BRB Nos. 04-0695
and 04-0695A

CARLOS ARBOLEDA	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
	)	
L'HOMME, INCORPORATED	)	DATE ISSUED: May 10, 2005
	)	
and	)	
	)	
LOUISIANA WORKERS COMPENSATION CORPPORATION	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order on Remand (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).

This is the second time that this case is before the Board. 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 averred that it established the availability of suitable alternate employment, and the reimbursement for various medical expenses pursuant to Section 7 of the Act, 33 U.S.C. §907.

In the initial 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), in determining 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), 33 U.S.C. §906(b) of the Act, 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, the Board affirmed the administrative law judge's determination of claimant's average weekly wage. The Board vacated, however, 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 remanded the case to the administrative law judge for reconsideration of the evidence of record, including the totality of Mr. Carlisle's testimony, regarding this issue. Lastly, the Board vacated the administrative law judge's denial of reimbursement to claimant for the treatment and prescriptions rendered by Dr. Lyons; on remand, the administrative law judge was instructed to consider all of the evidence on this issue 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 and, if such authorization had been sought by claimant and refused by employer, 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 Arboleda v. L'Homme, Inc.*, BRB No. 03-0306 (Dec. 23, 2003)(unpub.).

Following the submission of briefs by both parties, the administrative law judge issued his Decision and Order on Remand wherein, after addressing *inter alia* the testimony of Mr. Carlisle, he once again determined that employer established the

availability of suitable alternate employment during the period of January 18, 2000, through May 22, 2001. Additionally, the administrative law judge found employer to be liable for the reasonable and necessary medical expenses occasioned by Dr. Lyon's treatment of claimant.

On appeal, claimant challenges 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. In its cross-appeal, employer challenges the administrative law judge decision ordering it to reimburse claimant for the medical charges incurred as a result of his treatment with Dr. Lyons.

Where, as in this case, claimant is incapable of resuming his usual employment duties with his employer as a result of his work-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 P & M Crane Co. v. Hayes,* 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied,* 935 F.2d 1293 (5th Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992).

In the instant case, the Board remanded the case for reconsideration of Mr. Carlisle's testimony in view of his statements that, after listening to claimant speak English at the hearing, while he would not rule out the jobs he had identified as suitable, he could not say for a fact that the airport checker or towing dispatcher positions were suitable in view of claimant's difficulty in speaking the English language. In addition, Mr. Carlisle acknowledged that he did not have access to some of claimant's medical records. Since the administrative law judge relied on Mr. Carlisle's testimony in finding these jobs established suitable alternate employment, the Board remanded the case for reconsideration. *Arboleda,* slip op. at 4. On remand, the administrative law judge addressed these issues and determined that employer met its burden of establishing the availability of suitable alternate employment during the disputed period of time based upon the testimony of Mr. Carlisle and claimant. Decision and Order on Remand at 3-4. Based on the totality of Mr. Carlisle's testimony, the administrative law judge found

claimant would be able to perform the identified positions.[1] In this regard, the administrative law judge found that Mr. Carlisle's vague equivocation regarding claimant's ability to perform the identified positions was more the result of his desire for additional information than a contradiction of his earlier testimony and was thus of little weight. The administrative law judge determined that claimant's ability to work in an English-speaking environment for 25 years, including successful on the job training in welding and others skills, supported a conclusion he could perform the identified jobs, as did his ability to speak English during his deposition and at the formal hearing without a translator. The administrative law judge concluded that claimant's failure to appear for two appointments scheduled with Mr. Carlisle should not result in the rejection of Mr. Carlisle's testimony,[2] and that although Mr. Carlisle did not have every record available for his review, he did have a sufficient number of records from a variety of physicians and rehabilitation experts to render an informed decision. The administrative law judge found that Mr. Carlisle never stated the jobs were unsuitable and thus, while he would

[1] In his initial Decision and Order, the administrative law judge found that the positions of towing dispatcher, automated line worker, and airport checker established the availability of suitable alternate employment. On appeal, the Board noted that claimant did not challenge the administrative law judge's finding regarding the position of automated line worker. *See Arboleda*, slip op. at 4 n.4. On remand, after similarly acknowledging claimant's concession regarding this position, the administrative law judge interchanged the positions of towing dispatcher and automated line worker in discussion of the issue of suitable alternate employment. *See* Decision and Order on Remand at 3 - 4. Any error committed by the administrative law judge in this regard is harmless, however, as the administrative law judge's ultimate determinations are supported by substantial evidence, are rational, and are in accordance with law. *See* discussion *infra.*

[2] The administrative law judge found claimant's conduct in this regard to be unacceptable; specifically, the administrative law judge stated that claimant's position that Mr. Carlisle's opinion must be rejected due to his lack of personal information regarding claimant is belied by the fact that it was claimant's failure to meet with Mr. Carlisle that resulted in the amount of information available to that witness.

