BRB No. 97-881

SHIRLEY REED	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JAMESTOWN METAL MARINE	)	DATE ISSUED: _____
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE) COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Section 22 Modification of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Phillip J. Borne (Christovich & Kearney, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Modification (92-LHC-3442) of Administrative Law Judge James W. Kerr, 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 findings of fact and the 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).

This case involves an appeal of an administrative law judge's Decision and Order on modification. On January 31, 1991, while working for employer, claimant fell from a ladder, injuring her back and head. About 4 months after the accident, claimant began having seizures and experienced balance, memory, and vision problems, as well as difficulty in sleeping. Employer voluntarily paid claimant temporary total disability benefits from January 31, 1991, until November 6, 1991, plus $11,672.88 in medical benefits. Claimant sought additional disability compensation and medical benefits under the Act for her back

and head injuries.

In his initial Decision and Order dated March 19, 1994, the administrative law judge found that as of October 16, 1991, claimant's work-related back injury had resolved without residual disability. He further determined, however, that claimant remained incapable of performing any work due to a seizure disorder resulting from her work-related head injury, which was the result of a conversion reaction and thus a work-related psychological condition. Accordingly, he awarded her continuing temporary total disability benefits and necessary medical expenses resulting from the head injury.

Thereafter, in April 1994, claimant, who lives in Morgan City, Louisiana, began treatment with Dr. Sanders, a psychiatrist who practices in Metairie, Louisiana, which involved her traveling 197 miles round-trip. This treatment included an outpatient day program on two non-consecutive days per week, which required her to stay overnight in a hotel, supportive therapy, and the prescription of several medications. Although employer initially paid for Dr. Sanders' treatment, following a January 4, 1996, evaluation performed by its psychiatrist, Dr. Colomb, it refused to continue paying for this treatment. In March 1996, claimant's seizures and vertigo symptoms worsened, and Dr. Sanders referred claimant to Dr. Palmer for a neurological examination and additional diagnostic testing. An electronystagmogram (ENG) performed by Dr. Palmer in January 1995 revealed a central lesion in claimant's brain, which Dr. Sanders believed to be related to her work-related head injury and to be the cause of her vertigo condition.

Based on the deterioration of her condition, employer's refusal to provide medical treatment, and the newly obtained evidence indicating that a physical basis existed to explain her vertigo, claimant sought modification under Section 22 of the Act, 33 U.S.C.§922. In the modification proceedings, claimant argued that employer was liable for reimbursement of various transportation and mileage expenses relating to treatment provided by Drs. Sanders, Colomb and Truton, outstanding medical charges at University Hospital in New Orleans for the tests ordered by Dr. Palmer, and payment of outstanding medical charges associated with Dr. Sanders' treatment, including the costs of the day treatment program and various prescribed medications.[1] Claimant also sought future medical and psychological treatment of her seizure and vertigo conditions.

In his Decision and Order on Section 22 Modification, the administrative law judge found that claimant established a change in her physical condition, inasmuch as Dr. Sanders testified that claimant's condition had worsened since the original compensation Order, and that claimant's recovery could have been inhibited by her financial problems, lack of ability to obtain medication, and inability to receive psychological help due to employer's refusal to pay for Dr. Sanders' treatment. The administrative law judge further found a change in condition established based on the new diagnostic evidence showing that claimant's vertigo condition had a physical basis which Dr. Sanders related to claimant's work-related head injury. Crediting Drs. Sanders' testimony that the medications

[1]The medications prescribed included Antevert for vertigo, Valium for seizures, and Trazedone, an antidepressant.

and treatment he prescribed and provided, including the outpatient day treatment program, were reasonable and appropriate, the administrative law judge awarded claimant past and future medical benefits including the prescribed medications, the outstanding charges for Dr. Sanders' treatment and claimant's participation in the day treatment program, and the future hypnotic treatment recommended by Drs. Colomb and Sanders. In addition, he held employer liable for the outstanding charges for treatment of claimant's vertigo condition at the University of New Orleans, future treatment of her vertigo and psychological conditions, mileage and travel costs to Dr. Sanders' facility, and continuing temporary total disability compensation. Employer appeals the administrative law judge's award of medical benefits on modification on various grounds. Claimant has not responded to employer's appeal.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions on a claim; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's condition. *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT)(1995). Modification based on a change in condition may be granted where claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. *Id.*; *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). It is well-established that the party requesting modification bears the burden of proof. *See, e.g., Metropolitan Stevedore Co. v. Rambo*, 117 S.Ct. 1953, 31 BRBS 54 (CRT) (1997). Once the initial burden of proving a change in condition or mistake in fact is met, the same standards apply as in the initial adjudicatory proceedings. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428, 431 (1990).

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of claimant's work-related injury. *See Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is reasonable and necessary is a factual issue within the administrative law judge's authority to resolve. *See Schoen v. U. S. Chamber of Commerce,* 30 BRBS 112 (1996)*; Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

After consideration of the record evidence and employer's assertions on appeal, we affirm the administrative law judge's Decision and Order. Employer's allegation that modification was not properly raised by claimant is rejected, as claimant raised this issue in her opening statement at the December 12, 1996, hearing, Tr. at 9-10.[2] Based upon

[2]We note that, irrespective of Section 22, a claim for medical benefits under Section 7 is never time-barred. Thus, a claimant may seek benefits for medical treatment for a work-related condition at any time. In addition, as the administrative law judge initially awarded treatment by Dr. Sanders for claimant's work-related psychological condition,

claimant's presentation of Dr. Sanders' testimony at the formal hearing, which described a deterioration in claimant's seizure and vertigo conditions, the administrative law judge rationally concluded that claimant not only alleged, but had in fact proven, a change in her physical condition. Furthermore, claimant also introduced new evidence at the hearing on modification, *i.e*., the results of an ENG which reflected a central lesion in her brain which Dr. Sanders related to her work-related head injury. This evidence is directly relevant to the administrative law judge's prior determination that claimant's disability was due to a work-related psychological condition.

Employer's assertions that the administrative law judge erred in relying upon Dr. Sanders' testimony in the modification proceedings to conclude that claimant's vertigo condition was a physical injury causally related to her work-related January 31, 1991, head injury is similarly rejected. Employer argues that the issue of whether claimant sustained a physical injury in the January 31, 1991, work accident was finally resolved at the previous hearing through the deposition testimony of Dr. Gangi, a neurologist who treated claimant immediately after her injury and was unable to relate claimant's vertigo spells to her work injury. Section 22 of the Act, however, vests the fact-finder with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection upon the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *see also Rambo*, 515 U.S. at 295-296, 30 BRBS at 2-3 (CRT). In the present case, after evaluating both the original evidence and the newly submitted evidence introduced in the modification proceeding, the administrative law judge credited Dr. Sanders' testimony that claimant's vertigo condition was due to a physical problem resulting from his work-related head injury.

Employer also argues that the administrative law judge's reliance on Dr. Sanders' opinion is improper, because he did not begin seeing claimant until more than two years after the accident and his recent opinion is inconsistent with his prior testimony, as well as with the opinions of Drs Gangi and Black in the initial proceeding. We also reject this argument. In adjudicating a claim it is within the purview of the administrative law judge to weigh the relevant evidence and to evaluate the credibility of all witnesses. *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). As Dr. Sanders' testimony provides substantial evidence to support the administrative law judge's determination that claimant's vertigo condition is a physical condition resulting from her work-related head injury [3] and employer

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claimant could pursue payment of this specific treatment without resort to Section 22 proceedings. In any event, pursuing either specific medical treatment or modification proceedings lead to the same determinative issue--whether the condition for which treatment is sought is work-related.

[3]Although the administrative law judge did not consider the applicability of the Section 20(a) presumption, as he considered all of the relevant evidence and Dr. Sanders' testimony provides substantial evidence to support his finding that a causal relationship

has failed to establish that the administrative law judge's decision to credit this testimony was erroneous, his finding that employer is liable for past and future medical treatment relating to this injury is affirmed. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Employer's contention that the administrative law judge erred in finding that Dr. Sanders' treatment was reasonable and necessary, and thus compensable under Section 7 of the Act is also rejected. Employer argues on appeal that this treatment was neither reasonable nor necessary because there are two psychiatrists and a psychiatric hospital much closer to claimant's home and the treatment has, in any event, not proven beneficial. The administrative law judge, however, considered and rationally rejected this argument below, crediting Dr. Sanders' testimony that claimant was in fact making progress in the treatment program, that the treatment was necessary to help her cope with her psychologically caused seizures, that there was no other comparable outpatient program in Louisiana, and that the medications he prescribed for claimant are necessary and appropriate. Decision and Order On Section 22 Modification at 7-9. In finding Dr. Sanders' treatment compensable, the administrative law judge specifically acknowledged that employer's psychiatrist, Dr. Colomb, testified that claimant did not appear to be responding to Dr. Sanders' treatment, but nonetheless found, consistent with Dr. Sanders' testimony, that although claimant's condition had deteriorated, it was attributable to the fact that she had been denied necessary medication and treatment by employer. *Id*. at 6, 8. Inasmuch as the administrative law judge's finding that the treatment provided by Dr. Sanders was reasonable and necessary is rational and supported by substantial evidence, it is affirmed. *See generally Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

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exists between claimant's work-related head injury and her vertigo condition, any error he may have made in this regard is harmless. *See Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988).

Employer finally asserts that the administrative law judge erred in holding it liable for the mileage and travel costs associated with her treatment with Dr. Sanders, which involves her traveling 197 miles round trip. Employer maintains that inasmuch as Dr. Sanders admitted that there are two psychiatrists and a psychiatric hospital located much closer to claimant's home, and claimant has not demonstrated that care was unavailable for her at those locations, then pursuant to 20 C.F.R. §702.403,[4] it should not be required to reimburse claimant for mileage greater than 50 miles round-trip. We disagree. In holding employer liable for these expenses, the administrative law judge properly noted that although Section 702.403 provides that in choosing a physician, a distance of 25 miles from the place of injury or claimant's home is generally a reasonable distance to travel, other pertinent factors may be taken into consideration. In the present case, the administrative law judge found that other factors, including the importance of claimant's maintaining her relationship with her current treating physician and the uniqueness of Dr. Sanders' day treatment program, made it evident that Dr. Sanders' treatment is reasonable and necessary even though claimant must travel more than 25 miles.[5] Inasmuch as the administrative law judge's finding in this regard is rational, supported by substantial evidence, and in accordance with applicable law, it is affirmed. *See O'Keeffe*, 380 U.S. at 359.

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[4]Section 702.403 provides in relevant part:

> In determining the choice of physician, consideration must be given to availability, the employee's condition, and the method and means of transportation. Generally 25 miles from the place of injury or the employee's home is a reasonable distance to travel, but other pertinent factors must also be taken into account.

20 C.F.R. §702.403.

[5]Employer cites *Schoen v. United States Chamber of Commerce*, 31 BRBS 112 (1996), for the proposition that where competent care is available locally, claimant's medical expenses may reasonably be limited to those costs which would have been incurred had the treatment been provided locally. The facts in *Schoen*, however, are distinguishable from those in the present case. In *Schoen,* the administrative law judge found that the treatment available to the claimant locally was comparable to the more expensive treatment sought by claimant, while in the present case, the administrative law judge found that the treatment available closer to claimant's home would not suffice because of claimant's established relationship with her treating physician and the uniqueness of Dr. Sanders' day treatment program.

Accordingly, the administrative law judge's Decision and Order on Section 22 Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge