BRB Nos. 95-1796
and 96-774

ALEXANDER SANDERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order and Order Modifying Decision of Donald B. Jarvis, Administrative Law Judge, United States Department of Labor.

Matthew M. Fishgold and John E. Jones, San Francisco, California, for claimant.

Katherine Theofel (Finnegan, Marks & Hampton), San Francisco, California, for employer/carrier.

Mark Reinhalter (J. Davitt McActeer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order and Order Modifying Decision (94-LHC-1083) of Administrative Law Judge Donald B. Jarvis 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

During his career as a longshoreman, claimant sustained work-related back injuries in 1962, 1963, 1973, and 1980. As a result of these injuries, claimant was awarded permanent total disability benefits in a Decision and Order by Administrative Law Judge Lasky dated 1981. Judge Lasky also ordered employer to "pay for medical treatment and expenses as the nature of claimant's condition may require in the future." Judge Lasky's Decision and Order at 5.

In 1993, claimant requested housekeeping assistance pursuant to employer's obligation to furnish medical benefits. Claimant's treating physician, Dr. Hood, recommended the assistance because of claimant's herniated disc and low back pain related to his industrial injury. Emp. Ex. A at 15. Employer refused to provide the housekeeping assistance and claimant requested an informal conference to resolve the dispute. In an informal conference memorandum dated November 23, 1993, a Department of Labor claims examiner recommended against requiring employer to pay for housekeeping assistance, finding claimant's need arose from the aging process, not the work-related injury. The district director then transferred the case to the Office of Administrative Law Judges (OALJ).

In a Decision and Order dated June 14, 1995, Administrative Law Judge Jarvis initially noted that when parties do not reach agreement on the merits of the claim, the district director must transfer the case for a formal hearing before an administrative law judge. Thus, the administrative law judge found that the claim for medical benefits was properly before him.[1] In addition, the administrative law judge found that claimant established a *prima facie* case for compensable medical treatment because his treating physician recommended that claimant receive housekeeping assistance in order to avoid further aggravation of his back

[1]The administrative law judge also found that in this case, the informal conference memorandum issued does not represent a final order because it was written by a claims examiner. The administrative law judge noted that while a claims examiner can make recommendations to the district director, she lacks the authority to make final determinations that are within the district director's discretion. *See, e.g., Mazzella v. United Terminals, Inc.*, 8 BRBS 755 (1978), *aff'd on recon.*, 9 BRBS 191 (1978).

injury. Thus, the administrative law judge ordered employer to "furnish domestic assistance, or compensation therefor, for eight hours per week, at the going rate, commencing March 11, 1993." Decision and Order at 10. Both the Director and employer appealed this decision. BRB Nos. 95-1796/A. However, prior to the Board's consideration of the appeals, on January 19, 1996, employer filed a motion for modification based on a change in claimant's condition. Therefore, the appeals were dismissed without prejudice and the case was remanded to the administrative law judge to consider the modification request.

With the petition for modification, employer submitted a medical report by claimant's new treating physician, Dr. Blackwell,[2] in which Dr. Blackwell stated that he did not think that housekeeping services were appropriate. Rather, Dr. Blackwell suggested that physical therapy may be necessary to teach claimant the appropriate way to do the activities of daily living at home. Based on this report, the administrative law judge found that there had been a change in claimant's medical condition since his prior Decision and Order, and that claimant no longer requires domestic assistance. Order Modifying Decision at 2. Thus, as of November 30, 1995, employer's liability for the housekeeping services was terminated.

The Director appealed this decision, BRB No. 96-774, and requested reinstatement of his previous appeal, BRB No. 95-1796, on the basis that the administrative law judge does not have the authority to address the necessity of medical treatment. Employer did not seek reinstatement of its original appeal. Claimant responded to the Director's contention that the administrative law judge does not have the authority to review the claim for housekeeping assistance, but he has not appealed the latter decision denying housekeeping assistance. Thus, the validity of the initial award of housekeeping services and the subsequent denial thereof are not before the Board. Rather, the issue is a procedural one regarding whether the issue of claimant's entitlement to housekeeping assistance is one for the administrative law judge or the district director to decide.

On appeal, the Director contends that the Secretary has specifically and exclusively delegated to the Office of the District Director the authority to adjudicate the appropriateness of medical care, in this case consisting of housekeeping assistance. The Director notes that Section 7(b) of the Act, 33 U.S.C. §907(b), states that "the Secretary shall actively supervise the medical care rendered to injured employees,...[and] shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished...." In addition, the Director cites 20 C.F.R. §702.412(b) of the implementing regulations which

[2]Claimant's previous treating physician, Dr. Hood, retired from medicine, and Dr. Blackwell became claimant's treating physician.

provides:

> The Director or his designee may also order the employer or the insurance carrier to provide the employee with the services of an attendant, where the district director considers such services necessary . . . because of other disability making the employee so helpless as to require constant attendance in the discretion of the district director.

20 C.F.R. §702.412(b). The Director also contends that 20 C.F.R. §702.407, in general, provides that the Director's duties of supervising medical care include the determination of the necessity, character and sufficiency of any medical care furnished or to be furnished the employee, and the further evaluation of medical questions arising in any case under the Act. 20 C.F.R. §702.407(b), (d). Thus, the Director concludes that Section 7 does not confer to the parties a right to a hearing before an administrative law judge pursuant to Section 19 of the Act, 33 U.S.C. §919, and the Administrative Procedure Act (APA), 5 U.S.C. §554 *et seq.*, with regard to the necessity, character, and sufficiency of any medical aid furnished or to be furnished. The Director avers that Board decisions stating that the district director cannot engage in final fact-finding determinations are erroneous. The Director seeks remand so the district director can issue an order on claimant's entitlement to housekeeping assistance.

The Director relies on the Board's decision in *Toyer v. Bethlehem Steel Corp*., 28 BRBS 347 (1994)(McGranery, J., dissenting), in support of his contention that the Act provides to the Secretary the exclusive authority to order attendant care services. In *Toyer*, the Board reviewed an appeal of a denial of payment for medical services. The Board noted that Section 7(d)(2) of the Act, 33 U.S.C. §907(d)(2), provides that the "Secretary" may excuse a physician's failure to furnish a first report of injury or treatment within the prescribed ten-day period whenever he finds it to be in the interest of justice to do so. Prior to the 1984 Amendments, the implementing regulation, 20 C.F.R. §702.422(b) (1984) (amended 1985), explicitly stated that either the deputy commissioner or the administrative law judge could excuse the failure to comply with the reporting requirement. However, in 1985, the regulations were revised in the wake of the 1984 Amendments to state, in pertinent part, that "[f]or good cause shown, the *Director* may excuse the failure to comply with the reporting requirements of the Act...." 20 C.F.R. §702.422(b)(1996)(emphasis added).

Moreover, the Board noted that Section 7(d)(2) of the Act does not specifically provide that administrative law judges may make determinations with regard to first reports of treatment while a subsequent subsection, Section 7(d)(4), provides that the *Secretary or administrative law judge* may suspend compensation if an employee unreasonably refused to undergo medical treatment. 33 U.S.C. §907(d)(2), (4)(1988). Therefore, in *Toyer* the Board deferred to the Director's interpretation of Section 7(d)(2) and Section 702.422(b) and held that only the Director, through his delegates, the district directors, has the authority to make a

discretionary determination as to whether good cause has been shown for the failure to file a first report of treatment. *Toyer*, 28 BRBS at 353; *see also Krohn v. Ingalls Shipbulding, Inc.*, 29 BRBS 72 (1994) (McGranery , J., dissenting). However, the Board also noted that a case raising the factual issue of whether the report was in fact timely filed would be referred to the OALJ for resolution. *See Toyer*, 28 BRBS at 353; *see also Glenn v. Tampa Ship Repair & Dry Dock*, 18 BRBS 205, 208 (1986)(fee dispute before the district director would be referred to an administrative law judge when a finding of fact regarding the date of employer's controversion is needed).

We hold that the Director has misplaced his reliance on *Toyer*. Like Section 7(d)(2) which specifically grants the Secretary the discretion to excuse the failure to furnish a required report, Section 7(b) similarly confers on the Secretary the active supervision of a claimant's medical care. *See also* 20 C.F.R. §702.407 (conferring this authority on the Director and district directors). Nevertheless, this grant of authority cannot be read as removing from administrative law judges the authority to decide contested factual issues following a full evidentiary hearing.[3] 33 U.S.C. §919(d). "It is clear that all adjudicatory

[3]The Director contends that the issue of housekeeping services in this case is controlled by Section 702.412(b) which confers exclusive authority to order attendant care services to the Secretary. The Board has held that housekeeping services are clearly provided for under Section 7(a) of the Act as that section provides for medical assistance and treatment and "other" assistance and treatment. This wording would be superfluous if assistance was required to be medical only. *See Gilliam v. Western Union Telegraph Co.*, 8 BRBS 278 (1978); *see also Edward v. Zapata Offshore Co.*, 5 BRBS 429 (1977); *Timmons v. Jacksonville Shipyards*, 2 BRBS 125 (1975). However, none of the cases awarding housekeeping assistance has relied on Section 702.412(b) as authority to order this care.

functions reside only in the administrative law judge...." *Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129, 131 (1986). As the administrative law judge properly noted with regard to Section 702.412(b), neither the Act nor the regulation "give[s] [the Secretary] the authority to relieve the employer of liability for medical benefits; nor does it give him the authority to conduct a formal hearing on the issue." Decision and Order at 5. Moreover, the Board held in *Toyer* that any factual disputes that arose in the context of a claim for medical benefits would be referred to the OALJ for resolution. *Toyer*, 28 BRBS at 353.

The Board has previously considered the issue of the administrative law judge's authority to resolve issues raised under Section 7(b) of the Act. In *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989), the Board considered a case in which the employer contended that claimant had not requested authorization for medical treatment and that the administrative law judge lacked the authority to order payment for the unauthorized treatment. The Board rejected the employer's contention that Section 7(b) of the Act and the implementing regulations authorize the Secretary and his designate, the district director, to oversee the provision of medical care to the exclusion of the administrative law judge. *Anderson*, 22 BRBS at 24. The Board noted that payment for expenses already incurred is governed by Section 7(d), and that the administrative law judge is authorized to resolve all factual issues presented in a claim referred to him for adjudication. The Board held that whether authorization for treatment was requested by claimant, whether employer refused the request, and whether treatment subsequently obtained was necessary were all factual issues within the administrative law judge's authority to resolve. *Id*. Moreover, the Board has held that in cases in which the treatment had already taken place, the administrative law judge has the authority to determine the reasonableness and necessity of a medical procedure refused by employer. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 99 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbulding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

Rather, Section 702.412(b) provides an "attendant" when the claimant is so helpless as to require constant attendance. Although it is questionable whether this regulation is applicable to housekeeping assistance or rather applies to claimants who are totally dependent on others for daily living, we reject the Director's interpretation of this regulation to the extent that it deprives an administrative law judge of the authority to decide contested factual issues. *See* discussion, *infra*.

The regulations concerning claims processing also support the conclusion that disputed questions of fact in a claim for medical benefits are to be resolved by an administrative law judge. Section 702.315(a) provides that following an informal conference at which agreement is reached on all issues, the district director shall embody the agreement in a memorandum or formal compensation order. 20 C.F.R. §702.315(a). When employer has agreed to pay, reinstate or increase monetary compensation benefits, or *to restore or appropriately change medical care benefits*, such action shall be commenced immediately upon becoming aware of the agreement. *Id.* (emphasis added). Section 702.316, 20 C.F.R. §702.316, directs the district director to transfer the case to the OALJ when agreement cannot be reached on all issues. *See also Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants,* 17 F.3d 130, 28 BRBS 13 (CRT) (5th Cir. 1994). Thus, it is apparent that unresolved disputes regarding medical benefits are subject to the procedural requirements of these regulations, notwithstanding the general provisions of the Act that the Secretary is to oversee a claimant's medical care. A claim for medical benefits that raises disputed factual issues such as the need for specific care or treatment for a work-related injury must be referred to an administrative law judge for resolution of the disputed factual issues in accordance with Section 19(d) of the Act and the APA.[4]

In addition, as the administrative law judge noted, pursuant to Section 18 of the Act, if an employer fails to pay compensation, including medical benefits, due under an award within a period of 30 days after the compensation is due, the claimant may request that the district director issue a supplemental order declaring the amount due. 33 U.S.C. §918(a); *see*

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[4]Section 19(d) of the Act, 33 U.S.C. §919(d), states:

> Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

Lazarus v. Chevron USA, Inc., 958 F.2d 1297, 25 BRBS 145 (CRT) (5th Cir. 1992); *Kelley v. Bureau of National Affairs*, 20 BRBS 169 (1988). The implementing regulations require the district director to institute proceedings with respect to such application as if such claim was an original claim pursuant to Sections 702.315 and 702.316. 20 C.F.R. §702.372. Thus, a claim for enforcement of medical benefits is accorded the same adjudicatory procedures as an initial claim for compensation, which thus may involve adjudication by an administrative law judge. *Kelley*, 20 BRBS at 171.

In this regard, it is important to note that the Board has held that bifurcation of claims is generally to be avoided. *Toyer*, 28 BRBS at 353; *Hudnall v. Jacksonville Shipyards*, 17 BRBS 174 (1985). The effect of the position taken by the Director in the instant case could be to bifurcate the issues of the necessity for medical treatment from a determination of the causal relationship between the claimant's injury and his work, as well as the necessity for medical treatment from the claim for compensation on the merits. The Board noted in *Toyer* that the separation of a determination under Section 7(d)(2) from the case on the merits may result in administrative inefficiency and the waste of a party's resources, but concluded that these considerations are those of the party charged with administration of the Act, the Director. *Toyer*, 28 BRBS at 354. We decline to extend that holding to questions of the necessity of medical treatment as such issues are factual in nature, as distinguished from the discretionary determination associated with Section 7(d)(2). Thus, the Board's decision in *Toyer* cannot be interpreted as denying the administrative law judge in the present case the authority to resolve the disputed factual issue of whether housekeeping assistance was necessary.

While certain discretionary acts of the district director are directly appealable to the Board, *see, e.g., Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT)(5th Cir. 1988); *Toyer*, 28 BRBS at 353; *Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989); *Glenn*, 18 BRBS at 205, this case involves a factual dispute regarding the necessity of recommended housekeeping assistance pursuant to Section 7(a), specifically whether such assistance was required by the work injury or by aging, which is an issue of fact for the administrative law judge. *See generally Sans v. Todd Shipyards Corp.*, 19 BRBS 24, 28 (1986); *Maine*, 18 BRBS at 131. Therefore, we affirm the administrative law judge's finding that the claim for medical benefits was properly before him, and we reject the Director's contention. The administrative law judge's orders are affirmed.

Claimant's attorney has filed a request for an attorney's fee for work performed before the Board during the original appeals, BRB Nos. 95-1796/A. Claimant's attorney requests the amount of $1,380, representing 11.50 hours of legal services at the rate of $120 per hour. Employer has not filed any objections to the fee petition.

In the present case, claimant was initially awarded housekeeping assistance by Judge

Jarvis in his decision dated June 14, 1995, which employer contested. Employer and the Director appealed this decision, BRB Nos. 95-1796/A, and claimant's fee request is for work performed defending against these appeals. Before the Board could address these appeals, however, the case was remanded to the administrative law judge to address a petition for modification submitted by employer. Although on modification the administrative law judge found that there had been a change in claimant's medical condition since the earlier decision, and that claimant no longer requires domestic assistance, this decision was effective as of the date of the order and was not retroactive. *See generally Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993). Therefore, as claimant was successful in defending his award of housekeeping services from March 11, 1993 through June 2, 1995, which employer had disputed, and we affirm the administrative law judge's finding that the case was properly before him, we award claimant's attorney a fee for work performed before the Board in defending the original appeals to be assessed against employer. 33 U.S.C. §928; *see Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd*, 920 F.2d 558, 24 BRBS 49 (CRT)(9th Cir. 1990). Moreover, as there are no objections to the fee petition, and the work performed was reasonable and necessary to claimant's response to the Director's and employer's appeals, we award claimant's attorney a fee in the amount of $1,380 representing 11.5 hours of legal services at the hourly rate of $120.

Accordingly, the Decision and Order and Order Modifying Decision of the administrative law judge are affirmed. In addition, claimant's counsel is awarded a fee in the amount of $1,380 for work performed before the Board, to be paid directly to counsel by employer.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

NANCY S. DOLDER
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring:

I concur in the result reached in the majority's decision in the instant case. However, for the reasons stated in my dissenting opinion in *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (*en banc)* (Brown and McGranery, JJ., concurring and dissenting), I do not join in the majority's holding that certain discretionary acts of the district director are directly appealable to the Board. There is no authority for direct appeals to the Board in any case, including those involving a discretionary act of a district director or involving solely an issue of law. *See* 20 C.F.R. Part 702, Subpart C. Section 702.301, 20 C.F.R. §702.301, sets forth authority for the district director to resolve controverted claims amicably by informal procedures. That section provides, however, that "[w]here there is a genuine dispute of fact or law which cannot be so disposed of informally, resort must be had to the formal hearing procedures as set forth beginning at §702.331." 20 C.F.R. §702.301 (providing procedures for formal hearings conducted by an administrative law judge). Thus, when the district director is unable to resolve the dispute between the parties, the parties must take their case to an administrative law judge for a decision on purely legal questions, factual questions, and mixed questions of law and fact.

While the majority decision holds that the administrative law judge properly reviewed the factual question before him, I would hold that this case would properly be considered by the administrative law judge regardless of the characterization of the issue in contention before the district director.

JAMES F. BROWN
Administrative Appeals Judge