have liked to have interviewed claimant at length, Mr. Carlisle did not rule out the positions identified as being suitable for claimant.[3]

We affirm the administrative law judge's decision on remand that claimant was capable of performing suitable alternate employment during the disputed period of time, January 18, 2000 through May 22, 2001. It is well-established that the administrative law judge as the trier of fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, an administrative law judge may consider claimant's refusal to cooperate with employer's vocational expert in determining whether claimant is totally disabled. *Dangerfield v. Todd Pacific Shipyards Corp.,* 22 BRBS 104 (1989). In the case at bar, the administrative law judge thoroughly considered the totality of Mr. Carlisle's testimony on remand, and his ultimate determinations regarding that testimony are rational. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). As the testimony of Mr. Carlisle, as supported by that of Dr. Bourgeois, constitutes substantial evidence supporting 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, it is affirmed. *Id.; see Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

In its cross-appeal, employer challenges the administrative law judge's conclusion that it is liable for the medical expenses incurred by claimant as a result of his treatment with Dr. Lyons. Specifically, employer avers that there is no justifiable reason to hold it liable for the medical charges of Dr. Lyons since claimant's actions following his release by Dr. Bourgeois in July 1999 were unreasonable in that he engaged in "doctor shopping," that claimant made no showing of a need to treat with Dr. Lyons after that release, and that claimant did not establish any justification for employer's payment of Dr. Lyons' medical charges pursuant to Section 7 of the Act.[4] Er's br. at 6-7. We disagree. Section 7, 33 U.S.C. §907, of the Act generally describes an employer's duty to provide medical and related services and costs necessitated by its employee's work-related injury, employer's rights regarding control of those services, and the Secretary's duty to oversee them. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In this regard, Section 7(a) of the Act states that

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[3] Contrary to the references contained in claimant's brief that he was never released to return to work by Dr. Bourgeois, *see* Clt's br. at 12, Dr. Bourgeois's medical records indicate that he released claimant to sedentary employment in July 1999. EX 1. Moreover, in January 2000, Dr. Bourgeois approved the three employment positions identified by Mr. Carlisle as being suitable for claimant, *see* EX 6, and claimant acknowledged at the formal hearing that he was informed of this approval by Dr. Bourgeois. *See* Tr. at 80. Moreover, while claimant correctly states that he was under the care of Dr. Lyons during the disputed period of time, that physician's reports are silent as to claimant's ability to perform sedentary work. *See* CX 10.

[4] Both Dr. Bourgeois and Dr. Lyons are orthopedic surgeons.

> [t]he employer shall furnish such medical, surgical, and other attendance or treatment ... medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a); *see Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary, and must be related to the injury at hand. *See Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

We affirm the administrative law judge's findings that claimant's treatment with Dr. Lyons following his discharge by Dr. Bourgeois in July 1999 was reasonable and necessary, and that employer is therefore liable to claimant for the reimbursement of the charges thus incurred. In addressing this issue on remand, the administrative law judge initially acknowledged that claimant's treatment with Dr. Lyons did not overlap the treatment provided by Dr. Bourgeois, that Dr. Lyons' treatment was no different than that previously provided by Dr. Bourgeois, and that claimant had been discharged by Dr. Bourgeois due to his non-compliance with the doctor's recommendations and not because claimant no longer needed any treatment. Decision and Order on Remand at 2. Next, the administrative law judge determined that the issue of whether Dr. Lyons' treatment was reasonable and necessary required consideration of whether claimant's condition required treatment and whether the specific treatment procured by claimant from Dr. Lyons was appropriate for that condition. In light of claimant's ongoing medical condition, the administrative law judge concluded that the treatment claimant received from Dr. Lyons was necessary and comparatively appropriate for claimant's medical condition. Contrary to employer's position on appeal, the issue to be addressed does not focus on claimant's actions in procuring such treatment but, rather, on whether the treatment obtained was reasonable and necessary for the work injury.[5] In the instant case, the administrative law judge's findings that Dr. Lyons' specific treatment of claimant subsequent to his discharge by Dr. Bourgeois in July 1999 was reasonable and necessary in light of claimant's ongoing medical condition is supported by substantial evidence and

[5] It is not disputed that Dr. Bourgeois, claimant's initial choice of physician, discharged claimant and that, thereafter, claimant sought authorization in 1999 to treat with Dr. Lyons, which employer refused. Once employer did so, claimant was released from the obligation to continue to request approval and required to show only that the treatment he procured thereafter was reasonable and necessary for his work injury. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Employer does not argue that claimant's condition did not require treatment during the period of time he treated with Dr. Lyons.

thus will not be disturbed. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997). Accordingly, we affirm the administrative law judge's determination that employer is liable for the medical charges incurred by claimant as a result of his treatment with Dr. Lyons.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge