BRB No. 90-966

MATTHEW C. BROOKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
I.T.O. CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

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

Coleman W. Garrett, Memphis, Tennessee, for claimant.

Richard P. Salloum (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (88-LHC-3369) of Administrative Law Judge James W. Kerr, Jr. denying benefits 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On July 27, 1986, during the course of his employment as a washman, claimant injured his back when he fell from a container, striking the concrete below. He was hospitalized for approximately two weeks, and a CT Scan taken at that time revealed annular-type bulging at L5-S1 but no evidence of a herniated disc or other abnormality. Cl. Ex. 16; Emp. Ex. 2 at 2. Similarly, claimant's x-rays and bone scan were normal. Cl. Ex. 13-15, 24; Emp. Ex. 2 at 3. Claimant was hospitalized again in December 1986 and in January 1987 due to an exacerbation of his injury. He underwent a lumbar myelogram, the results of which were normal. Cl. Ex. 39; Emp. Ex. 2 at 4.

In March 1987, employer referred claimant to Dr. Bazzone, a neurologist, who concluded claimant's symptoms correlated with his CT Scan but questioned why his myelogram did not confirm the disc bulge. Consequently, Dr. Bazzone recommended claimant undergo a second

myelogram and a contrasting CT Scan. Cl. Ex. 54; Emp. Ex. 2 at 6. Claimant, however, refused to undergo the additional examinations, and Dr. Faison, claimant's treating physician, supported this decision. Cl. Ex. 55. Dr. Bazzone re-examined claimant on November 2, 1987. He concluded that claimant's condition had not changed and that claimant is 100 percent temporarily disabled and cannot return to work. Again, he recommended claimant undergo the additional testing, and again claimant rejected the recommendation. Cl. Ex. 56; Emp. Ex. 2 at 8. Due to claimant's continuing refusals, Dr. Bazzone revised his opinion and determined claimant's condition reached maximum medical improvement on November 30, 1987. Cl. Ex. 57; Emp. Ex. 2 at 9.

Claimant underwent a Functional Capacity Assessment in February 1988. The therapist concluded claimant exhibited poor effort, unusual and inappropriate behavior and interfering pain, rendering the test inconclusive. Cl. Ex. 59; Emp. Ex. 2 at 11. Dr. Bazzone reviewed the examiner's report and concluded that claimant is malingering. Cl. Ex. 62; Emp. Ex. 2 at 15. Based on Dr. Bazzone's opinion and on claimant's continuing refusal of health care, and his lack of cooperation with vocational rehabilitation efforts, employer terminated claimant's benefits as of April 15, 1988. Emp. Ex. 3. Claimant filed a claim for permanent total disability benefits, and employer controverted the claim citing a lack of medical evidence to substantiate further disability. Emp. Ex. 4.

A hearing was held on February 1, 1989, wherein the parties stipulated, *inter alia*, that claimant was injured on July 27, 1986, employer has paid some medical benefits pursuant to Section 7, 33 U.S.C. §907, employer has paid temporary total disability benefits from July 28, 1986 through April 15, 1988, and claimant has not returned to work. Decision and Order at 2. Claimant and employer disputed the nature and extent of claimant's disability and whether employer is liable for the cost of Dr. Faison's treatment of claimant. *Id.* The administrative law judge found that claimant's condition reached maximum medical improvement on November 30, 1987, that claimant has no permanent disability and is able to return to his usual work as a washman, and that employer is not liable for the cost of Dr. Faison's treatment, as Dr. Faison did not submit a first report of treatment to employer or to the district director as required by Section 7(d)(2) of the Act, 33 U.S.C. §907(d)(2) (1988).[1] Decision and Order at 4-6. Claimant appeals the denial of benefits, and employer responds, urging affirmance.

[1]Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

Claimant first contends the administrative law judge erred in finding that he has no permanent disability and can return to his usual work. He argues that the administrative law judge ignored Dr. Faison's opinion and improperly weighed the medical evidence. While Dr. Faison did not impose restrictions on claimant, he did not believe claimant could return to his usual work as a washman. Cl. Ex. 89 at 19. Dr. Bazzone, who originally stated that claimant could not return to work because he thought claimant was a longshoreman, concluded claimant is able to return to work as a washman. Emp. Ex. 8 at 9, 12. Ms. Roberts, a vocational counselor, analyzed the washman's job and, taking claimant's complaints of pain and the medical records into consideration, also concluded claimant could perform the duties of a washman. Emp. Ex. 9 at 8-9, 12, 15-16; Tr. at 120. Moreover, both employer and Ms. Roberts classified the washman position as a light to moderate or light to medium job. Emp. Ex. 9 at 8; Tr. at 145-146, 148.

Questions of witness credibility, including those concerning medical witnesses, are for the administrative law judge as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In this case, as is within his discretion as the trier-of-fact, the administrative law judge credited Dr. Bazzone's testimony as a neurologist over Dr. Faison's testimony as a general practitioner. He also credited Ms. Roberts' testimony concerning her efforts to locate suitable alternate employment for claimant and her later analysis of claimant's usual job. Decision and Order at 4-5. Because there is substantial evidence of record to support the administrative law judge's finding that claimant is able to return to his regular job, we reject claimant's contentions.[2] *See generally Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1988 (9th Cir. 1990).

Claimant also challenges the administrative law judge's findings concerning the admissibility of certain evidence. First, he contends the administrative law judge erred in rejecting the evidence marked for identification as Claimant's Exhibit 90, consisting of copies of job applications completed by claimant and response letters from prospective employers. Although the administrative law judge did not admit this evidence, he permitted claimant to read the dates and employers' names into the record.[3] Tr. at 151-154. Next, claimant contends the administrative law judge erred in admitting the evidence marked as Exhibits 1 and 2 to Employer's Exhibit 8, consisting of a job analysis of the position of washman and photographs of employees performing that job.[4]

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[2]Further, we reject claimant's contention that the administrative law judge erred in crediting employer for any overpayment of benefits it made since November 30, 1987. *See generally Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125 (CRT) (5th Cir. 1992); 33 U.S.C. §914(j).

[3]Employer objected to the admission of the applications and letters for two reasons. First, when claimant was deposed, employer specifically requested the list of employers to which claimant had applied, and claimant's counsel refused the request. *See* Cl. Ex. 84 at 47. Second, employer does not dispute the fact that claimant filled out applications for employment. *See* Tr. at 152.

[4]Claimant objected to these exhibits because he had not seen them prior to the deposition and because they were generated post-hearing. However, the record was left open without objection to

Section 702.339 of the regulations permits an administrative law judge to investigate a case so as to best ascertain the rights of the parties, and Section 702.338 requires the administrative law judge to inquire fully into the matter and receive relevant testimony and evidence. 20 C.F.R. §§702.338, 702.339. The Board has interpreted these provisions as affording administrative law judges considerable discretion in rendering determinations pertaining to the admissibility of evidence. *See Olsen v. Triple A Machine Shop, Inc.*, 25 BRBS 40 (1991); *Wayland v. Moore Dry Dock*, 22 BRBS 177 (1988); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). Because the admission of evidence is discretionary, the Board may overturn such a determination only if it is arbitrary, capricious or an abuse of discretion. *See generally Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), *aff'd in pertinent part sub nom. Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992). In this case, the administrative law judge did not abuse his discretion in rejecting Claimant's Exhibit 90 and in admitting Exhibits 1 and 2 to Employer's Exhibit 8, as all relevant evidence was allowed into the record and the rights of the parties were protected. *Olsen*, 25 BRBS at 40; 20 C.F.R. §§702.338, 702.339.

Finally, claimant contends the administrative law judge erred in finding that employer is not liable for the cost of Dr. Faison's treatment. Claimant asserts that employer was aware from the outset of Dr. Faison's status as claimant's treating physician, and he argues that this knowledge obligated employer to further investigate the matter. Section 7(d)(2) of the Act requires an injured employee's treating physician to provide the employer and the district director with a medical report of the injury within 10 days after the first treatment. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); 33 U.S.C. §907(d)(2) (1988). In the interests of justice, however, the failure to comply with the provisions of Section 7(d)(2) may be excused. *See Maguire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299 (1992); *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in pertinent part*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991); 20 C.F.R. §702.422.

In this case, the administrative law judge found that claimant refused to sign a release form to allow employer access to his medical records, and despite numerous requests, that Dr. Faison failed to submit a report to employer. Cl. Ex. 84 at 27; Tr. at 143. The first "report" Dr. Faison sent to employer was a bill dated December 9, 1988 for services provided from July 27, 1986 through November 14, 1988. Emp. Ex. 12; Tr. at 142. Thus, claimant's physician did not provide employer with a medical report within 10 days after claimant's first treatment. As claimant has the burden of proof regarding compliance with this requirement, we reject his contention that employer's awareness of Dr. Faison's status obligated it to investigate the matter. *See Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979). Further, although the administrative law judge did not discuss whether claimant's failure to comply might be excused, a

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allow for the depositions of Drs. Bazzone and Faison and of Ms. Roberts for an analysis of the duties of claimant's usual job as a washman and a determination as to whether he could perform those duties. Tr. at 8-9, 128. Additionally, although claimant objected to the inclusion of this evidence at Dr. Bazzone's deposition, he did not object when employer presented the same exhibits for admission into evidence at a later deposition. *See* Emp. Ex. 9 at 6-8.

two-year delay and outright refusals to submit reports cannot justify a finding that the interests of justice would be served by excusing the failure to comply with Section 7(d)(2). *See, e.g.*, *Maryland Shipbuilding*, 594 F.2d at 407, 10 BRBS at 8; *Force*, 23 BRBS at 6. Therefore, we affirm the administrative law judge's finding that employer is not liable for the cost of Dr. Faison's services.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

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BETTY J. STAGE, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge