BRB Nos. 11-0352
and 11-0352A

FRED BUSSE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 06/26/2012
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision on Remand of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., for claimant.

Jerry R. McKenney, Frank W. Gerold, Wesley K. Young (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision on Remand (2008-LDA-0087) of Administrative Law Judge Clement J. Kennington 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 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).

This case is before the Board for the second time. To recapitulate, claimant worked as a recovery mechanic for employer in Iraq. In July 2007, claimant noticed heat and redness on his right shoulder and was diagnosed with an abscessed staph infection. He was sent from the facility in Al Assad, Iraq, to Kuwait and subsequently returned to the United States for treatment in late July 2007. When treatment was unsuccessful, he was referred to Dr. Nellore, a specialist in infectious diseases, who diagnosed leishmaniasis.[1] Employer paid claimant temporary total disability benefits for the period of July 28 to October 23, 2007. Claimant sought additional disability and medical benefits.

In his Decision and Order dated October 10, 2008, the administrative law judge found that claimant's condition is work-related. The administrative law judge awarded claimant compensation for temporary total disability, 33 U.S.C. §908(b), for the period from October 23, 2007 to April 1, 2008.[2] The administrative law judge found that claimant's average weekly wage is $1,916.73 and that claimant's compensation rate is subject to the maximum rate in effect in July 2007, when claimant's disability commenced. The administrative law judge also held employer liable for medical benefits.

[1]Leishmaniasis is a disease found in parts of the tropics, subtropics, and southern Europe caused by infectious parasites which are spread by the bite of infected sand flies. EX 9 at 3-4.

[2]The administrative law judge found that claimant reached maximum medical improvement with regard to his leishmaniasis as of April 1, 2008, based on claimant's testimony that his shoulder healed sometime in April 2008 and Dr. Gutwein's report on June 19, 2008, that the treatments were successful and claimant's shoulder was fully functional. CX 17 at 4-8. Claimant also filed a claim for a work-related neck injury sustained in July 2007. In his decision dated December 4, 2009, the administrative law judge awarded claimant, based on his work-related neck injury, temporary total disability benefits from April 1, 2008 to July 9, 2009, and temporary partial disability benefits from July 9, 2009, based on a post-injury loss of wage-earning capacity of $1,281.73 per week. 33 U.S.C. §908(b), (e).

Claimant appealed, contending the administrative law judge erred: in awarding disability compensation only from October 23, 2007 to April 1, 2008, rather than from July 28, 2007, subject to a credit for the amount employer already paid; in limiting compensation payable to the maximum rate in effect at the time the disability commenced, rather than at the time the award was entered; and in failing to address the application of Section 14(e), 33 U.S.C. §914(e). In its decision, the Board modified the administrative law judge's decision to reflect claimant's entitlement to compensation for temporary total disability from July 28, 2007 to April 1, 2008, based on an average weekly wage of $1,916.73, with employer receiving a credit for amounts already paid during this period. *F.B. [Busse] v. Service Employers Int'l, Inc.*, BRB No. 09-0169 (Sept. 15, 2009) (unpub.). The Board stated that, for the reasons expressed in *Estate of C. H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009), and *Reposky v. Int'l Transportation Services,* 40 BRBS 65 (2006), the administrative law judge properly awarded compensation at the maximum rate effective in July 2007, when claimant's disability commenced. The Board remanded the case for the administrative law judge to address claimant's contention that he erred in failing to award additional compensation pursuant to Section 14(e) for payments due more than fourteen days before August 23, 2007, when employer filed its late notice of controversion. Pursuant to claimant's motion for reconsideration, the Board stated that the administrative law judge, on remand, also should determine the date claimant's disability commenced, i.e., July 15 or July 28, 2007, and award additional compensation, if appropriate. *Busse v. Service Employers Int'l, Inc.*, BRB No. 09-0169 (Dec. 12, 2009) (Order) (unpub.).

In his decision on remand, the administrative law judge found that claimant's leishmaniasis prevented his return to work from July 15, 2007 to April 1, 2008. Accordingly, the administrative law judge found claimant entitled to compensation for temporary total disability from July 15 to July 28, 2007. Decision on Remand at 3. The administrative law judge found that employer is not entitled to a credit for the wages employer paid claimant during this period as there is no evidence that these wages were intended as advance compensation payments. *Id*. at 4. The administrative law judge found that employer is liable for a Section 14(e) assessment on compensation payments due from July 29 to August 23, 2007, when employer filed its controversion notice. *Id*. Claimant and employer both appeal the administrative law judge's Decision on Remand.

On appeal, claimant argues that the Section 14(e) assessment should encompass all payments in advance of an award that were found due before and after employer filed its notice of controversion, and not just the payments that were due before employer filed its notice of controversion. Claimant also re-asserts his contention that the applicable maximum compensation rate should be the one in effect in Fiscal Year 2009, when he was first awarded compensation. BRB No. 11-0352. Employer responds, urging rejection of claimant's contentions. Employer cross-appeals the administrative law

judge's finding that claimant was disabled as of July 15, 2007, and, in the alternative, contends the administrative law judge erred by not awarding it a credit for the wages it paid claimant from July 15 to July 28, 2007. BRB No. 11-0352A. Claimant responds, urging affirmance of the administrative law judge's findings on these issues.[3]

Claimant first argues that the plain language of Section 14(e) contemplates a 10 percent assessment on "any installment of compensation" unless compensation is payable pursuant to an award, if a timely notice of controversion was not filed. Section 14(e) provides:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. §914(e). Claimant thus contends the administrative law judge erred in awarding the assessment only on those installments due and unpaid prior to the filing of employer's notice of controversion, which was not filed in a timely manner.

The Board addressed this issue in *Oho v. Castle & Cooke Terminals, Ltd.*, 9 BRBS 989, 991-993 (1979), holding that, consistent with the plain language in Sections 14(a), (b), and (d), 33 U.S.C. §914(a), (b), (d), and the policy incentive in Section 14(e) to encourage employers to promptly file a notice of controversion once they have knowledge of an injury, the assessment provided in Section 14(e) applies only to compensation that became due prior to an employer's filing of a controversion notice.[4]

---

[3]In an Order dated November 30, 2011, the Board placed this appeal in abeyance pending a ruling by the Supreme Court in the case of *Roberts v. Sea-Land Services, Inc.*. The Supreme Court issued a decision in *Roberts*, 132 S. Ct. 1350, 46 BRBS 15(CRT) (2012), on March 20, 2012; thus, the abeyance is lifted. Additional briefing by the parties is not required in this case.

[4]The Board added that "in order to accept the Director's [and thus in this case claimant's] argument, we would have to ignore the language of Section 14(e) which clearly applies the [assessment] only to installments which have become due and are

Accord National Steel & Shipbuilding Co. v. U.S. Dep't of Labor, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). Subsequently, the Board declined to overrule *Oho* in *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989), as Section 14 of the Act, taken as a whole, suggests that employer's liability for a Section14(e) assessment terminates with its filing of a notice of controversion. The Board stated that terminating an employer's liability for a Section 14(e) assessment upon its filing of a notice of controversion provides an incentive for employers to file the notice, which thereby benefits claimants by initiating resolution of the dispute. *Scott*, 22 BRBS at 169; *see Oho*, 9 BRBS at 993. In this case, claimant provides no new rationale for overruling well-established precedent. Accordingly, for the reasons stated in *Oho* and *Scott*, we reject claimant's contention and affirm the imposition of a Section 14(e) assessment on the payments due from July 29 to August 23, 2007, at which time employer filed a notice of controversion.

Claimant next asserts, based on *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997), that the administrative law judge erred by applying the maximum compensation rate in effect at the time of the injury in July 2007, rather than the rate in effect at the time the administrative law judge's initial award was filed in October 2008. 33 U.S.C. §906(b)(1), (c). The issue of the applicable maximum compensation rate was recently addressed by the Supreme Court in *Roberts v. Sea-Land Services, Inc.*, 132 S. Ct. 1350, 46 BRBS 15(CRT) (2012), wherein the Court held that the maximum compensation rate under Section 6 is the rate in effect when the claimant first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation order issues on his behalf. *Id.* at 1363, 22(CRT). Accordingly, we reject claimant's assertion, and thus affirm the administrative law judge's application of the maximum compensation rate in effect at the time claimant became disabled in July 2007. *Id.*

In its cross-appeal, employer contends that the administrative law judge erred by finding that claimant was disabled as of July 15, 2007, on the basis that it paid claimant the minimum wages he was due under his employment contract from July 14 to July 28, 2007. *See* EX 3 at 2. Employer asserts that claimant is not entitled to a disability award until he sustained an economic loss, which did not arise until employer stopped paying claimant wages when he was repatriated to the United States. Alternatively, employer argues that it is entitled to a credit for the wages it paid claimant during this period against the penalties and compensation due.

---

unpaid." *Oho*, 9 BRBS at 992. Installments are not "due" under Section 14(e) once a notice of controversion has been filed.

In his initial decision, the administrative law judge found claimant entitled to compensation for temporary total disability from July 28, 2007 to April 1, 2008. On remand, the administrative law judge found that claimant's leishmaniasis prevented his return to his regular employment from July 15, 2007 to April 1, 2008, and he thus awarded additional compensation for temporary total disability from July 15 to July 28, 2007. Decision on Remand at 3. The administrative law judge also found that the wages employer paid for the period from July 15 to July 26, 2007, are not "compensation" under the Act as there is no evidence that these wages were intended as advance payments of compensation. Therefore the administrative law judge found that employer is not entitled to a credit for wage payments under claimant's employment contract. *Id*. at 4.

"Disability" is defined by the Act, in pertinent part, as: "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §902(10). Thus, "disability" under the Act has been described as an economic concept, based on a medical foundation. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). A claimant's disability is determined by the extent of his *capacity* to earn wages and not on his mere receipt of wages. *See, e.g., CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Burley Welding Works v. Lawson*, 141 F.2d 964 (5th Cir. 1944); *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F.2d 513 (9th Cir. 1939). In this case, substantial evidence supports the administrative law judge's unchallenged finding that claimant was physically unable to return to his usual employment because of his work injury. As claimant thus lost all *capacity* to earn wages, the administrative law judge properly awarded temporary total disability benefits as of July 15, 2007. Employer's continued payment of wages under the employment contract is irrelevant to this disability determination. We, therefore, affirm the administrative law judge's award of temporary total disability compensation commencing on July 15, 2007.

Alternatively, employer argues that it is entitled to a credit for the wages it paid claimant after July 15, 2007. Pursuant to Section 14(j), 33 U.S.C. §914(j), employer is entitled to a credit only for its prior payments of compensation against any compensation subsequently found due.[5] *Trice v. Virginia Int'l Terminals, Inc.*, 30 BRBS 165 (1996). Employer must establish that the benefits were intended as advance payments of

[5]Section 14(j) provides:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. §914(j).

compensation in order to be entitled to a credit under Section 14(j). *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Specifically, employer is not entitled to a credit for continued salary payments unless it shows that these payments were intended to be advance payments of compensation. *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). In this case, the administrative law judge found there is no evidence that these wages were intended as advance compensation. Employer does not contest this finding. In the absence of such evidence, we affirm the administrative law judge's conclusion that employer is not entitled to a credit under Section 14(j) for the wages it paid claimant from July 15 to July 28, 2007. Thus, as the parties' contentions concerning the Decision on Remand are without merit, the administrative law judge's decision is affirmed.

Claimant's counsel has filed a petition for an attorney's fee totaling $9,500, representing 20 hours of attorney time at $475 per hour for work performed before the Board in the prior appeal in this case. BRB No. 09-0169. Employer filed objections to the fee request to which claimant filed a reply and appended a supplemental fee application in which counsel requested a fee for an additional 11.7 hours at $475 per hour.[6] We reject employer's argument that a fee should be denied because it was unnecessary for claimant's trial counsel to associate appellate counsel for the proceeding before the Board. There is no prohibition under the Act against the retention of appellate counsel and claimant is entitled to be represented by his choice of counsel. Only one attorney appeared before the Board on claimant's behalf and only one has filed a fee petition. *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009). Thus, there has been no duplication of services.

Employer challenges the requested hourly rate of $475, and contends that an hourly rate of $250 is appropriate. In this regard, employer submitted with its objections the 2010 Survey of Small Law Firm Economics. Employer's Response EX B. Claimant's counsel seeks a fee for services provided from December 22, 2008 to February 22, 2011, and, based on the *Laffey* Matrix, requests his current hourly rate of $475 for all services rendered due to delay in receiving a fee award for services rendered more than two years ago. *See Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 256, 43 BRBS 6, 10(CRT) (9th Cir. 2009); *see also Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997). For the reasons stated in *Holiday v. Newport News*

[6]Employer's contention that the fee petition was prematurely filed is moot, given that the Board has now addressed the appeals resulting from the administrative law judge's decision on remand.

Shipbuilding & Dry Dock Co., 44 BRBS 67(CRT) (2010),[7] we reject employer's evidence, and conclude, based on counsel's experience, expertise, and the *Laffey* Matrix, and in order to account for the delay in his receipt of a fee, that he is entitled to a fee at his requested hourly rate of $475 for all compensable services rendered from December 2008 to February 2011.

Claimant is entitled to an attorney's fee payable by employer because he was successful in obtaining a disability award from July 15, 2007, rather than the date the administrative law judge initially commenced the award on October 23, 2007, and a Section 14(e) assessment for payments due from July 29 to August 23, 2007. 20 C.F.R. §802.203(b). Nevertheless, the time requested by counsel is excessive under the circumstances of this case, as claimant's counsel was unsuccessful in challenging the applicable maximum compensation rate and in obtaining a Section 14(e) assessment on employer's payments due after its filed a notice of controversion on August 23, 2007. *See generally Hensley v. Eckerhart*, 461 U.S. 424 (1983). Employer adopts counsel's representation that he devoted a total of 5.1 hours to these unsuccessful issues. Employer's Objections at 10. In light of counsel's partial success, we disallow 5.1 hours of attorney time. Moreover, counsel's request for 11.7 hours for an eleven-page reply brief is excessive given the nature and number of employer's objections to the fee petition. Therefore, we disallow 6.7 of the 11.7 hours requested for this task. *See Malone v. Howard Fuel Co.*, 16 BRBS 364 (1984). Finally, employer's objection to the 2.5 hours requested for preparation of the fee petition is rejected as this time is compensable and not unreasonable. *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000); *see also Anderson v. Director, OWCP*, 91

[7]In *Holiday v. Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 44 BRBS 67(CRT) (2010), the Board stated that counsel adequately justified his hourly rate request by providing sufficient evidence of a "market rate" that he receives from paying clients in view of his expertise and experience and the *Laffey* Matrix. *Holiday*, 44 BRBS at 68. The Board added that the *Laffey* Matrix is more probative than the 2002 Altman Weil survey relied upon by employer, because the latter document failed to address with specificity the Washington, D.C. market or counsel's expertise. Moreover, the Board stated that the Supreme Court has held that a "reasonable attorney's fee" is calculated in the same manner in all federal fee-shifting statutes; thus, the Board found appropriate counsel's reference to the *Laffey* Matrix as support for his hourly rate request, as the Matrix applies to fee-shifting statutes, such as the Longshore Act, where the prevailing party may recover a reasonable attorney's fee. *Id.*; *citing City of Burlington v. Dague*, 505 U.S. 557, 561 (1992); *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT). In this case, the 2010 Survey of Small Law Firm Economics similarly groups practices by broad geographic regions, rather than by city.

F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). Consequently, claimant's counsel is awarded an attorney's fee of $9,452.50, representing 19.9 hours at $475 per hour for work performed before the Board in BRB No. 09-0169, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision on Remand is affirmed. Claimant's counsel is awarded a fee of $9,452.50 for work performed before the Board in BRB No. 09-0169, payable directly to counsel by employer.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge