BRB Nos. 13-0040
and 13-0040A

LARRY D. REMO	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
EMPIRE SCAFFOLDING	)	DATE ISSUED: 09/23/2013
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Larry D. Remo, Powhatan, Louisiana, pro se.

David K. Johnson (Johnson, Rahman & Thomas), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, appearing without representation, appeals and employer cross-appeals the Decision and Order on Remand (2009-LHC-00739) of Administrative Law Judge Patrick M. Rosenow 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq*. (the Act). In addressing an appeal in which claimant is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine if they are supported by substantial evidence, are rational, and are in

accordance with law; if they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. Claimant injured his left lower extremity on December 9, 2006, during the course of his employment for employer as a scaffold builder while being transferred in heavy seas on a rope swing from an oil platform to a ship. As a result of the accident, claimant was unable to work until January 7, 2007, when he returned to light-duty work for employer. He continued to work in this capacity until February 7, 2007, when he complained to his treating physician, Dr. Dansby, of lower back spasms due to his left leg injury. Tr. at 40-41; CX 2. Employer paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from February 9, 2007 to June 1, 2007, the date upon which it believed claimant's treating physician released claimant to return to light-duty work. Claimant subsequently was examined by Drs. Berliner, Pribil, and Cupic for continued pain in the left leg, as well as in his back and neck. CX 5. Dr. Pribil recommended that claimant undergo a lumbar microdiscectomy at L5-S1. CX 6 at 125. Claimant sought compensation for temporary partial disability, 33 U.S.C. §908(e), from June 2, 2007 to February 20, 2008, and for ongoing temporary total disability commencing February 21, 2008. Claimant also sought medical benefits for his lumbar and cervical conditions, including reimbursement of out-of-pocket expenses related to those conditions. 33 U.S.C. §907.

In his initial decision, the administrative law judge found that claimant is not entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his back and neck conditions to the work injury. The administrative law judge found, however, that claimant cannot return to his usual employment due to his work-related left leg injury, and that employer established the availability of suitable alternate employment on July 19, 2007, when claimant was offered suitable light-duty work in employer's shop paying $10 per hour and a weekly per diem of $275. The administrative law judge calculated claimant's average weekly wage as $439.80 pursuant to Section 10(c), 33 U.S.C. §910(c). The administrative law judge awarded claimant compensation for temporary total disability from December 10, 2006 to January 7, 2007, and from February 8, 2007 to July 19, 2007. The administrative law judge awarded claimant compensation for temporary partial disability based on a weekly loss of wage-earning capacity of $39.80 from January 8, 2007 to February 7, 2007.

Claimant appealed the administrative law judge's decision. *Remo v. Empire Scaffolding*, BRB No. 10-0440 (Feb. 23, 2011) (unpub.). In its decision, the Board reversed the administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption and, in the absence of substantial evidence to rebut the presumption, it reversed the administrative law judge's finding that claimant's back and neck injuries are not work-related. *Remo*, slip op. at 3-5. The Board remanded the case for the administrative law judge to address claimant's entitlement to reimbursement of out-of-pocket medical expenses after August 20, 2008, for the treatment of these conditions. *Id*.

at 5. The Board affirmed the administrative law judge's finding that employer's July 19, 2007 offer of light-duty employment established the availability of suitable alternate employment as it related solely to claimant's leg injury; however, the Board remanded the case for the administrative law judge to assess the effects of claimant's back and neck injuries on the suitability of this job. *Id*. at 6. The Board noted that the administrative law judge may address claimant's entitlement to a nominal award should he conclude that claimant does not currently have a loss of wage-earning capacity due to his injuries. *Id*. at 6 n.4. The Board affirmed the administrative law judge's calculation of claimant's average weekly wage, and it stated that, should the administrative law judge find on remand that employer's offer of light-duty employment satisfies its burden of establishing the availability of suitable alternate employment, the administrative law judge's calculation of claimant's post-injury wage-earning capacity is supported by substantial evidence.

On remand, the administrative law judge found that employer's July 30, 2007 offer of light-duty employment that involved a shorter commute, in consideration of claimant's back condition, established the availability of suitable alternate employment. Decision and Order on Remand at 4-5. The administrative law judge found that claimant's back condition had not reached maximum medical improvement based on Dr. Pribil's uncontradicted recommendation of lumbar microdiscectomy surgery. *Id*. at 6. He also found that the record does not support claimant's entitlement to a nominal award. *Id*. The administrative law judge found that claimant was not obligated to seek permission to change doctors for his back and neck conditions after August 20, 2008, since employer had previously denied the request for authorization. The administrative law judge found that Dr. Cupic was the only physician to treat claimant after this date and that there is no evidence that Dr. Cupic timely filed a report of his treatment pursuant to Section 7(d)(2) of the Act, 33 U.S.C. §907(d)(2). He found that employer was prejudiced thereby as it was unable to timely review Dr. Cupic's diagnosis; therefore, the administrative law judge denied the claim for reimbursement for Dr. Cupic's medical treatment. The administrative law judge found that the district director must determine whether good cause exists to excuse Dr. Cupic's failure to file a report. *Id.* at 8. The administrative law judge found that claimant's future care for his back and neck conditions shall include the back surgery recommended by Dr. Pribil and that claimant may seek to change physicians for his leg injury so as to have only one physician treating his back, neck and leg injuries. *Id*. at 8-9.

Claimant appeals the administrative law judge's decision on remand without the benefit of counsel.[1] BRB No. 13-0040. Employer filed a response brief. Employer also cross-appeals the administrative law judge's decision. BRB No. 13-0040A. Employer

[1]Thus, we will review the administrative law judge's findings that are adverse to claimant.

contends the Board's prior holding that employer did not establish rebuttal of the Section 20(a) presumption is erroneous. Employer also contests the administrative law judge's suitable alternate employment finding and his finding that claimant is entitled to seek medical treatment from physicians other than Dr. Sandifer.

We address first the issues raised in employer's cross-appeal. Employer challenges the Board's holding that it did not rebut the Section 20(a) presumption with respect to claimant's back and neck injuries.[2] Employer argues that the decision of the United States Court of Appeals for the Fifth Circuit in *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012) is intervening case law that mandates reversal of the Board's holding.[3] Section 20(a) of the Act presumes that a claimant's injury is work-related in "the absence of substantial evidence to the contrary." *Id.* In *Plaisance*, the Fifth Circuit, in whose jurisdiction this case arises, reversed the Board's holding that the Section 20(a) presumption was not rebutted in that case, stating that employer need not "demonstrate" the absence of a causal connection by showing a deficiency in claimant's prima facie case; all it must do is "advance evidence to throw factual doubt on the claimant's prima facie case." *Plaisance*, 683 F.3d at 231, 46 BRBS at 28-29(CRT). Employer argues that claimant's failure to report any back pain until February 7, 2007, or neck pain until February 20, 2008, *see* Decision and Order at 14-15, and the administrative law judge's finding in his initial decision that claimant's subjective complaints of neck and back pain are not credible is sufficient to evidence to establish rebuttal of the Section 20(a) presumption under *Plaisance*. Employer's argument has merit.

---

[2]Employer also challenges the Board's reversal of the administrative law judge's finding that claimant is not entitled to invocation of the Section 20(a) presumption with respect to his back and neck injuries. Employer has not set forth any argument to show that the Board's decision was clearly erroneous. *Irby v. Blackwater Security Consulting, LLC*, 44 BRBS 17 (2010). Thus, the Board's decision on this issue constitutes the law of the case, and we decline to address employer's contention in this regard. *See, e.g., Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003).

[3]This case was decided after the Board's first decision but before the administrative law judge issued his decision on remand. While the "law of the case" doctrine holds that the Board will not reconsider issues previously settled in its prior consideration of the case, *see Boone*, 37 BRBS 1, the Board has declined to apply the doctrine in instances where there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice. *See Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.*, 35 BRBS 190 (2002).

In its prior decision, the Board held that employer did not rebut the presumption because Dr. Pribil related claimant's back and neck conditions to the work injury, none of the other physicians of record stated that these conditions were not caused or aggravated by the work injury, and there is no other evidence of record that can rebut the Section 20(a) presumption. *Remo*, slip op. at 5. Claimant's 14-month delay in reporting neck pain and the two-month delay in his reporting back pain may constitute substantial evidence to "throw factual doubt" on claimant's prima facie case. Accordingly, we vacate the prior holding that employer did not establish rebuttal of the Section 20(a) presumption, and we remand for the administrative law judge to address the relevant rebuttal evidence. Should the administrative law judge find that employer established rebuttal for either or both of these conditions, he must then weigh the record evidence as a whole to determine if claimant established the work-relatedness of the condition. *Plaisance*, 683 F.3d at 229, 232, 46 BRBS at 27, 29(CRT).

Employer next contends that the administrative law judge erred by modifying the cessation date of claimant's temporary total disability award from July 19 to July 29, 2007, on the basis that such was beyond the scope of the Board's remand instructions. In its decision, the Board stated that the administrative law judge's finding that employer established the availability of suitable alternate employment on July 19, 2007 based on its offer of light-duty employment in its shop area is supported by substantial evidence as it relates to claimant's leg injury. *See* Decision and Order at 16. The Board remanded for further findings regarding suitable alternate employment, as the administrative law judge did not assess the effects of claimant's neck and back conditions on the suitability of the proffered job. *Remo*, slip op. at 6. Thus, contrary to employer's assertion, the administrative law judge was to reassess employer's offer of suitable alternate employment in view of claimant's back and neck injuries. As employer's initial job offer was not suitable in view of claimant's restriction for his back injury, the administrative law judge did not err in awarding claimant total disability benefits until suitable alternate employment was established on July 30, 2007. Accordingly, we reject employer's contention that the administrative law judge's modification of the temporary total disability award was not within the scope of the Board's remand order.[4] *See Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (2007), *aff'd sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997). Additionally, as it relates to claimant's pro se appeal, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment on July 30, 2007, within claimant's work restrictions from his leg, back and neck injuries as it is supported by the

[4]In the event the administrative law judge determines on remand that claimant's back condition is not related to the work injury, he may reinstate his prior suitable alternate employment finding.

evidence of record.[5] *See* EX 1 at 22-26*; see generally Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

Employer also challenges the administrative law judge's finding that Dr. Sandifer is no longer claimant's treating physician, and claimant's entitlement to reimbursement for the treatment rendered by Dr. Cupic should the district director determine that good cause excuses Dr. Cupic's failure to timely file medical reports.[6] 33 U.S.C. §907(d)(2). Employer's contentions are contingent, in part, on claimant's establishing work-related back and neck conditions.

On remand, claimant sought reimbursement only for Dr. Cupic's evaluation of claimant's back, neck and leg on November 4, 2008. The administrative law judge found that employer refused to provide treatment for claimant's back condition after August 20, 2008; therefore, claimant was not obligated to seek permission to change physician for his back and neck from Dr. Sandifer to Dr. Cupic.[7] Decision and Order on Remand at 7. However, the administrative law judge did not order employer to reimburse claimant for this treatment since Dr. Cupic did not file a medical report, pursuant to Section 7(d)(2), and employer was prejudiced by this omission as it was deprived of the opportunity to timely review Dr. Cupic's diagnoses. *Id*. at 8. The administrative law judge, therefore,

---

[5]On remand, the administrative law judge rationally credited Dr. Sandifer's work restrictions over the opinions of Drs. Berliner and Cupic that claimant is totally disabled due to his back condition, as Dr. Sandifer was claimant's longer-term treating physician who examined claimant nearer in time to the work injury. Decision and Order on Remand at 5; *see Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 F.App'x 126 (5th Cir. 2002) (table). The position credited by the administrative law judge as establishing the availability of suitable alternate employment pays the same as the position previously credited by the administrative law judge, which, the Board stated, did not result in a loss of wage-earning capacity. EX 1 at 11; *see Remo*, slip op. at 6, n.4. Accordingly, we also affirm the administrative law judge's denial of compensation after July 29, 2007.

[6]Employer also argues that it need not authorize future medical treatment as claimant has not sought any treatment for his work injuries since he saw Dr. Cupic on November 4, 2008. However, the absence of medical treatment since November 2008 is irrelevant to claimant's entitlement to care for his work injuries if additional treatment is necessary. 33 U.S.C. §907(a); *see generally Strachan Shipping Co. v. Hollis*, 460 F.2d 1108 (5th Cir.), *cert. denied*, 409 U.S. 867 (1972).

[7]The administrative law judge also found that claimant may seek to change physicians (from Dr. Sandifer) for his leg injury, in order to see only one orthopedist. Decision and Order on Remand at 9.

found that the district director must determine whether good cause existed for the failure to file a report under Section 7(d)(2).

Section 7(d) states the prerequisites for employer's liability for payment or reimbursement of medical expenses incurred by claimant. Specifically, in order to be entitled to payment for medical treatment, claimant must first request employer's authorization for the medical services performed by any physician, including claimant's initial choice. *See Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989). Under Section 7(d), an employee is entitled to recover medical expenses if he requests employer's authorization for treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Claimant retained new counsel in August 2008. Claimant's attorney at this time, Greg Unger, wrote to employer's insurance carrier on August 7, 2008. CX 21. Mr. Unger stated that claimant had injured his back during the work incident, he is temporarily totally disabled, and in need of active medical treatment. He sought compensation and authorization for claimant to treat with an orthopedic surgeon. CX 21. Employer responded on August 20, 2008, denying reinstatement of temporary total disability benefits and specifically denying a change of physician. CX 22.

On remand, the administrative law judge found that Dr. Sandifer was claimant's treating physician; the administrative law judge summarized the letter sent by Mr. Unger and employer's response, and he found that employer denied authorization and that future requests likely would be futile. Therefore, the administrative law judge found that claimant was no longer obligated to seek permission to change doctors for his back and neck. We affirm the administrative law judge's finding that claimant requested and was denied authorization by employer to change physicians as it is supported by substantial evidence. *Anderson*, 22 BRBS 20; *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988). Therefore, we affirm the administrative law judge's authorizing claimant to treat with Dr. Cupic, rather than Dr. Sandifer, for his back condition.

We next address the administrative law judge's denial of reimbursement for Dr. Cupic's treatment. Pursuant to Section 7(d)(2), "No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment" furnishes a report to the employer and district director. 33 U.S.C. §907(d)(2). There is no evidence of record contrary to the administrative law judge's finding that Dr. Cupic did not timely file a report of treatment. Moreover, the administrative law judge rationally found that employer was prejudiced because it was deprived of the opportunity to have another physician promptly review Dr. Cupic's assessment that claimant is in need of back

surgery. *See Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *see generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Accordingly, we affirm these findings.

The district director may excuse the failure to comply with the provisions of Section 7(d)(2) if it is in the interest of justice to do so. 33 U.S.C. §907(d)(2); *see Roger's Terminal & Shipping Corp.*, 784 F.2d 687, 18 BRBS 79(CRT); 20 C.F.R. §702.422.[8] The authority to determine whether non-compliance with Section 7(d)(2) may be excused rests solely with the district director and not the administrative law judge. *See Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994)(McGranery, J., dissenting). Thus, the administrative law judge properly found that the issue of whether good cause existed to excuse Dr. Cupic's failure to timely file his report must be decided by the district director. *Id.* Claimant's entitlement to reimbursement is predicated on the failure to file being excused.

We next address the administrative law judge's finding that claimant's work injuries are not at maximum medical improvement. On remand the administrative law judge found that claimant has not reached maximum medical improvement, based on the Board's holding that his back condition is related to the work injury, and Dr. Pribil's uncontradicted recommendation that claimant undergo a microdiscectomy.[9] See CX 6 at 132. If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). If surgery is anticipated, maximum medical improvement has not been reached. *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Kuhn v. Associated Press*, 16 BRBS 46 (1983). We affirm the administrative law judge's finding that claimant's back injury is not at maximum medical improvement because claimant requires a

---

[8]The implementing regulation, Section 702.422(b), 20 C.F.R §702.422(b), states in pertinent part:

> For good cause shown, the Director may excuse the failure to comply with the reporting requirements of the Act . . . .

[9]A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

microdiscectomy. *See Monta v. Navy Exchange Service Command*, 39 BRBS 105 (2005).

The Board also instructed the administrative law judge to address claimant's entitlement to a nominal award in the event he found no loss of wage-earning capacity. A nominal award is appropriate where claimant has not established a present loss in wage-earning capacity, but has established that there is a significant possibility of future economic harm as a result of the injury. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). On remand, the administrative law judge found, "[T]he record does not support such a finding at this time. Obviously, when Claimant undergoes the surgery recommended by Dr. Pribil that he seeks, he may likely have a new period of disability, but that would not be subject to the time limits of Section 22. Thus, there is no need for a de minimis award." Decision and Order on Remand at 6. We cannot affirm this finding. The administrative law judge did not cite any evidence in support of his summary denial of a nominal award or address the evidence in terms of the *Rambo II* standard. Moreover, contrary to the administrative law judge's finding, Section 22 time limits would apply in this case; claimant can seek modification only within one year of the last payment of benefits or the conclusion of proceedings on his claim. *Moore v. Virginia Int'l Terminals*, 35 BRBS 28 (2001) As the administrative law judge's conclusory finding fails to address whether claimant demonstrated a significant possibility of future economic harm due to his injury, we vacate the denial of a nominal award. On remand, the administrative law judge shall reconsider claimant's entitlement to a nominal award for his work-related injuries in accordance with the applicable legal standards.[10] *See Rambo II*, 521 U.S. at 137-141, 31 BRBS at 60-62(CRT); *L.W. [Washington] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 27 (2009).

Accordingly, the Board's prior holding that claimant's back and neck conditions are work-related is vacated, and the case is remanded for the administrative law judge to address whether employer rebutted the Section 20(a) presumption, pursuant to *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT). Should the administrative law judge find the presumption rebutted, he must then address the causation issued based on record

[10]Claimant could be entitled to a nominal award even if it is determined that his back or neck injuries are not related to the work injury as the parties stipulated that claimant's leg injury is not at maximum medical improvement. Decision and Order at 3; *see generally Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd mem.*, 84 F. App'x 333 (4th Cir. 2004).

evidence as a whole. The administrative law judge's denial of a nominal award is vacated and the case is remanded for the administrative law judge to reconsider claimant's entitlement to a nominal award consistent with this decision. In all other respects, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge