BRB No. 98-1084

TOM MAYS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES	)	DATE ISSUED: May 3, 1999
	)	
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.

Winthrop G. Gardner, New Orleans, Louisiana, for claimant..

Christopher M. Landry (Blue Williams, L.L.P.), Metairie, Louisiana, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-0677) of Administrative Law Judge James W. Kerr, Jr., 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 the 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).

Claimant suffered a work-related injury on March 18, 1991, when he was kicked during an altercation, sustaining a blow to the head and a fracture of the right cheek. Claimant was initially treated at West Jefferson Hospital by Dr. McKeon, who performed surgery for claimant's injuries on March 20, 1991. Claimant was referred to Dr. Leftwich, an ophthalmologist, for additional treatment for his sight-related problems. After treating claimant in March and April 1991, Dr. Leftwich concluded that there was no disability from

an ophthalmic standpoint. EX-5. Claimant decided that he desired additional medical treatment because he continued to experience pain and was having trouble with his eyesight. As a consequence, claimant's attorney referred him to Dr. Sabatier, who initially treated claimant on April 9, 1991. Claimant returned to both Drs. Sabatier and McKeon for additional examinations. On May 29, 1991, Dr. McKeon stated that claimant could return to work on a restricted basis as of the date of his last examination, April 12, 1991. On July 12, 1991, Dr. McKeon filled out a work restriction form, indicating that claimant could continuously sit, walk, lift, bend, squat, climb, kneel, twist and stand, and restricting claimant's lifting to a maximum of 75 pounds. RX-4A. After his final examination of claimant on July 15, 1991, Dr. Sabatier stated that he concurred with Dr. McKeon's work restrictions. RX-6A at 6-7; RX-8 at 76. Dr. Sabatier informed claimant via a letter dated August 5, 1991, that he would not participate in further examinations.

Claimant sought a change in physicians from employer, based on his move from Marrero, Louisiana, to Mer Rouge, Louisiana. Claimant testified that he requested the change on the same day that he saw Dr. McKeon, May 5, 1991, and was granted the request by employer's worker's compensation specialist, Ms. Smith, as long as he sought treatment by a specialist. Tr. at 82-92. A notation in Ms. Smith's records indicated that the request took place on July 2, 1991, and that claimant's request had been denied. RX-11 at 107. In any event, claimant sought additional treatment with Dr. Patterson, a family practitioner near Mer Rouge, on June 14, 1991, and continued treatment with Dr. Patterson through 1995. Subsequent to August 6, 1991, claimant sought additional treatment for his physical complaints from Dr. Hubli, and underwent pain treatment at the LSU Medical Center. Claimant also sought psychiatric treatment for depression from Drs. Ware, Stephens, Baker, and Roniger, commencing in February 1992.

Employer voluntarily paid claimant temporary total disability compensation and medical expenses from the date of injury. In a letter dated July 25, 1991, claimant was informed by employer that he was expected to return to work immediately, based on his release to work by Drs. McKeon and Sabatier. RX-11 at 103. Claimant did not return to work, and employer ceased its voluntary payments on August 6, 1991. Claimant sought disability compensation and medical expenses thereafter.

The administrative law judge, relying upon the opinions of Dr. McKeon, who found claimant's only physical restriction to be a 75 pound lifting restriction, Dr. Leftwich, who found no disability from an ophthalmic standpoint, and Dr. Ware, who concluded that claimant suffered no psychological disability, found that claimant was able to perform his usual work as a welder, and is thus not entitled to additional disability benefits beyond those which employer had voluntarily paid. The administrative law judge also determined that claimant is not entitled to reimbursement for the medical treatment procured after August 6, 1991, on the rationale that the treatment was unauthorized. In so concluding, the

administrative law judge found the notations found in Ms. Smith's logs more persuasive than the contrary testimony of claimant, and concluded that claimant requested a change in physicians pursuant to Section 7(c)(2) of the Act, 33 U.S.C. §907(c)(2), on July 2, 1991, and that his request was denied. The administrative law judge additionally determined that claimant failed to show good cause for the request and that he had not been denied additional treatment.

Claimant appeals the administrative law judge's denial of disability compensation and medical expenses incurred since August 6, 1991. Employer responds, requesting affirmance of the decision below.

Initially, we reject claimant's contention that the administrative law judge erred in denying his claim for additional disability compensation. In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Claimant argues that Dr. Patterson's opinion that he remained disabled from a physical and psychological standpoint during the period he treated claimant from June 1991 through 1995 is sufficient to establish his entitlement to additional disability compensation. *See, e.g.*, CX-5 at 21-22, 34-35, 91, 92. The administrative law judge acknowledged this testimony in his Decision and Order, but also noted that Dr. Patterson initially opined that claimant had no physical disabilities. Decision and Order at 21. Consequently, the administrative law judge rationally chose to credit the opinion of claimant's original treating physician, Dr. McKeon, in conjunction with the opinion of Dr. Leftwich, an ophthalmologist, over the opinion of Dr. Patterson to conclude that claimant was capable of performing his usual employment as a welder from a physical standpoint. In his opinion of July 11, 1991, the only restriction Dr. McKeon placed on claimant was a lifting restriction of 75 pounds. Dr. Leftwich found that claimant suffered no residual disability from a ophthalmic standpoint. A conclusion that claimant is able to return to his usual work requires a determination as to the job duties performed prior to his injury and a finding that these duties are within claimant's post-injury medical restrictions. *See, e.g.*, *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Since there is no evidence that the 75 pound lifting restriction would inhibit claimant's job duties as a welder, the opinions of Drs. McKeon and Leftwich constitute substantial evidence to support the administrative law judge's conclusion that claimant was physically capable of returning to his regular welding job as of August 6, 1991. *See Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem.*, 909 F.2d 1488 (9th Cir. 1990)(table).

In addition, the administrative law judge rationally concluded that claimant was able to return to work from a psychological standpoint, crediting the opinion of Dr. Ware, a Board-certified psychiatrist and Board-qualified neurologist, who found no evidence of significant disability or clinical depression, over the opinion of Dr. Baker, a licensed

psychologist, who found claimant disabled but who also noted that claimant may have been malingering. Such credibility determinations are solely within the purview of the administrative law judge.[1] *See, e.g. Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th

[1]Claimant notes in his brief that Dr. Baker's opinion was found to be credible by the Social Security Administration (SSA), and implies that the administrative law judge was bound to rely upon the opinion based on the SSA findings, which were excluded from the record by the administrative law judge. In its response brief, employer argues that the administrative law judge rationally excluded the SSA findings from the evidentiary record in this case. Although claimant does not specifically challenge the administrative law judge's exclusion of evidence in this appeal, we note that administrative law judges are accorded considerable discretion in rendering determinations pertaining to the admissibility of evidence, and the administrative law judge did not err in failing to consider evidence outside the record in rendering his decision in this case. *See* 20 C.F.R. §§702.338, 702.339; *Olsen v. Triple A Machine Shop, Inc.* 25 BRBS 40 (1991), *aff'd,* 996 F.2d 1226 (9th Cir. 1993)(table); *Wayland v. Moore Dry Dock,* 22 BRBS 177 (1988); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). Furthermore, the conclusions of an SSA administrative law judge are not binding on the administrative law judge; how much weight, if any, should be given to this decision is within the discretion of the administrative law judge. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Cir. 1962). The administrative law judge rationally credited the opinion of Dr. Ware over that of Dr. Baker based upon Dr. Ware's superior qualifications as a Board-certified psychiatrist. Inasmuch as claimant has failed to establish reversible error made by the administrative law judge in evaluating the conflicting medical evidence and making credibility determinations, his denial of additional disability compensation is affirmed.

Claimant also argues that the administrative law judge erred in finding that employer is not liable for medical expenses incurred after August 6, 1991. Section 7(c)(2) of the Act, 33 U.S.C. §907(c)(2), and Section 702.406(a) of the regulations, 20 C.F.R. §702.406(a), provides that where the employee has made his initial free choice of an attending physician, he may not thereafter change physicians without the prior written consent of the employer or the district director. *See, e.g., Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988). The Board has held that these provisions govern rights with regard to overseeing claimant's medical care, whereas the right to payment or reimbursement is controlled by Section 7(d), 33 U.S.C. §907(d). *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Under Section 7(d), an employee is entitled to reimbursement of medical expenses if he requests employer's authorization for such treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. *See Anderson*, 22 BRBS at 23; *see also 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). The employee is released from the obligation of seeking authorization if employer has refused or neglected to provide treatment. *Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in part and rev'd in part on other grounds sub. nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989); *Marvin v. Marinette Marine Corp.*, 19 BRBS 60 (1986).

The administrative law judge rationally determined, based on the handwritten records of Ms. Smith, that employer refused claimant's request to change physicians. *See generally Todd Shipyards Corp.*, 300 F.2d at 741. Once, as here, it has been established that claimant sought, and was denied, authorization, the question of reimbursement for treatment claimant subsequently procured on his own turns on whether the treatment was reasonable and necessary.[2] *Anderson*, 22 BRBS at 23-24. The administrative law judge denied claimant's

[2]Claimant contends that the administrative law judge erred in finding that claimant failed to establish good cause for the change. However, as the issues involve payment for past care, the dispositive issue is whether the treatment he subsequently procured was reasonable and necessary. *See generally Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT). Thus, we need not address claimant's allegations of error regarding good cause, as this issue is not dispositive of claimant's right to reimbursement. We note, however, that the administrative law judge erroneously focused upon whether employer established good cause for denying the change, finding employer was not aware claimant had moved, rather than on

claim for medical expenses incurred after the date he found claimant was able to return to work based on his finding that claimant's care was unauthorized, without considering the reasonableness or necessity of the treatment. Although the administrative law judge rationally concluded that claimant was not physically or psychologically disabled after July 11, 1991, claimant is not necessarily foreclosed from recovering medical expenses incurred subsequent to this date on this basis. Section 7 does not require that a work injury be economically disabling in order for claimant to be entitled to medical expenses. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

The record reveals that claimant was under the care of Dr. Patterson after 1991, and that he was treated by Dr. Hubli commencing November 10, 1995, including undergoing facial surgery on two occasions; on February 22, 1996, he had an open reduction internal fixation of the depressed zygomatic arch fracture, and on November 13, 1997, a facial reconstruction with a demineralized bone graft. Dr. Hubli also concluded in December 1997 that claimant may need additional surgery. CX-7 at 4, 5, 9, 31, 53, 57. Claimant also sought regular continued care for his facial injuries from Dr. Patterson and the LSU Medical Center for his facial injuries. *See* CX-5. Furthermore, although the administrative law judge concluded that claimant suffered no psychological disability, he did not consider the reasonableness and necessity of the psychological care claimant sought from Drs. Ware, Baker, Stephens, and Roniger commencing February 1992. *See Cotton*, 23 BRBS at 388. Consequently, since the record reveals that claimant was undergoing treatment for his work-related injury after August 6, 1991, we vacate the administrative law judge's denial of medical benefits incurred thereafter, and we remand the case for the administrative law judge to consider the necessity and reasonableness of medical expenses sought by claimant in this case. *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997).

Accordingly, the Decision and Order denying disability compensation is affirmed. The administrative law judge's denial of medical benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

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whether claimant established good cause for requesting a change. *See* 20 C.F.R. §702.406(a). The regulations specify that 25 miles is a reasonable distance to travel for medical care. 20 C.F.R. §702.403. If claimant in fact moved from Marrero, Louisiana, to Mer Rouge, a distance of approximately 200 miles, this move would be sufficient to establish good cause for a change in physician, justifying the need for claimant to see a new doctor. In considering claimant's entitlement to future care, the administrative law judge must consider the facts regarding claimant's place of residence. *See generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge