BRB No. 93-1293

GARY M. COPELAND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JONATHAN CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
EDWARD S. SCHAFFER, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	DECISION AND ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Lee E. Wilder (Rutter & Montagna), Norfolk, Virginia, for claimant.

R. John Barrett (Vandeventer, Black, Meredith & Martin), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-LHC-2674) of Administrative Law Judge Richard K. Malamphy 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).

On October 25, 1991, claimant, a rigger helper, injured his back, left leg, and ankle when he fell from a scaffold while working for employer. Claimant received temporary total disability benefits from October 28, 1991 through January 26, 1992, and on January 29 and 30, 1992. On November 18, 1991, claimant was examined by Dr. Neff, employer's physician. On the advice of coworkers, claimant sought treatment with Dr. Wagner on November 21, 1991. After discovering that Dr. Wagner was an associate of Dr. Neff, claimant sought treatment with Dr. Knauft from

January 1992 through October 1992. Based on Dr. Knauft's assessment that claimant should remain off work and then return to light duty work only, claimant sought continuing temporary total disability benefits from February 14, 1992. In his Decision and Order, the administrative law judge denied claimant's application for a change of physicians from Dr. Wagner to Dr. Knauft under Section 7 of the Act, 33 U.S.C. §907. The administrative law judge also denied claimant's application for continuing temporary total disability benefits from February 14, 1992, after crediting Dr. Neff's opinion that claimant could return to full duty work on February 10, 1992, as the most credible opinion of record. On appeal, claimant challenges the administrative law judge's denial of his application for a change of physicians and continuing temporary total disability benefits. Employer responds in support of the administrative law judge's Decision and Order.

Claimant initially contends that the administrative law judge erred in concluding that Dr. Wagner was his initial choice of an attending physician and in denying his request for a change of physicians from Dr. Wagner to Dr. Knauft. Claimant's contentions lack merit. In concluding that Dr. Wagner was claimant's initial choice of an attending physician, the administrative law judge found that claimant acknowledged that he went to Dr. Wagner on his own upon the advice of coworkers. *See Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988); Decision and Order at 9; Tr. at 19, 23. Although claimant argued that he would not have gone to Dr. Wagner if he had been aware that Dr. Wagner was an associate of Dr. Neff, employer's physician, the administrative law judge rationally found no basis to conclude that the partner of an examining physician may not be selected as the attending physician where bias in favor of the examining physician's opinion is not shown. Decision and Order at 9. In this case, the administrative law judge found that bias on the part of Dr. Wagner was not demonstrated as Dr. Wagner did not have Dr. Neff's dictation or x-rays from claimant's visit with Dr. Neff available to him.[1] Emp. Ex. A. Consequently, we affirm the administrative law judge's conclusion that Dr. Wagner was claimant's initial choice of an attending physician.

Moreover, the administrative law judge correctly found that employer was not required to consent to a change of physicians as claimant's initial choice, Dr. Wagner, was a specialist.[2] 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406(a); Decision and Order at 9. The administrative law judge's finding that claimant did not establish good cause for a change of physicians is also supported by the record. *See Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982); 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406(a); Decision and Order at 9. The fact that Dr. Wagner was an associate of Dr. Neff and that claimant may not have agreed with Dr. Wagner's diagnosis of muscular strain and the physician's conclusion that claimant should continue his physical therapy until rehabilitated and then return to work does not establish good cause for a change of physicians. Decision and Order at 9; Emp. Ex. A. We, therefore, affirm the administrative law judge's finding that claimant was not entitled to a change of physicians to Dr. Knauft as Dr. Wagner was a specialist and as claimant did not establish good cause for such change.

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[1]Dr. Wagner's report lists the symptoms identified by claimant, reports the physician's findings on examination, diagnoses a muscular strain, and advises claimant to continue his physical therapy until rehabilitation and then return to work. Emp. Ex. A.

[2]Dr. Wagner is a Board-certified orthopedic surgeon as are Drs. Neff and Knauft.

We also affirm the finding that claimant did not establish that employer refused to provide treatment. Under Section 7(d), 33 U.S.C. §907(d), an employee may receive reimbursement for treatment where he requests his employer's authorization for treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. *Slattery Assocs., Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44 (CRT)(D.C. Cir. 1984); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); 33 U.S.C. 907(d); *see also* 20 C.F.R. §725.421(a). The administrative law judge concluded that there was no indication that employer refused to provide treatment in this case. Decision and Order at 9. Although Dr. Wagner, claimant's initial choice of an attending physician, may have refused to provide treatment in this case in light of a note of record and the fact that Dr. Wagner saw claimant only once, this evidence does not establish a refusal by employer.[3] Emp. Ex. B at 28-29. In any event, any error in this regard is harmless in light of the administrative law judge's crediting of Dr. Neff's opinion that claimant was fit to return to full duty work on February 10, 1992. Therefore the expenses of Dr. Knauft's continued treatment were not necessary. We, therefore, affirm the administrative law judge's denial of claimant's medical expenses for Dr. Knauft as employer did not refuse to provide treatment and as Dr. Knauft's medical treatment was not necessary in light of the administrative law judge's crediting of Dr. Neff's opinion.

Claimant next contends that the administrative law judge erred in denying him continuing temporary total disability benefits from February 14, 1992. As the administrative law judge rationally credited Dr. Neff's opinion that claimant was fit for full duty work on February 10, 1992, as the most credible opinion of record, we affirm the administrative law judge's denial of continuing temporary total disability benefits from that date. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT)(9th Cir. 1988); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); Decision and Order at 5, 10; Emp. Ex. A.

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

SO ORDERED.

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[3]A note found in the record from Ghent Urgent Care [employer's physician] states:

> Neff [employer's physician] saw one day and Wagner [claimant's initial choice of an attending physician] the next. Both refused to see patient on followup . . . .

Emp. Ex. B at 28-29.

Although this note indicates that Dr. Neff refused to see claimant again, the record reflects that Dr. Neff in fact saw claimant twice after this note was written. Emp. Ex. A. Therefore, there was no refusal by employer to provide treatment. Even though Dr. Wagner did not see claimant again, it may have been for reasons other than Dr. Wagner's refusal, *i.e.*, claimant may have chosen not to seek further treatment from Dr. Wagner.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge