

DAVID L. WILSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SERVICE EMPLOYEES)	DATE ISSUED: 10/19/2010
INTERNATIONAL, INCORPORATED)	
)	
and)	
)	
INSURANCE COMPANY OF THE STATE)	
OF PENNSYLVANIA)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Denying Attorney’s Fee and Order Denying Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joel S. Mills (Pitts & Mills), Houston, Texas, for claimant.

Jerry R. McKenney, Billy J. Frey and Karen A. Conticello (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying Attorney’s Fee and Order Denying Motion for Reconsideration (2009-LDA-0004) of Administrative Law Judge Lee J. Romero, 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 sustained injuries to his neck, spine, and right knee in the course of his work for employer as a truck driver in Iraq on or about September 7, 2005. Claimant returned to the United States, and subsequently underwent surgery to his cervical spine on April 5, 2006, and right knee on May 25, 2006. Employer voluntarily paid temporary total disability benefits to claimant from September 21, 2005, at a compensation rate of \$1,047.16 per week. Claimant filed a claim seeking permanent total disability benefits for his work-related injuries;¹ employer did not controvert the claim. An informal conference was held by correspondence among the parties culminating in the district director’s written recommendation on May 21, 2008, that claimant is entitled to permanent total disability benefits from March 31, 2008, until such time that employer establishes the availability of suitable alternate employment, and that no further cervical surgery is warranted.

Claimant then requested a formal hearing to argue his entitlement to permanent total disability benefits, including appropriate cost-of-living adjustments. HT at 13. The administrative law judge found, based on the parties’ stipulations, that claimant sustained work-related injuries which reached maximum medical improvement as of March 31, 2008. As for the extent of claimant’s disability, the administrative law judge found that claimant is incapable of returning to his usual employment, that employer established the availability of suitable alternate employment, but that claimant has, despite a diligent job search, been unable to obtain any work. Accordingly, the administrative law judge found claimant entitled to temporary total disability benefits from September 21, 2005, through March 30, 2008, and permanent total disability benefits thereafter subject to annual increases pursuant to Section 10(f), 33 U.S.C. §910(f).

Claimant’s counsel sought an attorney’s fee totaling \$16,878.01 for work performed before the administrative law judge. The administrative law judge denied an employer-paid attorney’s fee, finding Section 28(a) inapplicable because employer was paying compensation to claimant when he filed his claim, 33 U.S.C. §928(a), and Section 28(b) inapplicable because employer had complied with the recommendation of the district director. 33 U.S.C. §928(b). Specifically, the administrative law judge found that employer continued to pay claimant total disability benefits in conformance with the district director’s recommendation. The administrative law judge also found that since

¹ The parties agreed that claimant reached maximum medical improvement with regard to his work injuries as of March 31, 2008.

claimant's entitlement to cost-of-living adjustments was not raised at the informal conference, it was not part of the district director's written recommendation.

On appeal, claimant challenges the administrative law judge's denial of an employer-paid attorney's fee pursuant to Section 28(b).² Employer responds, urging affirmance of the administrative law judge's denial of an attorney's fee.

Claimant contends that the administrative law judge erred in finding that employer complied with the district director's written recommendation. Claimant maintains that since employer did not pay the mandatory Section 10(f) increase that was effective as of October 1, 2008, employer did not comply with the district director's recommendation. Claimant notes that he thereafter successfully procured an award of permanent total disability benefits with Section 10(f) adjustments. Employer counters that claimant has not met the requirements of Section 28(b) because: (1) there was never any informal conference and/or written recommendation rendered by the district director with regard to the issue of claimant's entitlement to Section 10(f) for employer to reject; and that, in any event (2) it paid claimant all of the total disability benefits he was entitled to as a result of the district director's recommendation up to the time that claimant sought referral of the case to the Office of Administrative Law Judges on September 30, 2008.

An employer will be liable for a claimant's attorney's fee pursuant to Section 28(b) of the Act if all the following elements are satisfied: (1) an informal conference is held; (2) the district director issues a written recommendation; (3) employer rejects the written recommendation; and (4) claimant obtains greater compensation than that paid or tendered by employer after its rejection of the written recommendation. *Andrepoint v. Murphy Exploration & Production Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009). In this case, it is undisputed that the first two requirements for employer liability have been satisfied.

The district director recommended, following an informal conference, "that claimant is entitled to permanent total disability benefits from 03/31/2008 to the present & continuing until suitable alternate employment is identified or vocational rehabilitation is completed." CX 12. Although the district director did not specifically mention Section 10(f), we conclude that a recommendation for permanent total disability benefits necessarily incorporates Section 10(f) adjustments. The express language of Section

² The administrative law judge correctly found that employer is not liable for an attorney's fee pursuant to Section 28(a) as employer was paying benefits to claimant at the time he filed his claim for benefits. *Andrepoint v. Murphy Exploration & Production Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).

10(f) of the Act mandates that cost-of-living adjustments be made to permanent total disability benefits in order to minimize the effects of inflation.³ *See generally Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001); *Donovan v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 2, 5 (1997). Thus, a recommendation for permanent total disability benefits incorporates the recommendation that claimant “shall be” thereafter entitled to annual cost-of-living adjustments pursuant to Section 10(f) until such time that claimant is no longer permanently totally disabled. 33 U.S.C. §910(f); *see generally Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9(CRT) (9th Cir. 1990). In light of the unambiguous language of Section 10(f), the administrative law judge’s finding that Section 10(f) “was not addressed in the written recommendations” is reversed.⁴ *See Staftex Staffing v. Director, OWCP*, 237 F.3d 409, 35 BRBS 26(CRT), *modifying on reh’g* 237 F.3d 404, 34 BRBS 44(CRT) (5th Cir. 2000) (compensation rate at which permanent total disability is to continue is “an essential part of the recommendation” of

³ Section 10(f) provides:

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this chapter *shall be* increased by the lesser of—

(1) a percentage equal to the percentage (if any) by which the applicable national average weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or

(2) 5 per centum.

33 U.S.C. §910(f) (emphasis added).

⁴ The administrative law judge’s notation that “no contention regarding 10(f) was made at [the] formal hearing before the undersigned,” also is incorrect. *See* Supplemental Decision and Order n. 3 at 6. At the hearing, the parties raised their respective positions as to the applicability of Section 10(f), including whether such a reference was made in the district director’s written recommendation and as to whether a controversy existed over this issue at the time the case was forwarded to the Office of Administrative Law Judges. HT at 12-15. The administrative law judge, however, stated that “you can save this argument for briefs in opposition to an attorney fee, if you wish.” HT at 15. Moreover, the administrative law judge awarded claimant Section 10(f) adjustments.

the district director, even though it was not an issue at the time of the informal hearing because claimant was satisfied with what employer had paid at that point). We next address whether employer rejected the district director's written recommendation and claimant obtained greater compensation than that paid by employer following any rejection.

Before the administrative law judge, employer argued "that claimant is permanently and partially disabled from the date of maximum medical improvement, March 31, 2008," Decision and Order dated September 3, 2008 at 22, and supported its position by submitting evidence regarding the availability of suitable alternate employment subsequent to that date. Employer did not pay the Section 10(f) adjustment to which claimant became entitled on October 1, 2008, and opposed claimant's entitlement to permanent total disability benefits, with the corresponding cost-of-living adjustments under Section 10(f), as a finding that claimant was permanently partially disabled prior to October 1, 2008, would foreclose any entitlement to such adjustments. Consequently, employer's actions in this case constitute a rejection of the district director's written recommendation. We, therefore, reverse the administrative law judge's finding that employer did not refuse to accept the written recommendation of the district director.

While the administrative law judge denied claimant's counsel an attorney's fee without addressing the "greater compensation" issue, employer's failure before the administrative law judge to establish claimant's entitlement to permanent partial rather than permanent total disability benefits, in conjunction with the administrative law judge's specific finding that claimant is entitled to permanent total disability benefits with annual cost-of-living adjustments pursuant to Section 10(f), establishes that claimant obtained greater compensation than that paid by employer following its rejection of the district director's written recommendation. Specifically, claimant's entitlement to cost-of-living adjustments pursuant to Section 10(f) constitutes additional compensation within the meaning of Section 28(b). *See* 33 U.S.C. §910(f); *see generally Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (employer is liable for an attorney's fee where claimant obtains an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), as it results in the accrual of a benefit to claimant greater than that voluntarily paid by employer); *see also Bowen*, 912 F.2d 348, 24 BRBS 9(CRT). Counsel is, therefore, entitled to an employer-paid attorney's fee under Section 28(b). *Staftex*, 237 F.3d 404, 34 BRBS 44(CRT); *Anderson v. Associated Naval Architects*, 40 BRBS 57 (2006). Consequently, as employee refused the district director's written recommendation and claimant obtained greater compensation, we reverse the administrative law judge's denial of an employer-paid attorney's fee. We remand this case for the administrative law judge to determine the amount of the fee to which claimant's counsel is entitled. 20 C.F.R. §702.132.

Accordingly, the administrative law judge's finding that claimant's counsel is not entitled to an attorney's fee payable by employer pursuant to Section 28(b) is reversed, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge