BRB No. 96-1482

ELNORA FERGUSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVY EXCHANGE	)	DATE ISSUED:
	)	
and	)	
	)	
GATES, McDONALD AND COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Carl H. Jacobson (Uricchio, Howe, Krell, Jacobson, Toporek & Theos), Charleston, South Carolina, for claimant.

Mark K. Eckels and Benford L. Samuels (Boyd & Jenerette), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2873) of Administrative Law Judge Vivian Schreter-Murray 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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).

For several years claimant worked as a short order cook for employer, but due to downsizing, was transferred to work in a hot dog cart. On February 7, 1993, claimant suffered an injury to her back during the course of her employment with employer when she fell from a milk crate while trying to close a hot dog cart window. Since the accident, claimant has complained of constant pain in her neck, arms, lower back and legs. After

objective tests showed essentially normal findings, Drs. Poletti and Warren diagnosed claimant with a soft tissue back injury. Dr. Warren released claimant to light duty work offered to her by employer in April 1993, but claimant was unable to perform the duties required of the position due to her pain. Dr. Warren opined that claimant reached maximum medical improvement on June 3, 1993, with a 3 percent impairment rating. In September 1993, Dr. Warren referred claimant to Dr. Sheldon, who is board-certified in internal medicine, after an HLA-B27 antigen test was positive. However, further tests were negative, and Dr. Warren released claimant from his care in December 1993, commenting that claimant's impairment rating and date of maximum medical improvement remained unchanged, and that claimant could return to modified duty status. Thereafter, in March 1994, claimant began treatment with Dr. Sheldon, who diagnosed ankylosing spondylitis, a form of spinal arthritis. Employer voluntarily paid temporary total disability benefits to claimant through March 30, 1994. 33 U.S.C. §908(b). Claimant filed a claim for temporary total disability compensation from March 30, 1994 and continuing, as well as medical benefits for treatment provided by her physician of choice, Dr. Sheldon.

In her Decision and Order, the administrative law judge first found that Dr. Warren referred claimant to Dr. Sheldon only for an evaluation, and not for treatment, and concluded that since employer did not authorize medical treatment by Dr. Sheldon, employer is not liable for the payment of Dr. Sheldon's treatment, other than the evaluation performed in November 1993. The administrative law judge further discredited the opinion of Dr. Sheldon as unreasoned and not supported by the objective medical findings. Relying on the opinions of Drs. Warren and Poletti, the administrative law judge found that claimant sustained a work-related soft tissue injury as a result of her fall on February 7, 1993, that claimant reached maximum medical improvement on May 28, 1993, and that thereafter, claimant was capable of performing any light and sedentary jobs offered to her by employer. Thus, the administrative law judge denied claimant's claim for temporary total disability compensation and medical benefits.

On appeal, claimant challenges the administrative law judge's finding that claimant has reached maximum medical improvement and that employer is not liable for the treatment rendered by Dr. Sheldon. Claimant further contends that the administrative law judge erred in finding that claimant does not suffer from a totally disabling back condition, and that the administrative law judge should have invoked the Section 20(a) presumption and found that this back condition was caused by her work accident of February 7, 1993. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards, Inc.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). Once a claimant demonstrates an inability to return to her usual work, an employer may prove that the claimant is only partially disabled by establishing the availability of other jobs the claimant can realistically secure and perform given her age, education, physical restrictions and vocational history. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In the instant case, claimant was

examined by Dr. Poletti, an orthopedic surgeon, on March 11, 1993, who diagnosed a cervical strain. She began treatment with Dr. Warren, a board-certified orthopedist, who diagnosed a soft tissue complaint about the back. Dr. Warren returned claimant to light duty work in April 1993, but claimant was unable to perform light duty clerical, cashier or sandwich making positions with employer due to her pain. After x-rays and an MRI showed no positive findings, Dr. Warren opined on May 28, 1993, that claimant had reached maximum medical improvement and was physically capable of returning to her former employment, noting that there was a psychological component to claimant's condition. In his note dated June 3, 1993, Dr. Warren gave claimant a 3 percent impairment rating, and in an August 1993 report, changed his date of maximum medical improvement to June 3, 1993. Cl. Ex. B at 11.

After an HLA-B27 test, performed on September 27, 1993, was positive, Dr. Warren referred claimant to Dr. Sheldon, who is board-certified in internal medicine, for an evaluation. In his November 4, 1993 report to Dr. Warren, Dr. Sheldon expressed his opinion that claimant suffers from ankylosing spondylitis, a form of spinal arthritis, and secondary fibromyalgia, a chronic pain syndrome, and requested that Dr. Warren perform an ANA evaluation. After the results of this test were negative, Dr. Warren opined that his initial diagnosis remained unchanged. On December 9, 1993, Dr. Warren stated that claimant was capable of returning to modified duty status, Cl. Ex. B at 16, and on December 17, 1993, he released claimant from his care, commenting that claimant's impairment rating and date of maximum medical improvement remained unchanged. *Id.* at 17.

Thereafter, on March 16, 1994, claimant began treatment with Dr. Sheldon. On May 26, 1994, Dr. Sheldon opined that claimant's February 7, 1993, injury brought on claimant's underlying condition of ankylosing spondylitis, which in turn caused the fibromyalgia. Cl. Ex. C at 13. He testified that the most probable cause of claimant's condition was the fall she sustained while at work, although he conceded that ankylosing spondylitis has an insidious onset and that very few in the profession would ascribe to the belief that this condition can be caused by a traumatic event. Tr. at 93, 121-122. After a functional capacity evaluation was performed in December 1994, Dr. Sheldon observed that claimant had a markedly limited capacity, with no lifting, carrying, pushing and pulling, and less than two hours each for sitting, standing, and walking. Cl. Ex. C at 24-27. In his January 18, 1995 report, Dr. Sheldon noted that claimant's functional capacity was limited, and advised that she obtain home health aides to help her with bathing and daily activity. Cl. Ex. C at 28-29. Claimant was examined again by Dr. Poletti on December 14, 1993, who noted that claimant complained of pain even when Dr. Poletti did not touch her at all. Dr. Poletti diagnosed chronic strain and opined that claimant is capable of working, with the avoidance of heavy bending and lifting. Emp. Ex. B.

The administrative law judge, relying on the opinions of Drs. Warren and Poletti, found that claimant suffered a soft tissue injury in the nature of a back strain as a result of her fall on February 7, 1993, and that she was capable of performing any and all light duty work offered by employer as of May 28, 1993. In crediting the aforementioned opinions,

the administrative law judge rejected the opinion of Dr. Sheldon as unreasoned and not supported by the objective medical findings.[1] Moreover, the administrative law judge found claimant's testimony contradictory and inconsistent, and therefore discredited claimant's complaints of pain. We hold that the administrative law judge committed no error in crediting the opinions of Drs. Warren and Poletti over that of Dr. Sheldon, in discrediting claimant's testimony, and in concluding that claimant suffered a soft tissue injury as a result of her work accident.[2] In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw her own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, the administrative law judge's decision to credit the opinion of Dr. Warren, as supported by Dr. Poletti, regarding the nature of claimant's injury, over the contrary opinion of Dr. Sheldon, is rational and within her authority as fact finder. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Wheeler v. Interocean Stevedoring Co.*, 21 BRBS 33 (1988). However, inasmuch Dr. Warren changed his date of maximum medical improvement from May 28, 1993 to June 3, 1993, we hereby modify the administrative law judge's decision to reflect that June 3, 1993, is claimant's date of maximum medical improvement.

[1]The administrative law judge credited the opinion of Dr. Poletti that the positive HLA-B27 antigen test may be indicative of a pre-disposition for ankylosing spondylitis, but is not a confirmation of the diagnosis.

[2]As causation and disability are two distinct issues, claimant's argument with respect to the Section 20(a), 33 U.S.C. §920(a), presumption of causation is rejected.

The administrative law judge's denial of compensation benefits, however, cannot be affirmed. While Dr. Warren stated on May 28, 1993, that claimant was capable of returning to her former job, he subsequently opined in his December 9, 1993 report that claimant is most probably capable of returning to modified work status. Cl. Ex. B at 16. Dr. Poletti, in his December 14, 1994 report, restricted claimant from heavy bending and lifting. Emp. Ex. B. In her Decision and Order, the administrative law judge stated that claimant's work did not involve strenuous activity, moderate to heavy lifting, or significant stooping and bending. However, it is unclear whether the administrative law judge was referring to claimant's regular job with employer, or the light duty positions employer offered claimant after her injury. In either case, the administrative law judge provided no support for this conclusion[3] and did not fully discuss the physical requirements of claimant's employment with employer. Thus, the instant case must be remanded for the administrative law judge to determine the extent of any disability related to claimant's February 7, 1993 work injury. Specifically, on remand, if the administrative law judge finds that claimant cannot return to her regular employment duties with employer, the administrative law judge must address whether the light duty positions offered by employer constitute suitable alternate employment, *see Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987); *Beulah v. Avis Rent-A-Car*, 19 BRBS 131 (1986), as opposed to sheltered employment. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989). If it is found that employer's job offers to claimant were due solely to the beneficence of employer,[4] employer will not have met its burden of establishing suitable alternate employment, and claimant may be entitled to permanent total disability benefits. *See Dupre*, 23 BRBS at 93.

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[3]Claimant testified that one of the light duty positions employer attempted to provide claimant required heavy lifting, bending, kneeling and twisting. Tr. at 32-33. The administrative law judge found that according to claimant's own testimony, claimant lifted only a few ounces to a few pounds at most in this job. Decision and Order at 8. In fact, claimant testified that this position required the lifting of stacks of papers, not just one file. Tr. at 33.

[4]We note that at least one of the light duty positions to which employer attempted to return claimant was of a clerical or secretarial nature, yet claimant testified that she had neither clerical nor secretarial skills. Tr. at 14, 31.

Lastly, claimant challenges the administrative law judge's finding that employer is not liable for the medical treatment rendered by Dr. Sheldon. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." Thus, even where a claimant is not entitled to disability benefits, employer may still be liable for medical benefits for a work-related injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). 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. *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 her subsequent treatment and thereafter need only establish that the treatment she subsequently procured on her own initiative was necessary for her injury in order to be entitled to such treatment at employer's expense. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson*, 22 BRBS at 20. Claimant is not required to obtain the consent of employer for a change of physician where claimant has been referred by her 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).

In denying claimant's request for reimbursement for the medical charges of Dr. Sheldon, the administrative law judge found that Dr. Sheldon's treatment of claimant had not been authorized by employer. In the instant case, however, it is unclear whether Dr. Warren was employer's or claimant's physician and, thus, whether Dr. Warren's discharge of claimant from his care on December 17, 1993, could be construed as a refusal by employer to provide treatment.[5] *See, e.g., James v. Pate Stevedoring Co.*, 22 BRBS 271 1989). Moreover, the administrative law judge did not consider whether Dr. Sheldon, who is board-certified in internal medicine, is a specialist skilled in treating claimant's injury; if he is, employer may be required to consent to such treatment. *See generally* 20 C.F.R. §702.406; *Armfield*, 25 BRBS at 303. In this regard, we note that there is evidence to suggest that employer may have authorized treatment by Dr. Sheldon. *See* Tr. at 79-80. As the administrative law judge did not consider these issues when addressing employer's

[5]Claimant was referred to Dr. Warren by Dr. Reed. However, it is unclear from the record whether this referral was at the behest of employer. Claimant testified that she did not choose Dr. Warren. *See* Tr. at 22-23.

potential liability, we vacate her finding that employer is not liable for the medical services of Dr. Sheldon; on remand, the administrative law judge must reconsider all of the evidence of record as to whether claimant is entitled to reimbursement of these services pursuant to Section 7 of the Act.

Accordingly, the Decision and Order of the administrative law judge is modified to reflect that June 3, 1993 is the date of claimant's maximum medical improvement, the administrative law judge's denial of disability and medical benefits is vacated, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge