BRB No. 03-0210

EARL C. DAVIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GEORGE HYMAN CONSTRUCTION COMPANY	)	DATE ISSUED: Nov. 17, 2003
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Earl C. Davis, Clinton, Maryland, *pro se.*

James W. Greene and Matthew W. Carlson (Thompson, O'Donnell, Markham, Norton & Hannon), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2002-DCW-2) of Administrative Law Judge Richard T. Stansell-Gamm 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (the Act). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge=s findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220.

On August 11, 1965, while working as a journeyman carpenter for employer, claimant sustained serious injuries to his legs and pelvis when the floor being constructed above him collapsed and he was buried by construction debris. In the years since claimant's injury, employer's carrier (Liberty Mutual) has paid claimant permanent total disability compensation pursuant to 33 U.S.C. §908(a), and has provided medical benefits pursuant to 33 U.S.C. §907, for medical costs arising as a result of claimant's work-related injury. The appeal presently before the Board involves disputes between claimant and Liberty Mutual over employer's liability for various medical expenses. The proceedings before the district director and the administrative law judge regarding these disputes were both protracted and complicated. The procedural history is set out in the administrative law judge's Decision and Order, and thus we need not relate in detail the proceedings before the district director and the administrative law judge that preceded this appeal. We must briefly address, however, the role that the United States District Court for the District of Columbia (District Court) has assumed in the enforcement of claimant's entitlement to Section 7 medical benefits. Due to repeated difficulties in obtaining payment or reimbursement for his ongoing medical care, claimant filed an action against Liberty Mutual, and in an Order issued on August 24, 1982, the District Court established procedures for claimant to obtain payment of his medical expenses by Liberty Mutual. By Order dated March 15, 2001, the District Court modified the provisions of its original Order. Specifically, the modified Order directed Liberty Mutual to separately itemize each medical condition, procedure, therapy, or medication requested by claimant with the corresponding amounts claimed and reimbursed. If a particular medical expense was to be rejected, Liberty Mutual was required to provide a legally sufficient reason for the rejection; where a medical expense was rejected, the district director was to attempt to resolve the dispute.[1]

The issues now before the Board are those addressed in the administrative law judge's Decision and Order dated October 21, 2002.[2] In that decision, the administrative law judge first dismissed claimant's claim for payment in full of the cost of medical treatment provided by Dr. Snow. Next, the administrative law judge declined to adjudicate the issue of the bill for claimant's treatment at Sibley Hospital in light of Liberty Mutual's attorney's representation that a settlement of that bill had been reached

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[1] The modified Order additionally provided that Liberty Mutual would be liable for a $500 fine payable to claimant for every day beyond 30 days in which Liberty Mutual failed to pay in full or file an adequate response to a request for payment or reimbursement of medical expenses.

[2] These issues also were raised before the District Court. The Court deferred action on them pending administrative resolution of this case.

between Liberty Mutual and the hospital. The administrative law judge next approved claimant's request for reimbursement in full for prescription drugs, over-the-counter medication, mileage, and parking expenses. The administrative law judge denied claimant's request for an additional reimbursement for the cost of replacement exercise equipment above the amount previously paid by Liberty Mutual. Lastly, the administrative law judge denied claimant's request for authorization for the purchase of a powered wheelchair and van lift.[3]

On appeal, claimant, representing himself, challenges the administrative law judge=s refusal to hold employer liable for the various medical charges submitted for reimbursement or authorization by claimant.[4] Employer responds, urging affirmance of the administrative law judge=s decision in its entirety.

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[3] In his Decision and Order, the administrative law judge rejected claimant's challenge on hearsay grounds to the admission into evidence of documents proffered by Liberty Mutual. *See* Decision and Order at 4-5. The administrative law judge's admission of the *ex parte* documents submitted by Liberty Mutual is affirmed as claimant has not presented any evidence to refute their reliability; as correctly stated by the administrative law judge, he may rely on hearsay testimony as the formal rules of evidence do not govern hearings under the Act. 33 U.S.C. §923(a); 20 C.F.R. §702.339; *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98, *aff'd sub nom. Bell Helicopter Int'l, Inc. v. Jacobs,* 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984).

