BRB Nos. 96-1318
and 96-1318S

MATHIAS E. FELSHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
ITO CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Christopher A. Davis and Alben N. Hopkins (Hopkins, Crawley, Bagwell, Upshaw & Persons), Gulfport, Mississippi, for claimant.

Phillip W. Jarrell (Dukes, Dukes, Keating & Faneca, P.A.), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees (93-LHC-159) of Administrative Law Judge C. Richard Avery 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 worked as a longshoreman for employer from 1979 until April 14, 1992, when he injured his back while unloading bags of shrimp meal. Claimant continued his shift and sought medical treatment the next day. He initially requested treatment from Dr. Benefield, a general practitioner, which employer authorized. Dr. Benefield referred claimant to Dr. Bazzone, a neurosurgeon, who diagnosed congenital/developmental spondylosis and spondylolisthesis, as well as a possible rupture, at the L5 disc. Jt. Ex. 1 at 9-10. Dr. Bazzone believed claimant needed surgery and referred him to Dr. Hopper, an orthopedic surgeon. Jt. Ex. 9. Dr. Hopper refused to treat claimant because of a prior dispute he had with employer; therefore, employer's representative, Mr. Arceneaux, called Dr. Bazzone's office for another specialist and was referred by a secretary to Dr. Corban's office. Employer informed claimant of his appointment, and Dr. Corban treated claimant from July 21 through August 13, 1992, when he released him to return to his usual work. Jt. Exs. 6, 11. Employer then ceased paying temporary total disability and medical benefits, and claimant filed a claim for continuing benefits under the Act.

Although claimant did not return to work for employer due to circumstances unrelated to this injury, he subsequently worked as a longshoreman for five days between August 17 and November 23, 1992, for other waterfront employers. Tr. at 61-66. In September 1992, claimant, of his own accord, sought medical treatment with Dr. Longnecker, an orthopedic surgeon, who examined claimant, reviewed the objective evidence, and recommended surgery. Jt. Ex. 5. In May 1993, claimant began work as a security officer at a casino.

The administrative law judge found that claimant received treatment from his initial choice of physician, did not seek consent to change physicians, acquiesced to Dr. Corban's treatment, and provided no evidence that the treatment he received was inadequate. Thus, effectively, the administrative law judge determined that claimant was not entitled to choose Dr. Longnecker as his orthopedic specialist. Additionally, he concluded, based on Dr. Corban's opinion, that claimant's condition reached maximum medical improvement on August 13, 1992, without residual impairment. Decision and Order at 9-11. The administrative law judge also found that claimant is not entitled to permanent total or partial disability benefits, relying on Dr. Corban's release of claimant to return to his usual work without restrictions, claimant's return to longshore work at the same or higher wages, a videotape showing claimant fixing his car, and claimant's casino employment application stating he has no physical restrictions. *Id.* at 11-12. However, the administrative law judge found claimant entitled to the previously paid temporary total disability benefits based on a higher average weekly wage than employer paid and reasonable medical benefits related to his April 1992 injury. *Id.* at 13-15. In a Supplemental Decision and Order, the administrative law judge reduced claimant's attorney's fee from the requested $14,361.50, plus expenses, to $1,500. Claimant appeals both decisions, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding that his condition reached maximum medical improvement on August 13, 1992, and that he is not entitled to permanent total or partial disability benefits. Additionally, claimant challenges the administrative law judge's finding that he received his initial choice of physician and that he did not seek consent to change physicians, and he avers the administrative law judge erred in reducing the attorney's fee. Employer responds, arguing that the administrative law judge's decisions are supported by substantial evidence and are affirmable. For the reasons set forth herein, we affirm the administrative law judge's decisions.

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In this case, Dr. Corban released claimant to return to his usual work with no restrictions after three weeks of physical therapy. At that time, he determined that claimant's back was asymptomatic with no residual impairment. Jt. Ex. 6, 11. Although the record also contains the contrary opinions of Drs. Bazzone and Longnecker that claimant's condition has not yet reached maximum medical improvement because of the need for surgery, Jt. Exs. 1, 5, 9-10, the administrative law judge expressly credited Dr. Corban's opinion over those of Drs. Bazzone and Longnecker. Decision and Order at 10-11. As the administrative law judge is entitled to judge the credibility of the witnesses and the record contains substantial medical evidence to support his determination, we affirm his finding that claimant's back condition reached maximum medical improvement on August 13, 1992. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989); *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984).

Next, claimant contends he is entitled to continuing total or partial disability benefits, as he testified he cannot perform his usual work and as Drs. Bazzone and Longnecker stated claimant needs surgery. Claimant has the burden of establishing the extent of his disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). To establish a *prima facie* case of total disability, a claimant must show that he is unable to return to his usual employment due to his work-related disability. Once a claimant makes such a showing, an employer must establish the availability of other jobs the claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In this case, claimant was released by Dr. Corban to return to his usual work without restrictions, and Dr. Corban found that claimant did not need surgery. Claimant testified that he attempted to return to work for employer but was turned down for reasons unrelated to his back condition. Further, he testified that he subsequently worked for other maritime employers as a longshoreman, earning wages equivalent to or higher than those he earned at employer's facility, and that he currently is employed as a security officer at a casino. Cl. Exs. 5, 7; Emp. Ex. 4 at 6-7, 13; Tr. at 32-33, 42, 61-66, 76-79. Moreover, the administrative law judge credited a surveillance video which shows claimant repairing his car with no evidence of discomfort, as well as an application for employment at

the casino, in which claimant stated he is physically fit for the position.[1] *See* Emp. Exs. 1, 3. As the administrative law judge rationally found that claimant has not established a *prima facie* case of total disability, we affirm his finding that claimant is not entitled to disability benefits.[2] *See Peterson v. Washington Metropolitan Area Transit Authority*, 13 BRBS 891 (1981).

Claimant also contends he was not permitted to choose an appropriate specialist because Dr. Longnecker's treatment was denied him and because Dr. Corban was a specialist chosen by employer. A claimant has the right to his initial choice of physician and where his initial choice is not a specialist whose services are necessary for the treatment of the compensable injury, the employer shall give the employee consent to change physicians. In all other cases, an employer may give consent upon a showing of good cause. 33 U.S.C. §907; 20 C.F.R. §§702.403, 702.406(a). If an employee's initial choice is unavailable and the employer suggests a doctor with whom the employee continues to treat, then he has made that doctor his own physician. *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem*., No. 95-1035, 29 BRBS 105 (CRT) (4th Cir. July 19, 1995) (claimant treated with a physician selected by employer for over two years, thereby making him her physician of choice).

[1]Claimant asserted in the application that he is able to stand for seven consecutive hours and repetitively lift 70 pounds, and that he left his previous job because of a lack of work. Emp. Ex. 3.

[2]Inasmuch as the administrative law judge found claimant capable of performing his usual work, we need not address claimant's contention that he has a loss in wage-earning capacity and is entitled to partial disability benefits.

Claimant argues that he sought to appoint Dr. Longnecker or Dr. Drake as his orthopedic specialist but that employer refused to authorize treatment by either doctor. The administrative law judge discussed evidence of record which seems to indicate that claimant sought consent for a change of physicians; however, the evidence does not appear to have affected the administrative law judge's determination that claimant did not seek consent to change physicians and that he acquiesced to treatment by Dr. Corban. *See* Decision and Order at 4-5, 9. Specifically, the record contains a letter from employer to claimant which discusses claimant's right to a choice of physician and the procedure by which claimant obtained an appointment with Dr. Corban, Cl. Ex. 1, and it contains the memorandum of the informal conference which indicates claimant sought employer's authorization for treatment by Dr. Drake at least as early as July 22, 1992, the day after his first appointment with Dr. Corban. Jt. Ex. 4 at exh. 3. Moreover, Drs. Bazzone and Corban both testified that Dr. Bazzone did not refer claimant to Dr. Corban.[3] Jt. Exs. 1 at 14, 26, 6 at 18. Thus, there is evidence to support claimant's contention that he sought consent to treat with an appropriate specialist after Dr. Hopper's refusal to treat him and, contrary to the administrative law judge's finding, it is questionable whether Dr. Corban became "claimant's" physician after only three visits. *Cf. Hunt*, 28 BRBS at 371. Nonetheless, any error committed by the administrative law judge in this regard is harmless because there is substantial evidence of record to support the administrative law judge's findings that claimant's condition resolved as of August 13, 1992, because Dr. Corban released him from treatment and released him to return to his usual work.[4] *See Hunt*, 28 BRBS at 371; *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993). The administrative law judge was entitled to credit Dr. Corban's opinion regardless of whether he was claimant's chosen specialist, and the administrative law judge was not required to find that claimant needed surgery as stated by Dr. Longnecker. Claimant's contention of error therefore is rejected.

Finally, claimant contends the administrative law judge abused his discretion and acted arbitrarily in reducing his attorney's fee from a total of over $17,000 to $1,500. Under Section 28(b), 33 U.S.C. §928(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by the employer. *See Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). In this case, employer voluntarily paid temporary total disability benefits which, as the

[3]Dr. Corban specifically testified that the referral was from employer. Jt. Ex. 6 at 18.

[4]Because medical benefits are never time-barred, and because Dr. Corban stated that claimant's back condition may recur or he may sustain a re-injury, claimant may request medical care from the district director for additional treatment of his work-related back condition. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. *en banc*); 20 C.F.R. §702.418.

administrative law judge determined, were based on an incorrect average weekly wage. Thus, claimant established his entitlement to additional temporary total disability benefits of approximately $2,000. However, this is the only issue on which claimant was successful. As claimant's success was limited, the administrative law judge acted within his discretion in reducing the attorney's fee to comport with the limited success. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 162, 27 BRBS 14 (CRT) (5th Cir. 1993); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir.

1992). Consequently, we reject claimant's argument, and we affirm the administrative law judge's fee award of $1,500.[5]

Accordingly, the administrative law judge's decisions are affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JAMES F. BROWN
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

[5]We deny claimant's request for an additional $380 for time preparing materials before the administrative law judge in defense of the fee petition. The Board cannot award a fee for work performed before the administrative law judge. 33 U.S.C. §928(c).