BRB No. 91-1909

QUENTIS E. VAILE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOCKPORT MARINE	)	
	)	
	)	DATE ISSUED:
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER
	)	

Appeal of the Decision and Order Awarding Benefits, the Amended Decision and Order on Reconsideration, and the Order Awarding Attorney Fee of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

William H. Skalak, Portland, Oregon, for claimant.

Randolph B. Harris, SAIF Corporation, Portland, Oregon, for employer/ carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits, the Amended Decision and Order on Reconsideration and the Order Awarding Attorney Fee (89-LHC-1645) of Administrative Law Judge Ellin M. O'Shea 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 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 only be set aside if shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with the law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On January 14, 1987, claimant, a shipyard mechanic, experienced severe pain in his left calf

and knee while coming down a ramp during the course of his employment.[1] Claimant filed a claim under the Act the next day. Employer voluntarily paid claimant $276.76 a week based on his agreed average weekly wage of $415.19 from January 15, 1987, through November 2, 1988, characterizing the payments as temporary total disability compensation until April 6, 1988, and permanent partial disability compensation thereafter. Claimant, who has not returned to gainful employment since this injury, sought permanent total disability compensation under the Act.

Crediting Dr. Langston's opinion that claimant could return to his usual work over Dr. Noall's contrary opinion, the administrative law judge determined that claimant was capable of performing his usual work. Although the administrative law judge found that claimant could perform his usual work, she nonetheless also found that employer established the availability of suitable alternate employment based on inside sales, part sales, and customer service positions identified by its vocational expert, Ms. Shivell. The administrative law judge, therefore, denied the claim for permanent total disability compensation and awarded claimant compensation for a 5 percent permanent physical impairment under Section 8(c)(2) of the schedule, 33 U.S.C. §908(c)(2), commencing October 31, 1988, based on Dr. Langston's permanent disability assessment of that date. The administrative law judge further determined that while employer was not liable for claimant's treatment at a pain clinic because it was not reasonable and necessary, employer was liable for reasonable and necessary future medical benefits and for $148.60 in mileage and expense reimbursements.

On July 2, 1991, the administrative law judge issued an Amended Decision and Order on Reconsideration. In this decision, she reiterated that in denying the permanent total disability claim she credited Dr. Langston's opinion over that of claimant's treating physician, Dr. Noall, and awarded claimant compensation for a 5 percent impairment under the schedule commencing October 31, 1988, based on Dr. Langston's disability assessment of that date. The administrative law judge also clarified that claimant was entitled to temporary total disability benefits through October 31, 1988, pursuant to Section 8(b) of the Act, 33 U.S.C. §908(b).[2] Finally, the administrative law judge stated that claimant's counsel had submitted a fee petition requesting $14,971.27, representing 89.75 hours of attorney services at a rate of $150 per hour, 1 hour of legal assistant services at the rate of $60 per hour, and $1,448.77 in costs. Finding that claimant was successful in obtaining additional compensation beyond that agreed to by the employer, she allowed employer 20 days in which to respond to claimant's fee petition. Thereafter, employer filed its objections.

In her Order Awarding Attorney Fee, the administrative law judge awarded claimant's

[1]Claimant alleges that on December 12, 1986 he also fell on his left knee while at work, but he claimed there were no lasting physical difficulties.

[2]The administrative law judge also stated that in the original decision, she inadvertently omitted the provision awarding interest and modified her prior decision to correct this clerical error.

counsel a fee of $3,000, representing 20 hours of services at $150 per hour[3] plus $135 of the requested costs. In reducing counsel's request, she found that a predominate portion of the time claimed involved work performed on issues on which claimant did not prevail.

On appeal, claimant challenges the administrative law judge's denial of permanent total disability compensation. Claimant argues that as it is virtually undisputed that claimant cannot perform his usual work as a marine electrician, the burden shifted to employer to establish the availability of suitable alternate employment. Claimant asserts that the administrative law judge erred in finding that employer met this burden, inasmuch as Ms. Shivell failed to indicate that it is more probable than not that claimant could obtain the alternate work identified if he diligently tried. Moreover, claimant asserts that the administrative law judge failed to identify specific jobs which constituted suitable alternate employment claimant could obtain or perform. In the alternative, claimant argues that pursuant to *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1991), *cert. denied*, 498 U.S. 1073 (1991), the administrative law judge erred in terminating the award of temporary total disability benefits on October 31, 1988, the date of maximum medical improvement, instead of on November 6, 1989, the date of employer's first labor market survey. Finally, claimant maintains that the $3,000 attorney's fee awarded is wholly inadequate, arguing that the administrative law judge erred in limiting the fee to the issues on which claimant prevailed. Employer responds, urging affirmance. Claimant replies, reiterating the arguments raised in his petition.

We reject claimant's assertion that the administrative law judge erred in denying him permanent total disability compensation for his left knee injury. To establish a *prima facie* case of total disability under the Act, claimant must establish that he is unable to perform his usual work due to a work-related injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). If claimant establishes his *prima facie* case, the burden shifts to employer to demonstrate the availability of suitable alternate employment within the geographic area where claimant resides which claimant is capable of performing given his age, education, physical restrictions, and work experience. *See Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988). The Act requires that employer show realistic job opportunities for claimant, which necessarily requires establishing the precise nature and terms of the alternate positions. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 661 (9th Cir. 1980).

Although claimant argues on appeal that it is "virtually undisputed" that he cannot perform his usual work as a marine mechanic, upon review of the record we conclude that Dr. Langston's opinion provides substantial evidence to support the administrative law judge's finding to the contrary. Claimant suggests that Dr. Langston's opinion cannot properly support the administrative law judge's finding, as his deposition testimony, EX. 101 at 351 to 355, suggests that the employer would have to allow some modification of claimant's usual job duties for claimant to perform them. The administrative law judge specifically considered this argument in her initial decision and

[3]In the Order Awarding Attorney Fee, the administrative law judge wrote that claimant's counsel billed at a rate of $160 per hour, rather than the $150 claimed.

rationally rejected it, finding that overall, Dr. Langston's testimony reflects his belief that claimant can perform his usual work. *See, e.g.*, EX. 101 at 345, EX. 75.

Moreover, Dr. Langston's opinion did not provide the sole basis for the administrative law judge's finding. Rather, the administrative law judge also relied on surveillance evidence taken prior to claimant's deposition which depicted claimant moving about freely without a cane, crutch, or other support, performing activities in excess of what he claimed he could do. *See* Decision and Order at 13, RY. 1. The administrative law judge also found that claimant had not been candid, forthright and truthful in his presentation to the various medical providers and evaluators he had seen for various purposes since the injury. She specifically credited the Emanuel Pain Center's evaluation, which indicated that claimant "has a self-serving need to see himself disabled and to avoid the rigors of rehabilitation and return to work." Decision and Order at 13. Finally, the administrative law judge found claimant's credibility lacking because he had been less than truthful regarding his involvement in his wife's Amway business. The administrative law judge noted that while claimant represented to his vocational counselor and to the court that he had no significant involvement in his wife's Amway distributorship and that he had no salary or income arising therefrom, in fact, he reported to the Internal Revenue Service that he was self-employed as a sole proprietor in this business from 1985-1987.

Dr. Langston's opinion in conjunction with the administrative law judge's negative assessment of claimant's credibility provide substantial evidence to support her finding that claimant is able to perform his usual work. *See O'Keeffe*, 380 U.S. 359. As claimant has failed to raise any reversible error made by the administrative law judge in evaluating the conflicting medical evidence and making credibility determination, we affirm this determination. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert denied*, 440 U.S. 911 (1979); *Thompson v. Northwest Enviro Services*, 26 BRBS 53, 57 (1992). As claimant failed to establish a *prima facie* case of total disability, we need not address claimant's arguments regarding the administrative law judge's finding of suitable alternate employment; any error made by the administrative law judge is, in any event, harmless. As claimant failed to establish a *prima facie* case of total disability, the administrative law judge's finding that he is limited to an award based on his physical impairment under the schedule is also affirmed. *See generally Davenport v. Daytona Marine and Boat Works*, 16 BRBS 196, 199 (1984).

We also reject claimant's alternate argument that pursuant to *Stevens*, 909 F.2d at 1256, 23 BRBS at 89 (CRT), the administrative law judge erred in commencing the award of permanent partial disability compensation on October 31, 1988, the date of maximum medical improvement, because employer did not establish the availability of suitable alternate employment until November 6, 1989. In *Stevens*, the United States Court of Appeals for the Ninth Circuit held that total disability does not becomes partial, as a matter of law, retroactive to the date of maximum medical improvement, upon a later showing of suitable alternate employment by employer, since such a holding ignores the economic aspect of an employee's disability and assumes that the job market was the same at the time of maximum medical improvement as it was when the job showing was made. *See Stevens*, 909 F.2d at 1259-60, 23 BRBS at 94 (CRT); *Palombo v. Director, OWCP*, 937 F.2d 70,

25 BRBS 1, 7 (CRT)(2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990), *rev'g Berkstresser v. Washington Metropolitan Area Transit Authority*, 22 BRBS 280 (1989) and 16 BRBS 231 (1984); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). The court held that an employee's disability becomes partial upon the date employer shows suitable alternate employment to be available; from the date of maximum medical improvement to that date, the employee's disability is total.

In the present case, the economic disability concerns underlying *Stevens* are not present, as the administrative law judge found claimant capable of performing his usual work as of the date of maximum medical improvement. As claimant could perform his usual work as of the date of permanency, he sustained no permanent economic disability and employer was not required to establish the availability of suitable alternate employment. As claimant sustained no permanent economic disability, the administrative law judge rationally commenced the award of permanent partial disability compensation under the schedule on October 31, 1988, based on Dr. Langston's medical assessment of claimant's permanent physical impairment on that date. Accordingly, the administrative law judge's finding regarding the commencement date for claimant's award of permanent partial disability under the schedule is affirmed.

Turning to claimant's challenge to the attorney's fee award, claimant's sole argument is that the administrative law judge erred in discounting the fee based on issues on which claimant did not prevail. Claimant maintains that the administrative law judge's reliance on *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988), in limiting the fee in this manner is misplaced, noting that in *Horrigan*, unlike the present case, the claimant filed two *claims*, one for disability and another for discrimination under Section 49 of the Act, 33 U.S.C. §948a. Claimant asserts that in contrast, the present case involves only one claim for disability with several issues including temporary total disability, permanent partial disability and mileage and medical expenses. Claimant maintains that while the *Horrigan* court stated that where the claimant only prevailed on the disability claim, it was proper to disallow a fee for the unsuccessful Section 49 *claim*, the court did not hold that it was proper for the administrative law judge to limit the fee to the work performed on *issues* on which claimant prevails.

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, it created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

461 U.S. at 435. *See also George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award; the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436.

Claimant's argument that the administrative law judge erred in relying on *Horrigan* to reduce the fee because this case involves only one claim with multiple issues is without merit. Contrary to claimant's assertions, the administrative law judge's recognition of the scheduled disability and permanent total disability claims as separate and distinct is consistent with *Brooks*, 963 F.2d at 1532, 25 BRBS at 161 (CRT). In *Brooks*, the claimant sought permanent total disability compensation based on an injury he sustained to his left toe. Although the administrative law judge denied the claim for permanent total disability, on his own motion he awarded Brooks compensation under the schedule for a twenty percent impairment of the left foot totalling $11,968.73. In reversing the Board's and the administrative law judge's finding that the claims were too interrelated to separate for purposes of assessing an attorney's fee, the United States Court of Appeals for the District of Columbia Circuit held that the scheduled and permanent total disability claims were separate claims based on different factual and legal theories. The court noted that the facts needed to demonstrate total disability go well beyond the medical reports needed to establish a partially dysfunctional foot. The court further noted that this conclusion was reinforced by the differing prerequisites for recovery under Section 8(a) and (c); whereas a total disability claim was found to involve "an economic and not a medical concept" based on claimant's loss of wage-earning capacity, a scheduled disability under Section 8(c) must be made on the basis of physical impairment alone.

Although the administrative law judge in the present case rationally found that this case involved several unrelated claims, she further found that the fee petition did not differentiate between work performed on the successful and unsuccessful issues or claims. Accordingly, as it was impossible to screen and segregate the work performed on the unsuccessful claims, the administrative law judge indicated that the fee would be determined as a function of the degree of success.

In *Hensley*, the Court emphasized the discretion of the district court in determining the amount of a fee award, but remanded the case because the district court had not adequately considered the relevant criteria in entering the fee award. The Court also recognized that where claimant's success is limited, there is no precise formula for determining a reasonable fee and that the district court may attempt to identify specific hours that should be eliminated or *it may simply reduce the award to account for the limited success*. *Hensley*, 461 U.S. at 436-437 (emphasis added). In the present case, the administrative law judge recognized that although claimant sought permanent total disability compensation, his success was limited to establishing entitlement to additional temporary total disability from April 6, 1988, until October 31, 1988, the stipulated date of maximum medical improvement, and to $148.60 in various mileage and medical expense reimbursements for a total of $4,574.11. The administrative law judge found that the relief awarded was very limited in comparison to that sought and to the scope of the litigation as a whole, specifically noting that the claimant had only been awarded a minute fraction of the benefits sought and had achieved "but a minuscule amount" on the overall claim. Order at 3. After considering *Hensley*, and the factors enumerated in 20 C.F.R. §702.132, the administrative law judge found that claimant's counsel was entitled to a fee of $3,000, representing 20 hours at $150 per hour, noting that a significant and predominate portion of the hours counsel itemized were spent in and necessary for the presentation of the evidence and issues on which claimant did not succeed. The administrative law judge viewed this amount as reasonably commensurate with the necessary hours spent by counsel in light of the simplicity of the issues and the evidence on which he succeeded, and the limited amount of benefits obtained in comparison to the litigation as a whole. The administrative law judge thus specifically considered the fee request in light of the regulatory criteria, and provided a clear explanation of why the fee awarded was reasonable in light of the results obtained consistent with *Hensley*, 461 U.S. at 436. As claimant has failed to establish that the administrative law judge abused her discretion in this regard, the fee award is affirmed. *See generally Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993) (Brown, J., dissenting); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Amended Decision and Order on Reconsideration, and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge