BRB No. 97-0380

ANA POZOS	)	
	)	
Claimant	)	
	)	
ST. MARY'S HOSPITAL AND MEDICAL CENTER	)	DATE ISSUED: _____
	)	
Respondent	)	
	)	
v.	)	
	)	
ARMY & AIR FORCE EXCHANGE SERVICE	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order and Order Awarding Attorney Fee of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Dorine R. Kohn and Mark P. Epstein (Bjork, Lawrence, Poeschl & Kohn), Oakland, California, for St. Mary's Hospital and Medical Center.

Frank B. Hugg and Wendy B. Hugg, San Francisco, California, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Order Awarding Attorney Fee (95-LHC-462) of Administrative Law Judge Alexander Karst 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.,* as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* 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). The amount of an attorney's fee award is discretionary and

may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured her back on April 6, 1985, while working for employer as a sales clerk at Fort Bliss, Texas, when she fell from a ladder. Claimant, thereafter, filed a claim for benefits under the Act. On March 11, 1987, claimant underwent surgery for a posterior lateral fusion. Claimant and employer entered into a Section 8(i), 33 U.S.C. §908(i)(1994), settlement on July 24, 1989, whereby claimant received a lump sum payment of $33,090 in lieu of employer's liability for future compensation. The parties agreed that the settlement did not discharge employer's liability "for providing medical treatment for the results of this injury in accordance with Section 7 of the Act." Emp. Ex. 1 at 2.

Claimant, who moved to California subsequent to her surgery, continued to suffer from persistent back pain and experienced difficulty in walking. In December 1992, claimant's treating physician referred her to Dr. Glassman, a staff physician at the Department of Rehabilitation Medicine at St. Mary's Hospital and Medical Center (hereinafter St. Mary's). Following a June 16, 1993, examination of claimant, Dr. Glassman diagnosed claimant as suffering from pseudoarthrosis at the L5-S1 level and Grade 2 spondylolisthesis. In a June 16, 1993, letter to CIGNA, employer's claims representative, Dr. Glassman sought authorization for a two-day multidisciplinary evaluation (MDE) at St. Mary's, where a team of specialists would evaluate claimant and formulate a treatment plan. In his letter, Dr. Glassman stated that tests performed on claimant would include an indwelling lumbar epidural block, a likely myelogram/CT, and an EMG nerve conduction study.

On July 19, 1993, a representative from CIGNA notified Dr. Glassman that CIGNA would authorize the two-day hospitalization provided that the physician's request passed the scrutiny of PAC/CSR, CIGNA'S hospital review service.[1] On July 27, 1993, PAC/CSR certified that Dr. Glassman's request was necessary and appropriate for claimant's medical condition. Thereafter, on August 9, 1993, claimant was admitted to St. Mary's. After reviewing the results of the testing performed on August 9, the team of physicians examining claimant determined that additional surgery on claimant's back would be necessary to repair the previous fusion at L5-S1. Drs. Glassman and Zuckerman determined, however, that in order to gauge the extent of the surgical fusion, a discogram was needed.[2] On August 10, 1993, a discogram was performed on claimant by Dr. Hsu.

[1]PAC/CSR, which stands for Pre-Admission Certification/Continued Stay Review, was performed by Intracorp, a subsidiary of CIGNA. Certification signifies only that the medical treatment requested is necessary and appropriate for the medical condition, and, according to employer, is not synonymous with authorization.

[2]A discogram is a test whereby a needle and then dye are inserted into the disc in order to see whether the disc is painful. Tr. at 104-106.

Claimant was discharged from the hospital the next day, with the anticipation that she would undergo surgery within six to eight weeks.

On September 2, 1993, claimant was admitted to St. Mary's emergency room with fever, chills and severe discomfort in her lower back. It was later determined that claimant had contracted nosocomial discitis, an infection caused by the August 10, 1993 discogram. Claimant remained hospitalized at St. Mary's through September 17, 1993. In a letter dated September 8, 1993, PAC/CSR initially certified claimant's September 1993 admission to St. Mary's as related to her work injury; however, prior to claimant's discharge, on September 14, 1993, PAC/CSR revoked the certification based upon its determination that claimant's September hospital stay was not related to her compensable injury.[3] Employer subsequently refused to pay for claimant's September hospitalization, though it did pay for claimant's post-discharge home infusion therapy. Thereafter, St. Mary's filed a claim for medical benefits under Section 7 of the Act, 33 U.S.C. §907, seeking payment of $43,417.18 for the costs it incurred in treating claimant from September 2 through September 17, 1993, for the disc infection she contracted as a result of the August 10, 1993 discogram.

In his Decision and Order, the administrative law judge, relying on *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993), initially rejected employer's contention that he lacked jurisdiction to hear St. Mary's claim. The administrative law judge then found, contrary to employer's assertion, that St. Mary's in fact requested and received authorization from employer to perform the August 10, 1993 discogram on claimant. Accordingly, the administrative law judge found that employer is liable to St. Mary's for the cost of treating claimant for her resultant discitis. Assuming, *arguendo,* that employer did not authorize the discogram, the administrative law judge determined that the discogram was a reasonable and necessary procedure for St. Mary's to have performed and, therefore, employer is liable to St. Mary's for the cost of claimant's September 1993 hospitalization under that theory as well. Accordingly, the administrative law judge found employer liable to St. Mary's under Section 7 of the Act in the amount of $43,417.18, for St. Mary's treatment of claimant from September 2 through September 17, 1993, plus interest.

[3]Claimant eventually underwent a laminectomy on September 1, 1994.

Subsequent to the administrative law judge's Decision and Order, St. Mary's counsel filed an attorney's fee petition with the administrative law judge seeking a fee of $50,387.50, representing 355.5 hours of legal services performed at hourly rates of $150 for lead counsel, $135 for two associate counsel, and $65 for two paralegals, and $1,932.50 in expenses. Thereafter, employer filed objections to the petition. St. Mary's requested an additional fee in the sum of $592.50 in connection with its response to employer's objections. In an Order Awarding Attorney Fee, the administrative law judge reduced the number of hours sought for time devoted to preparing the original fee petition,[4] rejected all other objections to the fee petition "on the grounds recited in the responses to the objections," approved counsel's request for time devoted to the response to the objections, and thereafter awarded St. Mary's counsel an attorney's fee of $50,413.

On appeal, employer challenges the administrative law judge's determination that it is liable to St. Mary's for claimant's September 1993 hospitalization. Specifically, employer argues that St. Mary's had no standing to file a claim under the Act for medical benefits, and thus, the administrative law judge lacked jurisdiction to hear the claim. Alternatively, employer contends that the administrative law judge erred in finding that St. Mary's requested and received authorization from employer to perform a discogram on claimant on August 10, 1993, and, therefore, since that procedure had not been authorized, it should not be liable for the treatment of claimant's resultant discitis in September 1993. Employer further asserts that the discogram performed on claimant was not reasonable and necessary, and even if it was, employer would still not be liable for the treatment of claimant's discitis. In a supplemental appeal, employer contends that the administrative law judge's award of an attorney's fee to St. Mary's counsel payable by employer was improper. St. Mary's responds to both appeals, urging affirmance of the administrative law judge's decisions.

We first address employer's contention that the administrative law judge lacked jurisdiction to hear the instant case. In his Decision and Order, the administrative law judge rejected employer's assertion that it was protected from St. Mary's claim by the doctrine of sovereign immunity. Finding that claimant had not forfeited her rights to medical benefits, the administrative law judge reasoned that St. Mary's could enforce claimant's rights by filing a claim for medical benefits pursuant to the decision of the Ninth Circuit in *Hunt*. On appeal, employer asserts that St. Mary's has no standing to bring a claim against it under the Nonappropriated Fund Instrumentalities Act, as any question regarding its liability to St.

[4]In his Order, the administrative law judge sustained employer's objections to "two 4.2 hours" devoted to preparation of the original fee petition on October 29 and 31, 1996. According to the fee petition, a total of 5 hours was spent by counsel in preparation of the fee petition.

Mary's lies exclusively before the Court of Federal Claims pursuant to 28 U.S.C. §1346. Specifically, employer argues that *Hunt* is distinguishable from the instant case since claimant has already received her disability benefits, employer continues to pay her medical expenses related to her injury, and St. Mary's has not intervened on claimant's behalf and therefore does not stand in claimant's shoes.

Employer's arguments are without merit. In *Hunt*, the claimant's physicians, Dr. Hunt and Dr. DiPalma, intervened in claimant's claim for benefits, seeking payment for medical services rendered after the date the employer ceased paying benefits. The administrative law judge held the employer liable for disability and medical benefits; however, he denied the doctors interest on overdue medical expenses, and he denied them an attorney's fee. The Board affirmed the administrative law judge's denial of both interest and an attorney's fee to the doctors. *Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240, 243-244 (1991).

The United States Court of Appeals for the Ninth Circuit, on the doctors' appeal, deferred to the Director's positions that interest is payable on sums owed for medical services, and that the claimant's physicians were entitled to recover an attorney's fee. With regard to attorney's fees, the court began its analysis with Section 28(a) of the Act, which provides that in cases where the employer controverts liability, attorney's fees may be paid, "in addition to the award of compensation," to a "person seeking benefits" who successfully prosecutes a claim under the Act. 33 U.S.C. §928(a). Observing that the words "benefits" and "compensation" are synonymous, the court adopted the Director's interpretation that Section 7(d)(3) of the Act, 33 U.S.C. §907(d)(3)(1994),[5] grants medical providers standing to "seek benefits" on behalf of an employee where the benefits are owed to the provider for medical services rendered. Thus, the court held that medical providers suing for compensation under Section 7(d)(3) of the Act are "person[s] seeking benefits" for purposes of Section 28(a), and therefore, may be entitled to an attorney's fee. *Hunt*, 999 F.2d at 423-424, 27 BRBS at 90-91 (CRT).

Contrary to employer's assertion, St. Mary's action against it for medical benefits is clearly derivative of claimant's claim for benefits. In the instant case, claimant filed a claim for both compensation and medical benefits based on her work-related back injury. Though the parties entered into a settlement agreement with regard to compensation benefits, the settlement specifically did not discharge employer from its liability for medical benefits. Emp. Ex. 1. As employer has refused to pay for St. Mary's treatment of claimant for her discitis, which resulted from a discogram performed as a result of her work-related back condition, St. Mary's is now seeking to recover *claimant's* medical benefits to the extent that the benefits are owed to the provider in satisfaction of unpaid bills, a right it has under Section 7(d)(3) of the Act. *See Hunt*, 999 F.2d at 424, 27 BRBS at 91 (CRT).

[5]Section 7(d)(3) states: "The Secretary may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee."

Employer's argument that St. Mary's claim is not covered under the Nonappropriated Fund Instrumentalities Act (the Act) is rejected. The Act provides that compensation under the Longshore and Harbor Worker's Compensation Act (the Longshore Act) is the exclusive remedy against both the United States and the nonappropriated fund employer for injuries "arising out of and in the course" of an employee's employment. 5 U.S.C. §8173; 33 U.S.C. §902(2). In the instant case, it is undisputed that employer is a nonappropriated fund employer and that claimant suffered an injury covered by the Longshore Act, as extended by the Act. In fact, employer entered into a Section 8(i) settlement with regard to claimant's injury, and agreed to be liable for medical benefits related to the injury. Emp. Ex. 1. The question of whether the treatment claimant received is related to her injury pursuant to Section 7 of the Act is within an administrative law judge's authority. An action brought under the Federal Tort Claims Act to recover medical benefits would be barred by the Act.[6] *See Vilanova v. Unites States*, 851 F.2d 1, 21 BRBS 144 (CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 1016 (1989); *Aetna Life Insurance Co. v. Harris*, 578 F.2d 52 (3d Cir. 1978); 5 U.S.C. §8173. Accordingly, the administrative law judge's finding that he had jurisdiction to hear St. Mary's claim is affirmed.

With regard to the merits of the case, employer challenges the administrative law judge's conclusion that it is liable to St. Mary's for the cost of claimant's hospitalization and treatment for discitis from September 2 through September 17, 1993, which was caused by the discogram performed during the previous month. Specifically, employer contends that the administrative law judge erred in finding that it authorized the August 10, 1993 discogram and, therefore, that it is liable for claimant's September 1993 hospitalization. We disagree. In order to be entitled to medical expenses, claimant must first request employer's authorization pursuant to Section 7(d) of the Act, 33 U.S.C. §907(d). *See Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989). Under Section 7(d), an employee is entitled to recover medical benefits if she requests employer's authorization for treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. *See Schoen v. U.S. Chamber of Commerce*,

[6]In a letter dated December 23, 1993, employer sought a settlement of the issue, proposing that if St. Mary's agreed to "write off" the contested charges, it would abandon its efforts to seek reimbursement for the cost of discitis treatment. Employer stated that if this was not acceptable, "then St. Mary's will have to pursue an order of payment from the U.S. Department of Labor." *See* St. Mary's Exhibit K. Thus, in December 1993, employer believed that an attempt by St. Mary's to seek payment for claimant's September 1993 hospitalization would be covered under the Act.

30 BRBS 112, 113 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 23 (1989); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986); 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406. Moreover, the Board has held that where a surgical procedure is work-related, any complications or conditions stemming from the procedure are also work-related, and thus, compensable. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989).

While conceding that the MDE performed in August 1993 was necessitated by claimant's work-related back condition, and that it in fact authorized that two-day evaluation, employer asserts that claimant's request for authorization did not specifically include the discogram performed on August 10, 1993, and therefore, authorization was not given for it. In finding that St. Mary's sought authorization, and that employer provided authorization for the discogram, the administrative law judge did not interpret Dr. Glassman's June 16, 1993, letter to CIGNA as excluding other unlisted procedures. *See* Emp. Ex. 2. In support of this interpretation, the administrative law judge credited the testimony of Ann Merrill, a representative of St. Mary's, who testified that when seeking authorization for an MDE, it is her practice to explain to insurance companies that the doctors may decide to perform procedures not listed in the written request, and that it is her belief that such an explanation was given in this case when she left a phone message with CIGNA. *See* Tr. 244-245, 270-271. Thus, the administrative law judge found that St. Mary's sought authorization for a two-day hospital stay to perform an MDE of claimant's back condition consisting of any diagnostic test considered appropriate, including a discogram.

The administrative law judge further found that by virtue of CIGNA's letter of July 19, 1993, employer gave authorization for the subsequent discogram. In that letter, Sandra Hughes, a claim's representative with CIGNA, stated: "We will authorize this two day evaluation providing that your request passes the scrutiny of PAC-CSR reasonable and necessary review." Emp. Ex. 3. The administrative law judge rejected as contradictory Ms. Hughes' testimony that her letter authorized only the specific tests listed in Dr. Glassman's letter, and concluded that this July 19, 1993, letter authorized a multidisciplinary evaluation without any express or implied restrictions as to the type of tests she was authorizing. Decision and Order at 10.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of witnesses, and may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Based upon the record before us, we cannot say that the administrative law judge erred in crediting the testimony of Ms. Merrill over that of Ms. Hughes, and in interpreting Dr. Glassman's June 16, 1993, letter as a request to perform a multi-disciplinary evaluation without restrictions. Accordingly, we affirm the administrative law judge's conclusion that St. Mary's requested, and employer provided, authorization for the discogram, as that determination is rational and supported by substantial evidence.

Moreover, we affirm the administrative law judge's finding that the August 10, 1993, discogram was a reasonable and necessary procedure, thereby making employer liable for the cost of treating claimant's discitis on this basis as well. In so finding, the administrative law judge credited the opinions of Drs. Hsu, Bueff and Glassman that a discogram was necessary in claimant's situation in order to facilitate her eventual back surgery, *see* SM Ex. O at 57-60; Tr. at 88-89, 108, 110-111, 115-117, over the contrary opinion of Dr. Bernstein,

noting Dr. Bernstein's testimony that reasonable physicians can differ as to whether a discogram is necessary. Tr. at 363-364. Moreover, the administrative law judge found the opinions of Drs. Hsu, Beuff and Glassman supported by the Position Statement on Discography, wherein the Executive Committee of the North American Spine Society stated that discograms are an important procedure in the field of spinal care. *See* SM Ex. N. We hold that the administrative law judge's decision to credit the opinions of Drs. Hsu, Beuff and Glassman, over the contrary opinion of Dr. Bernstein, is rational and within his authority as factfinder, and affirm the administrative law judge's finding that the discogram performed on claimant was a reasonable and necessary procedure. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Wheeler v. Interocean Stevedoring Co.*, 21 BRBS 33 (1988). Consequently, we affirm the administrative law judge's determination that employer is liable for the treatment of claimant's discitis.

Lastly, employer challenges the attorney's fee awarded to St. Mary's counsel. Specifically, employer contends that the award is excessive in relation to the amount of medical benefits awarded to St. Mary's, and is not commensurate with the uncomplicated nature of the case. Employer requests that the case be remanded to the administrative law judge for further analysis, as the administrative law judge failed to address any of employer's contentions regarding duplicative billing, excessive time and unrelated services, and did not indicate whether he considered any of the factors specified in 20 C.F.R. §702.132 of the regulations.

In its objections to counsel's fee petition before the administrative law judge, employer objected to 57 hours requested by counsel, in the amount of $7,883, and $560.30 in costs. It did not contend, however, that the award was excessive in relation to the amount of medical benefits awarded, nor did it argue that the award was excessive in relation to the uncomplicated nature of the case. As these contentions were not raised below, we need not address them. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.2d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

In the instant case, the administrative law judge reduced the number of hours sought by claimant's counsel in preparing the original fee petition, but rejected all other objections to the fee petition "on the grounds recited in the responses to the objections." We decline to further reduce or disallow the hours addressed by the administrative law judge, as employer's assertions are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard. *See Maddon v. Western*

Asbestos Co., 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1991).

Accordingly, the administrative law judge's Decision and Order and Order Awarding Attorney Fee are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge