BRB No. 11-0735

TONY B. MCDONALD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CP & O, LLC	)	DATE ISSUED: 06/28/2012
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

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

Charlene A. Morring (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2010-LHC-00944) 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.* (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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On September 21, 2006, claimant was operating a forklift as part of his duties as a longshoreman when he backed into a pole and fell from the forklift to the ground. On September 25, 2006, claimant treated at Now Care facility for complaints of back pain, and Dr. Sack diagnosed a lumbar strain and restricted claimant to light work. CX 8. On October 4, 2006, claimant followed up with Dr. Mahoney, who diagnosed thoracic and lumbar strain. Dr. Mahoney prescribed medication and three weeks of physical therapy,

and assigned work restrictions, limiting claimant from driving or operating machinery after taking medicine, no lifting over 10 pounds, and no bending over. CX 4-1. Subsequently, claimant began complaining of pain radiating into his right leg and was referred to Dr. Clifford. Dr. Clifford diagnosed congenital stenosis of the lumbar, thoracic and cervical spine with degenerative disc disease at L4-5 and he attributed claimant's right leg pain to his back condition. CX 2 at 3, 5. Despite work restrictions, claimant worked consistently for employer as a longshoreman after his work accident until March 27, 2007.[1] On April 19, 2007, Dr. Clifford limited claimant to light-duty work with no lifting greater than twenty-five pounds. On April 26, 2007, pursuant to claimant's complaints of pain, Dr. Clifford additionally restricted claimant from driving a hustler and forklift until he completed a course of epidural steroid injections.[2] CX 1-3. On June 19, 2007, based on the job description for a hustler driver, Dr. Clifford returned claimant to regular duty. CX 2-11; EX 6. Claimant returned to work, working 21 days between July 16, 2007 and September 8, 2007. EX 17. Claimant did not again seek treatment for his back until returning to Dr. Clifford on July 22, 2008, due to increased pain. Based on a review of a recent MRI and claimant's complaints of excruciating pain, Dr. Clifford opined that claimant was not able to work full duty as of July 22, 2008, and he recommended surgery to reduce claimant's back and leg pain. CX 2 at 12, 14. Claimant was scheduled for surgery on October 7, 2008, but he canceled the surgery a week earlier. Dr. Clifford's office was not made aware of the cancellation until October 6, 2008. When claimant attempted to reschedule the surgery on October 24, 2008, Dr. Clifford stated that claimant is not disabled and would not benefit from surgery, and he recommended that claimant return to work.

Claimant filed a claim under the Act seeking compensation and medical benefits related to the September 21, 2006, work accident for injuries to his back and right leg. Claimant sought temporary partial disability benefits from September 22, 2006 to March 28, 2007, and from September 2 - 8, 2007, and temporary total disability benefits from September 9, 2007, and continuing. Employer contested the claim, contending that only claimant's back was injured in the fall and that the pain claimant subsequently suffered in his right leg resulted from the back injury. Employer also contested claimant's entitlement to temporary partial and total disability benefits.

The administrative law judge found that claimant did not establish that he suffered an independent leg injury on September 21, 2006, or his entitlement to temporary partial disability benefits for the requested periods because he failed to establish that he suffered

[1]Claimant reported to Dr. Clifford, on December 8, 2006, that no light-duty work was available so "he continue[d] to work despite his lower back pain." CX 2 at 1.

[2]Claimant sought to have these restrictions backdated to March 27, 2007. CX 2-9.

an economic loss. The administrative law judge further found that claimant is not entitled to temporary total disability benefits as of September 9, 2007, because claimant did not establish he was unable to work due to his work injury. The administrative law judge also denied reimbursement for the cost of unauthorized medical treatment with Drs. Wardell[3] and Rodrigue because claimant provided no evidence that he sought approval from employer or the district director for medical care from these doctors. Claimant appeals these findings, and employer responds urging affirmance.

Claimant initially contends that the administrative law judge erred in failing to find that he suffered a distinct work-related right leg injury on September 21, 2006.[4] In this case, the administrative law judge found claimant did not establish that he suffered a work-related injury to his right leg on September 21, 2006, because "[t]here is no credible evidence of record that the [c]laimant's source of pain in his right leg is from any harm to his body other than that evidenced in the low back." Decision and Order at 17. Indeed, the record reflects claimant was not diagnosed with a leg injury or impairment and that his post-injury treatment records diagnose only a back condition as the source of claimant's leg pain. CX 2, 4. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish that he sustained a separate right leg injury in the work accident. *O'Keeffe*, 380 U.S. 359. Therefore, claimant is not entitled to benefits for a right leg injury pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2).[5] *Barker v. United States Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985).

Claimant additionally asserts that he is entitled to temporary partial disability benefits from September 22, 2006 through March 28, 2007, and from September 2-8, 2007. Specifically, claimant contends that because his post-injury weekly earnings for nine of the twenty-seven weeks between September 22, 2006 and March 28, 2007, were less than his average weekly wage, he is entitled to temporary partial disability benefits

[3]The administrative law judge misstated Dr. Wardell's name as Dr. Warren.

[4]The parties stipulated that claimant suffered a back injury while working for employer on September 21, 2006.

[5]The administrative law judge properly found that claimant "is entitled to reasonably necessary medical treatment for right leg pain under §907 of the Act since it arises out of the work-related low back injury" and that any work restrictions resulting from claimant's right leg symptoms are relevant "in determining [his] entitlement to disability compensation benefits due to his work-related low back injury." Decision and Order at 17.

for those weeks. Employer responds that the administrative law judge properly looked at the totality of the wages claimant earned during that period rather than at earnings in individual weeks.

Section 8(e) of the Act provides for an award for temporary partial disability benefits based on the difference between a claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(e). Wage-earning capacity is determined under Section 8(h), which provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h). In this case, the parties stipulated that claimant's pre-injury average weekly wage was $940.59. The administrative law judge found that claimant earned more in the aggregate between September 22, 2006 and March 28, 2007, and from September 2-8, 2007, than his average weekly wage would have provided. Although claimant received actual wages lower than $940.59 in nine of the twenty-seven weeks between September 22, 2006 and March 28, 2007, the administrative law judge found that claimant did not establish that his decreased earnings in these weeks were due to his work injury rather than to the cyclical nature of his work. In so finding, the administrative law judge relied on the testimony of Mr. Eisenberg, assistant operations manager for employer, that longshoreman are casual employees who receive daily job assignments based on seniority and the needs of employer, and Dr. Clifford's December 8, 2006, treatment note, indicating that claimant continued to perform regular work despite lower back pain and light-duty restrictions. Decision and Order at 18; CX 2; Tr. at 66-76. Further, because claimant's earnings the week of September 2 – 8, 2007, also exceeded his pre-injury average weekly wage, the administrative law judge found that claimant did not establish a work-related economic loss in this period. As it is supported by substantial evidence of record, we affirm the administrative law judge's finding that claimant did not establish a loss in wage-earning capacity between September 22, 2006 and March 28, 2007, or from September 2-8, 2007. *See Ward v. Cascade General Inc.*, 31 BRBS 65 (1995); *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 293 (1990). Consequently, claimant is not entitled to temporary partial disability benefits for these periods.

We next address claimant's contention that the administrative law judge erred in finding that claimant failed to establish a prima facie case of total disability from September 9, 2007, onward. In order to establish a prima facie case of total disability, claimant must show that he is unable to perform his usual employment duties due to his work-related injury. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). The administrative law judge rejected claimant's assertion that he was unable to return to work because both Drs. Clifford and Dervay released claimant to his regular work as of June 19, 2007, and claimant did not again seek treatment for his back for over a year. CX

2-11; CX 3-4. As claimant performed regular longshore work post-injury despite restrictions and Mr. Eisenberg testified that the same work was available throughout the relevant periods, but that claimant did not register for work after September 6, 2007, the administrative law judge found that claimant removed himself from work on September 9, 2007.[6] Decision and Order at 17, 21. Drs. Clifford and Wardell subsequently opined that claimant was disabled. The administrative law judge found, however, that claimant could not have suffered a work aggravation after September 8, 2007, because he did not work after this date. Thus, the administrative law judge seemingly inferred that any disability Dr. Clifford diagnosed in 2008 was not due to a work-related injury.[7] *Id*. at 20. With respect to Dr. Wardell, the administrative law judge rejected his 2008 and 2009 treatment notes, indicating that claimant was "presently disabled," because Dr. Wardell did not explain the extent of claimant's disability, specify any work restrictions, or state his rationale for removing claimant from work. *Id*.; CX 1 at 6; CX 6 at 1-3. The administrative law judge also found that Dr. Rodrigue did not place any restrictions on claimant's ability to work in 2009. Therefore, based on the "credible evidence of record," the administrative law judge found that claimant failed to demonstrate his inability to return to his former job due to his work-related injury at any time after September 9, 2007.

We agree with claimant that the administrative law judge did not fully consider all relevant evidence as to whether claimant was disabled as of September 9, 2007. Claimant stopped working in September 2007, after Dr. Clifford released him to regular work, because, he testified, his continued work caused him pain.[8] Tr. at 57; Cl.'s Post-Hearing Br. at 12. Dr. Clifford, in releasing claimant, stated "we will see how he fares in regard to that regular work . . ." CX 2 at 11. Claimant also testified that, although his back was painful, he did not return to Dr. Clifford for more than a year after being released to regular work in June 2007, because he could not afford medical treatment. Tr.

[6]The administrative law judge also noted that claimant's light-duty restrictions "would not usually prevent the [c]laimant from returning to his previous work as a longshoreman." Decision and Order at 17.

[7]The administrative law judge noted Dr. Clifford's January 21, 2009, opinion that the lumbar strain claimant suffered as a result of the September 21, 2006, work accident resolved by June 2007, and any subsequent complaints resulted from his pre-existing degenerative disc disease. EX 10. The administrative law judge did not specifically credit this evidence.

[8]Claimant specifically told Dr. Clifford on April 27, 2007 and September 9, 2008, that he is not able to drive the forklifts or hustlers at work because of his back pain. CX 2 at 8, 15.

at 23-24; EX 3 at 22. The administrative law judge did not address this testimonial evidence. Moreover, the administrative law judge's reliance on the fact that claimant did not appear at the hiring hall after September 9, 2007 does not support a finding that claimant was not disabled; in fact, claimant's failure to report to the hiring hall is consistent with his testimony that he could not work due to pain. Claimant also testified that lighter work was not available.[9] Tr. at 24-25. As a claimant's credible complaints of pain, alone, may be sufficient to establish a claimant's inability to return to his usual work, the administrative law judge erred in failing to address claimant's testimony in this regard. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

Moreover, although the administrative law judge rationally found that neither the opinion of Dr. Wardell nor that of Dr. Rodrigue supports claimant's claim, *see generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), the administrative law judge did not fully explain his inference that the disabling back pain claimant experienced in 2008 was due to something other than the work injury. *See* n.7, *supra.* For example, the administrative law judge did not specifically address whether the increase in pain was due to the natural progression of claimant's work-related condition or due to an intervening injury. *See* Decision and Order at 20. Based on the foregoing, we vacate the administrative law judge's finding that claimant is not entitled to ongoing disability benefits as of September 9, 2007, and we remand the case for further consideration. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). On remand, the administrative law judge must make explicit findings as to whether claimant's complaints of pain are credible and whether claimant established that at any time after September 8, 2007, he could not perform his usual work due to his work injury.[10]

Claimant also contends that he is entitled to reimbursement for the cost of medical treatment by Drs. Wardell and Rodrigue because Dr. Clifford indicated he no longer wished to treat claimant after October 24, 2008. The administrative law judge found that claimant is not entitled to reimbursement for his treatment with either physician because claimant did not seek authorization for the treatment.

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[9]Mr. Eisenberg testified that, overall, less work was available at employer's facility in this time frame. Tr. at 69, 73.

[10]Although claimant additionally summarizes medical evidence he thinks is favorable, he does not explain how the administrative law judge erred in considering it. We, therefore, will not comment on this evidence.

An employer is liable for all reasonable and necessary medical expenses related to the work injury. 33 U.S.C. §907(a); *see Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). A claimant is entitled to his initial free choice of physician. 33 U.S.C. §907(b); *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900, 29 BRBS 105(CRT) (4th Cir. 1995). Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. Section 7(d) requires that a claimant request his employer's authorization for medical services performed by any physician, including the claimant's initial choice. *See Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981) (Miller, J., dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Where a claimant's request for authorization is refused by the employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need establish only that the treatment he subsequently procured on his own initiative was necessary for his injury in order to be entitled to such treatment at employer's expense. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). A discharge by employer's physician of a claimant from his care or a release of a claimant to return to work with no indication that further medical services will be provided may be construed as a refusal by the employer to provide treatment. *See Shahady v. Atlas tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983).

In this case, the administrative law judge found that claimant did not seek authorization for the treatment by Dr. Wardell, who subsequently referred claimant to Dr. Rodrigue for treatment of his back pain. This finding is not contested and is supported by substantial evidence. Moreover, the parties stipulated that Dr. Clifford is claimant's treating physician; as a result his conduct cannot constitute a refusal by employer to provide medical services. *See Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT) (D.C. Cir. 1984). In addition, Dr. Clifford did not refuse to treat claimant as his treatment note, dated October 24, 2008, states "I will see [claimant] back as needed." CX 2-16. Accordingly, as claimant did not seek authorization for treatment from employer or the district director, we affirm the administrative law judge's denial of medical benefits for the treatment rendered by Drs. Wardell and Rodrigue. 33 U.S.C. §907(d); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989).

Accordingly, we vacate the administrative law judge's finding that claimant failed to establish a prima facie case of total disability as of September 9, 2007 and we remand the case for further consideration of this issue, consistent with this opinion. In all other respects, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

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