BRB No. 07-0502

L.A.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINO SUGAR CORPORATION	)	DATE ISSUED:
	)	11/26/2007<u>2007</u>
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
		DECISION and ORDER

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

Leonard A. Washofsky, Metairie, Louisiana, for claimant.

John J. Rabalais, Janice B. Unland, and Robert T. Lorio (Rabalais, Unland & Lorio), Covington, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees (2006-LHC-778) 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 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 will not be set aside unless shown by the challenging party 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 sustained injuries, initially diagnosed as contusions of the left elbow, hip, and shoulder, as a result of a slip and fall accident which occurred in the course of his usual work for employer on July 17, 2000. Persistent symptoms, including leg weakness, prompted a visit to a neurosurgeon, Dr. George, who diagnosed disc herniations at C4-5 and C6-7. Dr. George subsequently performed surgeries on claimant's cervical spine in 2000 and 2002, and ultimately opined, on June 28, 2005, that claimant "is permanently totally disabled because of the spinal cord lesion he suffered," and that "therefore he is unable to perform any type of work." Claimant's Exhibit (CX) 6 at 3.

In contrast, Dr. Barfoot, on February 3, 2005, and Dr. Montz, on November 21, 2005,[1] each opined that claimant was capable of performing work at a sedentary level, leading employer to procure a labor market survey from Karla Seyler, dated October 25, 2006. Employer's Exhibit (EX) 15. Based on her assessment of claimant, in conjunction with the sedentary-only restrictions of Drs. Barfoot and Montz, Ms. Seyler identified four prospective alternative jobs which she believed were suitable for claimant. Claimant, however, did not believe he was capable of working and sought a determination that he is permanently totally disabled as a result of his work injury.

The administrative law judge found that claimant is not able to return to his former position and concluded, after reviewing and rejecting the positions identified in Ms. Seyler's labor market survey, that employer did not establish the availability of suitable alternate employment. Thus, the administrative law judge awarded claimant temporary total disability benefits from September 7, 2000, to December 8, 2004, and continuing permanent total disability benefits from December 8, 2004,[2] as well as medical benefits. The administrative law judge also found, contrary to employer's contention, that claimant's refusal to undergo a functional capacity evaluation (FCE) requested by Dr. Montz did not bar his recovery of compensation.

Claimant's counsel thereafter requested an attorney's fee totaling $9,099.20, representing 44.25 hours of services at an hourly rate of $200, plus costs of $249.20.

[1] In addition, Dr. Montz indicated that a functional capacity evaluation would assist him to further delineate claimant's work capacity and restrictions. EX 4.

[2] The administrative law judge found, based on Dr. George's opinion, that claimant reached maximum medical improvement as of December 8, 2004.

Employer filed specific objections to the fee petition. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge found employer liable for an attorney's fee to claimant's counsel totaling $8,959.20, representing 43.55 hours at an hourly rate of $200, plus the requested costs of $249.20.

On appeal, employer challenges the administrative law judge's findings regarding claimant's refusal to undergo a FCE and that claimant is totally disabled, as well as his award of an attorney's fee. Claimant responds, urging affirmance.

Employer asserts that the administrative law judge erred in not suspending claimant's compensation because of claimant's failure to undergo the FCE recommended by Dr. Montz. Employer specifically contends that Section 7(d)(4), 33 U.S.C. §907(d)(4), mandates that claimant's benefits be suspended as claimant's refusal to undergo the FCE is unreasonable. In this regard, employer contends that claimant offered no justification for his refusal, other than to state that he did not wish to undergo the test. Employer maintains that, therefore, claimant's compensation should be suspended from January 3, 2006, until he undergoes the FCE.

Section 7(d)(4) provides that an administrative law judge may, by order, suspend the payment of all further compensation to an employee during any period in which he unreasonably refuses to submit to a medical examination by a physician selected by employer, unless the circumstances justified the refusal. 33 U.S.C. §907(d)(4);[3] *see also* 20 C.F.R. §702.410(b). Section 7(d)(4) requires a dual inquiry. Initially, the burden of proof is on the employer to establish that claimant's refusal to undergo a medical examination is unreasonable; if carried, the burden shifts to claimant to establish that circumstances justified the refusal. For purposes of this test, reasonableness of refusal has been defined by the Board as an objective inquiry, while justification has been defined as a subjective inquiry focusing narrowly on the individual claimant. *See Malone v. Int'l Terminal Operating Co.*, 29 BRBS 109 (1995); *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979) (Smith, S., dissenting). If claimant's refusal is unreasonable and unjustified, then compensation is suspended during the period from the date of refusal until claimant undergoes the examination. *See B.C. v. Int'l Marine Terminals*, ___ BRBS

[3] Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), provides that:

> If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

___, No. 07-0325 (Sept. 28, 2007); *Dodd v. Crown Central Petroleum Co.*, 36 BRBS 85 (2002).

The administrative law judge rationally found that claimant's refusal to undertake the FCE was not unreasonable. Decision and Order at 9. The administrative law judge based this finding on the facts that neither Ms. Seyler nor Dr. George felt that an FCE was absolutely necessary, that Dr. Montz indicated only that it would be helpful, and that claimant had significant ambulatory difficulties. *See Malone*, 29 BRBS at 110-111; *Hrycyk*, 11 BRBS at 240-241. Moreover, the lack of the FCE did not deter Ms. Seyler from completing her labor market survey. *See* EX 17. Thus, employer did not establish that claimant's refusal to undergo the FCE was unreasonable. *See Malone*, 29 BRBS at 110-111; *Hrycyk*, 11 BRBS at 240-241. Consequently, we affirm the administrative law judge's finding that claimant's refusal to undergo the FCE does not support a suspension of compensation under Section 7(d)(4).

Employer next argues that the administrative law judge erred in finding that claimant is totally disabled. Employer asserts that its evidence confirms claimant's ability to do sedentary work and that this fact, in conjunction with its labor market survey, is sufficient to meet its burden of establishing the availability of suitable alternate employment. Employer contends that the administrative law judge's reliance on the opinion of Dr. George to establish permanent total disability is flawed since it was rendered in 2004 and because it contradicts Dr. George's prior assessment, in June 2003, that claimant was capable of performing sedentary work activities. In contrast, employer avers that the opinions of Drs. Barfoot and Montz, as well as the surveillance videotape, establish claimant's ability to do the sedentary work identified in Ms. Seyer's labor market survey.

Once, as in this case, claimant establishes an inability to perform his usual work as a result of his work injury, *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998), the burden shifts to employer to establish the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether a job is realistically available and suitable for the claimant. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). In ascertaining the suitability of a job, the administrative law judge must compare the duties of the positions with the claimant's restrictions. *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986). If the employer establishes the availability of suitable alternate employment, then the claimant is, at most,

partially disabled, unless he establishes he diligently tried but failed to obtain suitable work. *Turner*, 661 F.2d 1031, 14 BRBS 156.

In this case, the administrative law judge rationally credited the opinion of claimant's treating physician, Dr. George, that claimant "is unable to perform any type of work," CX 6, over the opinions of Drs. Barfoot and Montz, that claimant was capable of performing some sedentary work.[4] *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Dr. George's opinion provides substantial evidence supporting the administrative law judge's conclusion that claimant is unable to work and thus is totally disabled. In addition, the administrative law judge explicitly considered each of the positions identified by employer and deemed suitable by Dr. Montz, and thereafter determined, following a consideration of the totality of claimant's condition, including his background, work experience and skills, that claimant is incapable of performing any of these jobs.[5] As the administrative law judge's findings are rational, supported by substantial evidence, and are in accordance with law, his conclusion that employer did not demonstrate the availability of suitable alternate employment and consequent award of total disability benefits are affirmed. *See generally Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005).

Employer argues that claimant's counsel is not entitled to any attorney's fee pursuant to Section 28(b) in this case because it has been voluntarily paying total disability benefits at all relevant times and because the instant litigation arose solely out of claimant's refusal to undergo the FCE recommended by Dr. Montz. Citing *Flowers v. Marine Concrete Structures, Inc.*, 19 BRBS 162 (1986), employer contends that

[4] In this regard, the administrative law judge found that Dr. George "treated claimant for 5 years and two surgeries and was aware of his overall condition," Decision and Order at 8, whereas Drs. Barfoot and Montz "saw claimant once each." *Id.*

[5] The administrative law judge rejected the cafeteria position reasoning that "it is hard to image a person wearing a diaper with uncontrollable bladder and bowels" working in such a food-oriented setting. Decision and Order at 9. He next found it "equally hard to imagine" that claimant could, with his paresis of his legs and carpal tunnel syndrome, operate a sewing machine in a shirt factory. Lastly, the administrative law judge found that the parking lot attendant jobs were not appropriate because it is "questionable" whether claimant could perform the math tasks required of such a position and it does not appear to be consistent with claimant's bathroom needs, particularly given that the facilities are, as Ms. Seyler stated, not close at hand. *Id.*

claimant's counsel cannot be awarded an attorney's fee since the litigation was due merely to claimant's "intransigence" rather than any controversion on its part. Alternatively, employer challenges a number of specific entries in claimant's counsel's fee petition which were awarded by the administrative law judge.

The administrative law judge rationally rejected employer's specific contention that the litigation was occasioned solely because of claimant's refusal to undergo an FCE. He did not, however, address employer's contention that it cannot be held liable under Section 28(b) because it paid total disability at all relevant times. Section 28(b) requires, *inter alia*, that claimant obtain greater compensation than employer paid or tendered. *Avondale Industries, Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003). An award of permanent total disability benefits can result in employer's liability pursuant to Section 28(b) as Section 10(f) adjustments apply to awards of permanent total disability. 33 U.S.C. §910(f); *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9(CRT) (9th Cir. 1990). We must remand the case for the administrative law judge to address employer's contention that it is not liable for any fee because claimant did not obtain any greater benefits than employer paid from the date of injury.[6]

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed. However, the administrative law judge's finding that employer is liable for claimant's attorney's fee is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[6] The regulation at 20 C.F.R. §702.132 provides, *inter alia*, that the financial circumstances of claimant shall be taken into account if the fee is to be assessed against claimant.