BRB No. 96-1536

GERALD JACKSON Claimant-Petitioner v. UNIVERSAL MARITIME SERVICE CORPORATION and SIGNAL ADMINISTRATION Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED:_____ DECISION and ORDER

Appeal of the Order Changing Treating Physician of B. E. Voultsides, District Director, United States Department of Labor.

Gregory E. Camden (Rutter & Montagna), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer, Black, Meredith & Martin), Norfolk, Virginia, for employer/carrier.

LuAnn Kressley (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop, 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:

Claimant appeals the Order Changing Treating Physician (OWCP No. 5-93834) of District Director B. E. Voultsides 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). The determination of the district director must be affirmed unless it is shown to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

Claimant sustained injuries on October 26, 1994, during the course of his work as a container repairman. He was treated by Dr. Morales, a Board-certified orthopedic surgeon, who diagnosed a lumbar strain, chest contusion and a right rib injury. Attach. 1.[1] After treating conservatively with Dr. Morales from early November 1994 through mid-March 1995, employer sought an independent evaluation and arranged an appointment with Dr. Frank Burns on March 14, 1995. Claimant did not keep the appointment.[2] Consequently, employer requested an informal conference on the issues of continuing temporary total disability and medical benefits. Attach. 2. At the conference, employer requested a change of physicians, alleging that Dr. Morales has a history of self-referring cases to Dr. Iglecia.[3] The claims examiner recommended that the Department of Labor (DOL) set up an appointment for claimant for evaluation and treatment. The next day, an appointment was made with Dr. Budorick. Attach. 4-5. Dr. Budorick noted claimant's complaints of pain, evidence of spondylitic and degenerative changes at C6-7, with little or no degeneration in the lumbar spine, some degeneration in the thoracic spine, and a possible herniation at T8-9. However, because of claimant's "non-specific" pain, Dr. Budorick stated that, although

[1]The documents in this case are labeled as "Attachments" (herein "Attach.").

[2]Claimant, however, was examined by Dr. Burns on December 16, 1994. Dr. Burns diagnosed a small central herniation at T8-9 of unknown significance, osteoporosis and vertical striations of vertebra. He stated that further studies were needed and claimant could not yet return to work, as he should be followed closely. Attach. 32.

[3]At his deposition, Dr. Morales stated he was qualified for an exemption against self-referrals under the Virginia Code as of the time of claimant's physical therapy. Attach. 35 at 28.

claimant's symptoms relate to his injury, the disc findings are irrelevant and the symptoms are not consistent with a T8-9 herniation. He also reported that claimant's thoracic troubles appear to have resolved but that he should be registered in the Spineworks program for psychological and physical rehabilitation, after which he could return to work. Attach. 6.

In May 1995, employer requested another informal conference to resolve issues concerning medical and temporary total disability benefits and claimant's treating physician. Attach. 7, 9. An informal conference was held on May 30, 1995, and the claims examiner recommended that claimant be considered temporarily totally disabled until after completion of the Spineworks program. Attach. 10. After receiving notice of claimant's release from the program, Dr. Budorick reported that claimant had recovered from his injury, making him able to return to his usual work. Although he noted that the degenerative changes might make it difficult for claimant to return to work, he stated they did not occur as a result of the fall and that claimant had reached a pre-injury condition.[4] Attach. 13, 27-29. Employer ceased paying temporary total disability benefits on September 13, 1995, after receiving Dr. Budorick's August 1995 letter. Attach. 12-13.

In October 1995, claimant sought treatment with Dr. Gwathmey because of continuing numbness in his extremities, and he underwent the first of two surgeries for carpal tunnel syndrome, the second occurring in January 1996.[5] In December 1995, Dr. Morales, who was still treating claimant, referred him to Dr. Grant, a neurosurgeon, who determined that claimant's right-side chest pain was caused by his neck trauma and that

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[4]Dr. Budorick did not re-examine claimant after his completion of the Spineworks program. Instead, he relied on the reports of the Spineworks doctors. Dr. Gershon commenced claimant's treatment into the program, noting claimant's complaints of constant pain and numbness in his extremities. Attach. 28. Dr. Barr released claimant from the program in July 1995, stating it had little more to offer claimant for his "vague and diffuse musculoskeletal pain complaints. . . ." Moreover, she noted that claimant could return full-time to a light medium job. Attach. 27. On January 11, 1996, Dr. Budorick summarized his involvement with claimant's progress, stating he did not treat claimant but merely diagnosed his problems and referred him to the Spineworks program. Attach. 29.

[5]Dr. Gwathmey believed claimant's carpal tunnel syndrome, which developed while he was out of work recuperating from his 1994 fall, was compatible with the October 1994 work injury. Attach. 26.

such result was an atypical manifestation of a cervical disc injury. Dr. Grant diagnosed significant changes at C5-6, C6-7 with anterior cord compression, spinal stenosis and lateral recess compromise, requiring cervical diskectomy and fusion at two levels. Attach. 30-31, 33, 35.

Another informal conference was held in October 1995, and the parties, according to claimant, agreed to discuss changing claimant's physician. In November 1995, employer asked the claims examiner to issue a recommendation changing claimant's treating physician from Dr. Morales to Dr. Budorick because Dr. Budorick was chosen by DOL and his therapy succeeded where Dr. Morales' treatment failed. Claimant objected to the change because the parties never met to reach an agreement; therefore, claimant submitted a Pre-Hearing Statement (LS-18) and requested that the case be transferred to the Office of Administrative Law Judges (OALJ).[6] Attach. 14-15. As a follow-up to the October conference, the claims examiner recommended that employer reinstate benefits until a doctor could be agreed upon, and if Dr. Budorick was not acceptable, DOL would appoint another physician. On January 2, 1996, claimant notified the claims examiner of his objection to Dr. Budorick's selection. On January 10, 1996, employer filed its LS-18, and on January 31, 1996, the district director issued a letter of recommendation terminating Dr. Morales' authorization and appointing Dr. Budorick as claimant's treating physician. Attach. 16-19. On February 28, 1996, the district director transferred the case to the OALJ, and six months later, on July 29, 1996, employer asked the district director to issue his January 31, 1996 letter as an Order. Attach. 21-22. Claimant objected to the request, citing numerous reasons. The district director thereafter issued an Order changing claimant's treating physician from Dr. Morales to Dr. Budorick.

Claimant appeals the Order to the Board, contending the case belongs before the administrative law judge because there are unresolved factual disputes and because the case is directly on point with the Board's decision in *Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997) (Brown, J., concurring), and is distinguishable from *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting). Additionally, he argues that the district director abused his discretion in changing his doctor. Employer responds, urging affirmance of the Order which it contends is properly before the Board. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the plain language of the Act permits the district director to grant the change of physicians and that this is purely a discretionary act which is directly reviewable by the Board.[7] However, in this case, the Director asserts that the order should be vacated and the case remanded because the district director did not fully explain his decision.

[6]Claimant filed an amended LS-18 on January 29, 1996. Attach. 20.

[7]The Director originally did not respond to this appeal. On April 8, 1997, the Board ordered the Director to file a response brief addressing the following issues: 1) the district director's authority to grant a change in physician at the behest of an employer; and 2) whether claimant is entitled to a hearing before an administrative law judge if a dispute arises on this issue.

Section 7(b) of the Act states in pertinent part:

> The Secretary shall actively supervise the medical care rendered to injured employees, . . . shall have the authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished, *and may, on [her] own initiative or at the request of the employer, order a change of physicians or hospitals when in [her] judgment such change is desirable or necessary in the interest of the employee*. . . .

33 U.S.C. §907(b) (emphasis added). The Board has held that, in view of the 1972 Amendments transferring adjudicative functions to the administrative law judge, the statutory references to the "Secretary" are considered references to the district director, whereas references to the "deputy commissioner" refer to the administrative law judge if judicial functions are involved.[8] *Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989); *Ogundele v. American Security & Trust Bank*, 15 BRBS 96 (1980). The implementing regulations authorize the district director to order a change of physicians when such change is necessary or desirable. Specifically, the regulations provide:

> The district director . . . may order a change of physicians or hospitals when such a change is found to be necessary or desirable or where the fees charged exceed those prevailing within the community. . . .

20 C.F.R. §702.406(b). Section 702.407 authorizes the Director, "through the district directors and their designees," to actively supervise the medical care of injured employees. In pertinent part, it states:

> Such supervision shall include: * * *
> (b) The determination of the necessity, character and sufficiency of any medical care furnished or to be furnished the employee. . . .
> (c) The determination of whether a change of physicians, hospitals or other persons of locales providing treatment should be made or is necessary. . .

20 C.F.R. §702.407(b), (c). Thus, as employer and the Director argue, the plain language of the Act and the regulations grant the authority to change a claimant's physician to the district director. *See also Roulst v. Marco Construction Co.*, 15 BRBS 443 (1983).[9]

[8]Pursuant to 20 C.F.R. §701.301(a)(7), the term "district director" is substituted for the term "deputy commissioner" used in the statute.

[9]In *Roulst*, the Board declined to disturb that part of the district director's order which directed the claimant to obtain future medical treatment from a Board-certified orthopedic surgeon. The Board stated that the district director was authorized to order a change of physician under Section 7(b), and moreover, neither party challenged this portion of the Order. *Roulst*, 15 BRBS at 447.

Specifically, the Act provides that a change may be made at the request of an employer if such change is necessary or desirable in the interest of the employee. 33 U.S.C. §907(b).

Although the district director clearly has the authority to change claimant's treating physician, claimant contends the case properly belongs before an administrative law judge as there are disputed factual questions regarding the change. Employer and the Director disagree and argue that the administrative law judge has no role to play in a question arising under Section 7(b). They assert that the resolution of the issue is purely discretionary and, as it involves a discretionary act, it is reviewable on direct appeal to the Board under an "abuse of discretion" standard. The Director maintains that the part of Section 7(b) presently at issue unequivocally provides that the decision of a change of physician rests with the Secretary and her designees and does not involve a determination by an administrative law judge. Thus, the Director concludes that claimant is not entitled to a hearing before an administrative law judge on this matter, but he is entitled to a reconsidered, fully-expressed opinion by the district director.

Claimant contends this case is controlled by the Board's decision in *Sanders*. We disagree. In *Sanders*, the claimant's physician recommended housekeeping assistance as part of his medical treatment to prevent further aggravation of his back condition. The administrative law judge ordered employer to provide such assistance, but, on the motion for modification after the claimant's evaluation by another doctor, the administrative law judge determined that this assistance was no longer necessary. *Sanders*, 31 BRBS at 20. On the Director's appeal, the Board held that the question of liability for housekeeping assistance was properly before the administrative law judge, as opposed to the district director, as resolution of issues involving the necessity of medical treatment or services requires findings of fact and weighing of the evidence. These adjudicative functions rest solely with the administrative law judge. *Id.*, at 21-23; *see also Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989) (the administrative law judge has the authority to determine whether medical treatment is necessary and whether the employer should be held liable for the expenses incurred by the claimant under 33 U.S.C. §907(d) when the claimant sought, but was refused, authorization for treatment). To the contrary, in *Toyer*, 28 BRBS at 347, the Board held that whether the untimely filing of a physician's first report of treatment should be excused for "good cause" or "in the interest of justice" involves the exercise of the Secretary's discretion, and thus is a determination which must be made by her delegate, the district director. *Compare* 33 U.S.C. §907(d)(2) *and* 20 C.F.R. §702.422(b) (1994) *with* 33 U.S.C. §907(d)(4) *and* 20 C.F.R. §702.422(b) (1984) (amended 1985). Deferring to the Director's interpretation, the Board held that, under Section 7(d)(2), the administrative law judge has no authority to excuse an untimely filing of a physician's first report of treatment, as that discretionary authority has been granted to the Secretary, and by delegation to the district director. [10] *Toyer*, 28 BRBS at 355.

[10]The Board stated, however, that if a dispute arose as to whether the report was in

In this case, employer requested a change of claimant's treating physician. The Act authorizes the Secretary, through the district directors, to make such a change "on [her] own initiative or at the request of the employer" when "*in [her] judgment* such change is desirable or necessary in the interest of the employee. . . ." 33 U.S.C. §907(b) (emphasis added). Similar language can be found in Section 7(d)(2) which grants the Secretary the authority to excuse an untimely filed physician's first report "whenever [she] finds it in the interest of justice to do so." 33 U.S.C. §907(d)(2). As the Board held in *Toyer*, this language represents discretionary authority granted by statute solely to the Secretary, who has delegated her authority to the district director. *Toyer*, 28 BRBS at 351-353. Consequently, we hold that the provisions of Section 7(b) make the determination of a change of physicians "in [her] judgment" and "in the interest of the employee" a discretionary one. Thus, the district director alone, and not the administrative law judge, has the authority to change claimant's physician.

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fact timely, the case would have to be referred to an administrative law judge. *Toyer*, 28 BRBS at 353. *See also Glenn v. Tampa Ship Repair & Dry Dock*, 18 BRBS 205 (1986).

In *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting), the majority of the Board held, in an *en banc* decision, that direct appeals to the Board may be taken from an order of a district director when the issues raise a discretionary act of the district director or solely a question of law. As we noted in *Toyer*, 28 BRBS at 354 n.5, where an act is truly discretionary there is no role for the administrative law judge; the administrative law judge's function is to hold a *de novo* hearing and resolve issues, and doing so where the issues involve the exercise of discretion would simply substitute his judgment for that of the district director. In this case, as the district director's decision to change claimant's physician is a discretionary one, it is directly appealable to the Board which will review the decision under the abuse of discretion standard. *Brown*, 30 BRBS at 29. We note that the Director agrees that a district director's order changing a claimant's treating physician is appealable to the Board. Therefore, we reject claimant's contention that this case must be remanded to the administrative law judge for an evidentiary hearing and fact-finding.[11]

While we hold that the district director has the authority to issue an order changing claimant's treating physician, we note that he failed to fully explain his rationale for making the change and choosing Dr. Budorick over Dr. Morales in this instance. Although the district director, in general, mentioned his consideration of employer's request, claimant's objections, and the claims examiner's recommendation, he cited no specifics and gave no reasons for his decision. In particular, the district director did not explain how the change in physician is in the interest of the employee. The failure to provide an explanation makes it impossible for the Board to perform its review function and renders the district director's determination arbitrary and capricious. *See Toyer*, 28 BRBS at 350; *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979). Therefore, we vacate the district director's Order changing claimant's physician, and we remand the case for him to utilize the proper standard and determine whether such a change is "desirable or necessary in the interest of

[11]Claimant identifies four factual issues he believes must be resolved by an administrative law judge. They are: 1) whether Dr. Morales' treatment was beneficial; 2) whether Dr. Budorick is a qualified orthopedist; 3) whether Dr. Budorick's opinion is rational; and 4) whether Dr. Budorick accepted payment from an insurance carrier within the two years prior to examining claimant, thereby disqualifying himself from being an impartial examiner under Section 702.411(c). Contrary to claimant's assertion, the "issues" he raises should be considered by the district director in determining whether it is in claimant's interest to change his treating physician.

[claimant]" and to fully explain his reasons therefor.

Accordingly, the district director's Order is vacated, and the case is remanded for further consideration.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur:

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NANCY S. DOLDER
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring:

I concur in the decision to remand this case to the district director for a proper application of Section 7(b) and a full explanation of his rationale in ordering a change of physician. I am writing separately because I maintain, as I stated in my concurring and dissenting opinion in *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting), that there is no statutory, regulatory or judicial authority permitting a direct appeal from the district director to the Board in any case, including those involving discretionary acts or pure questions of law.[12] I believe that, in general, whenever a district director is unable to informally resolve the dispute between the parties, the case must be referred to an administrative law judge. *Brown*, 30 BRBS at 35-39 (dissenting opinion); *see also Sanders v. Marine Terminals Corp.*, 31 BRBS 19, 24 (1997) (concurring opinion); *Eneberg v. Todd Pacific Shipyards*, 30 BRBS 59, 64-67 (1996) (McGranery, J., concurring and dissenting); *Toyer*, 28 BRBS at 355-359 (McGranery, J., dissenting). Moreover, as I noted in my dissent in *Brown*, there may be some decisions, such as that in the instant case, relating to the Secretary's supervision of medical treatment under Section 7 that may not be subject to review at all because those decisions are made "in [her] judgment." Section 7(b) further provides that choice of a physician shall be as "authorized by the Secretary," the "Secretary shall actively supervise" the employee's medical care, and "shall have authority to determine the

[12]There are only two exceptions to the "three-tier" process. *See* 20 C.F.R. §725.366(a) dealing with attorney fee awards and 20 C.F.R. §725.521(a) dealing with commutations. These are regulations under the Federal Black Lung Act and are not applicable to cases under the Longshore Act.

necessity, character, and sufficiency of any medical aid" furnished to the employee. *See Brown*, 30 BRBS at 38 n.13. As the Order from which this appeal was taken provides no explanation for changing claimant's physician, I agree that the case must be remanded for further consideration and a full explanation.

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JAMES F. BROWN
Administrative Appeals Judge