BRB No. 02-0107

BETTY JEAN JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INTERMARINE, USA	)	DATE ISSUED: Sept. 30, 2002
	)	
and	)	
	)	
SIGNAL MUTUAL ADMINISTRATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order denying motions of March 7, 2000, the Decision and Order on Remand - Modification, and the Decision and Order on Reconsideration - Correction of Compensation Rates, Partial Approval of Attorney Fees of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Wayne Hampton Basford, Marietta, Georgia, for claimant.

G. Mason White (Brennan, Harris & Rominger LLP), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order denying motions of March 7, 2000, the Decision and Order on Remand - Modification, and the Decision and Order on Reconsideration - Correction of Compensation Rates, Partial Approval of Attorney Fees (92-LHC-2052) of Administrative Law Judge Richard T. Stansell-Gamm 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 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. *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 the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This is the third time that this case is before the Board. To reiterate the facts underlying this claim, claimant injured her right knee on October 18, 1990, during the course of her employment as a crew leader/laminator mixer. She was thereafter terminated on April 25, 1991, for excessive absenteeism. In his Decision and Order - Award of Benefits, issued January 5, 1993, Administrative Law Judge Charles P. Rippey awarded claimant permanent total disability compensation from October 18, 1990, and continuing, found employer had violated Section 49 of the Act, 33 U.S.C. §948a, ordered claimant reinstated to her former position and fined employer $5000. Employer appealed this decision to the Board, which affirmed Judge Rippey's decision, but remanded the case for consideration of employer's petition for modification. *Johnson v. Intermarine, USA*, BRB No. 93-0953 (Apr. 11, 1996)(unpublished). The Board's decision was affirmed by the United States Court of Appeals for the Eleventh Circuit. *Intermarine, USA v. Johnson*, No. 96-8675 (11th Cir. Apr. 28, 1997). On August 1, 1996, Judge Rippey issued a Final Order denying employer's petition for modification.

Employer appealed, challenging the administrative law judge's denial of its motion for modification. The Board vacated the administrative law judge's findings that no new evidence had been submitted by employer, and remanded the case for the administrative law judge to fully consider all of the evidence of record regarding the issue of claimant's present physical condition. The Board additionally held that the administrative law judge erred in declining to consider employer's evidence regarding the availability of suitable alternate employment; accordingly, the Board instructed the administrative law judge on remand to consider employer's evidence regarding the availability of suitable alternate employment. Lastly, the Board denied claimant's counsel's supplemental request for an attorney's fee for services allegedly rendered before the Board in connection with a motion for reconsideration in BRB No. 93-0953, since a review of the Board's records revealed no petition for reconsideration filed on behalf of employer nor a decision on reconsideration issued by the Board. *Johnson v. Intermarine, USA*, BRB Nos. 96-1679, 93-0953 (Aug. 22, 1997)(unpublished). On remand, this case was ultimately assigned to Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge).

In a Decision and Order on Remand - Modification, the administrative law judge granted employer's request for modification. Specifically, the administrative law judge found that employer established the availability of suitable alternate employment that

claimant was capable of performing. The administrative law judge therefore concluded that claimant is entitled to an award of temporary total disability compensation from October 18, 1990, until April 27, 1995, and temporary partial disability compensation from April 28, 1995, until April 27, 2000. 33 U.S.C. §908(b), (e). The administrative law judge also ordered employer to pay for an appropriate course of psychiatric evaluation and therapy, a pain management program, and medication for right leg and knee pain. 33 U.S.C. §907. In a Decision and Order on Reconsideration, the administrative law judge denied claimant's request for reconsideration of his refusal to admit Dr. Powell's post-hearing medical examination into evidence, and his finding that employer established the availability of suitable alternate employment. Subsequent to the issuance of the administrative law judge's decision, claimant's counsel submitted a fee petition to the administrative law judge requesting a fee of $66,750, representing 333.75 hours of services rendered at $200 per hour, and $2,853.84 in expenses. The administrative law judge, in his Decision and Order on Reconsideration, awarded claimant's counsel a fee of $1,582.50 and $75.08 in expenses.

On appeal, claimant challenges the administrative law judge's granting of employer's request for modification, as well as the amount of the attorney's fee awarded to her counsel. Employer responds, urging affirmance.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I],* 515 U.S. 291, 30 BRBS 1 (CRT)(1995). It is well-established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II],* 521 U.S. 121, 31 BRBS 54 (CRT)(1997); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). The Board has held that an employer may attempt to meet this burden with evidence demonstrating the availability of suitable alternate employment. *See, e.g., Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197 (1998); *Lucas v. Louisiana Ins. Guar. Ass'n,* 28 BRBS 1 (1994); *Moore v. Washington Metropolitan Transit* Authority, 23 BRBS 49 (1989); *Blake v. Ceres Inc.,* 19 BRBS 219 (1987). Once employer shows a change in condition, the standard for determining disability is the same in a Section 22 modification proceeding as it is in an initial proceeding under the Act. *Vasquez,* 23 BRBS 428.

Where, as in the instant case, claimant is unable to perform her usual employment duties, she has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Roger's Terminal & Shipping Corp. v.*

Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986). In order to meet this burden, employer must demonstrate that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing given her age, education, work experience and physical restrictions and which she could realistically secure if she diligently tried. *Wilson v. Dravo Corp.*, 22 BRBS 459 (1989)(Lawrence, J., dissenting).

We will first address claimant's assertion the administrative law judge erred in not taking into account the fact that claimant has Reflex Sympathetic Dystrophy[1] (RSD) when he addressed the issue of whether employer established the availability of suitable alternate employment. Claimant alleges that administrative law judge erred in disregarding her physicians' diagnosis of RSD, and that the doctors who opined that she does not suffer from RSD have no knowledge about that specific condition. In evaluating the relative probative value of the conflicting medical opinions regarding whether claimant suffers from RSD, the administrative law judge found Dr. Powell's assessment, that claimant has RSD, was not as well documented and reasoned as the contrary opinions of record. The administrative law judge explained: Dr. Powell had based his RSD diagnosis principally on the fact that claimant's pain was out of proportion to her injury; he had not measured claimant's legs for difference in size due to atrophy, but had visually concluded that there was a difference; he had not observed skin discoloration or temperature change; he was not aware of claimant's leg scan results, and he had seen only one case of RSD. The administrative law judge then found that the only reference to Dr. Woods, who claimant avers diagnosed RSD, is contained in claimant's testimony, and that while CX 1 at 85 is a referral to Dr. Woods, there is no actual report in the record, and the treatment notes with an illegible signature appear to be those of Dr. Powell. In contrast, the administrative law judge determined that the contrary opinions of Drs. Bodziner, Reckles, and Murray took a more comprehensive approach and relied on a more extensive, objective medical record in concluding that claimant does not have RSD. Decision and Order at 76. It is well-established that in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). On the basis of the record before us, the administrative law judge's decision to credit the opinions of Drs. Bodziner, Reckles, and Murray is

[1]RSD is a disturbance of the sympathetic nervous system marked by pallor or rubor, pain, sweating, edema or skin atrophy following sprain, fracture or injury to nerves or blood vessels. *Dorland's Illustrated Medical Dictionary*, 25th ed. 1974 at 460. RSD is a clinical diagnosis, based on a history and examination. There are no definitive tests to diagnose the condition. CX 8.

reasonable;[2] accordingly, as substantial evidence supports his ultimate finding, we affirm the administrative law judge's determination that claimant does not suffer from RSD.[3]

Claimant next argues that Dr. Griffith's opinion, that claimant cannot perform any work, is entitled to determinative weight, as he is claimant's treating physician. We disagree.[4] The administrative law judge declined to rely upon Dr. Griffith's opinion because Dr. Griffith's chronic lumbar strain diagnosis was based principally on a seven year history of claimant's subjective complaints and was unsupported by objective medical evidence. In light of the videotape evidence discussed below, the administrative law judge found claimant's subjective back complaints to be unreliable.

Employer submitted into evidence two and one-half hours of surveillance videotape

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[2]Claimant argues that Dr. Reckles's opinion, that claimant did not have RSD, is unreliable because, as of February 24, 2000, Dr. Reckles was severely incapacitated due to a terminal brain tumor and could not be cross-examined. This argument is misplaced, since Dr. Reckles's report addressing claimant's alleged condition dates from September 1998.

[3]We also reject claimant's contention that the administrative law judge did not consider her alleged reactive depression, as the administrative law judge discussed this issue and found Dr. Griffith's diagnosis of depression somewhat ambivalent because he relies on claimant's statement rather than on any definitive medical or psychological test. The administrative law judge reasoned that the record is insufficient to establish that claimant suffers from depression to the extent that it is an impairment to her employment.

[4]Although claimant alleges that Dr. Griffith stated that she cannot perform any work, Dr. Griffith in fact allowed claimant to work an eight hour day with restrictions. EX 15.

spanning seven years, from 1993 to 2000, containing approximately 20 scenes documenting claimant's activities. The administrative law judge stated that as claimant's injury relates to her right knee and associated pain and back pain, the videotape, which had been made over the course of seven years and which recorded her daily activities, including her ability to walk, lift and maneuver, was particularly relevant evidence. While the administrative law judge recognized the limitations of the videotape in that it does not cover every day of claimant's life during this period, he stated that he was struck by the incongruity between, on the one hand, claimant's behavior on the videotapes, and on the other, the testimony of claimant, her friends and relatives, as well as the comments of Dr. Griffith. Specifically, the administrative law judge observed that the two days during which claimant displayed "stunning disability" occurred on the days she visited the attorney representing her disability claim and the insurer's representative, Mr. DeHart. In this regard, the administrative law judge noted the "remarkable transformation" from a seemingly normal, mobile adult with a mobile gait, who has no problems getting into a car on February 20, 1995, into a severely crippled individual displaying dramatic and thorough physical incapacity the next day, February 21, 1995. Decision and Order at 64; Decision and Order on Recon. at 6. A month later, another video showed claimant fairly unaffected by life's physical demands. *See* Decision and Order on Recon. at 6. Moreover, the administrative law judge found that Dr. Bodziner noted that claimant's lumbar MRIs were normal, and Dr. Reckles found normal lumbar movement upon examination. An administrative law judge is not bound to accept the opinion of any particular medical examiner. *See Donovan*, 300 F.2d 741; *Hughes*, 289 F.2d 403; *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In the instant case, the administrative law judge rationally found that Dr. Griffith's opinion was not determinative as to claimant's present back condition; specifically, it was reasonable for the administrative law judge, in evaluating Dr. Griffith's opinion, to take into account claimant's lack of credibility and the testimony of the remaining physicians who examined claimant's back. Thus, as the administrative law judge's decision not to rely upon the testimony of Dr. Griffith is rational and within his authority as factfinder, it is affirmed.

Claimant also contends that the administrative law judge substituted his opinion for that of the medical experts of record in formulating his own restrictions based exclusively on claimant's knee and leg pain and in limiting the types of job claimant can perform to sedentary work which does not require extensive lifting or walking, as none of the doctors examining claimant limit claimant's problems to her leg. The administrative law judge stated that he assessed claimant's limitations himself, rather than relying on the medical opinions in evidence, because he found that in this case the medical experts were not particularly helpful and therefore he did not find their endorsement or critique of several market surveys probative. Decision and Order at 78. The administrative law judge explained that Drs. Sheils, Murray, Bedingfield and Reckles, in the absence of any finding of functional problems with claimant's right leg, believe that she could return to work with either no restrictions or only a lifting restriction, but none of these opinions takes into account the

visible effect of claimant's continued leg pain on her gait and mobility. The administrative law judge then cited, at the other extreme, Dr. Powell, who found claimant to be completely disabled due to RSD; the administrative law judge accorded this opinion little probative weight since it conflicts with the administrative law judge's finding, which is supported by a preponderance of the more probative evidence, that claimant does not have RSD. The administrative law judge also accorded little probative weight to the opinion of Dr. Griffith regarding claimant's limited employment capability, because Dr. Griffith considers claimant severely limited by her chronic lumbar strain, depression, and headaches, conditions which the administrative law judge found claimant did not have. Decision and Order at 78-79.

Claimant also alleges that when Mr. Yuhas identified the availability of suitable alternate employment which claimant is capable of performing, he did not consider the adverse effect of claimant's prescribed medications. The administrative law judge stated that Dr. Griffith, who prescribed the medication, had not received complaints about any adverse effects and indicated that he could change the medication if there were undesirable side effects; the administrative law judge also noted that claimant's alleged drowsiness was not evident in the videotape and that claimant did not seem hesitant to operate an automobile. Decision and Order at 77. As the administrative law judge reviewed the record in minute detail, weighed the evidence, and provided a reasonable rationale for his decision, his determination that claimant is capable of performing sedentary work that does not require extensive lifting or walking is rational and supported by substantial evidence.[5] *Id.* at 79.

[5]Claimant asserts that the evidence is to be viewed in a light most favorable to her. To the extent that claimant is arguing that when the evidence is in equipoise, it is to be decided in claimant's favor, the United States Supreme Court has held that application of the true doubt rule violates the Administrative Procedure Act (APA), 5 U.S.C. §501 *et*

Therefore, as the administrative law judge considered all of the evidence of record, and drew the rational inference that no medical opinion is solely determinative in this case, we affirm his assessment of claimant's physical capabilities on these facts.[6] *See Hughes*, 289 F.2d 403.

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seq., and thus cannot apply to cases arising under the Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

[6]The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has stated: "The law of this circuit is clear that the testimony of a treating physician must be given substantial or considerable weight unless 'good cause' is shown to the contrary." *Lewis v. Callahan*, 125 F.3d 1436, 1440 (11th Cir. 1997). However, the court then stated: "We have found 'good cause' to exist where the doctor's opinion was not bolstered by the evidence, or where the evidence supported a contrary finding." *Id.* The administrative law judge's analysis of the medical evidence in the instant case is not inconsistent with the court's pronouncement.

The administrative law judge next determined that employer met its burden of establishing the availability of suitable alternate employment as of April 27, 1995, based on numerous positions contained in three labor market surveys prepared by Steven Yuhas.[7] Mr. Yuhas, a certified rehabilitation counselor, prepared labor market surveys in 1995, 1998 and 2000, based on Dr. Sheils's weight lifting restrictions and Dr. Griffith's limitation on strenuous walking. EX 10 (2000). In a job market survey conducted April 26 to April 28, 1995, Mr. Yuhas set forth numerous employment opportunities such as telemarketer, front desk clerk, Wal-Mart customer service clerk, service station attendant, cashier and solicitor. The administrative law judge eliminated the jobs of Home Depot customer service clerk and security clerk because he considered them inappropriate in light of claimant's mobility limitations. In the 1998 survey, the administrative law judge considered the jobs of customer service representative, assembler, insurance agent and security guard unsuitable, but found the jobs of front desk clerk, receptionist, general office clerk, customer service representative Enmark clerk, cashier and hotel clerk, to be appropriate. The administrative law judge then found six similar positions in the March 2000 list constituted suitable employment, after excluding the parking garage attendant, insurance agent, security guard due to walking or special skills requirements.

[7]As the administrative law judge based his suitable alternate employment finding solely on the labor market surveys prepared by Mr. Yuhas, we do not need to address claimant's challenges with respect to the other labor market surveys of record.

We affirm the administrative law judge's determination that employer established the availability of suitable alternate employment which claimant is capable of performing. In this case, the three labor market surveys prepared by Mr. Yuhas, and the administrative law judge's independent review of the requirements of each position in light of his assessment of claimant's physical capabilities, establish that multiple employment positions are available within claimant's physical restrictions. Therefore, the administrative law judge's finding that claimant is capable of performing the identified jobs is supported by substantial evidence.[8] *See Wilson v. Dravo Corp.*, 22 BRBS 463 (1989); *Jones v. Genco*, 21 BRBS 1988. Accordingly, we affirm the administrative law judge's finding that employer has established the availability of suitable alternate employment.[9] *See Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Claimant next asserts that employer did not have standing to petition for modification as it has not been granted relief from the Special Fund pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Section 22 states that any party-in-interest, including an employer granted relief under Section 8(f), may apply for modification. 33 U.S.C. §922. When interpreting a statute, the starting point is the plain meaning of the words of the statute. *Mallard v. U.S. Dist. Ct. for the Souther Dist. of Iowa*, 490 U.S. 296 (1989); *see Story v. Navy Exch. Service Center*, 33 BRBS 111 (1997), *appeal dismissed*, No. 99-13726-AA (11th Cir. Feb. 4, 2000); *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993). If the intent of Congress is clear, that is the end of the matter; the court, as well as the agency that administers the policy under the statute, must give effect to the unambiguously expressed intent of Congress. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As the administrative law judge found in rejecting claimant's motion relating to this issue below, the reference to Section 8(f) employers is inclusive rather than limiting, and interpreting it in a restrictive manner leads to the nonsensical result that only an employer with limited liability due to Section 8(f) could seek modification of a disability compensation award, whereas an employer without resort to Section 8(f) relief would face

[8]The administrative law judge found that claimant has not reached maximum medical improvement, because she needs to undergo treatment for pain management, and is thus not permanently disabled. He therefore awarded claimant temporary partial disability compensation under Section 8(e), 33 U.S.C. §908(e). Claimant argues that since she has not reached maximum medical improvement, she is entitled to continuing maximum compensation. However, maximum medical improvement separates temporary from permanent disability, not total from partial disability. *See Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990).

[9]The administrative law judge found claimant did not establish that she diligently sought alternate employment. Claimant does not challenge this finding.

full financial liability without remedy even in cases where a claimant's wage-earning capacity increases or is restored.[10] As claimant's argument that employer has no standing to petition for modification has no merit based upon a plain reading of the Act, it is rejected.

Claimant also argues that the administrative law judge erred in denying her motion for an independent medical examination (IME) under Section 7(e) of the Act.[11] Section 7(e) states in pertinent part:

> In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician employed or selected by the Secretary and to obtain from such physician a report containing his estimate of the employee's physical impairment and such other information as may be appropriate. Any party who is dissatisfied with such report may request a review or reexamination of the employee by one or more different physicians employed or selected by the Secretary. The Secretary shall order such review or reexamination unless he finds that it is clearly unwarranted.

33 U.S.C. §907(e); *see generally Grbic v. Northeast Stevedoring Co.*, 13 BRBS 282 (1980)(Kalaris, J., dissenting). Consistent with the statutory authority given the Secretary under this section, the regulation delegates the authority to order an IME to the district director. 20 C.F.R. §702.408. *See also Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585 (1981).

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[10]Claimant raised this issue in a Motion to Dismiss before the administrative law judge and employer responded. The administrative law judge denied the motion in a Denial of Claimant's Motion to Dismiss, issued on March 7, 2000.

[11]In her petition before the administrative law judge, claimant requested additional IME testing to assess her alleged radiculopathy, and another bone scan, relating to a diagnosis of RSD, because she contends that the one she had was unreliable. In addition, claimant requested tests relating to the diagnosis of these two conditions.

In his decision, the administrative law judge denied claimant's request for an IME, finding that claimant's motion was untimely as it was received only one month prior to the hearing and claimant was not in such an extraordinary situation which would warrant a remand to the district director. We hold that the administrative law judge did not abuse his discretion in denying claimant's motion and declining to remand the case. Claimant, by her own admission, has already had three EMG tests, and the administrative law judge found claimant's testimony regarding the bone scan insufficient to impeach its accuracy. Decision and Order at 75 n.38. Therefore, the administrative law judge's denial of claimant's request for an independent medical examination because he found remand was unwarranted was rational on these facts. *See Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990); 20 C.F.R. §702.408.

Lastly, claimant challenges the fee awarded to her counsel by the administrative law judge. Subsequent to the issuance of the administrative law judge's decision, claimant's counsel submitted a fee petition to the administrative law judge requesting $66,750, representing 333.75 hours of services rendered at $200 per hour, and $2,853.84 in expenses. Employer submitted specific objections to this fee petition. After reviewing the petition, the administrative law judge disallowed 70 hours in response to employer's specific objections, thus reducing the lodestar figure to $52,750, and disallowed $351.11 of the expenses requested. In considering claimant's fee request, the administrative law judge stated that claimant succeeded only in obtaining medical treatment, consisting of pain management therapy, psychiatric help and pain medication, while claimant was unsuccessful in her principal claim, which was for continuing temporary total disability compensation. Accordingly, pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the administrative law judge reduced the requested fee to $1,582.50.[12]

We affirm the $1,582.50 attorney's fee awarded by the administrative law judge in view of the decision of the Supreme Court in *Hensley*. In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fee under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

First, did the plaintiff fail to prevail on claims that were unrelated to the

[12]The administrative law judge reasoned that had claimant prevailed, she would have continued to receive $17,000 per year in benefits. He calculated that the value of the medical benefits she obtained was, at best, worth just a few hundredths of the amount she sought and multiplied the $52,750 fee and $2,502.73 in expenses by 3/100.

> claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434; *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. *See Bullock v. Ingalls Shipbuilding, Inc.,* 27 BRBS 90 (1993)(*en banc)*(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc,* 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Ahmed v. Washington Metropolitan Area Transit Authority,* 27 BRBS 24 (1993).

In the present case, the administrative law judge reduced the fee pursuant to *Hensley*, because he found that claimant's counsel was successful only in obtaining medical treatment for claimant and was unsuccessful in defending against employer's motion for modification and in establishing entitlement to ongoing temporary total disability benefits. The administrative law judge further found that nearly all of counsel's efforts were expended on his unsuccessful efforts on the total disability issue rather than on issues involving the medical treatment ultimately awarded by the administrative law judge. The administrative law judge reasoned that employer had paid claimant $182,434.96 for total disability from October 18,1990, to June 1, 2001, pursuant to the initial decision in this case, which was modified to temporary total disability from 1990 to 1995 and temporary partial disability thereafter. The administrative law judge noted that as a result of his decision, claimant's entitlement to temporary partial disability benefits expired on April 28, 2000,[13] and due to the overpayment by employer, she is effectively precluded from

[13]Section 8(e) of the Act provides for an award for temporary partial disability benefits based on the difference between claimant's pre-injury average weekly wage and post-injury wage-earning capacity for a period not to exceed five years. 33 U.S.C. §908(e). Employer had paid claimant $182,434.96 between October 1990 and June 1, 2001, resulting in an

obtaining further compensation as of the date of his decision. In contrast to the efforts expended by counsel on the unsuccessful disability issues, the issue of medical treatment arose only post-hearing, based on claimant's request for assistance in obtaining this treatment. Under these circumstances, the administrative law judge could rationally find that the hours expended on the litigation times a reasonable hourly rate results in an excessive award. As the administrative law judge's reduced fee award is reasonable in relation to the results obtained, the administrative law judge's award of an attorney's fee totaling $1,582.50 is affirmed.

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overpayment subject to offset. As the administrative law judge in this case awarded claimant temporary partial disability beginning on April 28, 1995, claimant's entitlement to disability payments ended on April 27,2000. Consequently, due to employer's offset, claimant will not receive further disability compensation. *See* Decision and Order on Recon. at 11 n.5.

Accordingly, the administrative law judge's Order denying motions of March 7, 2000, Decision and Order on Remand - Modification, and Decision and Order on Reconsideration - Correction of Compensation Rates, Partial Approval of Attorney Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge