BRB No. 99-1284

BERTIS E. PORTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits and Decision and Order on Motion for Reconsideration of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits and Decision and Order on Motion for Reconsideration (98-LHC-2998) of Administrative Law Judge David W. Di Nardi 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 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).

Claimant injured his lower back on June 19, 1990, during the course of his

employment for employer as a chipper. He suffered from lower back pain, which radiated into his right leg. Claimant was diagnosed as having a herniated disc at L4-5 and degenerative disc disease and mild spinal stenosis at L5-S1, which required lower back surgery on June 9, 1991. On September 21, 1993, a compromise settlement was approved, whereby claimant received $56,000 in lieu of continuing compensation under the Act, and employer remained liable for causally related medical expenses. 33 U.S.C. §908(i). On October 23, 1997, claimant presented with hip pain to Dr. McCloskey, a neurosurgeon, who had treated claimant since August 1990 for his work-related back injury. On March 6, 1998, Dr. McCloskey suspected back radiculopathy and he noted a possible right hip problem. Dr. McCloskey also prescribed Lortab 5 (hydrocodone) for pain. After a lumbar myelogram and CT scan showed minor back abnormalities, Dr. McCloskey ordered an x-ray and bone scan of claimant's right hip. These tests indicated early aseptic necrosis, a progressive hip disease. Dr. McCloskey advised claimant to see an orthopedic surgeon. On April 20, 1998, claimant was examined by Dr. McGinley, who performed a total hip replacement on May 11, 1998. Dr. McCloskey continued to prescribe hydrocodone until November 1998, at which time employer refused payment for this drug. Employer asserted that the prescription was unrelated to claimant's work injury.

In his decision, the administrative law judge determined that claimant injured only his lower back on June 19, 1990. The administrative law judge found that claimant's medical history prior to the March 6, 1998, report of Dr. McCloskey references only claimant's right hip in relation to complaints of radiating lower back pain. The administrative law judge further credited Dr. McCloskey's opinion that aseptic necrosis is rapidly progressive and is unlikely to remain untreated for eight years. Finally, the administrative law judge found that claimant has recovered from his June 19, 1990, work-related back injury, and that Dr. McCloskey and Dr. McGinley opined that claimant's hip condition is not related to the work injury.

In regard to claimant's entitlement to medical expenses, the administrative law judge found that employer is not responsible for any expense related to claimant's right hip condition, including Dr. McCloskey's prescription for hydrocodone. The administrative law judge specifically found that Dr. McCloskey prescribed hydrocodone for claimant's right hip pain and he credited the testimony of employer's claims adjuster, Monica Pickens, who testified that she had authorized payment for hydrocodone only because she thought it was related to the treatment of claimant's low back condition. The administrative law judge denied claimant's motion for reconsideration of the finding that Dr. McCloskey did not prescribe hydrocodone, at least in part, for back pain related to claimant's work injury.

On appeal, claimant contends that employer failed to rebut the Section 20(a) presumption, 33 U.S.C. §920(a), that Dr. McCloskey prescribed hydrocodone for his work-

related back pain. Claimant also asserts that the administrative law judge erred by not crediting claimant's testimony and other evidence that he requires hydrocodone, in whole or in part, for work-related back pain. Finally, claimant alleges factual error in the administrative law judge's finding that he has recovered from his back injury and that employer failed to authorize payment for hydrocodone since November 1998, rather than since March 1998. Employer responds, urging affirmance.

Section 7(a) of the Act, 33 U.S.C. §907(a), 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." *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. *See Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996); 20 C.F.R. §702.402. Claimant does not appeal the administrative law judge's finding that his right hip condition is not related to his employment with employer, *see* Petition for Review at 2, and the Section 20(a) presumption does not apply to the pertinent issue of whether hydrocodone was prescribed, at least in part, for claimant's work-related back pain. It is claimant's burden to prove the elements of his claim for medical benefits. *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996); *see also Ingalls Shipbuilding, Inc., v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993).

Nevertheless, we reverse the administrative law judge's finding that Dr. McCloskey prescribed hydrocodone (Lortab 5) only for claimant's non-work-related hip pain. There is no evidence supporting the administrative law judge's finding that claimant has recovered from his work-related back injury. Dr. McCloskey stated, in response to written deposition questions, that he has been prescribing pain medication to claimant from 1990 to November 20, 1998, for his low back, right hip, and leg pain. EXS 16, 17, 18. The administrative law judge discredited this statement, in part, on the basis that it is not corroborated by Dr. McCloskey's contemporaneous medical reports. These reports document the diagnosis of claimant's hip condition, note that a lumbar myelogram and CT scan show minor abnormalities, and relate claimant's current "difficulties" to his hip condition. CX 5. However, Dr. McCloskey's records never state that claimant has recovered from his back injury or that he has no work-related back pain and there is no record evidence that claimant has recovered from his back injury. Dr. McCloskey's medical records do show that he first prescribed Darvocet for back pain in September 1990, and the following pain medications for claimant's back injury, seriatim, between December 1991 and October 1997: Equagesic, Lortab 5, Tylenol #3 with codeine, Darvocet, Tylenol #3 with codeine, and Ultram. CX 5; EX 21 at ex. 1. On October 23, 1997, Dr. McCloskey referred claimant to Dr. Laseter for treatment of pain associated with low back and right leg pain. Dr. Laseter continued prescribing Ultram for pain relief. CXS 5, 10. Claimant returned to Dr. McCloskey on March 6, 1998, complaining of low back, right hip and buttock pain, and radiating right leg pain. CX 5; EX 7. Dr. McCloskey ceased treating claimant's pain with Ultram and instead prescribed Lortab 5, which he continued prescribing until November 19, 1998, when

employer refused to continue authorizing payment. *Id*.; EX 21 at ex. 2.[1] There is no evidence that claimant received any other pain medication in 1998 or any evidence that hydrocodone was prescribe solely for claimant's non-work-related hip condition.

The administrative law judge also based his finding that claimant has recovered from his work-related back injury on the parties' stipulation that claimant's back reached maximum medical improvement on April 8, 1992. EX 2. This stipulation, however, is not supportive of the administrative law judge's finding as the stipulation also includes an agreement that claimant sustained a fifteen percent permanent partial disability of the back. *Id*. Moreover, a finding of maximum medical improvement establishes only that claimant's condition is unlikely to improve, not that he has fully recovered and is not in need of treatment. *See generally Director, OWCP, v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990). Thus, we agree with claimant that the administrative law judge erroneously found that claimant had recovered from his back injury as there is no evidence of record supporting the administrative law judge's finding.

[1]We therefore reject claimant's contention that employer refused authorization for hydrocodone in March 1998 as the administrative law judge's finding that employer first refused to authorize payment for hydrocodone in November 1998 is supported by substantial evidence. *See O'Keeffe*, 380 U.S. at 359.

The administrative law judge also discredited Dr. McCloskey's deposition response that he prescribed pain medication, in part, for claimant's work-related back pain on the basis that he did not "specifically answer" all the deposition questions posed to him. Decision and Order at 15; *see* EXS 16, 17, 18. In his May 28, 1999, responses, Dr. McCloskey stated that he has treated claimant since 1990 for "persistent low back, right hip and leg pain." EX 18. He stated that he prescribed pain medication to claimant since 1990 for "the treatment of his low back, right hip, and leg pain." *Id.* This statement establishes claimant's *prima facie* case of entitlement to continuing pain medication at employer's expense, as it establishes that Lortab 5 was prescribed in part for claimant's work-related back injury. *See Turner v. The Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984). There is no evidence of record that claimant was not prescribed hydrocodone, at least in part, for his work-related back injury.[2] Thus, we reverse the administrative law judge's finding that employer is not liable for the expense of this pain medication.[3] *See Kelley v. Bureau of Nat'l Affairs*, 20 BRBS 169 (1988).

Accordingly, the administrative law judge's Decision and Order-Denying Benefits and Decision and Order on Motion for Reconsideration are reversed regarding employer's liability for the prescribed pain medication, hydrocodone, and the administrative law judge's finding that claimant's work-related back injury has healed. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[2]The administrative law judge's reliance on the testimony of employer's claims adjuster, Ms. Pickens, is misplaced, as her opinion as to the work-relatedness of the prescribed medication is irrelevant.

[3]We note, however, that Dr. McCloskey stated that claimant has not asked for pain medication since November 1998, and that claimant has been under the care of Dr. McGinley.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge