BRB No. 00-0683

RONALD B. BOONE, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: April 4, 2001
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Reconsideration - Granting Motions for Reconsideration and Reducing the Length of Payment of Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Ronald B. Boone, Sr., Suffolk, Virginia, *pro se*.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order and Decision and Order on Reconsideration - Granting Motions for Reconsideration and Reducing the Length of Payment of Benefits (98-LHC-0803) 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.* 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.[1] *O'Keeffe v. Smith, Hinchman & Grylls*

[1]Claimant filed his appeal without counsel. Subsequently, a personal representative, Mary Harrell, filed a reply brief on claimant's behalf. As the Board acknowledged the appeal

Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). If they are, they must be affirmed. 20 C.F.R. §§802.211(e); 802.301.

Claimant sustained injuries when he mis-stepped and fell between 36 to 50 feet while working for employer on November 23, 1994. Claimant's injuries at that time included multiple contusions and abrasions, a contusion and sprain of the left wrist, a contusion of the left lower leg, extensive lacerations of the forehead and scalp, a right orbital floor fracture and right maxillary lateral wall fracture. He was initially treated at Riverside Regional Medical Center by Drs. Kanter and Clark, who upon claimant's discharge, referred him to an orthopedist, Dr. Swenson, and a neurosurgeon, Dr. Garner.

In late December 1994, claimant reported right leg and low back pain. Dr. Garner, in January 1995, diagnosed cervical and lumbosacral strain syndromes, and found evidence of disc degeneration and a central to slightly left-sided disc protrusion. Dr. Garner, however, opined that surgical intervention was not necessary, and further noted, in July 1995, that claimant could work but should avoid ladder climbing and working at heights. Another neurosurgeon, Dr. Allen, evaluated claimant in March 1996. He observed, based on an MRI, that there was further progression of claimant's degenerative disc, but agreed with Dr. Garner's assessment that claimant was not in need of surgery.

On November 21, 1996, Dr. Kyles diagnosed chronic pain and chronic disability syndromes as the objective findings did not support claimant's subjective complaints of pain. Additionally, he opined that claimant's current report of back pain was not related to the work injury of November 23, 1994, that claimant was at maximum medical improvement with regard to his work-related injuries and that claimant was capable of functioning at a sedentary level. He, however, observed that claimant lacked maximum medical improvement in his psychological response to his injuries. Dr. Kyles later clarified his statements, concluding that claimant was capable of sedentary work as of November 21, 1996.

Claimant was subsequently evaluated by Dr. Taylor, a psychologist, and Dr. Mein, a diplomate in physical medicine and rehabilitation, who concluded that claimant had a chronic pain syndrome and recommended that claimant take a multidisciplinary outpatient pain program. On May 12, 1997, Drs. Taylor and Mein reported that claimant completed his pain program and had indicated that he was open to seeking work within the light to medium

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as a *pro se* appeal, the Board will review the administrative law judge's findings adverse to claimant.

physical demand levels as suggested by Dr. Mein.

On October 17, 1997, claimant went to the hospital with back pain. Dr. Magness diagnosed a central L5/S1 disc herniation, and he performed surgery. In November 1997, Dr. Magness related claimant's disc herniation to the work injury sustained on November 23, 1994, and in June 1998, he noted that claimant remained unable to work. A work hardening evaluation was conducted by Dr. Ross on December 30, 1998, in which he concluded that claimant could perform sedentary work for four hours per day.

Employer voluntarily paid temporary total disability benefits from November 23, 1994, through December 8, 1996. In December 1996, employer wrote to claimant and asked him to call regarding job placement. Claimant testified that he called employer following his injury but was always told that there was no work available to him. Employer, however, stated that claimant did not contact the shipyard in late 1996 or in early 1997, and ultimately discharged claimant on March 19, 1997, for failing to comply with the five-day "call-in rule" during his absence.

In his Decision and Order issued September 24, 1999, the administrative law judge awarded temporary total disability from November 23, 1994, and continuing, and reasonable medical expenses related to claimant's work-related injuries, including his hospitalization in October 1997. The administrative law judge also denied claimant's request for a change in physicians, finding that Dr. Garner continued to be the authorized treating physician. Both parties subsequently requested reconsideration, with claimant arguing that the administrative law judge erred in denying his request for a change in treating physician, and employer asserting that the administrative law judge erred by awarding continuing temporary total disability benefits.

On reconsideration, the administrative law judge initially rejected claimant's assertions that he is entitled to a change in physicians. The administrative law judge also modified the award of compensation to reflect that claimant is entitled to periods of temporary total disability from November 21, 1996, through January 5, 1997, and from October 17, 1997, to December 30, 1998.

On appeal, claimant challenges the administrative law judge's findings that he is not entitled to a change in physician and that he is not entitled to a continuing award of temporary total disability benefits from November 21, 1996. Employer responds, urging affirmance.

We first address the issue of whether the administrative law judge properly determined that claimant is not entitled to a change of physicians. Section 7(b) of the Act, 33 U.S.C. §907(b), provides the employee with the right to choose an attending physician for

treatment of his work-related injuries, unless by virtue of his injury he cannot, at which point the employer shall select a physician for him.[2] Section 7(c)(2) of the Act, 33 U.S.C. §907(c)(2), provides that when the employer or carrier learns of its employee's injury, either through written notice or as otherwise prescribed by the Act, it must authorize medical treatment by the employee's chosen physician. Once claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier or district director. 20 C.F.R. §702.406. Employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to request authorization. *Slattery Assocs. v. Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT) (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982). Once the employer has refused to provide treatment or to satisfy a claimant's request for treatment, the claimant is released from the obligation of continuing to seek employer's approval. *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988). Claimant then need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury, in order to be entitled to such treatment at the employer's expense. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

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[2]Section 7(b) states:

> The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this chapter as hereinafter provided. If, due to the nature of the injury, the employee is unable to select his physician and the nature of the injury requires immediate medical treatment and care, the employer shall select a physician for him.

In his initial decision, the administrative law judge considered but rejected claimant's contention that he did not have a free choice of physicians when he was first treated, as there was no documentation of claimant's request to be treated at Sentara Hospital rather than Riverside Medical Center.[3] The administrative law judge also found that claimant received treatment, without any objection, over a long period of time by the physicians who were originally selected by employer and their referrals. In fact, it was not until August 1997, that claimant sought a change in his treating physician to Dr. Magness.[4] Employer refused to authorize this change since claimant had already been treated and evaluated by two neurosurgeons, Drs. Garner and Allen. The administrative law judge determined that Dr. Garner was claimant's treating neurosurgeon and that there was no reason for him to change to treatment by Dr. Magness.[5] The administrative law judge rationally found that Dr. Garner had been treating claimant for over two and a half years as of mid-1997, and that Drs. Garner and Magness have the same specialty, *i.e.*, they are both neurosurgeons. *See* 20 C.F.R. §702.406(a); *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.* 61 F.3d 900 (4th Cir. 1995)(table).

On reconsideration, the administrative law judge further determined that while Dr. Garner did not continue to see claimant on a regular basis after July 17, 1995, Dr. Garner did not dismiss claimant from treatment. Rather, as noted by Dr. Garner in November 1999, he released claimant to return to light duty work following his examination on July 17, 1995, and instructed claimant to return for additional treatment as necessary. Moreover, the administrative law judge relied on a letter from the district director dated September 4, 1997,

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[3]Claimant maintains that he demanded, in front of a family friend, Ms. Brinkly, that he be immediately transferred to Norfolk Sentara Hospital, a facility of his choice, at the time of his injury. However, both claimant and Ms. Brinkly stated that at the time of his request, he was neither in stable condition nor coherent. HT 44, 49, 68, 97-99. Moreover, employer's personnel who were charged with tracking claimant's condition, Mr. Smith and Ms. Ross, both noted that at no time did claimant or Ms. Brinkly request a transfer to another hospital or treatment from another physician. HT 192-93, 195-197.

[4]Claimant maintained that he initially sought a change of physician on May 21, 1997. However, he also admitted that his attorney at that time, John Klein, had informed him that Dr. Swenson had been treating him over an extended period of time and that, therefore, claimant had no basis to change treating physicians. HT at 93-95, 313.

[5]Claimant argues that Dr. Magness was a referral from his treating orthopedist, Dr. Swenson, by way of a series of referrals from a chiropractor, Dr. Savvas, to a rheumatologist, Dr. Hakim to Dr. Magness. There is no evidence that Dr. Swenson ever referred claimant to Dr. Magness, particularly given that he had already referred claimant to two other neurosurgeons, Drs. Garner and Allen.

which listed Dr. Garner as one of claimant's treating physicians. *See* Claimant's Exhibit B. The administrative law judge's findings that Dr. Garner is claimant's treating neurosurgeon and thus that additional treatment of claimant's work-related injuries by Dr. Magness, also a neurosurgeon, with the exception of claimant's hospitalization and resulting surgery in October 1997, would be duplicative, are affirmed as they are rational, supported by substantial evidence, and in accordance with law. *See Hunt*, 28 BRBS 364. Accordingly, the administrative law judge's conclusion that claimant is not entitled to a change in physician is affirmed.

We next address the administrative law judge's finding that claimant is not entitled to total disability benefits between January 6, 1997, and October 17, 1997, and from December 31, 1998. Where, as in the instant case, it is undisputed that claimant is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Lentz v. The Cottman Co.,* 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board [Tarner],* 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). Employer may meet this burden by offering claimant a suitable position in its facility. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

In his first decision, the administrative law judge initially found that claimant was capable of sedentary employment between May 12, 1997, and October 16, 1997, based on the opinions of Drs. Taylor and Mein, and from December 31, 1998, based on Dr. Ross's opinion, but that employer did not establish the availability of suitable alternate employment. Specifically, the administrative law judge determined that there was no indication that the modified fitter job identified by employer within its facility was offered to claimant in 1997 or subsequently, and that employer did not present any vocational evidence of jobs suitable for claimant since May 1997. Accordingly, he awarded claimant continuing temporary total disability benefits from November 23, 1994.

On reconsideration, the administrative law judge initially determined, in light of Dr. Kyles's clarified opinion, that claimant was capable of sedentary work as of November 21, 1996, and that employer notified claimant regarding the availability of work within his restrictions such that claimant could have returned to work as of January 6, 1997. The administrative law judge relied on the statements of employer's witnesses as to its notification to claimant regarding the availability of modified work and claimant's failure to respond to its inquiries. In particular, the administrative law judge credited the testimony of employer's witnesses, Jeffrey Carawan and Chris Hoyer, that suitable work was available

within claimant's restrictions and that claimant was contacted regarding that work, over claimant's contrary testimony that he called employer after his injury and was always told that there was no work available. Hearing Transcript at 254, 255-57; 286. The administrative law judge therefore concluded that employer established that a job within claimant's restrictions was available as of November 21, 1996, and that, as suggested by Dr. Kyles, treatment by Drs. Taylor and Mein would not affect on claimant's ability to do this work. However, given that claimant did not receive notice of this job until late December, the administrative law judge found that employer established suitable alternate employment from January 6, 1997, until October 16, 1997. With regard to the period between October 17, 1997, and December 30, 1998, the administrative law judge determined that claimant's back surgery was, as noted by Dr. Magness, related to his November 23, 1994, work injury and thus he concluded that claimant was unable to perform any employment during this time. The administrative law judge further found, based on Dr. Ross's opinion, that claimant reached maximum medical improvement with regard to his back injury and was capable of doing light duty work as of December 30, 1998.[6]

The administrative law judge acted within his discretion in crediting the testimony of employer's witnesses regarding the availability of the light duty position within employer's facility[7] and claimant's ability to do this work over the contrary statements made by claimant. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). In light of this, and as the medical evidence, notably the medical opinions of Drs. Kyles and Ross, supports the administrative law judge's determination that claimant was capable of doing sedentary work similar to that offered by employer, we affirm the administrative law judge's conclusion that employer, by offering claimant a light duty position within its facility, established suitable alternate employment from January 6, 1997, through October 16, 1997,[8] and from December 30, 1998. *See Darby,* 99 F.3d 685, 30 BRBS

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[6]The administrative law judge therefore reconsidered the light duty position originally offered by employer in November 1996, and determined, based in part on Dr. Ross's approval of said position, that claimant could have performed the job but for his discharge which was not in any related to his work injury.

[7]Chris Hoyer testified that on two occasions claimant came to employer's facility and was shown the job site and the jobs that he would be working once they became available. HT at 254. Additionally, he stated that the light duty position identified by employer, EX 37, was approved by Dr. Ross and became available to claimant in November 1996, that this work continues to be available, that he could not forsee a time when that job would not be available, and that it is necessary work to the shipbuilding process. HT at 255-57.

[8]In addition, we hold that the administrative law judge properly determined that employer was not required to show different suitable alternate employment outside its facility, as it demonstrated that claimant was capable of performing the job within its facility

93(CRT); *Brooks v. Newport News Shipbuilding & Dry Dock Co.,* 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). Accordingly, we affirm the administrative law judge's denial of temporary total disability benefits between January 6, 1997, and October 16, 1997, and continuing from December 30, 1998, as it is rational, supported by substantial evidence and in accordance with law.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

J. DAVIT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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and claimant's termination from employer is unrelated to his disability. *Brooks,* 26 BRBS 1.