BRB Nos. 06-0874, 06-0875, 06-0876,
06-0877, 06-0878, 06-0879, 06-0880, 06-0881,
06-0882, 06-0883, 06-0884

CHARLES POTTER, SAMUEL ALLEN, UMBERTO BEFUMO, THEODORE CODERRE, ROBERT MARTELL, GRAHAM PECKHAM, FRANKLIN B. POST, JOSEPH RIZZO, TED RUHE, DAVID SADOSKY, RICHARD SANTOS	)	
Claimants-Petitioners	)	
v.	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 06/28/2007
Self-Insured Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Remanding Claims to the District Director of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimants.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for self-insured employer.

Kathleen H. Kim (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimants appeal the Decision and Order Remanding Claims to the District Director (2005-LHC-01958, 01959, 01960, 01961, 01962, 01963, 01964, 01966, 01967, 01968, 01969) of Administrative Law Judge Daniel F. Sutton rendered on claims 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).

Each claimant sustained a work-related injury and is receiving medical benefits, including prescription medication, under the Act. Employer uses PMSI to provide the prescriptions; PMSI is a mail-order provider of prescription medication, which employer uses when its employees require long-term medication. The claimants wanted to select a different mail-order provider, the Injured Workers' Pharmacy. The district director scheduled an informal conference on this issue. Claimants did not contend that employer or PMSI had denied them appropriate services or delayed delivery of medications. The district director issued a memorandum of informal conference on May 27, 2006, which stated that "[Employer] has met its obligation under section 7(a) to furnish medication as prescribed. How they manage that is left to [employer]." The district director stated that if any party was dissatisfied with this recommendation, he could seek referral of the claim to the Office of Administrative Law Judges. Claimants requested a formal hearing.

Before the administrative law judge, claimants sought an order requiring employer to pay for prescriptions obtained from claimants' choice of pharmacy. Claimants and employer moved for summary decision, asserting that no questions of fact were at issue and that only a legal interpretation of Section 7, 33 U.S.C. §907, was to be decided. The administrative law judge therefore cancelled the formal hearing.

The Director, Office of Workers' Compensation Programs (the Director), then filed a motion to remand the case to the district director, as the parties did not raise any factual issues for the administrative law judge to decide and as issues concerning appropriate medical care are left to the district director. Claimants, in response to the Director's motion to remand, alleged that factual issues were raised. Claimants disputed employer's "factual" assertion that it is under a fiduciary duty to the Department of the

Navy to choose the lowest cost pharmaceutical provider and that PMSI is such a provider. Claimants also alleged that PMSI was not "claimant friendly."

The administrative law judge granted the motion to remand, stating that the Director correctly asserted the authority of the district director to address medical benefits issues when no issues of fact are raised. The administrative law judge relied on the parties' motions for summary decision as evidence of the lack of factual issues, as summary decision is appropriate only when no issues of material fact are raised. The administrative law judge stated that the types of "facts" raised by claimant are appropriately decided by the district director, especially since there has been no allegation of a lack of appropriate medical care or services. The administrative law judge deferred to the Director's interpretation that the issues raised are properly left to the district director in the first instance, with the right of direct appeal to the Board. The administrative law judge thus remanded the claims to the district director.

Claimants appeal the administrative law judge's decision. Claimants contend that they are entitled to their free choice of pharmacy, pursuant to Section 7(b) of the Act, and that employer is liable for the reasonable cost of the prescriptions from such pharmacy. Employer responds, urging rejection of claimants' contention and affirmance of the administrative law judge's decision remanding the case to the district director. The Director responds, also urging affirmance and stating that the district director, and not the administrative law judge, has the authority to address the choice of pharmacy issue raised in these cases.[1]

Section 7(a) of the Act states:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a) (emphasis added); *see also* 20 C.F.R. §702.401(a) (medical care shall include medicines). Section 7(b) of the Act states that "The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care . . . ." 33 U.S.C. §907(b); *see also* 20 C.F.R. §702.403. The regulation at Section 702.404 defines "physician" as:

> doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term

[1] By Order dated April 11, 2007, the Board denied the Director's motion to dismiss the appeals on the ground that they were taken from an interlocutory order, stating that it would address the issue of whether the administrative law judge or the district director was the appropriate official to decide the issues presented.

> includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings. Physicians defined in this part may interpret their own X-rays. All physicians in these categories are authorized by the Director to render medical care under the Act. Naturopaths, faith healers, and other practitioners of the healing arts which are not listed herein are not included within the term "physician" as used in this part.

20 C.F.R. §702.404. Contrary to claimants' contention, neither Section 7(b) of the Act nor its implementing regulation provides claimants with a right to select a pharmacy or provider of prescription medication. Therefore, we reject claimants' contention that they have a statutory right to select their prescription provider.

Section 7(b) of the Act states that the Secretary shall actively supervise the medical care of injured employees and has the authority "to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished. . . ." 33 U.S.C. §907(b). Section 702.407 of the regulations delegates this authority to the district director. 20 C.F.R. §702.407.[2] In his brief to the Board, the Director contends that these provisions give the district director the authority to address the choice of pharmacy issue raised in these cases.

The Board has addressed the scope of the district director's authority to decide issues involving medical benefits in several cases. Pursuant to Section 7(b), only the district director can order a change in physician. *See Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005); *Jackson v. Universal Maritime Serv. Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); *Roulst v. Marco Constr. Co.*, 15 BRBS 443 (1983). The administrative law judge, on the other hand, retains the authority to address issues of fact concerning

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[2] Section 702.407 states, in pertinent part:

> The Director, OWCP, through the district directors and their designees, shall actively supervise the medical care of an injured employee covered by the Act. Such supervision shall include:
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> * * *
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> b) The determination of the necessity, character and sufficiency of any medical care furnished or to be furnished the employee, including whether the charges made by any medical care provider exceed those permitted under the Act; . . . .

20 C.F.R. §702.407.

medical benefits, such as whether claimant requested authorization for treatment and employer refused the request, and whether specific treatment is necessary for the work-related injury. *See Weikert v. Universal Maritime Serv. Corp.*, 36 BRBS 38 (2002); *Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997) (Brown, J., concurring); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In another context, the Ninth Circuit has held that the Act does not establish an absolute right to a formal hearing. Rather, there are purely legal and/or discretionary issues that remain within the purview of the district director, with the right of direct appeal to the Board. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000); *see also Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988).

In these cases, claimants have not raised issues of fact concerning authorization or refusal thereof, or the necessity of medical care that require adjudication by an administrative law judge. *See Weikert*, 36 BRBS 38. Rather, the issues raised fall within the district director's supervision of claimants' medical care, as they concern the "character and sufficiency of any medical care furnished or to be furnished the employee."[3] 20 C.F.R. §702.407(b). As claimants are not afforded their choice of pharmacy as a matter of right and as the district director supervises claimants' medical care, we hold that the issues raised by claimants in these cases are properly addressed by the district director, with the right of direct appeal to the Board. *See Jackson*, 31 BRBS 103. Therefore, we affirm the administrative law judge's decision to remand the case to the district director. We remand the case to the district director as well; the district director should issue an order that addresses the issues raised by the parties and provides a rationale for his determination. *Lynch*, 39 BRBS at 33; *Jackson*, 31 BRBS at 108.

Accordingly, we affirm the administrative law judge's Decision and Order Remanding Claims to the District Director. The cases are remanded to the district director for further consideration consistent with this decision.

SO ORDERED.

[3] The issues raised before the administrative law judge and the Board include whether PMSI or the Injured Workers' Pharmacy better serves the needs of the claimants and whether employer has chosen PMSI as a result of its contract with the United States Navy, as well as any significance of such a contract. Given the lack of a final order by the administrative law judge or district director in these cases, the issues are not properly before the Board at this time.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge