BRB No. 99-155

RUDOLPH KAZIMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 9/28/99
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Joseph P. Moschetta (Joseph P. Moschetta and Associates), Washington, Pennsylvania, for claimant.

Michael W. Zimecki (Strassburger McKenna Gutnick & Potter), Pittsburgh, Pennsylvania, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (97-LHC-1483) of Administrative Law Judge Gerald M. Tierney 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 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, a dockman/riverman, injured his neck and back at work on October 25, 1994, when he fell 12 feet from one coal barge into another coal barge. He continued to work until February 17, 1995, when he was suspended and subsequently fired for leaving work early. Employer did not pay any disability or medical benefits with the exception of claimant's emergency room care on October 25, 1994. The administrative law judge awarded claimant permanent total disability

benefits from March 1997 and continuing after finding that claimant was unable to return to his usual work as of that date, and that employer did not establish the availability of suitable alternate employment. The administrative law judge also awarded claimant medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, including the chiropractic care provided by Dr. Wilhelm.

On appeal, employer challenges the administrative law judge's award of total disability and medical benefits. Claimant responds in support of the administrative law judge's award.

Employer initially contends that the administrative law judge erred in awarding claimant permanent total disability benefits, and argues that claimant is not entitled to total disability benefits because he was discharged from work on February 17, 1995, due to his misconduct. To establish his *prima facie* case of total disability, claimant must establish that he is unable to perform his usual employment due to his work-related injury. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Once claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In determining that claimant established that he was unable to return to work as of March 1997, the administrative law judge credited claimant's complaints of pain, along with the opinions of Drs. Wilhelm, Papincak, J. Lee, Zubchevich, and K. Lee, over that of Dr. Nettrour. The administrative law judge acted within his discretion in crediting the former physicians over the latter as Dr. Nettrour was the only physician who found claimant had completely covered from the work injury; in contrast, the credited physicians found claimant unable to return to his previous employment due to the work injury. Moreover, the administrative law judge noted Dr. Nettrour's lack of objective evidence corresponding to claimant's complaints of pain is contrary to the findings of Drs. Wilhelm and Papincak, claimant's treating physicians, and claimant's x-rays and MRIs. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *MacDonald v. Trailer Marine Transp. Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987); Decision and Order at 14; Cl. Exs. 2, 7, 11, 16-18, 27, 28; Emp. Exs. A, B, K at 21-23.

Contrary to employer's contention, claimant's discharge from work on February 17, 1995, does not prevent his receiving benefits for total disability. In this

regard, employer's reliance on the holdings in *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director,* OWCP, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993), *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986), and *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980), is misplaced. The administrative law judge did not award total disability benefits to a claimant who was medically able to return to suitable alternate work but could not because of his discharge. Rather, the evidence as rationally credited by the administrative law judge establishes that claimant is unable to return to his usual work due to his work-related injury as of March 1997; claimant's discharge has no effect on this determination which rests on claimant's physical capabilities alone. The claimants in *Brooks*, *Walker*, and *Harrod* were medically able to perform alternate work but could not work at the light duty jobs provided because of their discharges due to their own misfeasance.[1] As the administrative law judge acted within his discretion in finding that the evidence establishes that claimant is medically unable to return to his usual work as of March 1997, and as employer herein presented no evidence of the availability of suitable alternate employment that claimant could perform but for his discharge, we affirm the administrative law judge's award of permanent total disability benefits. *See Hite v. Dresser Guiberson Pumping,* 22 BRBS 87 (1989); *Anderson*, 22 BRBS at 20; *MacDonald*, 18 BRBS at 259.

Employer next contends that the administrative law judge erred in holding it liable for the bills of Drs. Baraff, Bailes, and Papincak, as well as for the bills for claimant's magnetic resonance imagings (MRIs) and prescriptions without considering Dr. Nettrour's opinion that further care and treatment was not necessary. Moreover, employer contends that the medical expenses of Drs. Baraff and Bailes are not compensable since claimant saw them only once in anticipation of litigation. Section 7 describes an employer's duty to provide medical services necessitated by its employee's work-related injuries. In order for a medical expense to be assessed against employer, the expense must be reasonable, necessary, and related to the work injury. *Romeike v. Kaiser Shipyards,* 22 BRBS 57, 60 (1989).

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[1]Under such circumstances, the employer does not have a renewed duty to establish suitable alternate employment, and claimant remains entitled to any partial disability award he was receiving absent evidence of a higher wage-earning capacity. *See Mangaliman v. Lockheed Shipbuilding Co.,* 30 BRBS 39 (1996).

The administrative law judge held employer liable for the charges of Drs. Bailes, Baraff, and Papincak, as well as the expenses for claimant's MRIs and prescriptions, finding them reasonable and necessary since employer did not provide any medical opinions in support of its position that these services were inappropriate. As employer correctly contends, the record includes Dr. Nettrour's opinion that further care and treatment was not indicated or required.[2] *See* Emp. Exs. A, B, K at 23. Any error in the administrative law judge's failure to specifically discuss Dr. Nettrour's opinion is harmless as he rationally gave less weight to this physician's opinion that claimant had recovered from his work injury when discussing the issue of claimant's ability to return to work. *See generally Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994). Although employer contends that the bills of Drs. Bailes and Baraff are not compensable because they were prepared only for the purposes of litigation, the administrative law judge rationally awarded these bills because Dr. Wilhelm, claimant's treating physician, referred claimant to these physicians for necessary testing. *See generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc);* Decision and Order at 16; Cl. Exs. 2, 9, 10, 14, 15.

Employer lastly contends that the administrative law judge erred in holding it liable for the bills of Dr. Wilhelm, a chiropractor, since Dr. Wilhelm did not diagnose a subluxation (dislocation) shown by x-ray or clinical findings. Section 702.404 of the regulations, 20 C.F.R. §702.404, provides that "chiropractors" are included in the definition of the term "physician" but "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings." 20 C.F.R. §702.404. Thus, the Board has held that the plain and literal language of the regulation is that a chiropractor's "only" reimbursable service is "limited" to treatment consisting of manual spinal manipulation to correct a subluxation shown by x-ray or clinical findings. *Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (1998).

In the instant case, the administrative law judge found Dr. Wilhelm's chiropractic treatment necessary for claimant's work-related condition, and that employer did not introduce any evidence to the contrary. In light of the fact that the

[2]The record also contains Dr. Burstein's opinion that there were no indications of claimant needing or having needed any psychiatric treatment, psychological counseling, or psychotropic medication. Emp. Ex. D. Since claimant did not seek such expenses, the administrative law judge properly did not consider Dr. Burstein's opinion in determining the reasonableness and necessity of the medical bills sought by claimant.

Board's decision in *Bang* was issued just prior to the administrative law judge's decision in this case, we vacate the administrative law judge's award of chiropractic expenses, and remand this case to the administrative law judge to determine if Dr. Wilhelm's expenses are compensable in accordance with Section 702.404. *Bang*, 32 BRBS at 183; 20 C.F.R. §702.404; Decision and Order at 16; Cl. Exs. 2, 3.

Accordingly, the administrative law judge's award of the chiropractic expenses of Dr. Wilhelm is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge