BRB No. 04-0483

THOMAS BORDEAUX	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PITTSBURGH & CONNEAUT DOCK	)	DATE ISSUED:FEB 14, 2005
	)	
and	)	
	)	
SIGNAL ADMINISTRATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER
	)	

Appeal of the Decision and Order-Awarding Benefits and the Supplemental Decision and Order of Thomas F. Phalen, Administrative Law Judge, United States Department of Labor.

Steven C. Schletker, Covington, Kentucky, for claimant.

Gregory P. Sujack (Garofalo, Schreiber, Hart & Storm, Chartered), Chicago, Illinois, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits and the Supplemental Decision and Order (2003-LHC-0034) of Administrative Law Judge Thomas F. Phalen 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 was employed as a structural welder when, on September 12, 2000, he suffered an injury to his head, neck and right wrist. At the time of the accident, he was bent over using a hose to remove debris when a fellow worker dropped a sandbag weighing fifty pounds from about a foot over claimant's head. The bag landed on the base of claimant's head, where it was not protected by his hard hat, and on his neck. Claimant was knocked down by the blow, and he broke his wrist in the fall. He was treated at the emergency room and released, but he returned to have his wrist placed in a cast and because he was having difficulty formulating sentences. Claimant subsequently underwent treatment for his neck, wrist, and a cognitive impairment, and has not returned to any form of work since the accident. He sought permanent total disability benefits under the Act.

In his decision, the administrative law judge found that claimant's work-related cognitive, neck and wrist problems reached maximum medical improvement by August 20, 2002. In addition, the administrative law judge found that the therapy recommended by Drs. Schwabenbauer and McCue will not cure claimant's cognitive deficits, but will only minimilize or alleviate the residual symptoms of anxiety and depression. The administrative law judge concluded that under the facts of this case, claimant reasonably refused to undergo the recommended therapy. The administrative law judge also found that as claimant is unable to return to his former work as a pipefitter, and, as there is no evidence of suitable alternate employment, claimant is entitled to permanent total disability benefits.

Subsequently, claimant's counsel submitted a petition for an attorney's fee, requesting $22,102.50 for 126.30 hours of legal services at the hourly rate of $175. He also requested $7,409.31 in litigation expenses. Counsel amended the fee petition to request an additional $519.10 in expenses on August 21, 2003. Employer objected to the fee petition, and claimant's counsel requested an additional $980 for 5.6 hours spent responding to objections. In a supplemental decision, the administrative law judge found that claimant successfully prosecuted the claim and that the fee petition sufficiently identified the attorney who performed the work, the extent and character of the work performed, the hourly rate, and the hours devoted to the work. In addition, after reviewing employer's specific objections, the administrative law judge found that 128.2 hours of legal services were reasonable and necessary. Thus, the administrative law judge awarded claimant an attorney's fee of $22,435, representing of 128.2 hours of work at the hourly rate of $175, plus $7,923.11 in expenses.

On appeal, employer contends that the administrative law judge erred in not compelling claimant to participate in a psychotherapy program to improve his cognitive impairment. Consequently, employer argues the administrative law judge erred in finding that claimant's cognitive defect had reached maximum medical improvement and that he is totally disabled. Employer also appeals the administrative law judge's

supplemental decision, contending that the administrative law judge erred in holding it liable for claimant's attorney's fee pursuant to Section 28(a) and objecting to counsel's method of block billing. Claimant responds, urging affirmance of the administrative law judge's Decision and Order-Awarding Benefits and the Supplemental Decision and Order. In addition, claimant has submitted an attorney's fee application for work performed before the Board.

Employer contends that the administrative law judge erred in failing to compel claimant to participate in a psychotherapy program recommended by Drs. McCue and Schwabenbauer. After the hearing was held and the post-hearing briefs were submitted, employer filed a motion with the administrative law judge to compel claimant to participate in a psychotherapy program and to suspend compensation if claimant refuses. Employer contended that claimant's cognitive impairment had not reached maximum medical improvement as claimant unreasonably refused to participate in a psychotherapy program. In addition, employer contended that improvements in claimant's cognitive impairment due to the proposed treatment would enable claimant to return to work and that claimant will be only partially disabled. Thus, employer requested that the administrative law judge compel claimant to participate in the program and to suspend compensation while claimant refuses to participate.

The administrative law judge first stated that employer's motion was not timely filed, as it was not filed until seven months after the hearing. The administrative law judge also stated that employer did not identify any authority under which the administrative law judge could compel claimant to undergo psychotherapy. The administrative law judge nonetheless addressed employer's motion on the merits. Decision and Order at 7-8 n.4. The administrative law judge reviewed the course of treatment recommended by Drs. Schwabenbauer and McCue, which employer sought to compel claimant to follow, and concluded that the program is not medically necessary for claimant's disability and that claimant's refusal to undergo the treatment is justified.

Dr. McCue examined claimant in January and February 2003, and concluded that claimant suffers from limitations in the ability to maintain attentional control, executive control (self-regulation, being able to inhibit response, freedom from impulsivity, problems with planning, and mild memory impairment), and mild to moderate depression. Emp. Ex. 4. Dr. McCue opined that the recommended course of psychotherapy treatment would not cure claimant's cognitive deficits but could reduce the impact of claimant's cognitive limitations as well his depression. Emp. Ex. 7 at 27-28, 30. Dr. Schwabenbauer also recommended therapy for claimant's cognitive and emotional problems, but testified that it was unlikely any significant change will be forthcoming. Cl. Ex. S at 22, 29-30. He noted that spontaneous recovery from head injuries occur within a year of the injury, with most people experiencing maximal return

within six months. Dr. Schwabenbauer opined that claimant's identified problems will significantly interfere with his ability to return to work. Cl. Ex. S at 31.

The administrative law judge also reviewed the other medical evidence of record. Dr. Lyon, a board-certified neurologist who examined claimant and performed numerous tests, opined that claimant is not neurologically able to return to his previous employment because of persistent pain, memory loss, and intermittent sensory symptoms. Emp. Ex. 5 at 23. She also reported that claimant was not able to concentrate and that he was depressed. *Id.* Dr. Lyon reviewed the plans proposed by Drs. Schwabenbauer and McCue for treatment and opined that the proposed psychotherapy will not assist claimant in recovering from complaints of memory loss enough to return him to work. *Id.* at 24. In addition, she opined that it was more likely that claimant will not be able to return to any gainful recovery, even with the proposed treatments, because of the duration of claimant's symptoms, *id.* at 28-29, and that the therapy would not reverse the underlying condition, but only how claimant adapts to it. *Id.* at 34. Nancy Crawford, a speech-language pathologist, treated claimant's cognitive linguistic deficits in three blocks of sessions, beginning on November 6, 2000 and ending on December 4, 2002. Ms. Crawford testified in a deposition that claimant would have a difficult time in a work situation unless he was in a completely distraction-free environment. She stated claimant also would need instructions on tasks and possibly a job coach, which would be someone present on the job with him to teach him how to most effectively learn the job tasks. She added that the job coach would have to be there for a long time, and if the job requirements changed, the job coach would have to return. CX T.

Section 7(d)(4) of the Act provides:

> If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

33 U.S.C. §907(d)(4).[1] Assuming, *arguendo,* that employer can move at any time to suspend compensation, we will address the administrative law judge's findings on their merits. *See Dodd v. Newport News Shipbuilding & Dry Dock Co., 22* BRBS 345 (1989). The Board has held that Section 7(d)(4) sets forth a dual test for determining whether compensation payments may be suspended as a result of a claimant's failure to undergo treatment. *See, e.g., Malone v. Int'l Terminal Operating Co.,* 29 BRBS 109 (1995). Initially, the burden of proof is on employer to establish that the claimant's refusal to undergo treatment is unreasonable. If employer meets this burden, the burden shifts to claimant to show that the circumstances justify the refusal. *Id.; Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979)(Smith, S., dissenting). For purposes of this test, the reasonableness of the claimant's refusal is an objective inquiry, while justification is a subjective inquiry focusing narrowly on the individual claimant. *Dodd v. Crown Central Petroleum Corp.,* 36 BRBS 85 (2002).

The administrative law judge found that the recommended psychotherapy was designed to minimize or alleviate the symptoms of claimant's anxiety and depression, but not to cure claimant's underlying cognitive defects. The administrative law judge found that the therapy offered only the possibility of some improvement to claimant's cognitive limitations. The administrative law judge noted that claimant would still be unable to return to his previous job as a pipe fitter due to his neck, wrist and cognitive limitations, and that the employer did not submit *any* evidence of suitable alternate employment, much less any that claimant could realistically compete for if his symptoms of anxiety and depression were removed and he experienced some improvement in cognitive function. The administrative law judge rejected employer's contention that the program would return claimant to light or sedentary work as it is speculative, not supported by any vocational analysis, and contradicted by the opinion of Dr. Durgin, a vocational counselor who opined that, based on claimant's age, lack of acquisition of transferable skills, physical/exertional limitations, and lack of access to the jobs in his labor market, claimant is unemployable. Cl. Ex. V.

In addition to finding that the recommended treatment was not necessary for claimant's condition, the administrative law judge found that claimant's refusal to undergo this treatment was justified under the facts in this case. The recommended

[1] We agree with the administrative law judge that neither the Act nor its implementing regulations provide him with the authority to compel claimant to undergo any particular medical treatment. The Act, 33 U.S.C. §907(e), and the regulations, 20 C.F.R. §§702.408-410, suggest only that claimant can be compelled to undergo an examination. The administrative law judge's authority in this regard is limited to whether claimant's compensation should be suspended pursuant to Section 7(d)(4) for the duration of an unreasonable refusal to undergo specified treatment.

treatment program is expected to last up to one year and would require claimant to take antidepressants, which claimant had demonstrated an inability to tolerate. *See, e.g.*, Cl. Ex. E at 51, 58. Moreover, the administrative law judge found that claimant had attended two sessions of psychotherapy with Dr. Schwabenbauer, that Ms. Crawford had worked with claimant during three blocks of sessions to improve claimant's ability to live with his limitations in manners similar to the type of cognitive therapy that Dr. McCue recommended, and that claimant had attended numerous physical therapy sessions. The administrative law judge concluded that claimant "demonstrated a clear willingness to heal and improve his physical and mental condition." Decision and Order at 7-8 n.4. Thus, the administrative law judge found that claimant's refusal to undergo psychotherapy, antidepressant therapy, cognitive rehabilitation therapy, and work-hardening is not unreasonable in view of the treatments he previously had undergone.

We affirm the administrative law judge's denial of employer's motion to compel and to suspend compensation as it is rational and supported by the evidence. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991) *aff'd mem.*, 8 F.3d 29 (9th Cir. 1993)(table). Claimant actively participated in numerous courses of treatment, including speech therapy, physical therapy, and psychotherapy for two years following his work-related injury. The administrative law judge thus rationally found that claimant was not recalcitrant in seeking appropriate care. The administrative law judge also rationally relied on the absence of any evidence that claimant's undergoing the proposed treatment would enable him to perform suitable alternate employment and found that the benefits of the proposed treatment therefore are speculative. As employer has not demonstrated error in the administrative law judge's denial of its motion, we affirm the administrative law judge's finding that claimant's cognitive impairment has reached maximum medical improvement and that claimant is totally disabled.

Employer also contends that the administrative law judge erred in awarding claimant's attorney a fee payable by employer, pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), and that the case must be remanded for the administrative law judge to address fee liability under Section 28(b) of the Act, 33 U.S.C. §928(b). The administrative law judge found that claimant successfully prosecuted his claim for permanent total disability benefits and therefore employer is liable for claimant's attorney's fee pursuant to Section 28(a).

We agree with employer that the administrative law judge erred in holding employer liable for an attorney's fee pursuant to Section 28(a). Claimant filed a claim on November 6, 2000, and employer voluntarily paid compensation for temporary total disability from the date of injury until August 20, 2002. JX 1. Thus, employer did not "decline to pay" compensation within the meaning of Section 28(a),[2] and it cannot be

[2] Section 28(a) states;

held liable for a fee under this subsection. *See Boe v. Dep't of the Navy/MUR*, 34 BRBS 108 (2000).

Nonetheless, we disagree with employer that the case must be remanded for consideration of its liability for a fee pursuant to Section 28(b), as employer is liable for a fee under this subsection as a matter of law. Section 28(b) applies when a controversy develops over additional compensation where the employer has paid or tendered compensation voluntarily.[3] Although Section 28(b) states the district director shall make a written recommendation regarding the disposition of the controversy, the Board and the Ninth Circuit have held that the failure of the district director to make a written recommendation will not preclude the assessment of an attorney's fee against the employer. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Caine v. Washington Metropolitan Area Transit*

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier.

[3] Section 28(b) states, in relevant part:

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [sic] to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.

Authority, 19 BRBS 180 (1986); *Cf. Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001)(lack of informal conference precludes liability under Section 28(b)); *Staftex Staffing v. Director, OWCP [Loredo]*, 237 F.3d 409, 34 BRBS 105(CRT), 35 BRBS 26(CRT) (5th Cir. 2000)(as employer rejected district director's recommendation, employer liable under Section 28(b)). Contrary to employer's contention, the absence of a written recommendation by the district director following the informal conference therefore, does not preclude liability. *National Steel*, 606 F.2d 875, 11 BRBS 68; *Caine*, 19 BRBS 180. In the present case, employer paid claimant temporary total disability benefits until August 20, 2002, but contested claimant's entitlement to permanent total disability benefits. *See* JX 1. An informal conference was held on September 19, 2002, to discuss settlement and the extent of claimant's permanent disability, which resulted in the district director's suggestion to use $200,000 as a starting point for settlement. The parties did not reach a settlement, and claimant pursued his claim before the administrative law judge. In his Decision and Order, the administrative law judge awarded claimant permanent total disability benefits, which we affirm on appeal. Thus, as employer voluntarily paid benefits, and claimant obtained additional benefits before the administrative law judge, we hold that employer is liable for an attorney's fee pursuant to Section 28(b) of the Act. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

Lastly, employer contends that the administrative law judge erred in accepting claimant's "block billing" in his fee application, alleging it is not possible to determine whether the value of the service rendered is reasonably related to the quality of the service or the extent of that service. The administrative law judge considered employer's objection and held that the fee petition identifies claimant's counsel as the person who performed the service and includes a complete statement of the extent and character of the work that he performed, his hourly rate, and the hours devoted by him to the work. Section 702.132 provides that a fee application shall be supported by a complete statement of the extent and character of the necessary work done and the hours devoted to each category of work. 20 C.F.R. §702.132. The fee petition summarizes counsel's complete activity on the case each day with a total amount of time spent each day. Counsel's description of the activity is well-detailed, even though he does not break down the actual amount of time spent on each individual activity. Moreover, the administrative law judge considered the individual entries and employer's objections thereto, and disallowed a number of them for lack of specificity. We reject employer's contention that the form of the application makes it impossible to review whether counsel's work was reasonable in this case. *See Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988). Consequently, as there are no other challenges to the fee award, we affirm the administrative law judge's award of an attorney's fee payable by employer.

Claimant's counsel has submitted a fee petition for work performed before the Board. Counsel requests a fee in the amount of $3,815.00, representing 21.80 hours of legal services at the hourly rate of $175. Counsel also requested an additional $647.50, representing 3.70 hours spent defending the fee petition at the hourly rate of $175. Contrary to employer's contention, claimant's counsel is entitled to a fee for successfully defending the award of benefits on appeal. *See* 33 U.S.C. §928(b);[4] *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). Employer also contends that claimant's method of billing does not allow for a proper review of the application. We reject this objection per the discussion above. Employer also objects to the amount billed on April 28, 2004, August 25, 2004 and August 26, 2004, contending that the hours requested for research are excessive given counsel's experience and expertise. However, as counsel contends in response, these hours are requested for review and organization of the voluminous case file as well as research into the case law. Thus, given the issues in this case and the substantial number of medical records, we reject employer's objection and award claimant's counsel a fee in the amount of $4,462.50, representing 25.5 hours of legal services at the hourly rate of $175 for work performed before the Board. 33 U.S.C. §928(b); 20 C.F.R. §802.203.

[4] Section 28(b) states, in relevant part:

> If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions.

Accordingly, the Decision and Order and the Supplemental Decision and Order of the administrative law judge are affirmed. In addition, claimant's counsel is awarded a fee in the amount of $4,462.50 for work performed before the Board to be paid directly to counsel by employer.

SO ORDERED.

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NANCY S. DOLDER
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge