BRB Nos. 11-0126
and 11-0126A

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| POLLY K. FORREST | ) | |
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| Claimant-Petitioner | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| BAE SYSTEMS NORFOLK SHIP REPAIR | ) | DATE ISSUED: 09/29/2011 |
| | ) | |
| Employer-Respondent | ) | |
| Cross-Petitioner | ) | DECISION and ORDER |

Appeals of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gary R. West, Newport News, Virginia, for claimant.

Robert A. Rapaport and Bonnie P. Lane (Clarke, Dolph, Rapaport, Hull, Brunick & Garriott, P.L.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (2010-LHC-0363) of Administrative Law Judge Daniel A. Sarno, Jr., 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On May 9, 1978, claimant sustained an injury to her back while working for employer as a laborer. Claimant and employer settled claimant's claim for compensation arising as a result of her work injury, but left open the question of claimant's entitlement to future medical care. 33 U.S.C. §908(i). Since her injury, claimant has experienced numerous back problems and has, consequently, sought medical treatment, including

surgery. A dispute arose regarding employer's responsibility for specific medical expenses related to claimant's work injury. Claimant sought reimbursement for back surgeries she underwent on March 2, 2007, and September 14, 2009, and to hold employer liable for access ramps to her home. Employer contested the claim and additionally challenged its continued liability for claimant's high blood pressure medication.

In his Decision and Order, the administrative law judge denied claimant reimbursement for the costs associated with her March 2, 2007, and September 14, 2009, surgeries, and he declined to consider claimant's request for two access ramps for her home, stating that employer's liability for this expense had previously been litigated and denied in a prior claim. The administrative law judge found employer responsible for the cost of claimant's high blood pressure medication.

On appeal, claimant challenges the administrative law judge's finding that employer is not liable for the cost of her two back surgeries and the administrative law judge's refusal to consider her claim for access ramps to her home. Employer responds, urging the Board to reject claimant's contentions of error. In its cross-appeal, employer contends that the administrative law judge erred in holding it liable for the cost of claimant's high blood pressure medication.

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); *see Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). Medical care must be appropriate for the work injury, 20 C.F.R. §702.402, and claimant must establish that the requested services are reasonable and necessary for the treatment of the work injury. *See generally Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *see also Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Monta v. Navy Exch. Serv.*

*Command*, 39 BRBS 104 (2005); *Weikert v. Universal Maritime Service*, 36 BRBS 38 (2002).

The administrative law judge found that neither of the surgeries claimant underwent on March 2, 2007, and September 14, 2009 was reasonable or necessary for the treatment of her work-related back injury and that, consequently, employer is not liable for the costs of those surgeries. We affirm the administrative law judge's finding that claimant failed to establish that the March 2, 2007, surgery was necessary for the treatment of her back condition. In this regard, the administrative law judge rationally credited the opinions of Drs. Markham and Foer over that of Dr. Waters. *See, e.g.*, *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Dr. Markham, in May 2006, opined that the risks accompanying further surgery on claimant's back outweighed any possible gains. EX 4.15. Dr. Waters initially opined in May 2006 that claimant's condition had healed and that further surgery was not recommended. EX 4.12. In October 2006, however, Dr. Waters noted claimant's increased complaints of pain and recommended exploratory surgery. EX 4.14. In November 2006, Dr. Foer, after examining claimant and reviewing her medical records, opined that further surgery would result in virtually no benefit to claimant. EX 4.11-16. Dr. Waters performed surgery on March 2, 2007. Crediting the opinions of Drs. Markham and Foer, and finding that Dr. Waters had not provided a sufficient reason for his change in opinion regarding the necessity of surgery, the administrative law judge determined that claimant failed to establish that the March 2, 2007, surgery was reasonable and necessary for her work-related condition. This finding is supported by substantial evidence and therefore we affirm the administrative law judge's finding that employer is not liable for the costs associated with this procedure. *Wheeler*, 21 BRBS 33; *see generally Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997).

We cannot affirm, however, the administrative law judge's finding that employer is not liable for the surgery performed on September 14, 2009. The administrative law judge relied on the opinions of Drs. Holzer and Irby, as supported by the report of Dr. Hansen, over the opinion of Dr. Waters, because Dr. Waters had been inconsistent in his opinion regarding claimant's need for additional back surgery. In February 2009, Dr. Holzer, who had been treating claimant with steroid injections, opined that further surgery was neither anticipated nor expected to be beneficial if undertaken by claimant. CX 1.14. Claimant subsequently underwent an MRI which revealed stenosis at L2-L3 and the possibility that claimant's previously performed spinal fusion at that level was breaking down. CX 1.17-18. Based upon this information, Dr. Waters recommended that claimant undergo back surgery and, on September 14, 2009, he performed decompressions on her back. CX 1.32-33. Five months after this surgery, in February 2010, Dr. Irby reviewed claimant's medical history and opined that no "further surgery"

would improve claimant's condition. EX 8.3. In April and May 2010, Dr. Hansen reported that claimant's recent surgery had not improved her condition. CX 5.1; EX 11.8.

We must remand the case for additional consideration of the necessity of the September 14, 2009, surgery. Although Dr. Holzer, in February 2009, recommended against further surgery, Dr. Waters's decision to operate was based on an MRI taken after Dr. Holzer gave his opinion. In addition, five months after claimant's September 2009 surgery, Dr. Irby opined that *further* surgery was not indicated. He did not address the necessity of the September surgery. The administrative law judge declined to rely on the opinion of Dr. Waters, at least in part due to his inconsistent recommendations regarding claimant's need for surgery in 2007; with regard to this specific procedure, however, the administrative law judge did not assess the basis for Dr. Waters's decision to operate, *i.e.*, claimant was experiencing increasing symptomatology and a contemporaneous MRI indicated L2-3 stenosis and the possible breaking down of her fusion at that level. *See* CX 1.18. Therefore, we vacate the administrative law judge's finding that employer is not liable for claimant's September 14, 2009, back surgery, and we remand the case for the administrative law judge to reconsider the necessity and reasonableness of that surgery. *See Monta*, 39 BRBS 104; *see generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).

Claimant next asserts that the administrative law judge erred in refusing to address her claim that employer is liable for the cost of access ramps in her home. We agree that the administrative law judge erred in not addressing this issue on the ground that it previously had been fully litigated when claimant's initial claim for medical expenses was adjudicated before Administrative Law Judge Krantz. *See P.F. v. BAE Systems Norfolk Ship Repair*, Case No. 2007-LHC-243 (July 26, 2007). As Judge Krantz denied the claim for the same access ramps presently sought by claimant, the administrative law judge concluded that claimant's current request was barred by the doctrine of *res judicata*.[1]

Section 7(a) of the Act states that the employer shall furnish medical benefits "for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. §907(a); *see also* 20 C.F.R. §§702.401-402. Thus, employer has ongoing liability for reasonable and necessary medical benefits related to the work injury. Modifications to claimant's home necessitated by the work injury are the liability of an employer pursuant

[1]In his decision, Judge Krantz determined that there was no "present need for the construction of ramps." *P.F.*, slip op. at 12.

to Section 7. *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989). The doctrine of *res judicata* is not applicable in this case because claims for medical benefits are never time-barred, *see, e.g.*, *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (*en banc*), and claimant presented new evidence that her medical condition has deteriorated since the issuance of Judge Krantz's decision in July 2007 and that access ramps are an appropriate accommodation for her work injury. The administrative law judge's finding that claimant is barred from seeking reimbursement for access ramps is therefore vacated and the case is remanded; on remand, the administrative law judge must address claimant's claim for the ramps and all evidence relevant to the issue. *See generally Holmes v. Shell Offshore, Inc.*, 37 BRBS 27 (2003).

In its cross-appeal, employer challenges the administrative law judge's finding that it is liable for the cost of claimant's hypertension medication. Specifically, employer, who had been paying for claimant's blood pressure medication, argues that such medication was being taken as a result of claimant's use of NSAIDS as treatment for her work-related condition and, because claimant is no longer taking NSAIDS, it should no longer be responsible for her hypertension medication. We reject employer's allegation of error. The administrative law judge found that the opinions of Drs. Angeles and Desai constitute the only evidence addressing claimant's high blood pressure. In this regard, both of these physicians opined that claimant's high blood pressure is related to her work injury. CX 6.2-3. Finding that the record contains no evidence to the contrary, the administrative law judge concluded that the opinions of these two physicians establish that claimant's hypertension medication is related to her work injury and is, therefore reasonable and necessary for her medical treatment; accordingly, the administrative law judge held employer liable for this medication. Decision and Order at 18. As the opinions of Drs. Angeles and Desai provide substantial evidence to support the administrative law judge's finding that employer is liable for claimant's hypertension medication, that award is affirmed. 33 U.S.C. §907.

Accordingly, the administrative law judge's denial of claimant's claim for medical benefits for her September 14, 2009, surgery and for the installation of access ramps at her home is vacated, and the case is remanded for further proceedings consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is 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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BETTY JEAN HALL
Administrative Appeals Judge