BRB No. 96-0643

TIMOTHY G. MYERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TAMPA SHIPYARDS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Edward F. Gerace (Legal Center for the Injured), Tampa, Florida, for claimant.

Timothy D. Wolf (Fowler, White, Gillen, Boggs, Villereal and Banker, P.A.), Tampa, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (94-LHC-1590) of Administrative Law Judge Frederick D. Neusner 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).

Claimant was injured during the course of his employment in September 1985 when he fell approximately six feet from a scaffold. Claimant ceased working on October 4, 1985, the stipulated

date of injury, because of increased pain. Claimant thereafter underwent a decompressive lumbar laminectomy with a posterolateral bilateral lumbar fusion in April 1986. As part of his rehabilitation program, claimant obtained a Bachelor of Arts degree in mathematics and a Master of Arts degree in education. He was subsequently employed by the University of South Florida from November 18, 1991, until October 21, 1993, when he was terminated because his increasing physical difficulties prevented him from performing his job duties.

In his Decision and Order, the administrative law judge awarded claimant temporary total disability compensation from the stipulated date of injury, October 4, 1985, until October 20, 1986, the date on which the administrative law judge determined that claimant reached maximum medical improvement, and permanent total disability compensation thereafter. Additionally, the administrative law judge found that employer was entitled to an offset for any wages earned by claimant following his work injury. Lastly, the administrative law judge found employer liable for the costs of the medical treatment undertaken by claimant, including, but not limited to, that rendered by Drs. Bonney, Lord, Magdovitz, Shams, Afield, and Kalin.

On appeal, employer challenges the administrative law judge's finding that claimant was totally disabled subsequent to November 18, 1991, and that employer failed to establish the availability of suitable alternate employment. Further, employer contends that the administrative law judge erred in determining claimant's entitlement to reimbursement for medical services. Claimant responds, urging affirmance.

Where, as in the instant case, a claimant is unable to return to his usual employment duties, the burden shifts to employer to establish the existence of realistically available job opportunities within the geographical area where the claimant resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing. *See Wilson v. Dravo Corp.*, 22 BRBS 459 (1989)(Lawrence, J., dissenting). Where claimant obtains a job after an injury, a finding of total disability during the period of employment may be made only if claimant works through extraordinary effort or is provided a position through employer's beneficence. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *see also Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir. 1988). An award of total disability while claimant is working is the exception rather than the rule. *Carter v. General Elevator Co.*, 14 BRBS 90 (1981).

Employer initially contends that the administrative law judge's decision to award claimant permanent total disability compensation during the period of time that claimant was employed by the University of South Florida (USF) cannot stand. We agree. In his Decision and Order, the administrative law judge awarded claimant permanent total disability compensation from October

20, 1986, the date of maximum medical improvement found by Dr. Nieto, claimant's orthopedic surgeon. In addressing claimant's employment with USF from November 18, 1991, until October 21, 1993, the administrative law judge summarily stated that claimant was "hired in suitable alternate employment" by USF, *see* Decision and Order at 11, and thereafter determined that employer is entitled to "an offset to the extent of any wages that were paid to Claimant for work . . . Claimant performed between the date of injury and the time of the hearing." *Id.* at 18. As employer correctly asserts on appeal, the administrative law judge did not consider whether claimant performed his job at USF with extraordinary effort or through the beneficence of that employer; accordingly, we hold that the administrative law judge's award of total disability compensation during this period of time must be vacated, and the case remanded for the administrative law judge to consider the evidence of record under the applicable legal standard. *See Patterson*, 846 F.2d at 715, 21 BRBS at 51 (CRT); *Everett*, 23 BRBS at 315; *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). Should the administrative law judge find, on remand, that the USF position constituted suitable alternate employment which claimant was capable of performing, the administrative law judge must next determine whether claimant is entitled to an award of permanent partial disability compensation, pursuant to the statutory scheme established in Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), rather than the permanent total disability award entered by the administrative law judge in his initial decision.[1] *See Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

Employer additionally contends that the administrative law judge erred in failing to credit the testimony of its rehabilitation expert and in failing to find that it established the availability of suitable alternate employment subsequent to October 21, 1993. We disagree. The administrative law judge concluded that employer failed to establish the availability of suitable alternate employment based upon the medical opinions of record that claimant was unemployable and claimant's credited complaints of pain; additionally, the administrative law judge found that the market survey prepared by Mr. Harvey, employer's rehabilitation expert, was insufficient to establish the availability of suitable alternate employment because he did not take into consideration the limitations imposed on claimant as a result of his elevated level of pain, which the administrative law judge concluded was the major cause of claimant's disability. *See* Decision and Order at 10. In this regard, Dr. Gomes opined that claimant suffered from post-laminectomy pain syndrome and was unemployable. *See* CXS 9, 12. Similarly, Dr. Ciccarello testified that claimant was incapable of fulfilling any job duties and that his condition would continue to worsen, *see* CX 11, while Dr. Afield, claimant's psychiatrist, testified that claimant cannot focus or pay attention to job duties due

[1]An award for permanent partial disability compensation in a case not covered by the schedule is based on the difference between claimant's' pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988). Sections 8(c)(21) and 8(h) require that a claimant's post-injury wage-earning capacity be adjusted to account for inflation to represent the wages that the post-injury job paid at the time of claimant's injury. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT)(D.C. Cir. 1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

to his pain and that claimant was totally disabled by that pain. *See* HT at 89-90. Even Dr. DeWeese, who found that claimant could perform sedentary employment from a physical standpoint, opined that claimant would have continuing pain, probably as a result of scar tissue resulting from the surgery, which would impact on his wage-earning capacity and for which no palliative therapy was available. *See* CX 11.

It is well-established that the administrative law judge as the trier of fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Therefore, we affirm the administrative law judge's decision to credit the testimony of claimant, as supported by the medical opinions of record, as that determination is neither inherently incredible nor patently unreasonable. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1981), *cert. denied*, 440 U.S. 911 (1979). Thus, as the testimony of record constitutes substantial evidence supportive of the administrative law judge's finding, we affirm the administrative law judge's finding that employer has failed to establish the availability of suitable alternate employment subsequent to October 21, 1993, and his consequent award of continuing permanent total disability compensation to claimant as of that date. *See generally Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

Employer next argues that the administrative law judge erred in determining that it is liable for the medical charges incurred by claimant as a result of his treatment with Drs. Magdovitz, Bonney, Lord, Shams, Kalin, and Afield. Section 7 of the Act, 33 U.S.C. §907, describes an employer's duty to provide medical services necessitated by its employee's work-related injuries. Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. The Board has held that Section 7(d) requires that a claimant request his employer's authorization for medical services performed by any physician, including the claimant's initial choice.[2] *See Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981)(Miller, J., dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Where a claimant's request for authorization is refused by the employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was necessary for his injury in order to be entitled to such treatment at employer's expense. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Claimant, however, is not required to seek the consent of employer for a change of physician where claimant has been referred by his treating physician to a specialist skilled in treating claimant's injury. *See generally Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992)(Smith, J., dissenting on other grounds); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988). Section 702.404 of the Act's regulations provides that chiropractors are included in the definition of the term "physician" within the meaning of Section 7, subject to the limitation that their services are reimbursable only for "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.

[2]In addition, Section 702.406(a) of the Act's regulations, 20 C.F.R. §702.406(a), requires that authorization from the employer be obtained when a change of physicians occurs.

Regarding its liability for claimant's medical expenses, employer initially asserts that the administrative law judge erred in concluding that, because it did not object to specific items contained in Dr. Magdovitz' bill, it is responsible for all services performed by that physician even if they are beyond the scope of the regulations. We agree. After recognizing that Dr. Magdovitz is a chiropractor whose services exceeded the limits of the regulations, 20 C.F.R. §702.404, the administrative law judge found employer responsible for Dr. Magdovitz' entire bill because employer failed to itemize those services to which it specifically objected. Pursuant to the Act's implementing regulations, treatment by chiropractors is reimbursable only to the extent that it consists of manual manipulation of the spine to correct a subluxation shown by x-rays or clinical findings. *See* 20 C.F.R. §702.404. Contrary to the administrative law judge's rationale, claimant, as the proponent, bears the burden of establishing his entitlement to medical services. *See generally Newport News Shipbuilding & Dry Dock Co. v. Loxley*, 934 F.2d 511, 24 BRBS 175 (CRT)(4th Cir. 1991). Accordingly, we hold that the administrative law judge erred in holding employer liable for the totality of claimant's chiropractic treatment without addressing the regulatory criteria. The administrative law judge's finding that employer is liable for the totality of Dr. Magdovitz' services is vacated, and the case is remanded for the administrative law judge to determine what services performed by that physician are compensable pursuant to Section 702.404 of the regulations.

Next, employer challenges the administrative law judge's finding that employer is liable for the medical services provided by Drs. Bonney, Lord, Shams, Afield, and Kalin; specifically, employer avers that claimant failed to obtain the authorization required in order to be treated by these physicians.[3] In addressing the issue of employer's liability for the medical charges incurred by claimant, the administrative law judge credited the testimony of claimant's treating physician, Dr. Magdovitz, that, since claimant's condition was beyond the scope of his expertise, he referred claimant to both the Florimed Clinic, with which Drs. Bonney, Lord and Kalin are associated, and Dr. Shams, since those physicians are specialists. *See generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Accordingly, as the credited testimony of Dr. Magdovitz establishes that claimant was referred by his treating physician to specialists, specifically the Florimed Clinic and Dr. Shams, for the treatment of his back condition, we hold that claimant was not required to seek employer's authorization, as claimant had been referred by his treating physician to these specialists. *See generally Armfield*, 25 BRBS at 303. Thus, we affirm the administrative law judge's determination that employer is liable for the charges incurred by claimant as a result of his treatment with Drs. Bonney, Lord, Kalin and Shams.

[3]Employer concedes, however, that Dr. Shams sought, but was denied, authorization to treat claimant. *See* Employer's brief at 17.

Lastly, we agree with employer that the record reflects that Dr. Magdovitz did not refer claimant to Dr. Afield, a neuropsychiatrist, who examined claimant on behalf of his attorney.[4] We, therefore, vacate the administrative law judge's finding that employer is liable for the medical services of Dr. Afield; on remand, the administrative law judge must reconsider the evidence of record as to whether claimant is entitled to reimbursement of these services pursuant to Section 7 of the Act.

Accordingly, the administrative law judge's award of total disability benefits from November 18, 1991, to October 21, 1993 is vacated, and the case is remanded for further consideration consistent with this opinion. In addition, the case is remanded for reconsideration of employer's liability for specific services performed by Dr. Magdovitz and for treatment by Dr. Afield. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[4]We note that the administrative law judge erroneously stated that Dr. Afield is associated with the Florimed Clinic.