BRB No. 97-1566

GAY NELL BANG	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Ronald T. Russell and Traci Castille (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (94-LHC-2186) of Administrative Law Judge Richard D. Mills 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).

This case is on appeal to the Board for the second time. Claimant, who worked for employer as a cable puller, was injured on January 26, 1993, when she slipped on a bulkhead. Employer voluntarily paid claimant temporary total disability benefits from February 6, 1993, until August 6, 1993. Claimant sought permanent total disability benefits. In his original Decision and Order, the administrative law judge denied claimant's claim for permanent total disability benefits but awarded

claimant temporary total disability benefits from February 6, 1993, to December 22, 1994, and permanent partial disability benefits thereafter. The administrative law judge concluded that employer was liable for claimant's medical expenses for her work-related injuries, including the cost of chiropractic treatment provided by Dr. Weilip. The administrative law judge summarily denied employer's Motion for Reconsideration.

In *Bang v. Ingalls Shipbuilding, Inc.*, BRB Nos. 96-0798 and 96-1273 (Feb. 25, 1997)(unpublished), the Board vacated the administrative law judge's award of medical expenses for Dr. Weilip's chiropractic treatment and remanded the case to the administrative law judge to reconsider the issue. The Board instructed the administrative law judge to identify the evidentiary basis for his conclusion that Dr. Weilip's services were the type of chiropractic services which were covered under the Act. The Board affirmed the administrative law judge's original Decision and Order in all other respects as well as his award of attorney's fees. The Board modified the district director's attorney's fee award.

In his Decision and Order on Remand, the administrative law judge held employer liable for costs incurred under Dr. Weilip for biofeedback treatment and physical therapy, but not liable for costs associated with spinal manipulation by Dr. Weilip, as the administrative law judge found that claimant does not have a subluxation.

In the current appeal, employer challenges the administrative law judge's conclusion that it is liable for the biofeedback treatment and physical therapy provided to claimant by Dr. Weilip. Employer contends that under the plain language of 20 C.F.R. §702.404, chiropractic services are reimbursable only for a spinal manipulation to treat a subluxation. Claimant did not file a response brief.

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. Relevant to this present appeal, Section 702.404 of the regulations 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. In his Decision and Order on Remand, the administrative law judge initially stated that the provisions of Section 702.404 do not apply in this case as to Dr. Weilip's care, as he stated this regulation applies only when claimant is choosing her attending physician and as claimant did not attempt to choose Dr. Weilip as her attending physician.[1] Section 702.404 is not explicitly so

[1]The administrative law judge rationalized that Section 702.404, which is entitled "Physician defined," should be construed this way as it follows Section 702.403

limited, however, and we can find no support in the case law for limiting this regulation to the initial choice of physician. In any event, the administrative law judge did not rely solely upon this reasoning in holding employer liable for biofeedback treatment and physical therapy provided to claimant by Dr. Weilip. The administrative law judge concluded that although employer is not liable for "chiropractic" treatment, specifically spinal manipulation, as claimant does not have a subluxation, he found employer is liable for the "non-chiropractic" biofeedback treatment and physical therapy provided to claimant by Dr. Weilip, finding such treatment reasonable and necessary. Decision and Order on Remand at 2; Cl. Exs. 3, 4, 9; Emp. Exs. 8-13.

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which sets forth claimant's right to choose her attending physician. In this case, claimant was referred to Dr. Weilip by her treating physician, Dr. Cooper.

The sole issue in this case is whether services other than spinal manipulation to correct a subluxation provided by a chiropractor upon referral from a treating doctor are reimbursable.[2] Chiropractic services were made reimbursable by a change in regulation in 1977. 42 Fed. Reg. 45,301 (1977). Prior to 1977, chiropractors were not recognized as physicians as that term was used in Section 702.404. *Blanchard v. General Dynamics Corp.*, 10 BRBS 69 (1979). In 1977, however, the definition of "physician" was expanded to include chiropractors to ensure conformity of interpretation under the Longshore Act and the Federal Employees' Compensation Act.[3] 42 Fed. Reg. 45,301 (1977). Section 702.404 now specifically provides,

> The term *physician* includes doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term includes chiropractors 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-

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[2]Employer does not challenge the administrative law judge's finding that the biofeedback treatment and physical therapy provided to claimant by Dr. Weilip are reasonable and necessary.

[3]The comments to the final rule amending the Part 702 regulations state:

> In the notice of proposed rulemaking (41 FR 34294) it was stated that the definition of "physician" as used in the Act would conform to the use of that term as defined in the Federal Employees' Compensation Act (FECA). Although most comments received concerning this proposal were favorable, several objections were received, particularly with respect to the inclusion of chiropractors. Since Congress amended the FECA to specifically include chiropractors and others within the definition of physician and since the Secretary has always been guided by the terms of the FECA in defining "physician" for Longshoremen's Act purposes, these objections have been rejected. Section 702.404 has been revised to ensure conformity of interpretation under the two statutes.

42 Fed. Reg. 45,301 (1977).

ray or clinical findings. . . .

20 C.F.R. §702.404 (emphasis added). Thus, the issue in this case is one of regulatory interpretation, which necessarily begins with the language of the regulation at issue. *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260, 1271 (5th Cir. 1978). The words of regulations are to be given their plain meaning.[4] *Powers v. Sea Ray Boats*, 31 BRBS 206 (1998).

We reverse the administrative law judge's finding that employer is liable for biofeedback treatment and physical therapy provided to claimant by Dr. Weilip based on the plain language of Section 702.404. The regulation provides that a chiropractor's services are reimbursable only for spinal manipulations to correct a subluxation. The regulation does not specifically provide for any other treatment provided by a chiropractor, even if such treatment is reasonable and necessary. Thus, 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. 20 C.F.R. §702.404.

The holding in the instant case is consistent with the Board's holding in *Blanchard*, decided prior to the regulatory change in 1977 including "chiropractor" within the definition of "physician." In *Blanchard,* the Board held that chiropractic services were not reimbursable under the "reasonable and necessary" standard of Section 7(a) where there was a separate regulatory provision specifically excluding chiropractors from the definition of physician, as to hold otherwise would make a nullity of Section 702.404. *Blanchard*, 10 BRBS at 71-72. Similarly, in the instant case, permitting services other than spinal manipulation to correct a subluxation would render the regulation at Section 702.404 meaningless. We are aware that this

[4]The Fifth Circuit, within whose jurisdiction this case arises, accords due deference to the Director's regulatory interpretations if they are reasonable, *see generally Texports Stevedore Co. v. Director, OWCP [Maples],* 931 F.2d 331, 28 BRBS 1 (CRT)(5th Cir. 1991), as does the Board. *Powers v. Sea Ray Boats,* 31 BRBS 206 (1998). In the instant case, the Director has not filed a brief and thus has not provided the Board guidance on how he would interpret this regulation.

interpretation results in an incongruity in that Dr. Weilip, a chiropractor, will not be reimbursed for the biofeedback treatment and physical therapy provided to claimant, but a physical therapist or other non-physician medical professional would be reimbursed for these same services. *See Barbour v. Woodward & Lothrop, Inc.,* 16 BRBS 300 (1984). However, we are not free to disregard the plain language of the regulation, which limits the compensable services performed by a chiropractor.

Because the administrative law judge awarded benefits for treatment provided to claimant by a chiropractor for other than a spinal manipulation to correct a subluxation, we must reverse the administrative law judge's award of benefits for these services. As employer argues, all services provided by a chiropractor are necessarily chiropractic services, but not all chiropractic services are reimbursable. The regulation provides only that spinal manipulations to correct a subluxation are reimbursable. As the evidence does not establish that claimant suffered from a subluxation and the administrative law judge so found, the biofeedback treatment and physical therapy provided by Dr. Weilip are not reimbursable.

Accordingly, the administrative law judge's Decision and Order on Remand awarding costs for claimant's treatment with Dr. Weilip is reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge