnell that a discogram was indicated because this opinion was not supported by any other medical evidence. In support of his contention that a discogram is now necessary, claimant submitted the more recent medical opinions of Drs. Staires, Heard and Juneau, all of whom treated claimant and recommended that claimant undergo a discogram. Although the administrative law judge discussed the opinions of these physicians, he focused on whether their recitation of claimant's symptomatology reflected deterioration in his condition rather than on the reasoning behind their recommendations that a discogram is now necessary.[6] Dr. Staires, a pain management specialist, recommended a discogram as part of claimant's treatment plan. EX 2; CX 3. In his initial decision, the administrative law judge specifically authorized claimant's treatment with Dr. Staires. Dr. Heard, an orthopedist, opined that a lumbar discography was necessary to determine whether claimant should undergo disc replacement or an instrumented arthrodesis. EX 3 at 10. Dr. Juneau, a neurosurgeon, stated that a discogram was necessary to investigate whether claimant's symptoms are of myofascial or discogenic etiology. CX 4. Given the bases for these opinions, the fact that claimant's condition has not further deteriorated is not determinative of whether a discogram is now a necessary and reasonable treatment for claimant's condition, which claimant's physicians believe has not improved. In contrast to the opinions submitted by claimant on modification, employer offered an October 2007 report of Dr. Foster, who opined that a discogram is not warranted and that claimant exhibits some signs of symptom magnification. EX 32.

As the administrative law judge did not weigh these conflicting opinions regarding the necessity of treatment, we must vacate the administrative law judge's decision to deny this procedure.[7] On remand, the administrative law judge must address whether claimant has met his burden of establishing the necessity of a discogram. A claimant

---

need for treatment may be addressed in order to determine whether a mistake of fact occurred with regard to a prior determination that the treatment was not necessary. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

[6] The records of Drs. Juneau, Heard and Staires reflect that claimant has moderate to severe pain which was similar to claimant's prior complaints of pain over his lower lumbar to right and left paralumbar regions and lower leg. *See* CXS 1, 2, 3. Moreover, Dr. Heard cleared claimant for a return to light-duty work on January 2, 2007. CX 1.

[7] The administrative law judge's denial of treatment by Dr. McDonnell, including a discogram performed by him, is rational and is affirmed, particularly in view of the disciplinary action taken against Dr. McDonnell by the Texas Medical Board. EX 26.

establishes a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255, 257-258 (1984). In this regard, the administrative law judge should evaluate the medical evidence, pro and con, giving regard to such factors as the credentials of the physicians, their status as treating or examining physicians, and the reasoning behind their opinions. *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005). The administrative law judge must provide a rationale for his findings of fact. *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000) (administrative law judge must provide a rationale for findings on material issues, pursuant to the Administrative Procedures Act). In addition, the administrative law judge should address claimant's request for authorization to treat with Dr. Juneau, a specialist in neurology. *See* 33 U.S.C. §907(b); 20 C.F.R. §702.406(a); *see generally Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988). Claimant correctly notes on appeal that this issue was raised in claimant's pre-hearing statement, at the formal hearing, and in claimant's post-hearing brief, but was not addressed by the administrative law judge.[8]

Accordingly, employer's Motion to Vacate and Motion to Dismiss Appeal are denied. Employer's Motion to Strike is granted. The administrative law judge's Decision and Order on Modification is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[8] Claimant also may file a motion with the administrative law judge to admit on remand the January 2008 report of Dr. Heard which claimant attached to his appellate brief.