[4] We will not consider the arguments made by claimant before the administrative law judge regarding the issue of whether Liberty Mutual's responses to claimant's requests for medical benefits are in compliance with the procedures set forth in the District Court's Orders for the processing of claimant's medical claims. The administrative law judge observed, in this regard, that his adjudication was limited to the substantive issues regarding claimant's entitlement to Section 7 medical benefits. The administrative law judge stated that his decision pertained only collaterally to issues concerning the manner, timing and adequacy of Liberty Mutual's responses to medical claims and that the District Court retains jurisdiction to enforce its Orders regarding the processing of the medical claims. *See* Decision and Order at 5. We consider the administrative law judge's demarcation of those issues before him and those remaining within the jurisdiction of the District Court to be correct. Our review, therefore, is limited to the administrative law judge's findings regarding claimant's substantive entitlement to the specific medical expenses addressed in the administrative law judge's Decision and Order. *See generally* 33 U.S.C. §918(a); 20 C.F.R. §702.372; *Lazarus v. Chevron U.S.A., Inc.,* 958 F.2d 1297, 25 BRBS 145(CRT)(5th Cir. 1992).

Pursuant to Section 7 of the Act, 33 U.S.C. '907, employer is liable for medical expenses for the reasonable and necessary treatment of a claimant's work-related injury.[5] The claimant has the burden of establishing the elements of a claim for medical benefits. *See Schoen v. United States Chamber of Commerce,* 30 BRBS 112 (1996). 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. Service,* 13 BRBS 1130 (1981); 20 C.F.R §§701.401(a), 702.402.

In the instant case, the administrative law judge considered a number of disputed medical expenses, which we will separately address. The administrative law judge first considered claimant's request that employer make full payment of the medical bills for treatment provided by Dr. Snow.[6] Prior to the March 7, 2002, hearing in this case, the administrative law judge remanded to the district director the issue regarding Dr. Snow's medical bills, for an investigation of whether Dr. Snow's fees exceed the prevailing community charge or Dr. Snow's customary charge. Decision and Order at 6-8; Remand Order issued October 19, 2001. This issue was remanded because the district director had not exercised his supervisory authority to determine whether the charges made by Dr.

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[5] Section 7(a) of the Act, 33 U.S.C. §907(a) states:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

[6] As fully explained in the administrative law judge's Decision and Order, Dr. Snow sends his bills for claimant's medical care directly to Liberty Mutual. If Liberty Mutual does not pay the requested fee in its entirety, Dr. Snow then bills claimant for the remaining balance. Liberty Mutual has reduced its payments to Dr. Snow to the extent it believes his fees exceed the prevailing community charges. Since 1993, the total amount of the balance billed by Dr. Snow to claimant is approximately $7,300. As of the date of the hearing, claimant had not paid any of this amount to Dr. Snow. *See* Decision and Order at 6-8.

Snow exceeded those permitted under the Act.[7] 33 U.S.C. §907(b), (g); 20 C.F.R. §702.407(b). The applicable regulations establish a framework for resolving disputes regarding the reasonableness of the amount charged by the medical providers. Specifically, Section 702.414, 20 C.F.R. §702.414, states that the district director "may, upon written complaint of an interested party . . . investigate any fee for medical treatment . . . that appears to exceed prevailing community charges . . . ."[8] The district director then makes specific findings on whether the fee exceeds the prevailing community charges and provides notice of his or her findings to the interested parties. 20 C.F.R. §702.414(c). If a party disputes this finding or the proposed action, it has a right to request an administrative hearing before an administrative law judge pursuant to 5 U.S.C. §556. 20 C.F.R. §§702.415, 702.416, 702.417; *see Newport News Shipbuilding & Dry Dock Co. v. Loxley*, 934 F.2d 511, 24 BRBS 175(CRT)(4th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992). Following the administrative law judge's remand of this issue, however, the district director expressly declined to conduct an investigation of the reasonableness of Dr. Snow's charges. *See* Recommendation of Claims Examiner Lisa Baxter dated November 1, 2001.[9] At the formal hearing before the administrative law judge which was subsequently held on March 7, 2002, neither Dr. Snow nor a representative of the district director was present, nor was evidence presented on the issue of whether Dr. Snow's fee exceeds the prevailing community charge.

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[7] Section 7(g) of the Act states in relevant part:

> All fees and other charges for medical examinations, treatment, or service shall be limited to such charges as prevail in the community for such treatment, and shall be subject to regulation by the Secretary.

33 U.S.C. §907(g); *see also* 20 C.F.R. 702.413 (referring to fee schedules in regulations promulgated pursuant to other statutes).

[8] This investigation may be conducted through informal contact with the provider, an informal conference with all interested parties, by interrogatories to the provider, or by subpoena for documents relevant to the dispute. 20 C.F.R. §702.414(a).

[9] Specifically, the claims examiner determined that claimant lacked standing to raise the issue of whether his treating physician's bills are being paid in accordance with the prevailing community charge. The claims examiner stated that Dr. Snow was the necessary party in a dispute regarding his medical fee and, noting that Dr. Snow had not challenged the amount received from employer, declined to render an opinion as to whether Dr. Snow's bills exceed the prevailing community rate. *See* Recommendation of Claims Examiner Lisa Baxter dated November 1, 2001.

In his October 21, 2002 Decision and Order, the administrative law judge found that claimant, as an interested party, was entitled to seek a hearing on the issue of whether Dr. Snow's fees exceed the prevailing community charges. *See* Decision and Order at 7; Hearing Tr. at 31; 20 C.F.R. §702.415. The administrative law judge further found, however, that pursuant to 20 C.F.R. §702.416, the two necessary parties for a hearing on this issue are the affected physician and the district director, and that neither of these parties appeared at the hearing conducted in this case. The administrative law judge concluded that because the necessary parties were not present at the March 7, 2000 hearing and because the record lacks any evidence regarding the issue of whether Dr. Snow's bills exceed the prevailing community charge, claimant's request that Dr. Snow's bill be paid in full must be dismissed. Decision and Order at 8.

We affirm the administrative law judge's refusal to address claimant's request for full payment of the balance of Dr. Snow's bill, on the facts of this case. As the administrative law judge correctly stated, neither Dr. Snow nor the district director, the two necessary parties, appeared at the hearing. *See* 20 C.F.R. §702.416; *Loxley*, 934 F.2d at 516-517, 24 BRBS at 184-186(CRT). Moreover, no evidence was adduced which could serve as a basis for a decision by the administrative law judge as to whether Dr. Snow's fees exceed the prevailing community charges. *See* 20 C.F.R. §§702.413, 702.414. The administrative law judge correctly recognized that the only court to have addressed this issue has held that the employer challenging the fee charged by the medical provider does not bear the burden of demonstrating that the requested fee exceeds the prevailing community charge. *See Loxley*, 934 F.2d at 517, 24 BRBS at 186(CRT). Because the record before the administrative law judge provided no basis for him to render a determination as to whether Dr. Snow's charges exceed the prevailing

community charges, his dismissal of claimant's request for payment in full of Dr. Snow's bills is affirmed.[10]

[10] Our affirmance in this regard is based on the posture of this issue before the administrative law judge. Had the district director conducted an investigation into this issue and made recommendations consistent with the administrative law judge's previous remand of this issue, and had the necessary parties been present at the hearing before the administrative law judge, the administrative law judge would have been in a position to decide this issue in accordance with 20 C.F.R. §702.417. In this regard, we express our disagreement with the position taken by the claims examiner that claimant lacked standing to raise the issue of the reasonableness of Dr. Snow's fees and that, accordingly, the district director would not conduct an investigation or make findings regarding this issue. *See* n. 9, *supra*. The claims examiner's statement appears to reflect a misapprehension of the regulatory procedures governing disputes regarding the reasonableness of the amounts charged by medical providers. We surmise that in concluding that claimant lacked standing, the claims examiner was relying on the regulation at 20 C.F.R. §702.416, which states that the *necessary parties* at a *formal hearing before an administrative law judge* are the medical provider and the district director. The fact that claimant is not considered a necessary party at an administrative law judge hearing pursuant to Section 702.416, however, is not tantamount to a finding that he is not an *interested party* with standing to raise the issue of the reasonableness of his medical provider's fees. Indeed, the regulations explicitly differentiate between the *necessary* parties and other *interested* parties affording interested parties, in addition to the medical provider and the district director, a role in the proceedings before the district director. *See* 20 C.F.R. §§702.414(a), 702.415. Specifically, an interested party may file a written complaint triggering an investigation by the district director of the reasonableness of a medical provider's fee and the interested party may be involved in any informal conference held to resolve this issue. *See* 20 C.F.R. §702.414(a). Moreover, an interested party has the right to seek a hearing before an administrative law judge after issuance of the district director's findings on the reasonableness of the medical provider's charges. 20 C.F.R. §702.415.

The administrative law judge next considered claimant's request for payment by employer of the bill for his May 2000 hospitalization at Sibley Hospital. On the basis of the representation made by counsel for Liberty Mutual that a settlement of the bill was reached by Liberty Mutual and the hospital, the administrative law judge found it unnecessary to adjudicate this issue. *See* Decision and Order at 8-9. We are mindful that the statements of a party's counsel are not evidence, *see Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329, 334 (1992); thus, counsel's representation that a settlement has been reached does not constitute evidence that this issue has in fact been resolved. As the administrative law judge has not adjudicated claimant's request for payment of the Sibley Hospital bill, the issue is not before us for review. *See* 33 U.S.C. §921(b)(3). In the event that the representation by Liberty Mutual's attorney that the hospital bill has been settled is not accurate, claimant may refile his claim for payment of that bill in light of the absence of an adjudication of that claim by the administrative law judge. *See generally Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002).

Next, the administrative law judge addressed claimant's requests for reimbursement of costs incurred by him for prescription drugs, over-the-counter medication, mileage, and parking fees. The administrative law judge determined that claimant was entitled to full reimbursement for these expenses. *See* Decision and Order at 14. Contrary to the administrative law judge's statement that the evidentiary record does not reflect that Liberty Mutual had fully reimbursed claimant for these expenses, the evidence of record does demonstrate that full payment in the amount of $8,530.74 has

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The administrative law judge in this case expressly found claimant to be an interested party, stating at the hearing the hardship to claimant imposed by his receipt of Dr. Snow's medical bills. In *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT)(9th Cir. 1993) and *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT)(5th Cir. 1992), the courts recognized that delays in the payment of medical bills impose potential economic consequences on the claimant who remains personally liable for his medical bills; the courts observed in this regard that the fact that the medical provider may not have yet attempted to collect from the claimant is merely fortuitous. *See Hunt*, 999 F.2d at 422, 27 BRBS at 88(CRT); *Lazarus*, 958 F.2d at 1302, 25 BRBS at 150(CRT). The courts further took notice of the chilling effect on the provision of medical services to injured employees that results from delays in payment of medical costs under the Act. *Id.*

Thus, should claimant wish to, he may refile his claim for payment in full of Dr. Snow's bills with the district director; in the event of such a filing, the district director is to resolve the issue of the reasonableness of the fees charged by Dr. Snow in accordance with the procedures set forth at 20 C.F.R. §§702.413, 702.414.

been made by Liberty Mutual to claimant. *See* CX 1; Hearing Tr. at 82-83.[11] As employer has fully reimbursed claimant for the requested expenses, no issue remains for our review with respect to the claim for prescription drugs, over-the-counter medication, mileage, and parking fees. *See* 33 U.S.C. §921(b)(3).

The administrative law judge also addressed claimant's request for reimbursement for exercise equipment purchased by claimant to replace worn-out equipment that previously had been prescribed by his physician for therapeutic purposes. The administrative law judge found that claimant initially had requested authorization to purchase replacement exercise equipment manufactured by Schwinn at a price of $8,197, and that Liberty Mutual authorized the purchase of that particular equipment and made payment in that amount after receiving a medical prescription for the equipment from claimant's physician. The administrative law judge further found that after receiving this payment from Liberty Mutual, claimant discovered that the Schwinn equipment was no longer available and he thereafter purchased similar equipment at an additional cost of $3,637.85, without seeking prior authorization for the additional cost. *See* Decision and Order at 11, 15; EXS 1, 2; Hearing Tr. at 60-61, 76. The administrative law judge denied the claim for the additional reimbursement on the basis that claimant provided no evidence that the purchase of the equipment constituted an emergency, thereby excusing his failure to seek Liberty Mutual's prior authorization for the additional cost of the equipment. Section 7(d) of the Act, 33 U.S.C. §907(d), provides that an employee is not entitled to reimbursement for medical expenses paid by the employee unless he requested authorization prior to obtaining the services except in cases of emergency or refusal or neglect of the request by the employer. *See* 20 C.F.R. §702.421; *Slattery Assocs. v. Lloyd,* 725 F.2d 780, 16 BRBS 44(CRT)(D.C. Cir. 1984); *Schoen,* 30 BRBS at 113. We uphold the administrative law judge's determination that claimant is not entitled to the cost difference of the replacement exercise equipment based upon his failure to seek prior authorization as it is rational, supported by substantial evidence, and in accordance with law. *See Slattery Assocs.,* 725 F.2d 780, 16 BRBS 44(CRT). The administrative law judge's denial of the request for an additional reimbursement for the replacement exercise equipment is therefore affirmed.

[11] The administrative law judge's finding that claimant is entitled to a total reimbursement for these expenses of $8,531.10 is based on a typographical error in the Decision and Order regarding the amount for mileage. *See* Decision and Order at 14 n.12. The actual amount for mileage is $1,115.04 rather than the $1,115.40 stated by the administrative law judge; thus, the total amount to which claimant is entitled and which Liberty Mutual has paid is $8,530.74.

Lastly, the administrative law judge denied claimant's request for authorization to purchase a powered wheelchair and wheelchair van lift on the basis that the record contains no medical documentation that this equipment is medically necessary for claimant's work-related injuries. *See* Decision and Order at 11, 15-16; EXS 1, 2; Hearing Tr. at 59-60, 74-76. As the record contains no medical opinion or prescription indicating that such equipment is necessary for claimant's work-related condition, we affirm the administrative law judge's determination that claimant has failed to establish the medical necessity of the requested equipment. *See Schoen*, 30 BRBS at 114. We therefore affirm the administrative law judge's denial of claimant's request for authorization of a powered wheelchair and van lift.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge