BRB No. 08-0508

J.R.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BOLLINGER SHIPYARD, INCORPORATED	)	DATE ISSUED: 12/19/2008
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

Danilo Peralta, Metairie, Louisiana, lay representative for claimant.

Kevin A. Marks and Jessie Schott Haynes (Galloway, Johnson, Tompkins, Burr & Smith), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2007-LHC-1112) 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, who was hired by employer to work as a pipefitter in March 2003, sustained injuries to his back and ribs as a result of an on-the-job accident on October 22, 2003. Claimant, who was initially diagnosed with lumbar and chest contusions, continued to work for employer, performing light-duty jobs in its tool room for an additional three or four weeks. However, persistent pain prompted claimant to quit this work on or about November 18, 2003. He has not worked since that time. Having seen no improvement in his condition, claimant visited an orthopedist, Dr. Hamsa, who thereafter became his regular treating physician. Based on an MRI performed on December 30, 2003, Dr. Hasma diagnosed a disc rupture at L5-S1 and a probable disc rupture at L4-5. Dr. Hasma opined that claimant was unable to work, he prescribed pain medication and physical therapy, and he recommended epidural steroid injections, along with surgical intervention.

On August 27, 2004, Dr. Nutik stated that he concurred with the recommendation for epidural steroid injections, but that he would otherwise try to avoid surgery on this patient since he felt that any surgery would not yield a good result. In follow-up, Dr. Nutik recommended, on August 7, 2007, that due to the failure to improve with conservative treatment, additional diagnostic testing and treatment, including a possible decompression of the disc at L5-S1 and fusion from L4 to the sacrum, would be in order, although he again expressed concern about the eventual outcome of any surgery because there appears "to be significant disability related behavior on the part of the patient." Employer's Exhibit (EX) 4.

Employer paid temporary total disability benefits from November 19, 2003, through November 1, 2005, and some medical benefits but refused to authorize the surgery recommended by Dr. Hamas. Claimant thereafter filed a claim seeking additional benefits under the Act. Additionally, claimant refused to see employer's vocational expert, Larry Stokes, Ph.D., and admitted not looking for work since the date of his injury because of his significant pain. Dr. Stokes, nonetheless, prepared an assessment and identified a number of positions which he believed would be suitable for claimant given his post-injury condition and general capabilities.

In his decision, the administrative law judge found that claimant is unable to work due to the severe pain associated with his October 22, 2003, back injury. In making this determination, the administrative law judge rejected employer's argument that claimant is not entitled to any additional compensation because of his status as an illegal alien. He thus found claimant entitled to temporary total disability benefits,[1] based on an average

[1] The administrative law judge found that claimant is not at maximum medical improvement due to his need for back surgery. The administrative law judge also found that claimant is entitled to interest on accrued unpaid compensation, and that employer is

weekly wage of $568, as calculated pursuant to Section 10(c), 33 U.S.C. §910(c), and medical benefits from October 22, 2003.

On appeal, employer challenges the ALJ's award of temporary total disability and medical benefits. Claimant responds, urging affirmance.[2] Employer has filed a reply brief, reiterating the arguments it has raised on appeal.

Employer argues that the administrative law judge erred in finding that claimant is entitled to temporary total disability benefits. Employer first contends that it properly terminated claimant's disability benefits as of November 1, 2005, because of claimant's continued refusal to participate in vocational rehabilitation. In this regard, employer argues that the administrative law judge ignored Dr. Stokes's testimony that he attempted to contact claimant on multiple occasions to arrange for vocational rehabilitation counseling, and furthermore, that the administrative law judge did not address claimant's refusal to meet with its vocational expert, Dr. Stokes, despite these numerous attempts to advise claimant. Employer also contends that the administrative law judge did not sufficiently address the vocational report of Dr. Stokes identifying suitable alternate employment prior to finding that claimant is entitled to total disability benefits.

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entitled to a credit for the voluntary temporary total disability benefits it paid between November 19, 2003, and November 1, 2005.

[2] Claimant also requests that the Board "award claimant the lay representative fee for services on record to the [Office of Administrative Law Judges] and to the Benefits Review Board" under 33 U.S.C. §928. In his decision, the administrative law judge allowed "claimant's counsel" 30 days to submit an application for "attorney's fees." Decision and Order at 16. As Sections 28(a) and (b) of the Act, 33 U.S.C. §928(a), (b), refer to attorney's fees, employer cannot be held liable for work performed by a lay representative. *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976); *see also Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001). Thus, any fees awarded to a lay representative are the responsibility of claimant. *Id.* Moreover, the Board does not have authority to award any fees for work performed at the administrative law judge level. *Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd sub nom. Kahny v. Director, OWCP*, 729 F.2d 777 (5th Cir. 1984) (table).

Employer further argues that claimant's violation of the Immigrant Reform and Control Act, 8 U.S.C. §1101 *et. seq.*, which could lead to his deportation, prevents him from receiving benefits under the Act. Employer proffers that claimant admitted that he is an illegal alien who has unlawfully resided and worked in the United States for the past seventeen years, and that his status as an illegal alien establishes that he has no legal wage-earning capacity. As such, employer contends that the administrative law judge wrongly rejected its assertion that an undocumented alien cannot achieve legitimate employment.

It is well established that where, as in the instant case, claimant has established a *prima facie* case of total disability by demonstrating his inability to perform his usual employment duties with employer, the burden shifts to employer to establish the availability of suitable alternate employment.[3] *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that in order to meet this burden, employer must establish that job opportunities are available within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir.), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Turner*, 661 F.2d 1031, 14 BRBS 156.

Substantial evidence supports the administrative law judge's finding that claimant is incapable of performing any work. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005). In reaching this conclusion, the administrative law judge rationally accorded greatest weight to claimant's description of the back pain he experienced since the October 22, 2003, accident, *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), along with the opinion of his treating physician, Dr. Hamsa, who has consistently stated that the October 22, 2003, back injury prevents claimant from performing any work. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 741 (5th Cir. 1962). Specifically, the administrative law judge found that claimant's ongoing use of medication and steroid injections combined with the objective evidence that he has a disc herniation and limited motion supports the

[3] It is undisputed that claimant cannot return to his pre-injury work for employer as a ship fitter, as Drs. Hamsa and Nutik concur in this assessment.

conclusion that claimant is unable to perform any work. As the administrative law judge's finding that claimant is entitled to temporary total disability due to his persistent pain as a result of his October 22, 2003, work injury is rational and supported by substantial evidence, it is affirmed. *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT)*; see also SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

The administrative law judge's finding that claimant is incapable of performing any employment renders employer's vocational evidence, consisting of the report of Dr. Stokes, moot. *Id.* Nonetheless, we reject employer's contention that the administrative law judge erred by ignoring Dr. Stokes's testimony that claimant did not cooperate with his efforts to provide vocational rehabilitation. A claimant's refusal to cooperate with employer's vocational expert is a factor which should be considered by the administrative law judge in evaluating the expert's testimony. *See Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989); *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985), *aff'd on recon.*, 17 BRBS 160 (1985). The administrative law judge explicitly acknowledged that Dr. Stokes "testified that he tried on a number of occasions to obtain a vocational assessment of claimant but claimant never showed for any scheduled evaluation." Decision and Order at 5. The administrative law judge found that Dr. Stokes was nevertheless able to prepare a vocational assessment and identify possible suitable alternate employment following a review of claimant's medical reports and vocational skills and background. As the administrative law judge rationally found, however, that claimant is medically unable to work at all, he was not required to assess the evidentiary weight to be accorded this vocational assessment, and thus claimant's failure to cooperate with Dr. Stokes does not affect claimant's disability.

Employer's argument that claimant's status as an illegal alien precludes him from receiving benefits under the Act is likewise without merit. In addressing this contention, the administrative law judge initially found, based on the decision cited by employer, *i.e.*, *Hernandez v. M/V Rajaan*, 848 F.2d 498 (5th Cir. 1988), that employer presented no evidence that claimant "was about to be deported or would surely be deported" in order to establish that he has no legal wage-earning capacity. In *Hernandez*, which involved an illegal alien longshoreman bringing a damage action against a ship owner under Section 5 of the Act, 33 U.S.C. §905, to recover damages for personal injuries, the Fifth Circuit held that "[o]nce Hernandez proved his prior wages in the United States, the burden shifted to Dianella (vessel owner) to establish that the use of past wages was factually improper. Because Dianella presented no proof that Hernandez was about to be deported or would surely be deported, the [lower] court did not err in basing its awards on Hernandez's past earrings." *Hernandez*, 848 F.2d at 500. Reviewing the evidence of claimant's residency status in terms of *Hernandez*, the administrative law judge found claimant's testimony establishing that he is, in fact, an illegal alien and that he falsified

documents in order to come into the United States and obtain employment therein, insufficient to establish that claimant's deportation was imminent. *See generally Hernandez*, 848 F.2d at 500.

Additionally, the administrative law judge, citing *Rivera v. United Masonry, Inc.*, 948 F.2d 774, 25 BRBS 51(CRT) (D.C. Cir. 1991), *aff'g* 24 BRBS 78 (1990), appropriately concluded that "the issue of illegal alienage" does not affect compensation entitlement under the Act. In *Rivera*, 948 F.2d 774, 25 BRBS 51(CRT), the United States Court of Appeals for the District of Columbia Circuit affirmed the Board's decision holding that a claimant's status as an illegal alien was not a proper factor for consideration in determining the availability of suitable alternate employment. *Rivera*, 948 F.2d at 775-776, 25 BRBS at 54(CRT). Specifically, the Board rejected claimant's argument that his status made suitable post-injury jobs unavailable and held that the availability of suitable alternate employment must be determined without consideration of illegal status as such a factor would permit an injured employee who was working illegally to obtain a benefit that a legal employee would not get given the same physical capabilities.[4] *Rivera*, 24 BRBS at 82; *see generally Licor v. Washington Metro. Area Transit Auth.*, 879 F.2d 901, 22 BRBS 90(CRT) (D.C. Cir. 1989) (D.C. Circuit held that the administrative law judge erred in relying on claimant's disingenuous statement on a loan application regarding his earnings, as other evidence of record indicated claimant's *lawful* wage-earning capacity was substantially less than that figure); *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003)(employer sought discovery of claimant's INS records; case remanded for administrative law judge to, *inter alia*, address relevance of these records).

Moreover, employer has not provided any support for its assertion that claimant's status as an illegal alien precludes his entitlement to benefits under the Act. The definition of "employee" does not differentiate between individuals based on their citizenship status. Rather, Section 2(3) of the Act, 33 U.S.C. §902(3), in pertinent part, states that "[t]he term 'employee' means *any* person engaged in maritime employment. . . ." (emphasis added). Additionally, while the definition includes specific exceptions to the term "employee," none of those exceptions precludes coverage based on an

[4] Pursuant to *Rivera*, if the medical evidence established claimant's ability to perform some work, employer's vocational evidence would be considered without regard to whether claimant is an illegal alien; such status is not a factor like age, education and work experience to be applied in addressing whether jobs are suitable or realistically available. Thus, employer's assertion that it cannot show suitable alternate employment due to claimant's status is without merit.

individual's citizenship or immigration status.[5] Furthermore, Section 9(g) of the Act, 33 U.S.C. §909(g), and its implementing regulation, 20 C.F.R. §702.142, state that compensation paid to aliens not residents, or about to become nonresidents, of the United States or Canada "shall be in the same amount as provided for residents," with certain exceptions relating to a claimant's dependents in a foreign country and a provision allowing the Secretary to commute future payments. Thus, the Act does not differentiate between the disability compensation paid to illegal aliens and that paid to legal residents and/or citizens of the United States. Consequently, we reject employer's contention that claimant's status as an illegal alien precludes claimant's entitlement to benefits. Thus, we affirm the administrative law judge's finding that claimant is entitled to an ongoing award of temporary total disability benefits from October 23, 2003.

Employer next argues that the administrative law judge erred in awarding claimant medical benefits for all work-related treatment recommended by Dr. Hamsa, including back surgery, open MRI testing and orthopedic devices. Claimant establishes a *prima facie* case for compensable medical treatment where a qualified physician states that treatment is necessary for a work-related condition. *Monta*, 39 BRBS 104; *see also Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). In order for medical care to be compensable, it must be appropriate for the injury, *see* 20 C.F.R. §702.402, and the administrative law judge has the authority to determine the reasonableness and necessity of medical treatment. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002). In his decision, the administrative law judge found that Dr. Hamsa recommended back surgery, additional open MRI testing, and orthopedic supplies, and that although Dr. Nutik expressed reservations about the success of the back surgery due to claimant's alleged symptom magnification, he nevertheless recognized the need for such a procedure based on the objective MRI evidence of one significant disc herniation with a possible second disc herniation.

The record supports the administrative law judge's findings regarding the need for surgical intervention. Contrary to employer's contention, the record establishes that Dr. Hamsa recommended an open MRI and that claimant undergo surgery in an attempt to ameliorate the pain caused by his work-related back condition. Claimant's Exhibit (CX) 3. Specifically, in his earlier reports, Dr, Hamsa stated that claimant would likely need surgery to alleviate the pain resulting from the back condition documented by the MRI dated December 30, 2003. CX 3. In his most recent opinion, dated August 24, 2007, Dr.

[5] Employer asserts that claimant should not obtain benefits because he has "no legal wage-earning capacity." However, it is undisputed that claimant was working for employer and earning wages when he was injured in that employment. Absent a statutory exclusion, which Congress clearly provided for specified types of employees, claimant must be treated as other injured workers for purposes of the Act.

Hamsa opined that claimant required "surgical intervention of necessity," and reflected that this was "a recommendation which we have made so very many months ago." CX 3. Furthermore, Dr. Hamsa opined that claimant's lumbar condition warranted the use of orthopedic devices, *i.e.*, a cane and back brace.

Similarly, Dr. Nutik's report dated February 10, 2004, indicated that an initial course of treatment involving epidural steroid injections and rehabilitative exercises was in order, but if that provided no improvement in claimant's condition, "further consideration may be needed for a surgical decompression at the herniated L5-S1 disc." EX 4. In his follow up report dated August 7, 2007, Dr. Nutik stated that "with the failure to improve with conservative treatment up to this point in time," he felt "that one needs to consider additional treatment which could include decompression of the disc at L5-S1 and fusion from L4 to the sacrum." EX 4. Consequently, substantial evidence supports the administrative law judge's finding that the additional open MRI testing, back surgery and orthopedic supplies, consisting of a cane and back support, are recommended for the treatment of claimant's work-related back injury. Thus, the award of medical benefits in this case is affirmed.[6] *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997).

Lastly, we reject employer's contentions that the administrative law judge erred in awarding claimant interest on accrued unpaid compensation benefits, and that the district director erred in awarding claimant's prior counsel an attorney's fee in this case. Employer's arguments on both issues are premised on its position that the administrative law judge improperly awarded benefits in this case which we have rejected. Furthermore, we note the district director's award of an attorney's fee in this case was not appealed and therefore is not properly before the Board.

[6] Employer also seeks clarification that claimant is not entitled to any medical treatment relating to his alleged neck, shoulder and headache conditions because those conditions are not work-related. Although the administrative law judge acknowledged, but did not specifically address, employer's contention that claimant is not entitled to medical benefits for any alleged neck, shoulder or headache conditions, it is clear from the record in this case that claimant has not sought, and that the administrative law judge has not awarded, medical benefits relating to claimant's cervical or headache conditions. In particular, the administrative law judge specifically ordered employer to pay for claimant's "back surgery, open MRI testing, [and] orthopedic devices (cane and back brace) recommended by Dr. Hamsa," treatment entirely attributable to claimant's lower to mid-back injury. Decision and Order at 15.

Accordingly, the administrative law judge's Decision and Order Granting Benefits 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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BETTY JEAN HALL
Administrative Appeals Judge