

BRB No. 99-0122

NORMAN ZEIGLER)
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 Claimant-Respondent)
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 v.)
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 DEPARTMENT OF THE ARMY/NAF) DATE ISSUED: 10/7/99
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of James Guill, Associate Chief Administrative Law Judge, United States Department of Labor.

Ronald S. Webster (Stump, Webster, Craig & Associates, P.A.), Orlando, Florida, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (97-LHC-1242) of Associate Chief Administrative Law Judge James Guill 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 bitten by a tick on June 17, 1992, while on assignment in Czechoslovakia for the *Stars and Stripes* newspaper. After he returned to his home in Germany, he noticed a bright red circular ring around the tick as he removed it from his body. The ring was hot to the touch, itched and burned. Claimant went to the emergency room where he was given a small supply of antibiotics and told to see his private physician. Subsequently, claimant began treatment in Germany for Lyme disease. In July 1992, claimant returned to the United States and sought treatment for Lyme disease with Dr. Epstein in Connecticut until the end of September. He returned to Germany and continued treatment for “sporadic lyme borreliosis.” He again saw Dr. Epstein in December 1992, while on a two week vacation, and then returned to Germany.

In November 1993, the tests performed in Germany were negative for Lyme disease, but claimant continued to complain of symptoms. He returned to the United States and the tests performed by Dr. Epstein in February 1993 also were negative for Lyme disease. Dr. Epstein referred claimant to Dr. Schoen, a leading expert on Lyme disease, and the tests performed by Dr. Schoen were negative for the disease. Claimant then began treatment with Dr. Keszler who diagnosed “chronic lyme disease” in January 1994. Emp. Ex. 14. After his return to Germany, claimant had a relapse in early 1994. Dr. Schuster-Aust diagnosed “chronic exhaustion syndrome with bronchial problems and an unclear abdomen following a mycoplasmatic pneumonia and a borrelia infection” and recommended a move to a warmer climate. Emp. Ex. 19

On this advice, claimant moved to Florida, where he was seen by Dr. Sanders, another leading expert on Lyme disease. Dr. Sanders opined that claimant does not have late stage Lyme disease after an examination and objective tests, including blood and spinal fluid analysis, were negative. On November 29, 1994, claimant began treatment with Dr. Davis for his continuing complaints of symptoms associated with Lyme disease. Claimant underwent surgery to remove his gallbladder in December 1995, due to “sludging” in the gallbladder secondary to antibiotic therapy for the Lyme disease. *See Ex. 72.* Claimant also was seen by a psychiatrist, Dr. Schaerf, who ruled out malingering and Munchausen syndrome, and opined that claimant is suffering from serious depression and a somatic disorder which were linked to his early diagnosis of Lyme disease. Ex. 222. Claimant sought permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that he suffered from a work-related disease, early stage Lyme disease, and that employer did not establish rebuttal of this presumption. The administrative law judge also found that claimant established invocation of the presumption that he suffers from late stage Lyme disease, but that the evidence was sufficient to establish rebuttal. Thus, the administrative law judge weighed the evidence as a whole and concluded that claimant does not have late stage Lyme disease. The

administrative law judge then reviewed the evidence to determine whether claimant suffers from a work-related psychological injury. He concluded that claimant has suffered a compensable psychological injury as a result of contracting early Lyme disease, namely a somatic disorder and depression, or in the alternative, that claimant suffered a compensable psychological injury as a result of the tick bite itself. The administrative law judge found that as a result of the psychological disorder, claimant is unable to work at this time. Thus, as the administrative law judge also found that claimant has not reached maximum medical improvement, the administrative law judge awarded claimant temporary total disability benefits.

In addition, the administrative law judge found that claimant sought treatment from Dr. Davis for his ongoing symptoms, and that Dr. Davis attempted to treat claimant based on the history of Lyme disease and on the symptoms thereof in good faith. Thus, the administrative law judge concluded that employer is liable for Dr. Davis's past medical treatment, although not for any future treatment as it is established that claimant does not have late stage Lyme disease. The administrative law judge held employer liable for claimant's gallbladder surgery, as it was a result of the copious amounts of antibiotics prescribed for treatment of symptoms which were thought to indicate Lyme disease, and for claimant's move to Florida, as it was under the advice of his physician in Germany. The administrative law judge also awarded further treatment for claimant's psychological condition. The administrative law judge rejected employer's contention that further compensation is barred pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), even though claimant refused to undergo a second examination by Dr. Sanders, finding claimant's refusal justified.

On appeal, employer contends that the administrative law judge erred in holding it liable for Dr. Davis's medical treatment as it was for a disease claimant does not have, and therefore was not necessary or reasonable. In addition, employer contends that the administrative law judge erred in finding that claimant was excused from seeking authorization for medical treatment after January 1994, and that the Section 7(d)(4) bar should apply as claimant refused an examination by a physician chosen by employer. Lastly, employer contends that the administrative law judge erred in awarding temporary total disability benefits based on "an imagined condition."

Initially, employer contends that the administrative law judge erred in finding it liable for Dr. Davis's medical treatment, as the evidence as a whole establishes that claimant was not suffering from Lyme disease, at least by December 1993. Section 7(a) of the Act, 33 U.S.C. §907(a), provides that employer is liable for medical expenses that are reasonable and necessary. Medical care must be appropriate for the injury. 20 C.F.R. §702.402. Claimant can establish a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Romeike v. Kaiser*

Shipyards, 22 BRBS 57 (1989). The United States Court of Appeals for the Ninth Circuit has held that “[a]lthough the employer is not required to pay for unreasonable and inappropriate treatment, when the patient is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny.” *Amos v. Director, OWCP*, 153 F.3d 1051, 1054, 32 BRBS 144, 147 (CRT)(9th Cir. 1998), *amended*, 164 F.3d 480 (9th Cir. 1999).

In the instant case, as employer correctly notes, claimant was told by medical experts that he did not have Lyme disease and Dr. Davis did not rely on the objective tests which were negative for Lyme disease but instead relied on a test by Dr. Coyle, which was partially positive. The administrative law judge noted this, but also noted that Lyme disease is very difficult to diagnose and generally requires a clinical analysis, at least in the early stage. Moreover, since 1992, claimant had an extensive history of symptoms and treatment for Lyme disease. In addition, the administrative law judge noted that this case was further complicated by claimant’s somatic disorder, because he continued to display the symptoms of Lyme disease even after it had resolved, supporting Dr. Davis’s diagnosis. In addition, Dr. Coyle’s test showed a potentially positive result adding further basis for a diagnosis of Lyme disease and its treatment.

Although claimant received conflicting opinions -- both that he did not suffer from late stage Lyme disease and that his symptoms fit the clinical description of Lyme disease-- the claimant is entitled to choose his own course of treatment. *Id.* Thus, based on the facts in this case, we affirm the administrative law judge’s finding that at the time the medical services were rendered, Dr. Davis and claimant believed the treatment to be necessary for Lyme disease even though the administrative law judge found that the disease actually had resolved by that time. *Amos*, 153 F.3d at 1054, 32 BRBS at 147 (CRT).

Employer also contends that the administrative law judge erred in finding that the Section 7(d)(4) bar does not apply as claimant refused to undergo a medical examination with Dr. Sanders.¹ Section 7(d)(4) provides that the administrative law judge may suspend

¹Employer contends that the administrative law judge erred in awarding medical benefits as claimant did not seek authorization for medical care and as employer did not refuse medical treatment. The administrative law judge found that as of July 27, 1995, when claimant requested treatment of the gallbladder condition, employer refused to authorize treatment. The administrative law judge also found that as employer controverted the claim as a whole on January 13, 1994, claimant did not need to seek authorization past this date. On appeal, employer does not challenge its liability for any specific treatment on the ground that claimant did not seek prior authorization. Thus, without a specific assignment of error, we reject the contention that the administrative law judge erred in awarding medical benefits on this basis. *See Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff’g on recon.*

the payment of compensation to an employee during any period in which he unreasonably refuses to submit to medical or surgical treatment, or to an examination by employer's chosen physician, unless the circumstances justify the refusal. 33 U.S.C. §907(d)(4). In order for Section 7(d)(4) to apply, employer must make an initial showing that the claimant's refusal to undergo an examination is unreasonable; the reasonableness of a claimant's actions must be appraised in objective terms. If employer meets this burden, the burden shifts to claimant to show that the circumstances justify his refusal; this inquiry is a subjective one. *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979).

Employer requested that claimant undergo a second examination by Dr. Sanders. The administrative law judge found that claimant already had submitted to one independent medical examination, by Dr. Torres. In addition, he noted that claimant had been thoroughly evaluated by Dr. Sanders previously, and he found that claimant did not have Lyme disease. The administrative law judge rationally noted that it was unlikely that this opinion would change after another examination. In addition, the administrative law judge noted that claimant and Dr. Sanders had bad rapport. While this latter factor alone may be insufficient to excuse claimant's refusal to be examined by Dr. Sanders for a second time, the administrative law judge looked at all the circumstances and found claimant's actions justified. *See Malone v. Int'l Terminal Operating Co.*, 29 BRBS 109 (1995); *see Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Thus, we affirm the administrative law judge's finding that claimant's benefits should not be suspended pursuant to Section 7(d)(4) as it is supported by substantial evidence and is a proper exercise of his discretion.

Lastly, employer contends that the administrative law judge erred in awarding temporary total disability benefits for "an imagined condition." It is well-settled that a psychological impairment which is work-related is compensable under the Act. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 89 (CRT)(2d Cir. 1997); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989). To establish a *prima facie* case of total disability, the employee must show that he cannot return to his regular or usual employment due to his work-related injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Initially, we reject employer's reliance on *Hike v. Billeting Fund*, 13 BRBS 1059 (1981). In that case, the working condition that could have precipitated the claimant's psychological condition did not exist, but was "imagined" by the claimant. In the present case, employer

en banc 31 BRBS 13 (1997).

does not dispute that claimant had early stage Lyme disease which was the precipitating factor in claimant's psychological disorder.

In concluding that claimant is unable to return to his former employment in the instant case, the administrative law judge gave greatest weight to the opinion of Dr. Schaerf, who opined that claimant needs psychiatric treatment to go back to work. He found Dr. Schaerf's opinion to be the most reliable as he was the only testifying clinical psychiatrist, he did not change his opinion at the deposition when presented with all the facts, and his opinion is based on seven sessions with claimant. In addition to Dr. Schaerf's opinion, the administrative law judge based his finding that claimant is currently unable to return to work on claimant's demeanor at the hearing, claimant's wife's testimony regarding claimant's "bad days," and claimant's unsuccessful attempt to return to writing. We affirm this finding as it is supported by substantial evidence and employer has raised no reversible error committed by the administrative law judge in weighing the evidence and making credibility determinations.

Once claimant shows an inability to return to his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The same standard applies whether the claim is for permanent or temporary total disability. *Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989). The administrative law judge rejected the suitable alternate employment identified by employer as he found that claimant is unreliable and unable to work consistently. In addition, the administrative law judge noted that Dr. Schaerf opined that claimant would need psychiatric treatment before he would be able to return to work of any kind. Contrary to employer's contention, the administrative law judge addressed Dr. Filskov's opinion regarding the extent of claimant's disability and noted that when asked whether claimant's psychological condition prevented him from working, Dr. Filskov responded "No, other than his belief he can't." The administrative law judge thoroughly considered all of the evidence of record and concluded that claimant is temporarily totally disabled, and employer has raised no error in this regard. *See generally Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Thus, as his finding is supported by Dr. Schaerf's opinion, we affirm the administrative law judge's finding that claimant is entitled to temporary total disability benefits under the Act.

Accordingly, the Decision and Order of the administrative law judge awarding compensation and medical benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge