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| DAVID HARMON |) | |
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| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| McGINNIS, INCORPORATED |) | DATE ISSUED: <u>July 25, 2002</u> |
| |) | |
| and |) | |
| |) | |
| FRANK GATES ACCLAIM |) | |
| |) | |
| Employer/Carrier- |) | |
| Petitioners |) | DECISION and ORDER |

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

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

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

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Order Denying Reconsideration (1999-LHC-2969) of Administrative Law Judge Thomas F. Phalen, 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.* (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 barge laborer/barge cleaner, injured his wrist, head, and low back when he fell off a barge at work on July 31, 1998. Claimant has not returned to his usual work but post-injury has held three jobs. Claimant currently works as a part-time dishwasher. Employer voluntarily paid various periods of temporary total disability benefits. The administrative law judge awarded claimant various periods of total disability benefits pursuant to Section 8(a) and (b) of the Act, 33 U.S.C. §908(a), (b), and partial disability benefits pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). The administrative law judge also awarded medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

Before the administrative law judge issued his decision, claimant's counsel submitted a fee petition to the administrative law judge requesting an attorney's fee of \$21,655, and costs of \$3,635.16. The administrative law judge awarded claimant's counsel the entire fee requested in the amount of \$25,290.16 concurrent with his award of disability and medical benefits. Subsequent to the administrative law judge's decision, employer filed a motion for reconsideration regarding the administrative law judge's award of disability and medical benefits and enclosed its objections to claimant's counsel's fee request. In response, the administrative law judge issued an order denying employer's motion for reconsideration and striking employer's objections to claimant's counsel's fee request as untimely filed.

On appeal, employer challenges the administrative law judge's award of partial disability and medical benefits and the award of an attorney's fee. Claimant filed a response brief in support of the administrative law judge's awards to which employer replied.

We first address employer's challenges to the administrative law judge's award of partial disability benefits under Section 8(c)(21). Employer contends that the administrative law judge erred in finding that claimant could not return to his usual work, in finding that it did not establish the availability of suitable alternate employment, and in determining that claimant's current earnings as a part-time dishwasher fairly and reasonably represent his post-injury wage-earning capacity. A claimant establishes his *prima facie* case of total disability if he is unable to perform his usual employment duties due to his work-related injury. See *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998). If claimant succeeds in establishing that he is unable to perform his usual work duties, the burden shifts to employer to demonstrate the availability of suitable alternate employment. See *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). An award of partial disability benefits is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33

U.S.C. §908(c)(21), (h). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h). The party seeking to prove that claimant's actual post-injury earnings do not fairly and reasonably represent his post-injury wage-earning capacity bears the burden of proof. See, e.g., *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT)(5th Cir. 1992).

In the instant case, the administrative law judge acted within his discretion in finding that claimant is unable to return to his usual work based on the opinion of claimant's treating physician, Dr. Querubin, who is Board-eligible in internal medicine, over the contrary opinions of Drs. Love and Anthony, who are Board-certified in orthopedic surgery and neurology, respectively.¹ See generally *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT)(2d 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*, 528 U.S. 809 (1999); Decision and Order - Awarding Benefits at 26, 35, 36, 45; Cl. Ex. 24 at 22, 29; Emp. Exs. 1, 2 at 4, 12-13, 15-16, 24, 27-28, 31, 4 at 6, 14-15. Moreover, the administrative law judge rationally found that employer did not establish the availability of suitable alternate employment. In this regard, the administrative law judge credited the opinion of claimant's vocational expert, Ms. Pearson, that claimant could not perform the jobs identified by employer's vocational expert, Ms. Pride. Moreover, the administrative law judge rationally rejected the jobs identified by Ms. Pride because it was not clear what physical and mental limitations Ms. Pride relied upon in identifying prospective jobs for claimant. See *Wilson v. Crowley Maritime*, 30 BRBS 199, 204 (1996); *Canty v. S.E.L. Maduro*, 26 BRBS 147, 151-152 (1992); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988); Decision and Order - Awarding Benefits at 40, 41, 46; Cl. Exs. 23, 25 at 18-19, 40-41, 50; Emp. Ex. 7. Lastly, the administrative law judge's finding that claimant's current earnings as a part-time dishwasher fairly and reasonably represent his post-injury wage-earning capacity is supported by substantial evidence. The administrative law judge credited the opinions of Dr. Querubin and Ms. Pearson that claimant cannot work more than 30 hours a week and is functioning at the highest vocational level possible considering his physical and mental limitations. Decision and Order - Awarding Benefits at 46-47, 50-52; Cl. Exs. 23, 24 at 22-24, 27, 25 at 12-13, 17; Tr. at 73. Consequently, we affirm the administrative law judge's award of partial disability benefits. See generally

¹Claimant's usual work required lifting of over 75 pounds whereas Dr. Querubin limited claimant to lifting 10 pounds post-injury. Cl. Exs. 24 at 22, 26; Tr. at 39.

Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 2000).

We next address employer's challenge to the administrative law judge's award of medical benefits pursuant to Section 7. Employer contends that the administrative law judge erred in awarding medical benefits for the diagnosis and treatment of claimant's Bell's palsy after finding that this condition is not work-related. In order for a medical expense to be assessed against employer, claimant must establish that the expense is work-related and reasonable and necessary for the treatment of his work injury. 33 U.S.C. §907; *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). In the instant case, claimant sought reimbursement from employer for medical bills in the amount of \$16,452.40. See Cl. Ex. 21.

The medical bills arise in part from events which occurred in June and July 1999. On June 30, 1999, claimant presented himself to Dr. Querubin for relief from neck and back pains, headaches, facial numbness, and slurred speech. Cl. Ex. 24 at 62-66. Dr. Querubin hospitalized claimant locally and consulted with a neurologist, Dr. Bansal. Cl. Ex. 13. Dr. Bansal determined that claimant should be transferred to the University of Kentucky Medical Center for the investigation of his symptoms, stating that had it not been for claimant's work accident in which claimant suffered head trauma, claimant would have been treated locally. Cl. Ex. 14. Claimant was transported by ambulance on July 1, 1999, to the University of Kentucky Medical Center where he was hospitalized until July 3, 1999, and diagnosed with and treated for Bell's palsy. Cl. Exs. 13, 15, 16, 21. It is undisputed that claimant's Bell's palsy is a viral condition and not trauma-related. Emp. Exs. 2 at 25, 3, 4 at 12-13.

The administrative law judge found employer liable for medical expenses associated with the diagnosis of Bell's palsy, as the doctors thought claimant's symptoms could be due to the work injury. The administrative law judge stated that employer is not liable for expenses associated with the treatment of the Bell's palsy. Decision and Order - Awarding Benefits at 53 n. 6. The administrative law judge, however, held employer liable for all medical expenses sought because employer did not establish which bills were related to the diagnosis, and which were related to the treatment, of the Bell's palsy.

We agree with employer that the administrative law judge erroneously held it liable for medical expenses for the diagnosis and treatment of claimant's Bell's palsy. See Decision and Order - Awarding Benefits at 53 n. 6. It is claimant's burden, not employer's, to establish that medical treatment is necessary for and related to his work injury. See, e.g., *Schoen v. U.S. Chamber of Commerce*, 30

BRBS 112 (1996); *Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1130 (1981). Thus, the lack of information concerning which bills were associated with diagnosis and which with treatment cannot result in employer's being held liable for all expenses. *Id.* Moreover, we hold that the administrative law judge erred in finding employer liable for the expenses associated with the diagnosis of claimant's Bell's palsy. Although the physicians opined that claimant's symptoms could have been due to the work injury, claimant ultimately was diagnosed with Bell's palsy, which is not related to the work injury. Employer cannot be held liable for these non work-related medical expenses regardless of the reasonableness of the course of diagnosis and treatment. Thus, we reverse the administrative law judge's finding that employer is liable for the expenses incurred for the diagnosis and treatment of Bell's palsy. However, we remand this case to the administrative law judge for further consideration of claimant's entitlement to medical benefits because there may be work-related medical bills included in the requested amount of \$16,452.40, as it appears some medical expenses were incurred prior to the onset of the Bell's palsy symptoms. See Cl. Ex. 21.

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 awarding the attorney's fee concurrent with his awards of disability and medical benefits and in striking its objections as untimely filed when it was not aware that it would be held liable for an award of disability and medical benefits. An administrative law judge may issue his fee award concurrent with his compensation award. See *Luna v. Todd Shipyards Corp.*, 12 BRBS 70 (1980). Although the Act and the fee regulations governing fee awards by administrative law judges, 33 U.S.C. §928; 20 C.F.R. §702.132, do not specify a time period for the filing of either a fee petition or objections thereto, the Board has upheld an administrative law judge's decision not to consider employer's objections after finding that employer did not timely reply in accordance with the regulations at 29 C.F.R. §§18.4(c), 18.6(a), (b), which together provide a party opposing a motion to respond within 15 days. See *Harmon v. Sea-Land Svc., Inc.*, 31 BRBS 45 (1997). Due process requires only that the fee request be served on employer and that it be given a reasonable time to respond. *Id.*, 20 C.F.R. §702.132.

In the instant case, the administrative law judge did not set a time limit for the filing of employer's objections upon receipt of claimant's counsel's fee request on November 3, 2000, which was served upon employer. The administrative law judge awarded the entire fee requested concurrent with his award of disability and medical benefits, in May 2001. Employer first objected to claimant's counsel's fee request in its motion for reconsideration. We hold that the administrative law judge committed no abuse of discretion in striking employer's objections as untimely filed, and we affirm this finding. See *Harmon*, 31 BRBS 45; 29 C.F.R. §§18.4(c), 18.6(a),

(b).

However, we cannot affirm the administrative law judge's fee award because claimant's success on remand will be less than his initial success based on our disposition of employer's appeal of the medical benefits. Consequently, on remand, the administrative law judge should reconsider the amount of the fee to be awarded based on claimant's reduced success on remand. See *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT)(5th Cir. 1993); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT)(D.C. Cir. 1992); *Stratton v. Weedon Eng'g Co.*, 35 BRBS 1 (2001)(*en banc*).

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board, requesting a total fee of \$2,620.47, representing 14.7 hours of work at an hourly rate of \$175, and costs of \$47.97. Employer has not objected to the fee petition. We award counsel the fee as requested as it is reasonable for his work defending his award of partial disability benefits against employer's appeal. See *McKnight v. Carolina Shipping Co.*, 32 BRBS 251 (1998)(decision on reconsideration *en banc*); 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Order Denying Reconsideration are vacated with respect to the administrative law judge's awards of medical benefits and attorney's fee, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's decisions are affirmed. Claimant's counsel is entitled to an attorney's fee of \$2,620.47 for work performed before the Board to be paid directly to claimant's counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge