BRB No. 09-0458

C.T.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	DATE ISSUED: 10/29/2009
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

C.T., Washington, D.C., *pro se.*

Sarah O. Rollman (Office of General Counsel, WMATA), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2007-DCW-6) of Administrative Law Judge Daniel F. Solomon 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973)(the Act). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they 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). If they are, they must be affirmed.

On May 12, 1981, while working for employer as a custodian, claimant sustained low back injuries when she was pushed to the ground by a subway passenger rushing to catch a train. On June 1, 2004, claimant was awarded permanent total disability benefits under the Act; this award was affirmed by the Board on October 27, 2005. *[C.T.] v. Washington Metro. Area Transit Auth.*, BRB No. 04-0780 (Oct. 27, 2005)(unpub.). Claimant subsequently sought to obtain payment from employer of expenses she incurred for the physical therapy she underwent upon referral by her treating physician, prescription medications she alleged were related to her work-related back condition, and travel expenses incurred in traveling to her medical appointments.[1]

Following the June 25, 2008, formal hearing, claimant submitted a post-hearing brief to the administrative law judge which included a report from her physical therapist, Ira Silverstein, which she requested be introduced into evidence. In his Decision and Order, the administrative law judge initially denied claimant's request that this report be submitted into the record, finding that claimant failed to comply with the time limitations for the exchange of exhibits set forth in the judge's pre-hearing order; accordingly, while he admitted the proffered report for identification purposes, the administrative law judge stated that he would attribute no weight to it in adjudicating claimant's claim. The administrative law judge then dismissed claimant's claim that employer be held liable for her physical therapy expenses, finding that the proper parties for such a claim were not present before him and that the record lacked any evidence regarding whether claimant's physical therapy was reasonable. The administrative law judge also determined that employer is not liable for claimant's travel expenses.

On appeal, claimant, representing herself, challenges the administrative law judge's refusal to hold employer liable for her physical therapy and travel expenses. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

We first address the administrative law judge's refusal to admit into evidence the report of Ira Silverstein, claimant's physical therapist, addressing the physical therapy which he performed on claimant for her back condition. In his decision, the administrative law judge rejected this report as untimely, since it had not been served by claimant upon employer within the time period provided in the administrative law judge's pre-trial order for the exchange of exhibits. Section 702.338, 20 C.F.R. §702.338, of the Act's implementing regulations provides that the administrative law judge has a duty to inquire fully into matters at issue and receive into evidence all relevant and material

[1] Before the administrative law judge, employer agreed to reimburse claimant for the cost of her prescription medications. *See* June 25, 2008 Transcript at 6.

testimony and documents. *See also* 20 C.F.R. §702.339. The Board has held that an administrative law judge may, within his discretion, exclude even relevant and material evidence for failure to comply with the terms of a pre-hearing order. *See Durham v. Embassy Dairy*, 19 BRBS 105 (1986)(the Board affirmed an administrative law judge's decision to exclude the testimony of employer's sole witness where employer's counsel misplaced the administrative law judge's pre-hearing order); *see also Picinich v. Seattle Stevedore Co.,* 19 BRBS 63 (1986)(the Board affirmed an administrative law judge's decision to admit employer's evidence into the record despite its non-compliance with a pre-hearing order since the order in question stated that such evidence may result in exclusion and the administrative law judge's decision was not arbitrary, capricious or an abuse of discretion). Accordingly, because the admission or exclusion of evidence is discretionary, the Board may overturn such determinations only if they are arbitrary, capricious, or an abuse of discretion. *See Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997); *Raimer v. Willamette Iron & Steel Co.,* 21 BRBS 98 (1988).

The administrative law judge rationally excluded the report at issue here on the basis that it was not submitted within the time required by his pre-hearing order. Specifically, the administrative law judge's February 28, 2008, pre-hearing order set the date of the formal hearing and informed the parties that all exhibits intended to be offered into evidence "shall" be delivered to the opposing parties by June 4, 2008. While Mr. Silverstein's report is dated June 28, 2008, three weeks after the date for the exchange of exhibits, claimant's counsel did not present this report for admission into the record until he filed his post-hearing brief with the administrative law judge on January 9, 2009, over six months after the report was prepared by Mr. Silverstein. The administrative law judge found that to admit this report into evidence would be patently unfair to employer. As the administrative law judge's decision to exclude the report is neither arbitrary, capricious, or an abuse of discretion, it is affirmed. *See Williams v. Marine Terminals Corp.,* 14 BRBS 728 (1981); *see also Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.,* 22 BRBS 46 (1989)(party seeking to admit evidence must exercise due diligence in developing its claim prior to hearing).

We next address the administrative law judge's finding that employer is not liable for the expenses claimant incurred as a result of her having undergone physical therapy for her work-related back condition. Section 7 of the Act, 33 U.S.C. §907, generally describes an employer's duty to provide medical and related services and costs necessitated by its employee's work-related injury, employer's rights regarding control of those services, and the Secretary's duty to oversee them. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In this regard, Section 7(a) of the Act states that

> [t]he employer shall furnish such medical, surgical, and other attendance or treatment ... medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a) (1983);[2] *see Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). While active supervision of a claimant's medical care is performed by the Secretary of Labor and her delegates, the district directors, *see* 33 U.S.C. §907(b), (c) (1983) (amended 1984); 20 C.F.R. §702.401, the administrative law judge is empowered to determine factual issues involving claimant's entitlement to, and employer's liability for, specific medical treatment such as the physical therapy at issue here. *See Weikert v. Universal Maritime Service Corp.,* 36 BRBS 38 (2002). In order for a medical expense to be assessed against employer, the treatment must be both reasonable and necessary, and it must be related to the work injury. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981).

In addressing employer's liability for the outstanding charges of her physical therapist, the administrative law judge found that, pursuant to Section 702.416 of the Act's regulations, 20 C.F.R. §702.416, both Mr. Silverstein and the district director are necessary parties for the adjudication of these unpaid charges.[3] Since neither appeared at the formal hearing, and after further finding that there was no evidence regarding the issue of whether the amounts in question are reasonable, the administrative law judge dismissed claimant's claim for medical benefits for her physical therapy. We vacate the administrative law judge's decision to dismiss claimant's claim and remand the case for further consideration.

Initially, the administrative law judge erred in applying Section 702.416 to this case. This regulation addresses procedures implementing Section 7(g) of the Act, 33 U.S.C. §907(g), which provides that employer's liability for medical services is limited to the prevailing community charges for such. This section addresses the amount of a medical cost rather than employer's liability for treatment under Section 7(a). While, as the administrative law judge stated, Section 702.416 provides that when a fee for medical

[2] As this case arises under the 1928 D.C. Act, which was amended in 1982 to no longer incorporate the Longshore Act, the provisions of the Act and regulations in effect at that time apply. *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

[3] At the formal hearing, the parties stipulated that Mr. Silverstein's unpaid charges total $26,033.28. Tr. at 9; Decision and Order at 1; CX 2.

services is in dispute, the necessary parties shall be the person whose fee or cost charge is in question and the Director, it further states that it applies to formal hearings held pursuant to Section 702.415. Section 702.415, 20 C.F.R. §702.415 (1983)(amended 1986), provides that, after investigation and ascertainment under Section 702.414 that a fee or charge is not in accordance with prevailing community charges and the person claiming the fee or charge refuses to make the necessary adjustment, the matter shall be forwarded to the Office of Administrative Law Judges for a formal hearing. Section 702.414, 20 C.F.R. §702.414 (1983)(amended 1986, 1995), in turn, provides in relevant part that

> The Director or his designee may, or upon the written complaint of an employer or carrier shall, investigate any fee for medical treatment, services or supplies that appears to be not in line with prevailing community charges for similar treatment, services or supplies.

When read together, Sections 702.414-416 of the regulations set forth the procedure to be followed when a fee for medical treatment, services or supplies is challenged as exceeding the prevailing community charges for similar treatment, services or supplies. In this case, however, employer has not filed a written complaint under Section 702.414 averring that the fees for physical therapy services exceed prevailing community charges, nor has the Director conducted an investigation regarding the prevailing community charges for such physical therapy. Sections 702.414-416 thus do not apply.[4] Neither Mr. Silverstein nor the Director are therefore necessary parties to this claim, which concerns whether the prescribed physical therapy is a treatment for which employer is liable under Section 7(a). *See Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984); 20 C.F.R. §§702.401, 702.402. Accordingly, the administrative law judge's decision to dismiss claimant's claim on the basis that the necessary parties were not present at the formal hearing must be vacated and the case remanded for the administrative law judge to address the merits of claimant's claim.[5]

---

[4] The inapplicability of Section 702.416 of the regulations to this case is further reinforced by the last sentence of that section which reads "[t]he employer or carrier *may* also be represented . . .in the discretion of the administrative law judge." Where, as here, a claim is made regarding the *liability* of an employer for the payment of medical benefits allegedly related to a work-related condition, the employer potentially liable for such services is a necessary party.

[5] The administrative law judge's statement that claimant does not seek *reimbursement* for Mr. Silverstein's charges but, rather, seeks *recovery* for his outstanding medical charges does not support his decision to dismiss claimant's claim. The same procedures apply regardless of whether claimant is seeking reimbursement of

The administrative law judge further based his decision to dismiss claimant's claim on a finding that the record does not contain evidence regarding the reasonableness of Mr. Silverstein's *charge*s. The issue, however, is the necessity and reasonableness of the *treatmen*t provided and whether it is related to the work injury.[6] In this regard, at the formal hearing claimant submitted into evidence multiple reports from her treating physician, Dr. Moskovitz, addressing claimant's work-related back condition and her need for physical therapy. *See* CX 1. Moreover, after finding claimant to be generally credible, the administrative law judge did not address claimant's testimony that her physical therapy appointments were predominately related to her back injury. *See* Tr. at 17-29. An administrative law judge's failure to analyze or discuss the relevant evidence of record contravenes the Administrative Procedure Act, 5 U.S.C. §557. *See, e.g., Shrout v. General Dynamics Corp.*, 27 BRBS 160 (1993)(Brown, J., dissenting on other grounds); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). On remand, therefore, the administrative law judge must discuss the evidence relevant to whether claimant's physical therapy was necessary treatment for her work injury.[7] *See Turner v. C&P Telephone Co.*, 16 BRBS 255 (1984). If so, employer is liable for this treatment provided the requirements of Section 7(d), 33 U.S.C. §907(d), are met. *See Armfield v. Shell Offshore Inc.*, 25 BRBS 303 (1992).

---

charges she has paid or payment by employer in the first instance. *See Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979). Pursuant to Section 7 of the Act, employer has a continuing obligation to pay an injured employee's medical expenses. *See Strachan Shipping Co. v. Hollis*, 460 F.2d 1108 (5th Cir.), *cert. denied*, 409 U.S. 867 (1972). *See generally Marshall v. Pletz*, 317 U.S. 389 (1943); *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992). Thus, the fact that Mr. Silverstein's charges remain outstanding does not absolve employer from its potential liability for these unpaid charges. Claimant's claim that employer is liable for the outstanding medical charges which she alleges were incurred as a result of her work injury, if successful, will consequently result in the payment of those medical charges by employer rather than claimant.

[6] As discussed, the reasonableness of the amounts charged is addressed in terms of whether the charges exceed prevailing community charges and involves the procedures at 20 C.F.R. §702.413 *et seq.*

[7] The administrative law judge, on remand, has the discretion to reopen the record for additional evidence including the June 28, 2008, report of Mr. Silverstein should claimant resubmit that document, as employer would no longer be surprised by its contents and could be allowed the opportunity to respond.

Claimant also sought reimbursement for the travel expenses she allegedly incurred commuting to and from her appointments with Mr. Silverstein. In support of this request, claimant submitted into evidence a personal log, numerous cab fare receipts, and a May 3, 1990, note from Dr. Moskovitz stating that claimant, because of her condition, is unable to take public transportation which would require her to transfer three times in each direction. *See* CXs 1, 5. In his decision, the administrative law judge declined to hold employer liable for the travel expenses, finding that claimant did not request reimbursement from employer for these costs at the time they were incurred and that claimant did not establish a need for these services. Additionally, the administrative law judge found that he was unable to determine whether claimant's physical therapy during the periods at issue were related to a subsequent injury arising under the Virginia workers' compensation scheme, and whether claimant may seek reimbursement for her travel expenses under that law. *See* Decision and Order at 3 – 4.

Under the Act, an employer is liable for all reasonable and necessary medical expenses related to her work injury. 33 U.S.C. §907(a) (1982) (amended 1984); *see Ballesteros,* 20 BRBS 184. Costs incurred for transportation for medical purposes are recoverable under Section 7(a) of the Act. *See Day v. Ship Shape Maintenance Co.,* 16 BRBS 38 (1983); *Castagna v. Sears, Roebuck & Co.,* 4 BRBS 559 (1976), *aff'd mem.,* 509 F.2d 1115 (D.C. Cir. 1978). In this regard, Section 702.401 of the regulations states that "Medical care shall include. . . the reasonable and necessary cost of travel [related to that medical care], which is recognized as appropriate by the medical profession for the care and treatment of the injury or disease." 20 C.F.R. §702.401 (1983) (amended 1985).

We vacate the administrative law judge's decision to deny claimant reimbursement for the travel costs incurred traveling from her home to her physical therapist. Claimant's entitlement to payment of her travel expenses is ancillary to her physical therapy appointments. Thus, if on remand the administrative law judge determines that employer is liable for the physical therapy, it is also liable for her expenses in traveling to it. *Castagna,* 4 BRBS 559. In this regard, the administrative law judge stated that claimant had not "established a need" for her use of a cab to attend her appointments, Decision and Order at 4, but he did not address Dr. Moskovitz's office note stating that claimant should avoid public transportation. Accordingly, on remand, if the administrative law judge determines that employer is liable for claimant's physical therapy, he must reconsider her claim for the associated travel costs. 20 C.F.R. §702.401 (1983).

Accordingly, the administrative law judge's dismissal of claimant's claim for medical benefits is reversed, his denial of claimant's claim for travel expenses 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