U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 23-0226

MAXIMO POLO Claimant-Respondent v. SUN TERMINALS, INCORPORATED and AMERICAN LONGSHORE MUTUAL ASSOCIATION (ALMA), c/o THE AMERICAN EQUITY UNDERWRITERS, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	**NOT-PUBLISHED** DATE ISSUED: 10/09/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding in Part, Denying in Part, and the Order Denying Motion for Reconsideration of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Callie J. Fixelle (Grossman Attorneys at Law), Boca Raton, Florida, for Claimant.

Robert B. Griffis (Law Office of Robert B. Griffis), Altamonte Springs, Florida, for Employer and its Carrier.

Amanda Torres (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor, Mark Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Awarding in Part, Denying in Part and her Order Denying Motion for Reconsideration (2020-LHC-00441) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

Claimant suffered a work-related low back injury while operating the top pick loader at Employer's facility on March 16, 2019.[1] Hearing Transcript (Tr.) at 133-135, 183; Claimant's Exhibit (CX) 1; *see* Decision and Order (D&O) at 3. He went to the emergency room where he was diagnosed with chronic right-sided low back pain, prescribed medications, and referred to an orthopedic surgeon, Dr. Jeffrey Worth.[2] EX 43.

On March 20, 2019,[3] Claimant visited Dr. Lowell Davis, a pain management physician, who diagnosed right lumbar radiculopathy, prescribed medication, and recommended Claimant undergo an MRI of his lumbar spine. CX 12, at 1-4. Based on a March 27, 2019 MRI, CX 12 at 5-6, Dr. Davis treated Claimant's lumbar spine with a

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because the injury occurred in Florida. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[2] There is no evidence in the record of Claimant having followed up with Dr. Worth.

[3] On March 27, 2019, Employer filed its initial notice of controversion for "investigation of [this] claim." EX 15 at 6.

series of epidural steroid injections and physical therapy. *Id.* at 8-25. On June 24, 2019, Dr. Davis recommended Claimant undergo a surgical spine evaluation. *Id.* at 27.

Meanwhile, Claimant saw orthopedist Dr. Kenneth Taylor on April 2, 2019, who diagnosed him with a work-related lumbar strain and spinal stenosis of the lumbar region,[4] prescribed medication, and restricted Claimant to modified duty work with no lifting, pushing, pulling, squatting, kneeling, or twisting. CX 13 at 4. On June 27, 2019, Dr. Taylor reiterated that Claimant's condition was not yet at maximum medical improvement (MMI) and opined he could return to work activities provided he adhered to a 25-pound lifting restriction. Dr. Taylor also recommended medical care be transferred to a neurosurgeon. *Id.* at 25, 28-30; EX 52 at 4.

On July 9, 2019, Claimant identified Dr. Guillermo Pasarin as his treating neurosurgeon on an Employer-generated "Choice of Physicians Form."[5] EX 3. Thereafter, with respect to the 2019 work injury, Claimant was evaluated once by Dr. Pasarin on July 31, 2019,[6] who stated Claimant's back condition "is at a crossroads now" having "exhausted conservative management," thus requiring Claimant to decide whether to pursue surgery. CX 11 at 4. Dr. Pasarin opined that until Claimant decides, he remains on light-duty restrictions and his condition is not at MMI. *Id.* at 4, 6. However, Dr. Pasarin further opined if Claimant does not wish to pursue surgery, he would place him at MMI and refer him back to Dr. Davis for continued long-term pain management.[7] *Id.* at 4. On

[4] Dr. Taylor opined Claimant "clearly has an exacerbation of some pre-existing arthritic change and stenosis" and that "the major contributing cause for treatment is work-related." CX 13 at 4.

[5] The form Claimant signed stated: "I understand that I have one choice of physician for treatment of my job-related injury. I also understand that I am not permitted to change physicians without authorization." EXs 2, 3. When asked about this form on cross-examination at the hearing, Claimant testified, "[the form] was given to me. I did not – this was not my choice." Tr. at 174, 180.

[6] The record indicates Claimant previously treated with Dr. Pasarin in 2013 for lower back pain. EX 43.

[7] At his March 31, 2021 deposition, Dr. Pasarin revised his opinion, stating that based on Employer's counsel's representations of Claimant's physical activities exhibited via surveillance video, he was at MMI as of "[t]he day I saw him," EX 41, Dep. at 14, July 31, 2019, with "an impairment rating of about three percent for predominantly myofascial type low back pain" and "limitations of not doing severe bending and lifting." *Id.*, Dep. at 13. Dr. Pasarin also stated he "would not recommend surgery" because "it sounds like he

July 11, 2019, Claimant filed a claim seeking benefits for a work-related back injury. CX 5.

On September 2, 2019, Claimant signed another Employer-generated "Choice of Physicians Form," identifying Dr. Taylor as his treating physician. EX 2. Employer then sent Claimant to Dr. Luis Pagan, a board-certified neurological surgeon who evaluated Claimant on September 6, 2019, and opined his back injury was at MMI because conservative treatment had "failed" and he "did not believe [Claimant] was a surgical candidate."[8] CX 36, Dep. at 19-20; EX 42. On November 11, 2019, Employer filed a second notice of controversion "[d]enying additional medical treatment related to [Claimant's] back per defense medical evaluation opinion."[9] EX 12 at 212.

Next, having completed Claimant's trigger point injection therapy, Dr. Davis, to whom Claimant had been referred by Dr. Pasarin, recommended on November 20, 2019, that Claimant undergo a repeat surgical evaluation due to persistent symptoms. CX 12 at 50. In addition, Dr. Davis indicated, from his perspective as a pain management specialist, Claimant's back condition had reached MMI. *Id.* at 54; EX 40 at 14.

On December 9, 2019, Claimant requested an informal conference with the Office of Workers' Compensation Programs (OWCP) to address various issues regarding disability compensation and medical benefits, including for authorization of Dr. Jonathan Hyde, a neurosurgeon, as his choice of a spine surgeon. EX 12 at 203. That same day, the claims examiner sent a "Notice of a Telephonic Informal Conference" to Employer and its Carrier, scheduling the informal conference for January 14, 2020. *Id.* at 200-202.

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is functional" and "not in a lot of pain." *Id.*, Dep. at 13. He conceded, however, he would defer to Claimant's treating physician, Dr. Jonathan Hyde, to determine whether Claimant is currently a candidate for surgery but then reiterated, based on a lack of objective evidence of any surgical pathology, "I don't think surgery is indicated." *Id.*, Dep. at 22-23. Employer's counsel described Claimant's surveillance video activities as involving five or six hours of his "raising and lowering and climbing" an aluminum extension ladder to place "Christmas lights around his house." *Id.*, Dep. at 12.

[8] Dr. Pagan explained his evaluation of Claimant did not show any neurological symptomology, and his interpretation of Claimant's MRIs would not have made him a candidate for surgery. CX 36, Dep. at 20. He further "believed" "the treatment [Claimant] had been given formally was sufficient to treat the exacerbation of his pre-existing arthritic changes." *Id.*, Dep. at 9.

[9] Presumably, Employer was referring to Dr. Pagan's September 6, 2019 report.

Employer, however, did not participate in the informal conference purportedly because its counsel did not receive the notice. EX 17; Tr. at 175.

On January 16, 2020, the claims examiner issued a Memorandum of Informal Conference. In addition to recommending Employer pay certain periods of disability compensation, she recommended Employer "authorize [C]laimant's choice of physician for treatment and surgery with Dr. [] Hyde." In doing so, she determined Claimant's choice of Dr. Hyde for his treatment and as his spine surgeon was reasonable as there was no evidence to the contrary.[10] EX 12 at 1-5. On January 30, 2020, Employer informed OWCP that it refused to authorize Dr. Hyde as Claimant's "first free choice in physician," maintaining Claimant previously, in writing, selected Dr. Pasarin to serve in that capacity.[11] EX 47. At Claimant's request, the case was transferred to the Office of Administrative Law Judges (OALJ) on February 5, 2020. CX 8.

On June 9, 2020, Claimant began treating with Dr. Hyde, who diagnosed "severe multifaceted degenerative change" of the lumbar spine consistent with "at least an exacerbation, and more likely than not" a work-related aggravation of his pre-existing chronic degenerative disease. CX 14 at 9-10. As a result, Dr. Hyde recommended a spinal fusion and a laminotomy. He further instructed that, "[w]ith or without surgical intervention, [Claimant] should have restrictions of no lifting greater than 25 pounds" and "also avoid excessive bending and squatting."[12] *Id.* at 10, 15-16; 35 at 8; Tr. at 53-54.

A formal hearing was held on December 15, 2021, resulting in the ALJ's January 13, 2023 decision. The ALJ found Claimant established a prima facie case of total disability for his work-related back injury, entitlement to temporary total disability compensation from March 16, 2019, to June 19, 2019, and entitlement to ongoing

[10] During the informal conference, the claims examiner unsuccessfully attempted to contact both Employer's claims adjuster and its attorney.

[11] Before the ALJ, Employer argued it did not authorize the change in physician and the district director's action does not amount to a change in physician. Emp's Post-Hearing Br. at 2-3.

[12] Dr. Hyde reiterated his findings and opinion in follow-up reports dated May 4, 2021, and September 20, 2021. CXs 15, 16, 35. Additionally, he opined, during his deposition and hearing testimony, that Claimant's condition was not yet at MMI. CX 35, Dep. at 8; Tr. at 53-54.

temporary partial disability compensation as of June 19, 2019.[13] D&O at 13-15, 19. She credited the opinions of Drs. Hyde and Davis to find spinal fusion surgery and a laminectomy are medically necessary and reasonable treatment. *Id.* at 17. In addition, she found Claimant's request to choose Dr. Hyde as his treating physician is reasonable. *Id.* at 18. Thus, the ALJ found Employer liable for medical benefits for future treatment of Claimant's work-related back injury by Dr. Hyde, as well as for reimbursement of expenses already incurred. *Id.* The ALJ denied Employer's motion for reconsideration.[14]

On appeal, Employer challenges the ALJ's finding that Claimant's work-related back injury has not yet reached MMI and her corresponding awards of medical and temporary partial disability benefits. It also contests her designation of Dr. Hyde as Claimant's treating physician, alleging Claimant did not properly request a "change in physician" from Dr. Pasarin to Dr. Hyde when the matter was before the district director. Employer asserts the ALJ could not order a change in physicians because the issue before her should have been whether Claimant "freely and voluntarily" chose Dr. Pasarin as his first treating physician. Claimant responds, contending Employer forfeited its arguments, the ALJ rationally weighed the evidence, and "good cause" exists for changing his treating physician to Dr. Hyde.

The Director, Office of Workers' Compensation Programs (Director), filed a response to Employer's brief, arguing Employer failed to timely appeal the district director's order directly to the Board, thereby forfeiting its challenge. Alternatively, he argues the ALJ properly found Claimant requested a change in physician and properly authorized treatment with Dr. Hyde.[15] Employer filed a reply brief reiterating its arguments.

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[13] The parties stipulated Claimant's injury arose out of and in the course of his employment, he is entitled to compensation and medical benefits, and his average weekly wage was $1,546.79. Tr. at 9-12. The ALJ found Employer demonstrated, and Claimant did not rebut, the availability of suitable alternate employment from June 19, 2019, to the present. D&O at 14-15.

[14] On reconsideration, the ALJ reiterated her finding that Claimant's choice of Dr. Hyde as his treating physician, as well as the treatment Claimant received from him, was reasonable and necessary for Claimant's work-related back injury.

[15] The Director takes no position on the ALJ's award of disability compensation. Dir's Br. at 7 n.2.

Nature and Extent of Disability

Employer asserts the ALJ erred in finding Claimant's work-related back injury has not yet reached MMI and in concluding he is entitled to temporary partial disability benefits. In addressing MMI, it maintains the ALJ erred in failing to provide special deference to Dr. Pasarin, whom Employer maintains is Claimant's treating physician, particularly when his opinion on a proposed course of treatment is not, in view of the other evidence of record, unreasonable. Employer also states the ALJ erroneously relied on Dr. Hyde's opinion that Claimant is not yet at MMI because the objective and subjective foundations of his opinion are belied by other evidence in the record. In this regard, Employer states the objective medical evidence demonstrates Claimant's spine condition is degenerative rather than work-related and surveillance evidence refutes Claimant's subjective complaints of pain and demonstrates he has the physical capacity to work beyond forty hours per week. Employer, therefore, asserts the ALJ erred in relying on Claimant's subjective complaints in finding him incapable of performing "a job with little physical requirements."[16]

The claimant has the burden of establishing the nature and extent of disability. *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). A claimant's condition has reached MMI when he is no longer undergoing treatment with a view toward improving his work-related condition or that condition is of a lasting and indefinite duration and beyond a normal healing period. *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601 (5th Cir. 2004); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *see also McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000). Nevertheless, if a physician believes further treatment should be undertaken, then a possibility of success exists. *Abbott*, 40 F.3d at 126. Even if, in retrospect, the further treatment was unsuccessful, MMI does not occur until the treatment is complete. *Id.*

[16] It is unclear whether Employer is referencing Claimant's usual work as a top pick loader or his post-injury light-duty work as a yard checker. To the extent it is the former, we reject Employer's contention as the ALJ rationally found the top pick loader job description included requirements of occasional lifting or moving up to 100 pounds, CX 20 at 2, as well as sitting "most of the time" up to 23 hours a workday, Tr. at 279-280, which exceed the restrictions imposed by Drs. Davis and Hyde, CX 12 at 27; CX 35 at 22, 29. *Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63, 65 (2010); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197, 202 (1998).

The Board must affirm a finding of fact establishing the date of MMI if it is supported by substantial evidence. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 24 (1999); *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984). Further, where a claimant has returned to suitable alternate work post-injury, as in this case, the ALJ must determine the claimant's lost wage-earning capacity (WEC), if any, by comparing his pre-injury AWW with his post-injury WEC.[17] 33 U.S.C. §908(c)(21); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 723 (11th Cir. 1988).

In addressing the nature of Claimant's disability, the ALJ reviewed the reports and testimony of the physicians who expressed opinions on whether Claimant's work-related back condition had reached MMI. She found Dr. Davis ultimately opined Claimant's condition had reached MMI during the course of his treatment with him "as an interventional pain physician" but his opinion did not encompass MMI for Claimant's overall work-related back injury because he also recommended Claimant pursue a repeat surgical evaluation. CX 12 at 54; EX 40 at 14. The ALJ also found Dr. Pagan placed Claimant's back condition at MMI as of September 6, 2019. CX 36, Dep. at 19-20; EX 42. She next found Dr. Pasarin initially opined on July 31, 2019, that Claimant's condition was not yet at MMI but then later testified, in response to Employer's counsel's description of surveillance footage of Claimant taken between June 30 and July 3, 2019, that he had indeed reached MMI as of July 31, 2019. EX 41 at 12-13. Finally, the ALJ determined Dr. Hyde opined Claimant's condition was not at MMI because he believed Claimant would benefit from surgical intervention. CX 35, Dep. at 29.

The ALJ accorded "great weight" to Dr. Hyde's "well-documented, well-reasoned, and well-supported" opinion,[18] "some weight" to Dr. Davis's limited opinion, and "less

[17] The ALJ found Claimant established a prima facie case of total disability. In addition, she found Employer demonstrated suitable alternate employment as of June 19, 2019, when it offered Claimant a light-duty yard checker position. The ALJ further found Claimant has been working that job forty hours per week since June 24, 2019. D&O at 14. These findings, as well as the ALJ's conclusion that Claimant is entitled to, and Employer is liable for, temporary total disability benefits from March 16, 2019, to June 19, 2019, are affirmed as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[18] The ALJ premised this conclusion on his findings that Dr. Hyde is the only physician to have examined Claimant twice, he also reviewed and compared Claimant's 2013, 2019, and 2021 MRIs, and he was the only surgeon who personally reviewed the surveillance footage of Claimant. D&O at 12.

weight" to both Dr. Pagan's "weakly supported and inconsistent" MMI opinion[19] and Dr. Pasarin's "inconsistent" MMI statements in his medical report and subsequent testimony. D&O at 12. In so doing, the ALJ rationally rejected Employer's argument that the surveillance videos significantly undermined Claimant's subjective complaints of pain and therefore Dr. Hyde's opinion. Specifically, she found Claimant credibly explained he was capable of performing the movements he was seen doing on surveillance for a "short period of time," HT at 166, and Dr. Hyde was the only physician to actually view the videos and explicitly stated they did not change his opinion that Claimant has "severe disease" and remains a candidate for lumbar surgery. *Garcia v. Nat'l Steel & Shipbuilding Co.*, 57 BRBS 33, 36 (2023) (after reviewing surveillance video, ALJ's credibility determinations are not "inherently incredible and patently unreasonable" simply because he did not arrive at the same conclusions as the employer). The ALJ therefore rationally concluded Claimant's back condition is not yet at MMI, and any disability remains temporary in nature because, according to Dr. Hyde, surgical intervention may improve Claimant's physical condition. *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35, 39 (2018), *aff'd sub nom. International-Matex Tank Terminals v. Director, OWCP*, 943 F.3d 278 (5th Cir. 2019); *see also Abbott*, 40 F.3d at 126.

As to the extent of disability, the ALJ found Claimant entitled to temporary total disability benefits from March 16, 2019, to June 19, 2019, and temporary partial disability benefits from that date forward based on Employer's offer and Claimant's acceptance of a light duty job. Addressing Claimant's entitlement to temporary partial disability benefits, she calculated Claimant's loss in WEC as $789.19 by comparing his post-injury WEC of $757.60 (forty hours at his $18.94 hourly rate) with the parties' stipulated average weekly wage of $1,546.79.[20]

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[19] The ALJ relied on her finding that Dr. Pagan did not adequately explain in his September 6, 2019 report why the pain radiating down Claimant's right leg was not radicular in nature. D&O at 12. Additionally, she found Dr. Pagan's statements inconsistent because although he stated Claimant's pain was not radicular, he later stated Claimant suffered from "mild radiculopathy," EX 42, Dep. at 29. D&O at 12.

[20] Before the ALJ, Employer suggested Claimant's refusal to perform overtime work offered to him post-injury "self-limited his earning capacity." It thus argued "he retained his pre-injury, earning capacity" and is entitled to no additional temporary partial disability benefits. Emp. Post-Hearing Br. at 8. As noted above, Employer alleged the surveillance footage of Claimant demonstrates he was not limited to forty hours of work per week. The ALJ, however, placed no value on the surveillance evidence. D&O at 13. Moreover, in addressing Claimant's post-injury WEC, she concluded his "paystubs show he worked 40 hours per week." D&O at 15. Furthermore, Employer has made no specific argument that Claimant's actual post-injury wages do not fairly and reasonably represent

The ALJ is entitled to evaluate the credibility of all witnesses and draw her own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co*., 306 F.2d 693, 696 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46, 52 (1999). The Board may not reweigh the evidence or substitute its own inferences but may assess only whether substantial evidence supports the ALJ's decision. *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 1219 (11th Cir. 2009); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003). Moreover, contrary to Employer's assertion, an ALJ is not required to give dispositive weight to a treating physician's opinion as to the nature and extent of a claimant's disability but has the duty to independently determine the weight to be given any expert's opinion. *See, e.g., Pisaturo v. Logistec, Inc*., 49 BRBS 77, 81 (2015).

In this case, the ALJ rationally credited Dr. Hyde's opinion that Claimant is a surgical candidate, and his work-related back injury is not yet at MMI, over the opinions of Drs. Davis, Pagan, and Pasarin. *Calbeck*, 306 F.2d at 696; *Cooper*, 33 BRBS at 52. Additionally, in addressing Claimant's ability to work post-injury, she permissibly found Claimant credible regarding his symptoms and reasonably relied on the restrictions Drs. Davis and Hyde imposed. *Id.* We therefore affirm the ALJ's findings as to the nature and extent of Claimant's disability as they are rational, supported by substantial evidence, and in accordance with law. *Gates*, 563 F.3d at 1219; *Victorian*, 52 BRBS at 39; *Ezell*, 33 BRBS at 24; *see also Patterson*, 846 F.2d at 723. Consequently, we affirm the ALJ's finding that Claimant is entitled to temporary total disability benefits from March 16, 2019, to June 19, 2019, *see* n.16 *supra*, and temporary partial disability benefits thereafter based on a loss in WEC of $789.19, 33 U.S.C. §908(c)(21); *Patterson*, 846 F.2d at 723.

Change of Physician/Medical Benefits

Employer asserts the ALJ improperly granted Claimant a change in physicians from Dr. Pasarin to Dr. Hyde and misunderstood the issue before her. According to Employer, the issue before the district director, and therefore the ALJ, was Claimant's request to grant his first choice of physician, rather than a change in physician, to Dr. Hyde. Because Dr. Pasarin was already Claimant's first choice as his treating physician at that time, Employer alleges the ALJ could not authorize a change to Dr. Hyde. Employer also asserts ALJs

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his post-injury WEC, nor has it provided specific evidence establishing an alternative reasonable WEC. 33 U.S.C. §908(h); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1043 (5th Cir. 1992) (party contending an employee's actual earnings are not representative of his WEC has the burden of establishing an alternative reasonable WEC). For these reasons, we reject Employer's general challenge to the ALJ's post-injury WEC finding.

lack the statutory authority to grant a change in physician as that discretionary authority rests only with the district director under Section 7 of the Act. Because Claimant allegedly did not request, nor did the district director grant, a change in physician, it asserts there was no factual dispute upon which to confer jurisdiction to the ALJ to grant Claimant's request alongside the other issues being concurrently litigated before the ALJ.

In response, Claimant maintains Employer forfeited any arguments relating to the ALJ's authority to approve Dr. Hyde as his choice of treating physician because Employer acknowledged, first in its pre-hearing statement and then at the hearing, that this was a factual issue for the ALJ to resolve.[21] Alternatively, Claimant asserts the record establishes he had good cause for changing physicians from Dr. Pasarin to Dr. Hyde, which constitutes substantial evidence in support of the ALJ's conclusion.

The Director also asserts Employer forfeited its argument but contends the forfeiture occurred when Employer failed to appeal the claims examiner's initial change in physician recommendation directly to the Board. In the alternative, he maintains the ALJ reasonably and properly resolved the issue.

An employer's liability for medical treatment is governed by Section 7 of the Act, 33 U.S.C. §907. It states an injured employee is permitted his initial free choice of a physician to treat his work injury, 33 U.S.C. §907(b), but he:

> may not change physicians after his initial choice unless the employer, carrier, or [district director] has given prior consent for such change. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

33 U.S.C. §907(c)(2); 20 C.F.R. §702.406. Therefore, if a claimant wishes to change physicians after making his initial choice, he must obtain prior written approval from his employer, the carrier, or the district director. 33 U.S.C. §907(b), (c); 20 C.F.R. §702.406; *Jackson v. Universal Maritime Services Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring); *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364, *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995).

[21] Claimant maintains Employer untimely raised the issue of the ALJ's authority to address the change in physician in its Motion for Reconsideration.

The district director is tasked with the supervision of a claimant's medical care, 20 C.F.R. §702.407, and has the authority to change a claimant's treating physician under 20 C.F.R. §702.406. *See Lynch v. Newport News Shipbuilding & Dry Dock Co*., 39 BRBS 29 (2005); *Roulst v. Marco Constr. Co.*, 15 BRBS 443 (1983). Thus, a district director's decision to change a claimant's treating physician is appealable directly to the Board. *Jackson v. Universal Maritime*, 31 BRBS 103 (Aug. 14, 1997). Nevertheless, the Board has declined to interpret Section 7(b) of the Act, or Section 702.407 of the regulations, in such a manner as to exclude the ALJ's authority to resolve questions of fact relating to medical benefits. *See Lynch*, 39 BRBS at 32; *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38, 40 (2002); *Sanders v. Marine Terminals Corp.*, 31 BRBS 19, 21 (1997) (Brown, J., concurring).[22]

We are satisfied that the claims examiner's recommendation that Employer authorize Dr. Hyde as Claimant's treating neurosurgeon raised a disputed question of fact over the identity of Claimant's treating physician and thus the appropriateness of his request to be treated by Dr. Hyde. This conclusion is confirmed by the procedural history and Employer's arguments before the district director and the OALJ.

As discussed, on July 9, 2019, Claimant signed a form identifying Dr. Pasarin as his treating neurosurgeon. EX 3. On July 11, 2019, he filed a claim for a work-related back injury. CX 5. Dr. Pasarin examined Claimant once on July 31, 2019, and concluded that because conservative treatment had failed, Claimant was at a "crossroads" regarding whether to undergo surgery. CX 11 at 4. Then, on September 2, 2019, Claimant completed another form identifying his treating physician as Dr. Taylor, the orthopedist who had previously recommended that his care be transferred to a neurosurgeon. EX 2. On November 11, 2019, Employer filed its notice of controversion, denying additional medical treatment for Claimant's back.

Claimant thereafter requested that OWCP authorize treatment "with Dr. Hyde, a neurosurgeon of his choice." Following the informal conference, the district director found Claimant's request "reasonable" and recommended Employer "authorize the claimant's choice of physician for treatment and surgery with Dr. Jonathan Hyde." EX 17 at 4. In reaching that conclusion, she acknowledged that Dr. Pasarin had treated Claimant, while Claimant maintained that "the carrier selected" Dr. Pasarin. She also noted that his

[22] For instance, the Board has held the ALJ has the authority to resolve disputes over whether the claimant requested authorization for treatment, whether the employer refused the request for treatment, whether the treatment obtained was reasonable and necessary, and whether a physician's report was filed in a timely manner. *Weikert*, 36 BRBS at 40; *Sanders*, 31 BRBS at 21; *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

"request for choice of physician to Dr. Hyde" as "a neurosurgeon of his choice" was due to "failed spinal injections with Dr. Pasarin."[23] *Id.* In response, Employer informed OWCP that it "will not authorize" Dr. Hyde "as [C]laimant's first free choice in physicians" because he "previously, in writing, selected Dr. Pasarin," EX 47, prompting Claimant to request transfer of the case to the OALJ for a formal hearing.

At the outset of the hearing, the ALJ identified and confirmed with the parties that the "issues that [she] must decide in this matter" included "[t]he identity of Claimant's choice of treating physician."[24] Tr. at 13-15. Employer's post-hearing brief further identified "[M]edical Necessity of the recommended Lumbar surgery" as an unresolved issue and connected it to the question of Claimant's treating physician. Emp PH Br. at 1. In particular, it argued Claimant is not entitled to the surgery recommended by Dr. Hyde because he is not Claimant's "choice in physicians" and that to find the surgery medically necessary would require the ALJ to impermissibly "accept the opinion" of Claimant's "independent medical examiner," Dr. Hyde, "over that of the treating physician [Dr. Pasarin]." Employer explicitly identified the resolution of the surgery issue as a "dispute" involving "factual matters within the [ALJ's] authority to resolve." *Id.* at 3.

Under these circumstances, we reject Employer's contention that the ALJ misunderstood the issue before her and hold the ALJ had the authority to resolve the factual matters pertaining to the identity and choice of Claimant's authorized treating physician and the reasonableness and necessity of any treatment provided thereafter, including surgery.[25] *Lynch*, 39 BRBS at 32; *Weikert*, 36 BRBS at 40; *Sanders*, 31 BRBS at 21.

In determining the reasonableness of Claimant's request to be treated by Dr. Hyde, the ALJ reviewed Claimant's assertion that Dr. Pasarin was Employer's choice of physician and that he wanted to exercise his right to a choice of his physician by selecting Dr. Hyde. D&O at 6; EX 17. She also considered the testimony of Claimant and his wife,

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[23] The record indicates the spinal injections were given to Claimant by pain management specialist Dr. Davis upon referral from Dr. Pasarin. CX 11 at 4; CX 12.

[24] Employer's February 27, 2020 pre-hearing statement reflects that Claimant "is receiving authorized medical care and treatment by physician listed in #7 below," though "#7" actually lists three physicians, Drs. Hyde, Pagan, and Pasarin. EX 4. This statement appears to conflict with Employer's denial of any additional medical care as per its November 11, 2019 notice of controversion. EX 15 at 3.

[25] Thus, we also reject the Director's argument that the ALJ's treating physician finding in this claim was not appealable to the Board.

the Memorandum of Informal Conference, Employer's "Choice of Physicians" forms, and the opinions proffered by Drs. Davis, Hyde, Pagan, and Pasarin. D&O at 18; Tr. at 148, 217; EXs 2-3, 17. She acted within her discretion and authority by reviewing the relevant facts and parties' positions before concluding that Claimant had changed physicians to Dr. Hyde and doing so was reasonable. *Lynch,* 39 BRBS at 32; *Maguire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299, 301 (1992).

Substantial evidence supports the ALJ's determination that Drs. Pasarin and Hyde both gave Claimant the option to move forward with spinal fusion surgery and that Claimant and his wife credibly testified that they preferred Dr. Hyde as his treating physician.[26] *See Monta v. Navy Exch. Serv. Command*, 39 BRBS 104, 107-108 (2005) (Board affirmed the ALJ's finding that when presented with two valid options for treatment, the decision should be left with the claimant to choose between them, and employer is liable for the option the claimant chooses); D&O at 18; CXs 11 at 4; 14 at 10; 35 at 8; Tr. at 53-54, 216-217. Consequently, we affirm the ALJ's resolution of the factual dispute and finding that Claimant chose Dr. Hyde as his treating physician and Claimant's decision was reasonable. 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406(a), (b).

Moreover, as Claimant's choice of physician was authorized, the related medical benefits awarded are also authorized and must be paid by Employer.[27] D&O at 18-19. We therefore affirm the ALJ's findings that Claimant is entitled to, and Employer liable for, future medical care and surgical intervention with Dr. Hyde and that his wife's insurance plan, Comm Care Plan, is entitled to reimbursement from Employer for the medical lien

[26] Moreover, as Claimant points out, the record contains evidence indicating Dr. Pasarin himself did not believe he was Claimant's treating physician. In this regard, Dr. Pasarin's July 2019 report reflects he was "sent to the courtesy of Workers' Compensation for evaluation of an injury," CX 11 at 3, and he answered "yes" when asked at his deposition if he would "refer to the claimant's treating physician Dr. Hide [*sic*]" to determine "whether Claimant is currently a candidate for surgery," EX 41, Dep. at 22-23.

[27] Our affirmance of the ALJ's findings that Claimant reasonably changed to Dr. Hyde as his treating neurosurgeon and that Dr. Hyde's recommended treatment, including surgery, is medically reasonable and necessary establishes Employer's liability for those expenses. This, coupled with Employer's stipulation, as the ALJ articulated, that Claimant is entitled to medical benefits, D&O at 2; Tr. at 9-12, renders moot any remaining arguments Employer presents pertaining to its liability for Dr. Hyde's treatment. *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83, 84 (1999); *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84, 88 (1985).

imposed upon Claimant for unpaid medical costs associated with past treatment of Claimant's work injury, as those findings are supported by substantial evidence.[28]

Accordingly, we affirm the ALJ's Decision and Order Awarding in Part, Denying in Part and her Order Denying Motion for Reconsideration.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[28] Contrary to Employer's position, it clearly demonstrated an unwillingness to provide Claimant further treatment as evidenced by its November 19, 2019 notice of controversion. Its refusal released Claimant from a continuing obligation to seek Employer's approval and rendered it liable for any reasonable and necessary treatment Claimant thereafter procured. *Roger's Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d 687, 693 (5th Cir.), *cert. denied,* 479 U.S. 826 (1986). We also decline to address Employer's assertions that Claimant's failure to provide it with a timely report from Dr. Hyde in compliance with Section 7(d)(2) of the Act and/or certain medical providers' failure to intervene under Section 7(d)(3), 33 U.S.C. §907(d)(3), preclude its liability for any reimbursement, as those specific issues are now being raised for the first time on appeal. *See Johnston v. Hayward Baker*, 48 BRBS 59, 63 (2014); *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27, 32 (2000); *Boyd v. Ceres Terminals,* 30 BRBS 218, 223 (1997).