BRB No. 03-0306

CARLOS ARBOLEDA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
L'HOMME, INCORPORATED	)	DATE ISSUED: Dec. 23, 2003
	)	
and	)	
	)	
LOUISIANA WORKERS COMPENSATION CORPPORATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

James E. Shields (Shields & Shields, APLC), Gretna, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHC-0518) of Administrative Law Judge C. Richard Avery 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).

On April 27, 1995, claimant sustained injuries to his face, knee, shoulder, hip and hand when he fell approximately 22 feet from a ladder onto the deck of a barge during the course of his employment with employer. Claimant subsequently underwent multiple

surgical procedures, including arthroscopic knee surgery, gum surgery, and oral TMJ bilateral surgery. Employer voluntarily paid claimant disability benefits from April 27, 1995 to January 18, 2000, and from July 10, 2001 and continuing. 33 U.S.C. §908(b), (e). Claimant sought temporary total disability compensation for the period of January 19, 2000 through July 9, 2001, during which time employer avers that it established the availability of suitable alternate employment, and the reimbursement of various medical expenses pursuant to Section 7 of the Act, 33 U.S.C. §907.

In his Decision and Order, the administrative law judge determined that employer established the availability of suitable alternate employment from January 18, 2000 through May 22, 2001, at which time Dr. Bourgeois restricted claimant from any kind of work. Next, the administrative law judge utilized Section 10(c) of the Act, 33 U.S.C. §910(c), to determine that claimant's average weekly wage at the time of his injury was $230.77; as the use of this figure would result in a weekly benefit payment of $153.84 to claimant, the administrative law judge awarded claimant compensation pursuant to Section 6(b) of the Act, 33 U.S.C. §906(b), which provides for a minimum benefit payment to injured employees. Lastly, the administrative law judge denied claimant's request for the reimbursement of specific medical expenses, and he remanded that issue pursuant to Section 7(d)(2) of the Act, 33 U.S.C. §907(d)(2), to the district director for further consideration.

On appeal, claimant challenges the administrative law judge's denial of his claim for disability and medical benefits, as well as the administrative law judge's calculation of his average weekly wage. Employer responds, urging affirmance of the administrative law judge's decision.

Where, as in this case, it is uncontroverted that claimant is unable to return to his usual employment duties with employer as a result of his work-related injury, the burden shifts to employer to establish the availability of realistically available jobs within the geographic 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. *Wilson v. Dravo Corp.*, 22 BRBS 459 (1989)(Lawrence, J., dissenting).

Claimant initially challenges the administrative law judge's finding that employer established the availability of suitable alternate employment from January 18, 2000, through May 22, 2001; specifically, claimant avers that the administrative law judge erred in relying upon the testimony of Mr. Carlisle, employer's vocational consultant,

since Mr. Carlisle did not consider claimant's education, work experience, and limited proficiency with the English language when he conducted his labor market survey. Additionally, claimant asserts that, as Mr. Carlisle conceded that he would like to both interview claimant and review the totality of claimant's medical records in order to validate his labor market survey, Mr. Carlisle's opinion is insufficient to establish the availability of suitable alternate employment.

In his decision, the administrative law judge determined that employer met its burden of establishing the availability of suitable alternate employment, specifically the positions of airport checker, towing dispatcher, and automated line worker, during the disputed period of time based upon his evaluation of claimant's English proficiency, the positions identified by Mr. Carlisle, and Dr. Bourgeois' opinion that claimant could perform sedentary work. In reaching this conclusion, the administrative law judge, after initially stating that Mr. Carlisle testified that he would like to re-evaluate his labor market survey in light of the information that he had obtained at the formal hearing and that he was thus unable to state for a fact that the identified position of airport checker constituted a valid job for claimant, later found that Mr. Carlisle explained that that position could be performed with a limited proficiency in English. *See* Decision and Order at 9, 25. Next, the administrative law judge found that Mr. Carlisle continued to believe, even after hearing claimant testify, that claimant would be able to perform the position of towing dispatcher. *Id.* at 25. The administrative law judge concluded that these positions, along with the position of automated line worker, established the availability of suitable alternate employment that claimant was capable of performing.

Claimant's argument regarding Mr. Carlisle's opinion has merit. After reviewing numerous medical records regarding claimant's post-injury treatment,[1] his physical restrictions, and vocational evidence,[2] Mr. Carlisle prepared a labor market survey which identified various sedentary to light-duty employment opportunities, such as airport checker, towing dispatcher, and automated line worker, which he opined were suitable for claimant. *See* Emp. Ex. 6; Tr. at 106-109. Contrary to claimant's initial assertions of error, Mr. Carlisle specifically testified that, since claimant did not attend the two appointments that were scheduled for him, he considered claimant's documented

[1] Mr. Carlisle testified that the medical records of Drs. Bourgeois, Smith, Gallagher, Schiavi, Faust, Gorbitz and Juneau, the Orthopedic Physical Therapy of New Orleans, and the Health Center, were made available to him for review. *See* Tr. at 101-102.

[2] Mr. Carlisle testified that vocational rehabilitation reports prepared by American Rehabilitation Consultant Services were made available for his review. *See* Tr. at 101-103.

educational level, work history, and transferable skills when working on claimant's case.[3] *See* Tr. at 103-106. Additionally, Mr. Carlisle stated that Dr. Bourgeois, who had last treated claimant on or about July 21, 1999, approved the aforementioned three employment opportunities as being suitable for claimant. *See* Emp. Ex. 6; Tr. at 109. Lastly, after listening to claimant testify during the formal hearing, Mr. Carlisle opined that claimant generally had sufficient language skills to perform the identified jobs. *See* Tr. at 110.

As claimant asserts, however, Mr. Carlisle later stated that he would like the opportunity to interview claimant in order to validate his labor market survey. *See* Tr. at 134-135, 144. Specifically, after listening to claimant's ability to speak English, Mr. Carlisle testified that while he would not necessarily rule out claimant's ability to perform the jobs which he had identified as being suitable for claimant, he could not say for a fact that either the airport checker or the towing dispatcher positions were valid employment opportunities in light of claimant's difficulty in speaking the English language. *Id.* at 134-135. Moreover, Mr. Carlisle acknowledged that when conducting his labor market survey, he was unaware that claimant was being treated by a second orthopedic specialist in 1999, Dr. Lyons, who recommended an additional surgical procedure, *see* Clt. Ex. 10, nor did he have the records of Dr. Smith, who was treating claimant for the injuries sustained to his teeth and jaw, *see* Clt. Ex. 8. Tr. at 121-122. Based upon these disclosures, Mr. Carlisle testified that, in order to make sure that his report was correct, he would like to both meet with claimant and have access to all of claimant's medical records. *Id.* at 144.

In determining whether an employment position constitutes suitable alternate employment, the administrative law judge must compare the job's requirements with the totality of claimant's condition. *See generally Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984). In the instant case, the administrative law judge's finding that employer established the availability of suitable alternate employment is premised upon his evaluation of Mr. Carlisle stating that the airport checker position could be performed with a limited English proficiency and that the position of towing dispatcher was suitable for claimant, when the transcript of the formal hearing reveals that Mr. Carlisle conceded, after hearing claimant testify, that he could not state that those two positions constituted valid jobs for claimant.[4] Accordingly, the administrative law judge

[3] Claimant, in his brief on appeal, repeatedly references Mr. Carlisle's failure to meet with claimant prior to the preparation of his labor market survey. *See* Clt's brief at 12-15. Mr. Carlisle testified, however, that he contacted claimant's counsel on two occasions in order to schedule an appointment to meet with claimant, and that on both occasions claimant failed to appear. *See* Tr. at 103-104; Emp. Ex. 12.

[4] Claimant does not challenge the administrative law judge's finding that the position of automated line worker also was suitable for claimant.

must reconsider the totality of Mr. Carlisle's testimony. We therefore vacate the administrative law judge's finding that employer established the availability of suitable alternate employment during the period of January 18, 2000, through May 22, 2001, and we remand the case to the administrative law judge for reconsideration of the evidence of record regarding this issue.[5] *See generally Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990).

Claimant next challenges the administrative law judge's calculation of claimant's average weekly wage at the time of his injury. Initially, claimant contends that the administrative law judge should have calculated claimant's average weekly wage pursuant to Section 10(b), rather than Section 10(c), of the Act. We disagree. Section 10(b) of the Act, 33 U.S.C. §910(b), applies where the employee was not employed for substantially the whole of the year; calculation of average weekly wage under subsection (b) is based on the wages of an employee of the same class who worked substantially the whole year in the same or similar employment. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a), 33 U.S.C. §910(a), nor Section 10(b) can be reasonably and fairly applied.[6] *See Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988).

In the instant case, the administrative law judge determined that there was insufficient evidence in the record to apply Section 10(b) to this issue. Decision and Order at 27. The administrative law judge thus declined to utilize that subsection of the Act and, rather, calculated claimant's average weekly wage pursuant to Section 10(c). As the record does not contain evidence regarding the wages of an employee in the same welding class as claimant who worked substantially the whole of the year in the same or similar employment, we hold that the administrative law judge rationally determined that Section 10(b) could not be applied to the instant case, and we affirm his determination that claimant's average weekly wage should be calculated pursuant to Section 10(c).

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[5] An award for partial disability benefits 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). Thus, should the administrative law judge on remand determine that employer has established the availability of suitable alternate employment during the disputed period of time, he must compare the wages which the new job would have paid at the time of claimant's injury to claimant's pre-injury wages in order to determine if claimant has sustained a loss in wage-earning capacity as a result of his injury. *See generally Sproull v. Stevedoring Services of America*, 26 BRBS 100 (1991)(Brown, J., dissenting on other grounds), *aff'd in pert. part on recon. en banc*, 28 BRBS 2271 (1994).

[6] In the instant case, no party contends that Section 10(a) is applicable.

Claimant alternatively challenges the administrative law judge's calculation of his average weekly wage pursuant to Section 10(c) of the Act. It is well-established that the object of Section 10(c) is to arrive at a sum which reasonably represents the claimant=s annual earning capacity at the time of his injury, s*ee James J. Flanagan Stevedores, Inc. v. Gallagher,* 219 F.3d 426, 34 BRBS 35(CRT)(5th Cir. 2000); *SGS Control Serv. v. Director,* OWCP, 86 F.3d 438, 30 BRBS 57(CRT)(5th Cir. 1996); *Empire United Stevedores v. Gatlin,* 936 F.2d 819, 25 BRBS 26(CRT)(5th Cir. 1991)*; Richardson v. Safeway Stores, Inc.,* 14 BRBS 855 (1982), and that the administrative law judge has broad discretion in determining a claimant=s annual earning capacity under Section 10(c). *See Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh=g*, 237 F.3d 409, 35 BRBS 26(CRT)(5th Cir. 2000). Accordingly, the Board will affirm an administrative law judge=s determination of claimant=s average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant=s annual earning capacity at the time of the injury. *See Fox v. West State Inc.,* 31 BRBS 118 (1997).

The administrative law judge examined the income tax records of claimant for the years 1991, 1992 and 1993, which reflected annual earnings of $7,404, $8,999, and $12,129 respectively, *see* Emp. Ex. 9, and claimant's claim form which stated prior annual earnings of $12,000, *see* Emp. Ex. 7, and concluded that in the four years preceding his injury claimant never earned more than $12,129. The administrative law judge then concluded that claimant's annual earning capacity at the time of his injury was $12,000, a figure which he subsequently divided by 52 in order to calculate claimant's average weekly wage at the time of his injury. *See* 33 U.S.C. §910(d). As the sum of this calculation, $230.77, resulted in a weekly compensation figure below the statutory minimum, the administrative law judge awarded claimant a weekly benefit pursuant to Section 6(b) of the Act. We hold that the result reached by the administrative law judge is reasonable, is supported by substantial evidence, and best reflects claimant's earning capacity with employer at the time of his injury. *See Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT). We therefore affirm the administrative law judge's determination of claimant's average weekly wage.[7]

Lastly, claimant challenges the administrative law judge's finding that employer is not liable for the medical expenses, including prescriptions, associated with his treatment by Dr. Lyons. 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." Under Section 7(d), 33 U.S.C. §907(d), claimant must seek authorization from employer for medical treatment in

[7] Any error by the administrative law judge in not considering claimant's 1994 IRS Form 1040, which documented total earnings of $13,405 for that calendar year, is harmless, as those earnings, if accepted, would still result in weekly compensation benefits less than the statutory minimum, and claimant would still be entitled to weekly benefits under Section 6(b) of the Act, 33 U.S.C. §906(b).

order for employer to be liable for reimbursement of claimant's medical expenses. *See Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 194 (1988). The Board has held that Section 7(d) requires that a claimant request his employer's authorization for medical services performed by a 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 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 Roger's Terminal & Shipping Corp. v. Director,* OWCP, 784 F.2d 18 BRBS 79(CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

It is undisputed that Dr. Bourgeois was claimant's initial choice of physician. Following claimant's discharge by Dr. Bourgeois in July 1999, claimant commenced treatment with Dr. Lyons, who is also an orthopedic surgeon. *See* Clt. Ex. 10. In addressing the issue of reimbursement for the treatment and prescriptions associated with Dr. Lyons' care of claimant, the administrative law judge found that Dr. Bourgeois' release of claimant in July 1999 was not a refusal by employer to treat claimant, and that as Dr. Lyons' treatment of claimant was unnecessarily repetitious of the treatment rendered to him by Dr. Bourgeois, Dr. Lyons' treatment is not covered by the Section 7 of the Act. In addressing this issue, however, the administrative law judge focused on whether Dr. Bourgeois's actions constituted a refusal by employer, rather than determining whether claimant independently sought authorization for treatment by Dr. Lyons which employer refused. Although the administrative law judge acknowledged claimant's testimony that he sought such authorization and it was refused, and stated that employer does not deny that Dr. Lyons was not authorized, Decision and Order at 31, the administrative law judge stated only that it was "worth noting" that claimant "did not avail himself" of the Act's procedure for changing physicians, *i.e.*, that claimant obtain prior written approval for such a change by the employer or carrier. *Id.* at 32 n.18.

We affirm the administrative law judge's finding that Dr. Bourgeois's release of claimant was not a refusal of treatment by employer. Nonetheless, as there is evidence that claimant sought authorization from employer for the treatment provided him by Dr. Lyons, *see* Emp. Ex. 41; Tr. at 76-77, 161, 169-170, 174, 190-191, the administrative law judge's denial of reimbursement for the treatment and prescriptions rendered by Dr. Lyons must be vacated. Where claimant seeks authorization for a change in physician under Section 7(c)(2) and employer refuses to authorize the change, employer may nonetheless be liable for reimbursement under Section 7(d), if the treatment claimant thereafter procured on his own initiative was reasonable and necessary. *Anderson*, 22 BRBS 20. Thus, the case must be remanded for the administrative law judge to consider the evidence and determine whether claimant, following his release by Dr. Bourgeois in

July 1999, sought authorization from employer or its carrier for his subsequent treatment with Dr. Lyons. If such authorization had been sought by claimant and refused by employer, the administrative law judge, as factfinder, must then determine whether the treatment and prescriptions thereafter procured by claimant on his own initiative from Dr. Lyons were reasonable and necessary for his work-related injury. *See Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

In this regard, the administrative law judge's statement that Dr. Lyons' treatment was "unnecessarily repetitious" and thus not covered, Decision and Order at 32, is insufficient to support a finding that the treatment was unnecessary. As the treatment by Dr. Lyons did not overlap that provided by Dr. Bourgeois, the fact that Dr. Lyons' treatment was no different than that provided by Dr. Bourgeois does not support this conclusion, as it is undisputed that Dr. Bourgeois discharged claimant for non-compliance with his recommendations and not because claimant no longer needed any treatment. Whether the treatment claimant procured from Dr. Lyons was necessary requires consideration of whether claimant's condition during this period required treatment, and whether the treatment Dr. Lyons prescribed was reasonable requires findings as to the appropriateness of the specific treatment. Thus, the case must be remanded for the administrative law judge to resolve these issues.

Accordingly, the administrative law judge's findings that employer established the availability of suitable alternate employment from January 18, 2000 through May 22, 2001, and that claimant is not entitled to reimbursement for the medical charges associated with his treatment with Dr. Lyons, are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.[8]

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge

[8] In light of our disposition of this appeal, claimant's request for oral argument is denied. 20 C.F.R.§802.306.