BRB No. 14-0116

DANIEL PENSADO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
L-3 COMMUNICATIONS CORPORATION	)	DATE ISSUED: Apr. 30, 2014
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	DECISION and ORDER
Employer/Carrier-Respondents	)	on MOTION for RECONSIDERATION

Appeal of the Order Following Conference Call on Where Claimant Must Appear for Medical Examinations/Vocational Evaluation of William Dorsey, Administrative Law Judge, United States Department of Labor.

Eric A. Dupree and Paul R. Myers (Dupree Law), Coronado, California, for claimant.

Keith L. Flicker (Flicker, Garelick & Associates, L.L.P.), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant has timely filed a motion for reconsideration of the Board's Order dismissing his appeal of the administrative law judge's interlocutory order.[1] *Pensado v.*

[1] Contrary to employer's argument, the Board's Order dismissing claimant's appeal is not an interlocutory order as it is a final resolution as to BRB No. 14-0116. As claimant filed his motion within 30 days of the filing of the Board's Order, the motion for reconsideration was timely filed. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407.

L-3 Communications Corp., BRB No. 14-0116 (Feb. 12, 2014). Employer responds, urging the Board to affirm the dismissal. Upon further review, the Board agrees with claimant that its guidance is necessary to direct the course of the adjudicatory process in this case. *See Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989); *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987). Accordingly, we grant claimant's motion for reconsideration, we vacate the Board's February 2014 Order dismissing claimant's appeal, and we reinstate claimant's appeal on the Board's docket. 20 C.F.R. §802.409. We will address the merits of claimant's appeal in this decision, as the parties have fully briefed the issues.

Claimant appeals the Order Following Conference Call on Where Claimant Must Appear for Medical Examinations/Vocational Evaluation (2013-LHC-00268) of Administrative Law Judge William Dorsey 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). The administrative law judge's discovery determinations will be upheld unless the challenging party establishes they are arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012); *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010). We hold that the administrative law judge erred in requiring claimant to bear the expense of his attendance at employer's medical and vocational evaluations.

Claimant injured his knee on March 31, 2009, while working for employer in San Diego as a shipyard machinist. Employer provided compensation benefits and medical care, including surgeries for the work injury. The parties dispute the extent of his disability.[2] In this regard, the parties have deemed it necessary that claimant undergo medical and vocational evaluations to develop their cases for the formal hearing. The present dispute involves claimant's attendance at evaluations requested by employer. Specifically, in granting employer's motion to compel claimant to attend these evaluations, the administrative law judge ordered that claimant "must attend the defense examinations (psychiatric, orthopedic and vocational)" in San Diego "at his own expense." Order at 3. Claimant appeals this order.

Claimant asserts that he cannot afford to travel from his home in Rosarito, Mexico, to stay three days for evaluations in San Diego, California, as he does not have the money to pay for transportation, lodging, and meals. He also asserts he does not have a working vehicle and that he is physically unable to use public transportation. Regardless of his financial state, however, claimant argues that it violates "longstanding DOL policy" to require him to pay for his attendance at employer's defense evaluations.

[2] In addition to a knee impairment, claimant contends he developed secondary injuries to his shoulder and upper extremity as a result of using a cane, as well as a psychological disability.

Thus, claimant requests that the Board order employer to have the defense evaluations conducted in Rosarito, Mexico, or if they are to take place in San Diego, to provide round-trip transportation, lodging, meals, and transportation to and from each evaluation. Employer responds that claimant has not shown there has been an abuse of the administrative law judge's discretion. Moreover, employer argues that it had twice previously set the appointments for the evaluations, at its expense, and that claimant refused to attend; employer avers that claimant was able to travel to San Diego to attend his own medical appointments. Thus, employer asserts, it was reasonable for the administrative law judge to require claimant not only to attend employer's evaluations but to do so at his own expense.

The administrative law judge is not bound by technical or formal rules of procedure, 33 U.S.C. §923(a), and he has the authority, *inter alia*, to compel the production of documents, to compel appearances, and "to do all other things conformable to law which may be necessary to enable him effectively to discharge the duties of his office." 33 U.S.C. §927(a); 20 C.F.R. §702.331 *et seq*.; 29 C.F.R. §18.29(a). These powers include the authorization and direction of discovery. *See, e.g., Armani*, 46 BRBS 63; *Irby*, 44 BRBS 17; *Maraney v. Consolidation Coal Co.*, 37 BRBS 97 (2003) *Cornell v. Lockheed Aircraft Int'l*, 23 BRBS 253 (1990); *Bonner v. Ryan-Walsh Stevedoring Co., Inc.*, 15 BRBS 321 (1983).

In this case, employer filed a motion to compel claimant to attend medical and vocational evaluations in San Diego. The administrative law judge granted the motion to compel and found that, as claimant had worked and been injured in San Diego, it was reasonable for him to attend evaluations in San Diego.[3] We reject claimant's contention that the administrative law judge abused his discretion in this regard. *See generally Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002). The administrative law judge properly found, pursuant to 20 C.F.R. §702.337(a), that the formal hearing on a claim must be held within 75 miles of the claimant's residence. *See also* 20 C.F.R. §702.403 (generally, claimant's free choice physician should be within 25 miles of the place of injury or claimant's home, but other factors may be relevant). Rosarito is approximately 30 miles south of San Diego. Thus, the administrative law judge rationally concluded that San Diego is an appropriate venue for employer's medical and vocational examinations. As claimant has not established an abuse of the administrative law judge's discretion in this regard, the administrative law judge's finding is affirmed. *See generally Maraney*, 37 BRBS 97.

[3] Additionally, employer contends San Diego is convenient because claimant attended his own medical evaluations there.

Employer's motion, however, did not request that claimant pay his own expenses to attend these evaluations. Thus, the administrative law judge's order that claimant do so was *sua sponte*. Moreover, as the administrative law judge stated, these evaluations are not for the treatment of claimant's injuries pursuant to Section 7(a) of the Act, 33 U.S.C. §907(a), but are an "aspect of discovery aimed at developing [employer's] evidence." Order at 2. Typically, each party pays its own discovery costs. *See generally Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) (unless there is a fee-shifting statute applicable, the "American Rule" applies and parties pay their own fees and expenses); *Castro v. Maher Terminals, Inc.*, 710 F.Supp. 573 (D. N.J. 1989) (confirmation evaluations by employers do not constitute medical benefits or compensation under the Act and may not be included in a lien against a claimant's third-party recovery); *see also* 29 C.F.R. §22.21(f); 22 C.F.R. §35.21(f).[4]

Additionally, to the extent the administrative law judge's order that claimant pay his own expenses to attend employer's defense evaluations constitutes a sanction for claimant's non-attendance at prior appointments, the administrative law judge abused his discretion. The Act provides specific procedures to sanction a party who "disobeys any lawful order." 33 U.S.C. §927(b); *see Soliman v. Global Terminal & Container Service, Inc.*, 47 BRBS 1 (2013); *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003); *Percoats v. Marine Terminal Corp.*, 15 BRBS 151 (1982); *Creasy v. J.W. Bateson Co.*, 14 BRBS 434 (1981). Specifically, Section 7(d)(4) provides that if a claimant "unreasonably refuses to submit . . . to an examination by a physician selected by the employer," the administrative law judge may "suspend the payment of further compensation during such time as such refusal continues[.]" 33 U.S.C. §907(d)(4); *see also* 33 U.S.C. §919(h); *B.C.* [*Casbon*] *v. Int'l Marine Terminals*, 41 BRBS 101 (2007). In addition, if the administrative law judge deems sanctions warranted for a party's failure to follow a lawful order, he must certify the facts to the appropriate district court and the court will order sanctions. 33 U.S.C. §927(b); *A-Z Int'l v. Phillips*, 323 F.3d 1141, 37 BRBS 1(CRT) (9th Cir. 2003). Thus, ordering claimant to pay the costs of attending medical and vocational evaluations arranged by employer for discovery purposes is not an appropriate sanction.

We hold that the administrative law judge erred in ordering claimant to bear the costs of his attendance at employer's medical and vocational examinations in San Diego. Employer must bear the cost of obtaining its own evidence. Therefore, the administrative law judge's order in this regard is reversed.[5]

---

[4] Under the Act, if the district director orders an independent or special examination of the claimant, he may, in his discretion, charge the costs to either the employer or to the Special Fund. 33 U.S.C. §§907(e), 919(h); 20 C.F.R. §702.412(a). Neither the Act nor the regulations provide for a claimant to pay these expenses.

[5] Claimant's allegations of bias on the part of the administrative law judge and the

Accordingly, claimant's motion for reconsideration of the dismissal of his appeal is granted and the appeal is reinstated on the Board's docket. 20 C.F.R. §802.409. We affirm the administrative law judge's finding that San Diego is an appropriate venue for employer's medical and vocational examinations. We reverse the administrative law judge's order that claimant pay his own expenses for attending these examinations; employer must bear the cost of obtaining its evaluations. This case remains pending before the Office of Administrative Law Judges.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

request to have his case assigned to another administrative law judge must first be raised before the Office of Administrative Law Judges. *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988); *Swain v. Bath Iron Works Corp.*, 17 BRBS 145 (1985). Further, as the administrative law judge did not render a decision on the matter, claimant's argument regarding the location of a deposition of an Atlanta-based psychiatrist is premature. *See generally J.T.* [*Tisdale*] *v. American Logistics Services*, 41 BRBS 41 (2007), *decision after remand*, 44 BRBS 29 (2010). Therefore, we shall not address either argument.