BRB No. 07-0325

B.C. Claimant-Petitioner	)	
v.	)	
INTERNATIONAL MARINE TERMINALS	)	DATE ISSUED: 09/28/2007
and	)	
ACE AMERICAN INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Richard A. Weigand (Weigand & Levenson), New Orleans, Louisiana, for claimant.

Thomas J. Smith and Jason F. Giles (Galloway, Johnson, Tompkins, Burr & Smith), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2006-LHC-623) of Administrative Law Judge Clement J. Kennington 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 was injured on June 16, 2004, when pulling lines to dock a ship. Employer voluntarily paid temporary total disability benefits from June 30, 2004 to

December 21, 2005. Claimant initially sought treatment from Dr. Serio on June 21, 2004. Dr. Serio diagnosed a lumbar sprain and placed restrictions on claimant's return to work.[1] Claimant was treated conservatively by Dr. Serio and Dr. Juneau, an orthopedist, until November 2004. As claimant's condition did not improve, Dr. Juneau referred him to the Culicchia Neurological Clinic where he was seen by Dr. Steck, a neurosurgeon, Dr. Atkins, a neurologist, and Dr. Colvin, a physiatrist and pain management specialist. Claimant was examined by Dr. Carey, his choice of physician, on May 20, 2005, and he recommended that claimant return to Dr. Colvin for physical therapy and pain management. Claimant did not do so.

Beginning in July 2005, employer requested that claimant be re-examined by Dr. Colvin to assess the need for pain management. After numerous missed appointments, employer ceased paying benefits on December 21, 2005, because of claimant's refusal to be examined by Dr. Colvin. On January 5, 2006, the claims examiner inquired into the status of the medical issues raised at the July 12, 2005 informal conference. The claims examiner noted that compensation had been suspended and recommended that employer reschedule the appointment with Dr. Colvin and reinstate benefits. The claims examiner also instructed claimant to attend the appointment when it was rescheduled. On June 12, 2006, employer requested an order from the administrative law judge to compel claimant to attend an appointment, which the administrative law judge issued on July 27, 2006. The claimant attended the appointment with Dr. Colvin on August 2, 2006, and employer reinstated temporary total disability benefits. Claimant then sought reinstatement of temporary total disability benefits from December 21, 2005 to August 2, 2006.

In his Decision and Order, the administrative law judge found that claimant's refusal to be reexamined by Dr. Colvin was not reasonable or justified. Thus, the administrative law judge concluded that employer properly suspended benefits from December 21, 2005 to August 2, 2006, 33 U.S.C. §907(d)(4), and denied claimant's request to have the benefits reinstated.

On appeal, claimant contends that the administrative law judge erred in retroactively applying Section 7(d)(4) to suspend his benefits. Claimant also contends that the administrative law judge erred in finding his refusal to be examined was unreasonable and unjustified. Claimant contends that employer was ordered on January 5, 2006, by the district director to reschedule the appointment with Dr. Colvin, but that it did not do so until the August 2, 2006 appointment, which claimant attended. Thus, claimant contends that he did not refuse to be seen by Dr. Colvin during the period

[1] Dr. Serio restricted claimant to lifting no more than 10 pounds with no repeated bending, stooping, squatting, pushing, jerking, twisting, or bouncing. Emp. Ex. 6.

employer suspended benefits. Employer responds, urging affirmance of the administrative law judge's decision.

We initially reject claimant's contention that Section 7(d)(4) was not properly raised as an issue before the administrative law judge. Employer suspended compensation while the case was before the district director, informing claimant and the district director of its reasons for doing so. Emp. Ex. 1 at 8. The claims examiner referenced Section 7(d)(4) in his letter to the parties. One of the issues on which the case was referred to the administrative law judge was claimant's contention that employer improperly suspended compensation. In its pre-hearing statement sent in February 2006, employer wrote that one issue was, "Claimant's refusal to submit to an examination by employer's choice of physician." Emp. Ex. 1 at 3. Moreover, employer referenced Section 7(d)(4) in its motion to compel claimant's attendance at a medical examination by Dr. Colvin. At the time of the formal hearing, the suspension of benefits was the only issue left in dispute, and claimant was fully prepared to address the issue. *See* Tr. at 4-6. Thus, the issues of claimant's refusal to be examined and the propriety of employer's suspension of benefits were properly before the administrative law judge.

Claimant next contends that the administrative law judge erred in permitting employer to suspend compensation for a period pre-dating the administrative law judge's order. Claimant contends that case precedent provides that compensation can be suspended only prospectively, after employer obtains an order from the administrative law judge. Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), provides that the administrative law judge may, by order, suspend the payment of further compensation to an employee who unreasonably refuses to submit to medical treatment, or to an examination by employer's chosen physician, "for such time as such refusal continues" unless the circumstances justified the refusal.[2]

In *Johnson v. C&P Telephone Co.*, 13 BRBS 492 (1981), the Board set forth a procedure for the suspension of compensation pursuant to Section 7(d)(4). Prior to the 1984 Amendments, only the Secretary, through the deputy commissioner (now district

[2] Specifically, Section 7(d)(4) states:

> If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

33 U.S.C. §907(d)(4); *see also* 20 C.F.R. §702.410(c).

director) could order the suspension of benefits. In *Johnson*, the administrative law judge remanded the case to the deputy commissioner for a determination as to whether benefits should be suspended for a period of time due to the claimant's alleged unreasonable refusal to submit to an examination by a physician of employer's choice. The Board stated its agreement with claimant that employer "was obligated to obtain permission to suspend benefits before the adjudicatory stage," and thus vacated the administrative law judge's remand of the case to the deputy commissioner to consider the issue. *Johnson*, 13 BRBS at 496 (emphasis in original). The Board stated that this "clear procedure," set forth in the statute, was not followed as employer did not "request permission" to suspend payments from the deputy commissioner. *Id.* As this procedure was not followed, the Board held that the suspension mechanism in Section 7(d)(4) was unavailable to employer.

Subsequently, the Board followed this holding in *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989). In *Dodd*, the claimant injured his back in 1981 and failed to report to light-duty work as ordered by employer's clinic in 1982. Employer suspended its voluntary payments at that time, and the administrative law judge, citing Section 7(d)(4), held that claimant's unreasonable refusal to undergo back surgery had resulted in a break in the causal relationship between the injury in October 1981 and the claimant's disability at the time of the hearing. The Board first held that the administrative law judge erred in his application of Section 7(d)(4) as he simply denied benefits based on a conclusion that claimant's unreasonable refusal to undergo back surgery resulted in a break in the causal chain. The Board held that "Section 7(d)(4) does not serve to sever the causal connection between claimant's injury and disability, but is a method for suspending compensation for a specific period during which claimant has unreasonably refused to undergo medical treatment." *Id.* at 247. The Board also agreed with claimant's contention that the administrative law judge erred in applying Section 7(d)(4) retroactively. *Id.* at 249. Citing *Johnson*, the Board stated that it is inconsistent with the statutory language to apply Section 7(d)(4) to terminate payments for a period prior to employer's raising the issue, which employer did two years after suspending compensation for other reasons. The Board held that Section 7(d)(4) contemplates an immediate remedy for an employer when a claimant unreasonably refuses to submit to a medical examination or treatment and requires an employer to obtain an order authorizing it to suspend benefits before it takes such action. *Id.* The Board thus vacated the administrative law judge's "retroactive" suspension to May 1982.

Claimant contends that these cases support his contention that the administrative law judge erred in suspending his compensation for a period prior to employer's obtaining an order from the administrative law judge. The administrative law judge did not discuss these cases, but, in suspending compensation, relied upon the Board's decision in *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002), in which the

Board stated that the administrative law judge erred in suspending all benefits due the claimant due to his refusal to undergo an examination; rather, the Board, stated, compensation can be suspended only from the date of the refusal and until claimant complied with the administrative law judge's order to undergo an examination.[3] *Id.* at 89.

Upon reflection of the case precedent and the statutory language, we hold that the procedure outlined in *Johnson* is not founded in the statute. Section 7(d)(4) does not state that employer must obtain an order prior to suspending benefits due to claimant's unreasonable refusal to undergo an examination or treatment. Moreover, the statute does not state that a suspension may be prospective only from the date of the order or that the suspension order cannot be retroactive to the date of the commencement of the refusal. Rather, the statute provides for the suspension of benefits "during such time as such refusal continues." As stated in *Dodd,* 36 BRBS 85, the focus for the commencement of any suspension should be on the initial date of the claimant's unreasonable refusal to treat or to be examined. Such an approach is consistent with Sections 7(f) and 19(h), 33 U.S.C. §§907(f), 919(h), which state that "no compensation shall be payable for any period during which the employee may refuse to submit to examination" by a physician of the district director's choosing. There is simply no support in the statute for the requirement in *Johnson*, 13 BRBS 492, as extended by *Dodd*, 22 BRBS 245, that employer must obtain an order prior to suspending compensation or the holdings that benefits cannot be suspended during a period of refusal prior to the issuance of an order. Therefore, these cases are overruled insofar as they require the issuance of an order prior to a suspension of benefits under Section 7(d)(4). We hold that the administrative law judge, by order, may suspend compensation pursuant to Section 7(d)(4) commencing on the date of the claimant's unreasonable refusal to undergo examination or treatment and continuing for the period of "such refusal."

As we hold that claimant's benefits may be suspended for the period of any unreasonable refusal, we must address his contention that the administrative law judge erred in finding that claimant's refusal was unreasonable and unjustified. Section 7(d)(4)

[3] The two *Dodd* decisions involve unrelated claimants. In *Dodd*, 36 BRBS 85, the Board affirmed the administrative law judge's finding that the claimant's refusal to undergo the examination was unreasonable and unjustified. The Board held, however, that compensation cannot be suspended retroactively to a period prior to claimant's refusal but may be effective only from that date. The Board remanded the case to the administrative law judge to determine the date on which claimant refused to undergo the examination, stating that compensation would be suspended from that date until claimant complied with the administrative law judge's order that he undergo an examination. *Dodd*, 36 BRBS at 89.

requires a dual inquiry. Initially, the burden of proof is on the employer to establish that claimant's refusal to undergo a medical examination is unreasonable; if carried, the burden shifts to claimant to establish that circumstances justified the refusal. For purposes of this test, reasonableness of refusal has been defined by the Board as an objective inquiry, while justification has been defined as a subjective inquiry focusing on the individual claimant. *Malone v. Int'l Terminal Operating Co.* 29 BRBS 109 (1995); *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979) (Smith, S., dissenting); *see generally Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

In this case, claimant's stated reasons for refusing to be examined again by Dr. Colvin were that he lacked the medical records from his prior examination by Dr. Colvin so that he could make an informed decision as to whether to attend the exam, that he disagreed with Dr. Colvin's initial recommendation that he undergo testing for diabetes and high blood pressure, and that Dr. Colvin was his choice of physician and thus could not also be employer's choice. The administrative law judge considered claimant's contentions and found that claimant had no basis for refusing to see Dr. Colvin because he disagreed with the need to undergo testing. In addition, the administrative law judge found that claimant had copies of his medical records as of January 13, 2006, and employer's refusal to provide them was not a valid basis to refuse an examination after that date. Thus, the administrative law judge found that claimant's refusal was not reasonable or justified.

We affirm this finding as it is rational and supported by substantial evidence. Claimant is not entitled to control the circumstances under which he will be examined, *Dodd*, 36 BRBS at 88, and cannot reasonably refuse to be examined by a physician of employer's choosing on the ground that he lacks confidence in that physician. *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979). In addition, assuming, *arguendo*, claimant could properly refuse an examination by his chosen physician, Dr. Colvin examined claimant only one time at the behest of claimant's orthopedist and the record thus does not establish that Dr. Colvin was claimant's choice of physicians. *See* 33 U.S.C. §907(b). Moreover, assuming, *arguendo*, the relevancy of claimant's need for the requested medical records, he had obtained them by January 13, 2006, during the period employer sought to suspend benefits. As the administrative law judge rationally found that claimant's reasons for declining an examination by Dr. Colvin were unconvincing, we affirm the finding that claimant's compensation benefits were properly suspended during the period he refused to be examined by Dr. Colvin. *See Jenkins*, 594 F.2d 404, 10 BRBS 1; *Dodd*, 36 BRBS 85; *see generally Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

The last issue presented by claimant's appeal is whether the administrative law judge properly found that claimant refused to be examined during the period for which employer sought the suspension of compensation. Claimant contends that he did not refuse to be examined after January 5, 2006, as employer did not make an additional appointment with Dr. Colvin as recommended by the claims examiner. We reject claimant's contention. Claimant had failed to report to three prior examinations and was notified by employer in December 2005 that his benefits were being suspended due to his refusal to be examined by Dr. Colvin. Although employer did not schedule another examination after the claims examiner recommended that it do so, claimant testified in a deposition taken on June 2, 2006, that if another appointment were to be scheduled, he would not attend. Emp. Ex. 13 at 49. Thereafter, employer moved to compel claimant's attendance at an examination. Claimant complied on August 2, 2006, with the administrative law judge's order compelling him to undergo an examination. As claimant's deposition testimony indicated his continued unwillingness to be examined by Dr. Colvin, the administrative law judge did not err in suspending claimant's benefits from December 21, 2005, to August 2, 2006.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

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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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REGINA C. McGRANERY
Administrative Appeals Judge