

BRB No. 01-0795

ERNEST AXSON)
)
 Claimant-Respondent)
)
 v.)
)
 ELECTRIC BOAT CORPORATION) DATE ISSUED: July 2, 2002
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Decision on Motion for Reconsideration, and Supplemental Decision and Order Granting Attorney Fee of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Mark W. Oberlatz (Murphy and Beane), New London, Connecticut, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, Decision on Motion for Reconsideration, and Supplemental Decision and Order Granting Attorney Fee (2000-LHC-1924) of Administrative Law Judge David W. Di Nardi 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 be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a welder, suffers from hand/arm vibration syndrome arising from the use of vibratory tools at work. Claimant last worked for employer in 1996. Employer voluntarily paid claimant benefits for a five percent permanent impairment to his right hand and a four percent permanent impairment to his left hand based on Dr. Wainwright's opinion. The administrative law judge awarded claimant benefits for a 15 percent permanent impairment to the right hand and 20 percent permanent impairment to the left hand pursuant to Section 8(c)(3) of the Act, 33 U.S.C. §908(c)(3), crediting Dr. Browning's opinion over the opinions of Drs. Wainwright and Jones. The administrative law judge summarily denied employer's motion for reconsideration.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of \$7,991.44, representing 37.58 hours of attorney services performed at \$200 per hour and 1.5 hours of legal assistant time at \$55 per hour, plus costs of \$392.94. The administrative law judge awarded claimant's counsel a fee of \$8,191.44, representing 39.58 hours at \$200 per hour for attorney services, which included two additional hours for claimant's counsel's defense of his fee petition, 1.5 hours of legal assistant time at \$55 per hour, and costs of \$392.94.

On appeal, employer challenges the administrative law judge's awards of benefits based on Dr. Browning's opinion and the award of an attorney's fee. Claimant has not responded to this appeal.

We first address employer's challenge to the administrative law judge's award of permanent partial disability benefits. Employer contends that the administrative law judge erred in crediting Dr. Browning's opinion over the opinions of Drs. Wainwright and Jones on the basis that Dr. Browning is claimant's treating physician. Dr. Browning assessed claimant's condition as a 15 percent impairment to the right hand and a 20 percent impairment to the left hand. CX 2. Dr. Wainwright assessed ratings of five percent to the right hand and 4 percent to the left hand. EX 6. Dr. Jones, who reviewed claimant's medical records, opined that claimant has a 4 percent impairment of the left upper extremity, but no ratable impairment to the right hand or arm. EX 8.

An administrative law judge may accord determinative weight to the opinion of claimant's treating physician. See *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT)(2^d Cir. 1997); see also *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT)(9th Cir. 1999), *cert. denied*, 120 S.Ct. 40 (1999). In this case, however, the administrative law judge erred in crediting Dr. Browning's opinion on this basis, as there is no evidence to support the administrative law judge's finding that Dr. Browning is claimant's treating physician.

Dr. Browning saw claimant on only two occasions, the first at the behest of claimant's attorney for evaluation purposes, and the second to rate claimant's impairment based on the objective studies performed by Dr. Alessi, a neurologist. Decision and Order Awarding Benefits at 4-6; Emp. Ex. 5; Cl. Exs. 2, 6 at 4, 15-16. Dr. Browning did not provide continuing treatment for claimant. Cl. Ex. 6 at 6, 15, 21; Tr. at 33, 35. Thus, the administrative law judge erred in according greater weight to Dr. Browning's opinion on the basis that he is claimant's treating physician as both Drs. Wainwright and Browning saw claimant only for the purpose of assigning him impairment ratings.¹

Employer contends that the administrative law judge also erred in relying on Dr. Browning's ratings of 15 and 20 percent impairment to the right and left hands, respectively, because they take into account claimant's daily chronic pain and limitations; employer avers that Dr. Browning's opinion does not reflect the existence of these factors and that there is no evidence to establish that claimant has daily chronic pain or has any limitations except to avoid the use of air powered tools. An administrative law judge may rely on a physician's impairment rating based on subjective factors, such as pain, to assess the extent of claimant's disability. See *Cotton v. Army Air Force Exch. Serv.*, 34 BRBS 88 (2000).

Employer correctly contends that the administrative law judge's reasoning is not consistent with Dr. Browning's actual findings. Dr. Browning stated that he based his ratings primarily, if not exclusively, on Dr. Alessi's interpretation of the electromyography (EMG) results, and not on claimant's complaints of pain or inability to perform his usual work. Cl. Ex. 6 at 36. Dr. Browning testified by deposition that his ratings were based on claimant's occupational use of air powered tools as well as on Table 16 of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993)(AMA *Guides*) and Dr. Alessi's interpretation of his EMG testing that claimant has a mild right median mononeuropathy and a moderately severe left median mononeuropathy.² Cl. Ex. 6

¹Apparently, claimant does not have a treating physician for his hand condition, as claimant testified at the hearing that he has not seen any other doctor for his hands except Drs. Browning, Wainwright, and Alessi. Tr. at 37.

²Table 16 of the AMA *Guides* provides ratings for upper extremity impairment due to

at 32-36. Dr. Browning reported claimant's primary problem as numbness in his hands but did not report that claimant has daily chronic pain. Cl. Ex. 6 at 5.

entrapment neuropathy. *AMA Guides* at 3/57.

Moreover, the evidence of record does not establish that claimant is in daily chronic pain. Rather, claimant's testimony as well as the medical opinions of Drs. Browning and Wainwright and Ms. Leindecker establish that claimant's hands would get cold, would sometimes get numb, and would get a tingling sensation and be stiff in the morning, and that claimant suffers from a decreased grip strength and cold sensitivity.³ Emp. Exs. 6, 9, 12 at 6; Cl. Ex. 6 at 5; Tr. at 29-31. The only pain referred to in the record is that claimant's wrists would get sore if he carried more than a bundle of newspapers in his newspaper delivery job which he held for six or seven months and does not currently perform. Cl. Ex. 2; Tr. at 27, 31.

Although Dr. Browning restricted claimant from using air powered tools, he did not otherwise restrict claimant's work activities or state how the injury affects claimant's ability to work. Cl. Exs. 2, 6 at 21. In any event, the fact that claimant cannot perform his usual work is not dispositive where, as here, compensation is awarded under the schedule, which provides compensation based on the degree of medical impairment and not on a loss in wage-earning capacity. See *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT)(4th Cir. 1998); *Cotton*, 34 BRBS 88; 33 U.S.C. §908(c). Thus, the administrative law judge erred in assigning determinative weight to Dr. Browning's rating for the reasons that it takes into account claimant's daily chronic pain and inability to perform his usual work. See generally *Pimpinella v. Universal Maritime Serv., Inc.*, 27 BRBS 154 (1993). Because the administrative law judge provided invalid reasons for crediting Dr. Browning's opinion, we must vacate the administrative law judge's award of benefits and remand the case for reconsideration. On remand, the administrative law judge must reweigh the medical evidence of record and provide valid explanations for the weight assigned to the evidence in discerning the extent of claimant's permanent impairment.

We next address employer's challenge to the administrative law judge's award of an attorney's fee. Employer contends that the administrative law judge erred in approving the fee request in its entirety without requiring claimant's counsel

³Dr. Wainwright reported that claimant had numbness in his hands at night, morning stiffness, paresthesia, decreased grip strength, and cold sensitivity. Emp. Exs. 6, 12 at 6, 11. Drs. Alessi and Jones did not record claimant's symptoms. Emp. Exs. 8, 15; Cl. Ex. 4. An occupational therapy evaluation performed by Ms. Leindecker recorded a four year history of numbness and a pins and needles sensation in both hands occurring primarily at night and with certain positions of the arms such as overhead. Emp. Ex. 9. Contrary to the administrative law judge's statement that claimant's daily chronic pain affects his daily living, Ms. Leindecker stated that claimant's symptoms do not interfere with his activities of daily living except that he cannot use vibrating tools. Decision and Order Awarding Benefits at 23; Emp. Ex. 9.

to provide additional information regarding the services performed on August 8, September 14, November 20, 2000, and January 22, 2001, as multiple tasks were performed on those dates. Pursuant to 20 C.F.R. §702.132, any fee approved must be reasonably commensurate with the necessary work done and take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. §702.132.

In the instant case, the administrative law judge stated he considered employer's objections, but agreed with claimant's counsel's explanation in reply, and rejected employer's contention that the fee should be significantly reduced. Supplemental Decision and Order Granting Attorney Fee at 1. The administrative law judge noted that the claim was vigorously defended by employer and was successfully prosecuted with a most reasonable number of hours; further, he applied the regulatory criteria at 20 C.F.R. §702.132. Supplemental Decision and Order Granting Attorney Fee at 1-2. Given the administrative law judge's consideration and rejection of employer's objections, as well as his application of the pertinent regulation, we hold that employer's contention is insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard. See *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT)(10th Cir. 1997); *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997); Supplemental Decision and Order Granting Attorney Fee at 1-2. Thus, the administrative law judge's award of an attorney's fee is affirmed, subject to claimant's success on the merits of the case on remand.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision on Motion for Reconsideration are vacated, and the case is remanded to the administrative law judge for further findings consistent with this opinion. The administrative law judge's Supplemental Decision and Order Granting Attorney Fee is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge