BRB Nos. 98-1565
and 98-1565A

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| LIONEL MUSE | ) | |
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| Claimant-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| AVONDALE INDUSTRIES, INCORPORATED | ) | DATE ISSUED: 8/18/99 |
| | ) | |
| | ) | |
| Self-Insured | ) | |
| Employer-Petitioner | ) | |
| Cross-Respondent | ) | DECISION and ORDER |

Appeals of the Decision and Order Granting Benefits, the Order Denying Employer's Petition for Reconsideration, and the Supplemental Decision and Order -- Awarding Attorney's Fees of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

B. Gerald Weeks (Weeks, Kavanagh & Rendeiro), New Orleans, Louisiana, for claimant.

Richard S. Vale (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits and the Order Denying Employer's Petition for Reconsideration, and claimant appeals the Supplemental Decision and Order -- Awarding Attorney's Fees (94-LHC-1909) of Administrative Law Judge James W. Kerr, Jr., 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).

The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured on June 3, 1992, during the course of his employment, when he tripped over an air wire and fell, hurting his left knee, left elbow and his back. Jt. Ex. 1; Tr. at 25. He attempted to return to work after a short period, but was unable to do so. Tr. at 26-28. Over the course of several years, he had undergone four different surgeries related to his work injury: arthroscopy on the left knee, an ulnar transposition on the left elbow, and two back surgeries, both of which were considered failures. Emp. Exs. 4-5. A third back surgery, a cage procedure, is currently recommended; however, doctors have been unable to perform this operation due to claimant's unstable heart condition. *See* Emp. Exs. 21 at 11-12, 23 at 43.

The administrative law judge found that claimant is permanently totally disabled and awarded benefits accordingly. Specifically, he stated that claimant's disability is permanent because, under *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), it "has lasted for a lengthy period of time and appears to be of a lasting or indefinite duration." Decision and Order at 31. The administrative law judge found that claimant's disability is total because he has not been released to return to any form of work by his doctors, Drs. Davis, Manale and Watermeier, and one vocational rehabilitation counselor, Mr. Roberts, opined that claimant's prognosis for performing even sedentary work was poor. *Id.* at 31-32. The administrative law judge then denied employer's motion for reconsideration. Employer appeals the award of permanent total disability benefits, and claimant responds, urging affirmance. BRB No. 98-1565.

Subsequently, claimant's counsel filed a petition for an attorney's fee of $34,860, representing 199.2 hours at an hourly rate of $175 for work performed between April 15, 1993, and July 30, 1998. Employer filed objections, and the administrative law judge reduced the hourly rate to $125, denied a fee for all services performed before July 9, 1997, and disapproved time for preparing the fee petition. Consequently, he awarded counsel a fee of $9,450 for 75.6 hours at an hourly rate of $125. Supp. Decision and Order. Claimant appeals the fee award, and employer responds, urging affirmance. BRB No. 98-1565A. Employer also responded by filing a supplemental appeal of the fee award.[1]

[1]Employer's supplemental appeal duplicates its response to claimant's appeal, raising no new issues.

Initially, we reject employer's contentions regarding the administrative law judge's determination as to the nature and extent of claimant's disability. It is well-established that a disability is considered permanent when it continues for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson*, 400 F.2d at 654. Moreover, the prognosis that a condition may improve in the future does not preclude a finding of permanency. *Id.* In this case, claimant's injury occurred in 1992, and he has not worked since then. He has undergone two operations which failed to alleviate his back problems, and he underwent knee and elbow surgeries. Cl. Exs. 1-2; Emp. Exs. 21, 23. Further, Drs. Manale and Watermeier recommend that claimant undergo a third operation on his back once his unrelated heart condition improves. Emp. Exs. 5, 21, 23. Although surgery is potentially pending, doctors have stated that its purpose is to alleviate pain and to stabilize the spine; it will not cure claimant's problems. Thus, the recommendation for surgery and its potential for improving claimant's condition do not preclude the administrative law judge's determination that claimant's condition is permanent. As the finding of permanency comports with the rule espoused in *Watson*, is supported by substantial evidence, and is reasonable, we affirm it. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57 (CRT) (5th Cir. 1996); *Mills v. Marine Repair Service*, 21 BRBS 115 (1988), *modified on other grounds*, 22 BRBS 335 (1989).

With regard to the extent of claimant's disability, we first note that it is uncontroverted that claimant cannot return to his usual work. Thus, claimant has established a *prima facie* case of total disability. *See Armand v. American Marine Corp.*, 21 BRBS 305 (1988). Once claimant establishes an inability to return to his usual work, the burden shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). However, if the administrative law judge finds, based on medical opinions, that claimant is not able to perform any work, then employer has not established the availability of suitable alternate employment. *Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

In this case, the administrative law judge found that claimant has not been released to return to any work by his doctors, and that his prognosis for performing sedentary work is poor. Decision and Order at 31-32. Substantial evidence of record supports this finding, and it will not be disturbed. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991). Specifically, in 1997, Dr. Davis, claimant's original treating physician, stated that claimant cannot perform any job. Cl. Ex. 1. Dr. Manale, who took over claimant's care upon Dr. Davis' retirement, stated in 1998 that claimant has not been released to any work, Emp. Ex. 23, Dr. Sanders, claimant's psychiatrist, stated that claimant's prognosis for returning to work is poor, Emp. Ex. 22 at 21, 26, and Dr.

Watermeier, who will perform the cage procedure, has stated that claimant is permanently totally disabled, Emp. Ex. 5. Additionally, Mr. Roberts, a rehabilitation counselor, conducted tests and determined that claimant was unable to sustain work functions after three hours or so; therefore, his prognosis for performing sedentary work was poor. Tr. at 101-103.

Nevertheless, employer argues that claimant can perform alternate work because Dr. Manale stated that he would not disapprove if claimant wished to attempt sedentary work, and other doctors who examined claimant believed he could perform sedentary work. Emp. Exs. 18 at 29, 21 at 11-12, 22 at 26-28, 23 at 34. Therefore, according to employer, the administrative law judge should have considered the suitable alternate employment evidence it put forth. We disagree. While those doctors cited by employer may have espoused opinions concerning the level of activity claimant could attempt, this, as the administrative law judge found, is not the equivalent of releasing claimant for work. Moreover, the administrative law judge credited claimant's physicians and the opinion of Mr. Roberts, over the opinions of non-treating physicians, *see Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988), and reasonably concluded that because claimant has not been released to return to any form of work and because his vocational rehabilitation prognosis is poor, he is totally disabled. As the administrative law judge relied on the medical opinions which stated that claimant cannot work, there was no need for him to address employer's vocational evidence pertaining to suitable alternate employment. *Lostaunau*, 13 BRBS at 227. Accordingly, we affirm the administrative law judge's determination that claimant's disability is permanent and total.

Next, we address the appeal of the attorney's fee award. Specifically, claimant contends that the administrative law judge erred in reducing the hourly rate, disapproving all work performed before July 9, 1997, and denying time for preparing the fee petition. Employer responds, urging affirmance of the fee award.

Claimant first contends the administrative law judge erred in disapproving all work performed before July 9, 1997. The administrative law judge, noting that the case was referred to the Office of Administrative Law Judges (OALJ) on July 9, 1997, disallowed all work before that date. However, according to claimant, a portion of the time requested in the petition represented work previously performed before the OALJ. Specifically, claimant avers that employer originally refused to pay for one of his surgeries and he was forced to request a formal hearing. Prior to the hearing, employer agreed to pay, and the case was remanded to the district director. Thus, claimant contends this case was before the OALJ from February 23, 1994, through April 7, 1995,[2] and work performed during that time

[2]Employer does not dispute this. Rather, it argues that claimant should have filed a fee petition at that time. However, there is no limit on the time in which to file a petition for

resulted in claimant's successful recovery of the costs of surgery. Because claimant's case was previously before the OALJ, during which time he succeeded in obtaining additional benefits, and as the OALJ is the only entity with the authority to award a fee for services performed before it, the administrative law judge erred in failing to consider the fee requested for services performed during that time period. 33 U.S.C. §928(b), (c); *Owens v. Newport News Shipbuilding & Dry Dock Co.*, 11 BRBS 409 (1979); 20 C.F.R. §702.132. Therefore, we vacate the denial of a fee for services performed before the OALJ between February 23, 1994, and April 7, 1995, and we remand the case to the administrative law judge for reconsideration of the request. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980); *Brown v. General Dynamics Corp.*, 12 BRBS 528 (1980). The administrative law judge correctly denied a fee for other periods prior to July 9, 1997, as those services were performed before the district director. *Owens*, 11 BRBS at 409.

Additionally, we vacate the denial of a fee for time necessary to prepare counsel's fee petition, as such time is compensable. *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67 (CRT) (9th Cir. 1996); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998). On remand, the administrative law judge must also consider counsel's request for a fee for this service and award a reasonable amount. We affirm the administrative law judge's reduction of the hourly rate from $175 to $125, as counsel has not shown error in awarding a fee based on this rate. *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991). In all other respects, we affirm the fee award.

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an attorney's fee. The regulations provide only that the petition be filed within the time specifications set by the entity awarding the fee. 33 U.S.C. §928; *Baker v. New Orleans Stevedoring Co.*, 1 BRBS 134 (1974); 20 C.F.R. §702.132.

Accordingly, the administrative law judge's Decision and Order and his Order Denying Employer's Motion for Reconsideration are affirmed. The fee award is vacated in part, and the case is remanded for the administrative law judge to reconsider the fee in accordance with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge