BRB No. 00-0448

WENDALL TAYLOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CRAFTSMAN CONTRACTORS, INCORPORATED	)	DATE ISSUED: Jan. 19, 2001
	)	
and	)	
	)	
UNITED STATES FIDELITY & GUARANTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Section 22 Modification of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Joseph G. Albe, Metairie, Louisiana, for claimant.

Michael J. McElhaney, Jr. (Colingo, Williams, Heidelberg, Steinberger McElhaney, P.A.), Pascagoula, Mississippi, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Section 22 Modification (93-LHC-1451) of Administrative Law Judge James W. Kerr, Jr., 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his right hand in a work-related fall which occurred on March 24,

1992. Claimant's immediate injuries included a laceration of the index finger tip, a superimposed contusion of the middle finger, and a broken ring finger. Drs. Freeman and Irvin subsequently diagnosed the disorder of reflex sympathetic dystrophy (RSD), opined that, at the time of the original hearing, *i.e.*, January 30, 1996, claimant was not yet at maximum medical improvement with regard to his work-related hand injury, and observed that a spinal cord stimulator would improve claimant's condition.

In a Decision and Order dated December 12, 1996, the administrative law judge awarded, based on claimant's RSD, temporary total disability benefits from March 25, 1992, until March 21, 1994, the date which he found that employer established suitable alternate employment, and temporary partial disability from March 22, 1994, and continuing until such time that claimant underwent the recommended surgery and a period of recuperation. The administrative law judge also awarded medical benefits. Employer's motion for reconsideration was denied.

Employer thereafter filed a timely petition for modification under Section 22 of the Act, 33 U.S.C. §922, based on a change in physical and economic conditions, *i.e.*, employer alleged that claimant reached maximum medical improvement and that higher paying suitable alternate employment was now available. A formal hearing was held at which claimant proceeded *pro se* and argued that his condition has, in fact, deteriorated.

In his decision on modification, the administrative law judge determined that employer has not established a change in conditions and thus is not entitled to modification. Specifically, the administrative law judge found that claimant has not yet reached maximum medical improvement with regard to his work-related RSD, and further concluded that employer cannot establish the availability of suitable alternate employment as the credible evidence of record establishes that claimant cannot currently perform any employment as a result of his work-related injuries. The administrative law judge therefore concluded that claimant is entitled to temporary total disability benefits from July 27, 1999. The

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[1]*Dorland's Illustrated Medical Dictionary* (25th Edition 1974) at p. 488, defines RSD as "a disturbance of the sympathetic nervous system marked by pallor or rubor, pain, sweating, edema, or skin atrophy following sprain, fracture or injury to the nerves or blood vessels."

[2]The administrative law judge determined that employer satisfied its burden to show the availability of suitable alternate employment via the report of its vocational rehabilitation consultant dated March 21, 1994.

[3]In addition to claimant's existing RSD, the administrative law judge found, based on the medical opinions of Drs. Weisberg and Rosenbaum, that claimant has also developed a work-related psychological disorder.

[4]The administrative law judge noted that although claimant was working part-time for his father, who was an electrician, said employment was due solely to the "beneficence of

administrative law judge also ordered employer to pay for all past and future medical treatment related to claimant's work injuries, and found that claimant is entitled to his physician of choice, Dr. Morris, to treat his RSD and related conditions.

On appeal, employer challenges the administrative law judge's denial of modification and the finding that claimant is entitled to his own choice of physician. Claimant responds, urging affirmance.

Section 22 of the Act provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo,* 515 U.S. 291, 30 BRBS 1 (CRT)(1995). It is well-established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II],* 521 U.S. 121, 31 BRBS 54 (CRT) (1997)*; Vasquez v. Continental Maritime of San Francisco, Inc.,* 23 BRBS 428 (1990).

Employer initially asserts that, contrary to the administrative law judge's finding, it has established a change in condition as claimant's treating physicians, Drs. Irvin and Freeman, subsequently determined that claimant is not suffering from RSD, and thus has reached maximum medical improvement with regard to his work-related injury. Additionally, employer argues that the administrative law judge erred by crediting the opinion of Dr. Patel over the opinions of claimant's treating physicians Drs. Irvin and Freeman in finding that claimant has not as yet reached maximum medical improvement, since Dr. Patel provided no basis for his diagnosis of RSD and is, as a general practitioner, not qualified to make such a diagnosis.

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement, *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997), or where it has continued for a lengthy period and appears to be of lasting or infinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Whether claimant's condition is permanent is primarily a question of

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his employer," and thus did not affect claimant's entitlement to temporary total disability benefits. Decision and Order on Section 22 Modification at 15.

[5]We note that in part of his decision, the administrative law judge inadvertantly referred to claimant's choice of physician as Dr. Morse. *See* Decision and Order on Section 22 Modification at 18.

[6]In addition, employer notes that these physicians opined that claimant was no longer in need of a spinal cord stimulator.

fact based on the medical evidence. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

In determining that claimant has not as yet reached maximum medical improvement with regard to his work-related RSD, the administrative law judge credited the medical opinion of Dr. Weisberg, that claimant did not yet reach maximum medical improvement as of April 26, 1996, and that it would be very unusual for claimant to have improved without further treatment of his RSD, in conjunction with the original statements regarding claimant's need for, and the beneficial nature of, the treatment recommended by Drs. Irvin and Freeman, over the subsequent contrary opinions by Drs. Irvin and Freeman that claimant no longer had RSD and thus had reached maximum medical improvement without the previously recommended surgery. The administrative law judge's weighing of the evidence is supported by substantial evidence, and thus his finding that claimant's work-related RSD has not yet reached maximum medical improvement is affirmed. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993)*; Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

Employer next contends that the administrative law judge erred in finding claimant entitled to temporary total disability benefits from July 27, 1999, because the basis for that decision, *i.e.*, claimant's condition has deteriorated to the extent that he cannot perform any employment, is not supported by the evidence of record. Again, employer asserts that the medical opinions of claimant's prior treating physicians, Drs. Irvin and Freeman, conclusively establish that claimant no longer has RSD. Employer therefore asserts that claimant is now physically capable of working and further notes that it has presented sufficient evidence as to the availability of suitable alternate employment such that the administrative law judge's finding that claimant is totally disabled is not supported by the evidence of record.

In considering the extent of claimant's present disability, the administrative law judge first determined that claimant's assertions that his condition has deteriorated are supported by

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[7]The administrative law judge specifically acknowledged Dr. Freeman's original testimony that claimant's condition could be improved with the implantation of a stimulator, as well as Dr. Irvin's original testimony that claimant, without the stimulator, would not improve.

[8]We further note that while claimant's RSD has continued for a lengthy period, *see generally Watson*, 400 F.2d at 649, the administrative law judge explicitly determined, based on the medical evidence of record, that further treatment should be undertaken, including the recommended surgery, *i.e.*, implantation of a spinal cord stimulator, which would most likely improve claimant's condition.

the testimony of his father (that claimant has bouts of swelling and pain which can last as long as ten days), and the medical evidence. Specifically, Dr. Weisberg stated that there can be a natural exacerbation after remission and that even without dystrophic changes there can still be sympathetically mediated pain, and Dr. Patel diagnosed right hand pain and RSD as of May 12, 1999. In addition, the administrative law judge found claimant's assertion of continuing RSD further supported by his own observations, at the formal hearing, of hair loss and swelling in claimant's right arm and hand, which the administrative law judge noted are both symptoms of RSD. *See* n. 1 *infra*. The administrative law judge further found that the prior hearing testimony of Dr. Irvin that the observations of other doctors of claimant's symptomatology would be significant gives weight to the May 12, 1999, medical opinion of Dr. Patel. Moreover, the administrative law judge accorded greatest weight to Dr. Patel's May 12, 1999, diagnosis of RSD, since, as the most recent medical opinion of record, it serves as the best indication of claimant's present condition. In contrast, the administrative law judge observed that Dr. Irvin last examined claimant in 1993. Furthermore, the administrative law judge determined that, based on the medical opinions of Drs. Weisberg, Matherne and Rosenbaum, claimant suffers from a psychological disorder brought on by his work-related injury.

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[9]In addition, Dr. Weisberg placed significant physical limitations on claimant primarily related to his work-related RSD. These included that claimant cannot lift anything with his right arm; claimant cannot stand or walk for more than 10 minutes without interruption and then can only function in this capacity for a total of three hours in an eight hour day; that due to low back pain presumably in conjunction with his RSD, claimant cannot sit for more than three hours in an eight hour day and cannot sit for longer than 10 minutes without interruption; and that due to his RSD claimant is unable to climb, crawl, reach, handle, feel, or push or pull.

[10]In fact, Dr. Irvin last examined claimant on March 3, 1997. Nonetheless the administrative law judge's basis for according greatest weight to Dr. Patel, *i.e.*, the recency of his report, remains valid as the record establishes that Dr. Patel's opinion includes the most recent medical examination of claimant by more than two years. Moreover, in contrast to employer's contention regarding Dr. Patel's qualifications, the administrative law judge noted claimant's credible testimony that Dr. Patel was familiar with RSD and had treated it quite frequently.

[11]Specifically, the administrative law judge noted Dr. Weisberg's testimony, referencing claimant, that "there is obviously and always going to be a psychiatric overlay to a patient with a chronic illness;" Dr. Matherne's diagnosis of "considerable psychological overlay which complicates claimant's disability;" and the prior deposition testimony of Dr. Rosenbaum that he diagnosed claimant with adjustment reaction with a depressed mood which was triggered by the limitation of his activities due to his pain related difficulties emanating from his work-related injury.

In summary, the administrative law judge rationally concluded that based on claimant's chronic illness and chronic pain with resulting limitations, as delineated by Dr. Weisberg, and claimant's psychological disorder, claimant cannot currently perform any employment. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F. 2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991). In addition, the administrative law judge concluded that although claimant performs very limited work with his father, as an electrician's helper, this employment is due solely to the "beneficence of his employer." *See generally CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991). The administrative law judge's finding that claimant is entitled to temporary total disability benefits from July 27, 1999, is affirmed as it is supported by substantial evidence, is rational, and is in accordance with law.

Employer lastly argues that the administrative law judge erred in finding that claimant is entitled to an additional choice of physician and treatment of his RSD and related conditions simply because Drs. Freeman and Irvin had released him. The administrative law judge determined that, as claimant's argument that Drs. Irvin and Freeman have refused him further treatment is supported by the evidence of record, claimant is entitled to a physician of his choice to treat his RSD and related conditions. He therefore ordered employer to pay all reasonable and necessary medical expenses related to claimant's work injury, including those related to future treatment rendered by Dr. Morris, claimant's choice of physician.

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 the required 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). However, failure to request authorization for a change can be excused where claimant has been effectively refused further treatment. *Id.* 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).

As an initial matter, it is important to note that Drs. Irvin and Freeman served as claimant's treating physicians, and thus it was incumbent upon claimant to seek the written approval of employer or the district director prior to changing physicians in this case. *See* 20 C.F.R. §702.406. The refusal by Drs. Freeman and Irvin to provide additional treatment prompted claimant to visit several emergency rooms and/or community medical facilities for symptoms associated with his RSD, at which time he encountered Dr. Patel. During this

period claimant also visited Dr. Weisberg, an independent medical examiner selected by the Social Security Administration in relation to a separate claim filed with that agency, who in turn recognized Dr. Morris as an expert in pain management. The administrative law judge ultimately determined that Dr. Morris was claimant's present choice of physician. As employer argues, claimant did not seek prior authorization for further treatment in this case and thus, we reverse the administrative law judge's determination that it is responsible for past medical expenses arising from claimant's treatment by Dr. Patel for his work-related injuries. *See* 33 U.S.C. §907(c)(2), (d); 20 C.F.R. §702.406. We, however, affirm the administrative law judge's decision that claimant, prospectively, is entitled to a new physician of his choice to treat his RSD and related conditions. The administrative law judge determined that the evidence of record supported claimant's contention that Drs. Irvin and Freeman have refused further treatment to claimant in this case. In particular, he noted the statements of Drs. Irvin and Freeman, in conjunction with their findings that claimant does not have RSD and has reached maximum medical improvement, which clearly exhibit a refusal by these physicians to provide claimant with further treatment for his work-related injury. Consequently, we modify the administrative law judge's decision to allow prospective treatment by Dr. Morris, commencing once requested during proceedings before the administrative law judge, as the administrative law judge found a reasonable basis for the change in physician, and the proceedings below suffice to alert employer of claimant's request for treatment by that doctor. *See generally Lloyd*, 725 F. 2d at 787, 16 BRBS at 53 (CRT); *Maguire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299, 301-302 (1992).

Accordingly, the administrative law judge's decision is modified to reflect that employer is not liable for past medical expenses arising from claimant's treatment by Dr. Patel, but is liable for prospective treatment of claimant's work-related injuries by claimant's chosen physician. In all other regards, the administrative law judge's Decision and Order on Section 22 Modification is affirmed.

SO ORDERED.

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[12]In his notes, Dr. Irvin diagnosed possible old RSD, right upper extremity, and stated that he informed claimant that he was "quite unsure whether he [Dr. Irvin] wanted to re-establish a physician/patient relationship with [claimant]," that he had "severe reservations regarding the patient's motivations," and that he "question[ed] whether or not [claimant] is having any significant problem with the right upper extremity at present." Employer's Exhibit 6. Moreover, Dr. Irvin stated, in a letter to claimant's attorney, Mr. Albe, that "it appears to me that you have bought [claimant's] story and current reports 'hook, line sinker," and that claimant's "continued perceived disability is either due to conscious or unconscious psychological factors or possibly to frank malingering." Claimant's Exhibit 2. Dr. Freeman concurred with Dr. Irvin's assessment of claimant's condition.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge