BRB No. 10-0272

EDDIE BARKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 07/29/2010
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter Mills LLP), Norfolk, Virginia, for claimant.

John Schouest and Limor Ben-Maier (Wilson, Elser, Moskowitz, Edelman & Dicker LLP), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-LDA-00408) of Administrative Law Judge Alan L. Bergstrom 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 Defense Base Act, 42 U.S.C. §1651 *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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained an injury to his neck and head on January 4, 2006, while working as a truck driver in Iraq. Claimant began treatment with Dr. Sullivan, a neurosurgeon, who treated claimant's pain conservatively with physical therapy and pain medication. As claimant continued to complain of pain, Dr. Sullivan recommended and performed an anterior cervical fusion at C6-C7 on January 3, 2007. Claimant continued to suffer from significant pain and underwent a discogram per Dr. Sullivan's recommendation. In November 2007, based on the results of the discogram, Dr. Sullivan recommended a revision surgery with removal of the anterior cervical plate at C6-C7 followed by a C4-C5, C5-C6 discectomy interbody bank bone fusion with plating at C4-C6. Cl. Ex. 2; Emp. Ex. 9. Claimant requested authorization for the surgery, which was not approved by employer.

Employer scheduled claimant for an examination by Dr. Hanley, an orthopedic surgeon, on February 27, 2008, which claimant attended. Dr. Hanley opined that, in this case, the recommendation of the treating physician is reasonable and the patient should not be prohibited from going forward with the procedure, although he opined that success was not likely. Emp. Ex. 9. As employer still did not authorize the recommended surgery, claimant requested an informal conference in a letter to the district director dated March 24, 2008, which was scheduled for July 8, 2008. By letter dated June 3, 2008, employer notified claimant of a scheduled examination to take place on June 13, 2008, by Dr. Cohen, a neurosurgeon. Claimant, through counsel, objected to the second employer-scheduled examination by letter dated June 19, 2008, contending that claimant had already undergone an examination by an employer-chosen physician, who agreed that the recommended surgery was reasonable. Claimant averred that employer was "doctor shopping." Claimant also notified employer that he would undergo another medical examination if it was ordered by the district director. Emp. Ex. 24. Employer responded that Dr. Cohen was a neurosurgeon whereas Dr. Hanley was an orthopedic surgeon; claimant again refused to undergo the examination. *Id.* Employer suspended claimant's benefits as of June 13, 2008, based on his refusal to submit to an examination by Dr. Cohen. 33 U.S.C. §907(d)(4).

An informal conference was held on July 8, 2008, regarding claimant's request for authorization for the surgery recommended by Dr. Sullivan, employer's request for a second medical examination, and employer's suspension of benefits. At the informal conference, employer submitted a hand-written note from claimant's treating pain specialist, Dr. Rosenthal, which stated that, after his review of Dr. Weintraub's report, he agreed that a second neurological opinion was warranted. Emp. Ex. 13. This hand-written note had not previously been produced for the district director or claimant's counsel. Neither claimant's counsel nor employer's representative at the informal conference knew who Dr. Weintraub was or what his report stated. *See* Emp. Ex. 24 at 10. The district director also noted that Dr. Rosenthal's note did not indicate whether he

was aware of Dr. Hanley's opinion. The district director recommended that employer reinstate claimant's benefits, and she held the request for authorization for surgery in abeyance pending a response from Dr. Rosenthal after his review of Dr. Hanley's report. By letter dated August 14, 2008, the district director wrote to the parties to inform them of Dr. Rosenthal's response. Dr. Rosenthal opined that claimant should be seen by Dr. McAfee regarding the necessity and feasibility of the recommended surgery. The district director recommended that employer arrange such an examination as soon as possible. She also noted that employer had not reinstated compensation benefits. On August 27, 2008, claimant requested a formal hearing.[1] It is unclear from the record when claimant was provided with the April 18, 2008, report of Dr. Weintraub, Emp. Ex. 12, and it appears that claimant has not undergone an examination by Dr. McAfee.

The administrative law judge found that claimant's refusal to submit to an examination by Dr. Cohen on June 13, 2008, was unreasonable and unjustified. He found the requested examination was reasonable in light of the conflicting opinions regarding the need for additional surgery, noting that claimant's treating pain specialist recommended that claimant obtain another opinion. Moreover, he found that claimant had been examined by an orthopedic surgeon on behalf of employer and it was reasonable for employer to request an examination by a neurosurgeon given the nature of claimant's complaints. The administrative law judge also found that claimant knew of the scheduled appointment and that employer provided transportation to the appointment. The administrative law judge concluded that the refusal was not justified as there were no physical reasons, medical impairments, or religious reasons claimant could not attend. Therefore, the administrative law judge found that employer properly suspended benefits for the period from June 14, 2008 to January 28, 2009, inclusive, pursuant to Section 7(d)(4) of the Act. Claimant appeals this finding. Employer responds, urging affirmance.

Section 7(d)(4) of the Act provides:

> If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

[1] Subsequently, the request for authorization for surgery was withdrawn and claimant agreed to undergo a Functional Capacity Evaluation.

33 U.S.C. §907(d)(4). The Board has held that Section 7(d)(4) sets forth a dual test for determining whether compensation payments may be suspended as a result of a claimant's failure to undergo an examination or treatment. *See, e.g., Malone v. Int'l Terminal Operating Co.*, 29 BRBS 109 (1995). Initially, the burden of proof is on employer to establish that the claimant's refusal to undergo treatment is unreasonable. If employer meets this burden, the burden shifts to claimant to show that the circumstances justify the refusal. For purposes of this test, the reasonableness of the claimant's refusal is an objective inquiry, while justification is a subjective inquiry focusing narrowly on the individual claimant. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

We cannot affirm the administrative law judge's finding that claimant's refusal to attend the appointment on June 13, 2008, was unreasonable and unjustified as it is not based on substantial evidence of record and rests on an inaccurate assessment of the medical evidence. *See generally Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968); *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). The administrative law judge specifically cited "conflicting" evidence on the issue of the recommendation for surgery to find that employer reasonably sought an additional examination of claimant in June 2008. However, at the time of claimant's refusal to be examined on June 13, 2008, claimant was not aware of any conflicting opinions; thus, his response to employer's request for another examination correctly stated that employer had not provided a basis for another examination. Dr. Sullivan recommended the cervical fusions as conservative treatment had been unsuccessful in alleviating claimant's continued complaints of pain. Cl. Ex. 2. Dr. Hanley opined that "the prognosis is extremely guarded that he will get much in the way of improvement with a multilevel fusion as being recommended by Dr. Sullivan." Cl. Ex. 3 at 3. He concluded, however, that "[i]n this particular case the recommendations made by the treating physician are reasonable and based on firm foundation and information gained through appropriate testing and therefore should the patient choose to go forward with this procedure he should not be prohibited in that sense." *Id*. Contrary to the administrative law judge's finding that Dr. Hanley disapproved of a fusion at C4-5, Dr. Hanley stated, "[I]t seems the better part of valor to take the risk of fusing the 4-5 level as well" due to the stress likely to occur from the other fusions. *Id.* Therefore, at the time employer scheduled the examination with Dr. Cohen, there was no conflicting medical evidence of which claimant was aware.

In this regard, the administrative law judge erred in relying on evidence that was not shared with claimant and the district director until the informal conference to support a suspension of benefits as of the date of the refusal. The administrative law judge relied on Dr. Weintraub's opinion that claimant did not require additional surgery and Dr. Rosenthal's supplemental statement that he agreed claimant needed to undergo a second neurological evaluation to help determine the necessity of surgery. Dr. Rosenthal's

statement, dated May 1, 2008, was first presented to claimant and the district director at the informal conference on July 8, 2008. Dr. Weintraub's report, dated April 18, 2008, was not presented to claimant until sometime after the informal conference, at a date that cannot be ascertained from the present record. Thus, this evidence cannot support a suspension of compensation commencing June 14, 2008, as claimant had no basis for knowing that conflicting opinions existed. The administrative law judge also did not discuss the district director's correspondence with the parties concerning the submission of medical evidence and her recommendation in August 2008 following her receipt of the basis for Dr. Rosenthal's opinion.

For the above reasons, we vacate the administrative law judge's finding that claimant's refusal to attend the appointment with Dr. Cohen on June 13, 2008, was unreasonable and unjustified. As a result we vacate the suspension of benefits and remand the case for further findings. On remand, the administrative law judge must reconsider the reasonableness of employer's request to have claimant examined a second time and whether claimant was justified in refusing the request. If the administrative law judge finds that claimant's decision to refuse the examination was unreasonable and unjustified, the administrative law judge must make a specific finding as to the date such a refusal began. A non-inclusive list of factors that may be relevant to these determinations includes: the dates on which claimant and the district director became aware of Dr. Rosenthal's basis for recommending a second opinion and of Dr. Weintraub's opinion; the specialties of the various physicians; the district director's recommendation on August that claimant be seen by Dr. McAfee; claimant's hospitalization in August 2008 for a psychological condition, Cl. Ex. 4; and any additional attempts by employer to schedule an examination.[2] *See generally B.C. [Casbon] v. Int'l Marine Terminals, Inc.*, 41 BRBS 101 (2007).

[2] Any suspension commences on the date of the unreasonable refusal and continues for the period of "such refusal." *See B.C. [Casbon] v. Int'l Marine Terminals, Inc.*, 41 BRBS 101 (2007). The administrative law judge should also address the termination date, particularly in view of the fact that claimant's June 19, 2008, letter stated he would undergo the examination if ordered to do so by the district director.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge