

BRB Nos. 06-0132
and 06-0132A

ANDREW BLAYMAN)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
ELECTRIC BOAT CORPORATION)	DATE ISSUED: 09/21/2006
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Order Granting Reconsideration and Modifying Award of Attorney Fees, and Order Denying Reconsideration of Award of Attorney Fees of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

David N. Neusner (Embry & Neusner), Groton, Connecticut, for claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for self-insured employer.

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

SMITH, Administrative Appeals Judge:

Claimant appeals and employer cross-appeals the Decision and Order Awarding Benefits, Order Granting Reconsideration and Modifying Award of Attorney Fees, and Order Denying Reconsideration of Award (2004-LHC-01268) of Administrative Law Judge Colleen A. Geraghty 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant slipped and fell on April 1, 1997, during the course of his employment as a transportation supervisor. Claimant complained of right buttock pain, which radiated to his right thigh. He was diagnosed with a lower back/right hip strain. CXs 3 at 3, 5 at 1. X-rays of claimant's back and right hip were interpreted as showing very early degenerative changes at the right hip and possibly early lumbar spondylosis. CX 3 at 2. Claimant's right hip condition deteriorated, and in July 2002, claimant's treating physician, Dr. Richeimer, recommended hip replacement surgery. An x-ray of claimant's hip showed marked degenerative changes, spurring, narrowing of the hip joint, and subchondral bone cysts. CX 3 at 6. Claimant underwent surgery on October 22, 2002. Employer voluntarily paid compensation for temporary total disability from October 15, 2002, to March 2, 2003, when claimant returned to work. Employer also paid medical benefits. Claimant subsequently received an impairment rating of 37 percent for the right lower extremity. CXs 1, 2. Employer disputed claimant's entitlement to compensation under Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), for his leg impairment.

In her decision, the administrative law judge found that the site of claimant's injury is the right hip joint, and that the hip joint is not a part of the leg. Thus, she found that claimant is not entitled to an award under the schedule. The administrative law judge concluded that claimant may recover for permanent partial disability based on a loss of wage-earning capacity, pursuant to Section 8(c)(21), should he sustain a future loss of wage-earning capacity. 33 U.S.C. §908(c)(21). The administrative law judge found claimant's attorney entitled to a fee award inasmuch as he established claimant's right to medical benefits and future compensation. Employer also did not object to claimant's fee petition requesting \$5,012.50 and costs of \$99.75. Accordingly, the administrative law judge awarded the requested fee.

On reconsideration, the administrative law judge granted employer's motion and vacated her finding that claimant may be entitled to compensation under Section 8(c)(21) because claimant did not present any evidence of a reasonable probability of a future loss of wage-earning capacity due to his injury. The administrative law judge found that claimant is not entitled to a nominal award of benefits. The administrative law judge also rejected employer's contention that claimant's counsel is not entitled to an attorney's fee payable by employer. She found that claimant was successful in establishing entitlement to medical care notwithstanding employer's voluntary payment of claimant's medical bills. However, the administrative law judge found that the fee award should be reduced to reflect claimant's partial success. Claimant's attorney was awarded a fee totaling \$3,408.17, payable by employer. The administrative law judge summarily denied employer's second motion for reconsideration of the fee award.

On appeal, claimant challenges the administrative law judge's finding that he is not entitled to compensation under Section 8(c)(2) for the work-related impairment to his leg. BRB No. 06-0132. Claimant contends that he injured his femur in the work accident and that the femur is part of the leg. Employer responds, urging affirmance of the administrative law judge's denial of scheduled benefits. Employer appeals the award of an attorney's fee, contending that claimant did not prevail on the sole issue before the administrative law judge, that of claimant's entitlement to compensation under Section 8(c)(2). BRB No. 06-0132A. Claimant responds, urging affirmance of the fee award.

The Board has not addressed whether an injury necessitating hip replacement surgery and resulting in a leg impairment may be compensable under Section 8(c)(2).¹ It is well established that the Section 8(c) schedule is not applicable where the actual situs of the injury is to a part of the body not specifically listed in the schedule, even if the injury results in disability to a part of the body which is enumerated. *Keenan v. Director, OWCP*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004); *Pool Co. v. Director, OWCP [White]*, 206 F.3d 543, 34 BRBS 19(CRT) (5th Cir. 2000); *Barker v. U. S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998); *Ward v. Cascade General, Inc.*, 31 BRBS 65 (1995). Thus, claimant is not entitled to compensation under Section 8(c)(2) for the 37 percent impairment of this right lower extremity if the situs of his work-related injury does not include the right leg.

In her decision, the administrative law judge discussed the evidence addressing the site of claimant's injury. Dr. Abella stated that claimant damaged his "hip joint" in the fall at work. CX 3 at 5. Claimant's treating physician, Dr. Richeimer, described the hip joint as where the femur meets the pelvis. CX 7 at 5. The cup-shaped area of the pelvis attenuated to the femur is the acetabulum. The hip joint also includes ligaments and cartilage appended to the femur and acetabulum. Claimant was diagnosed with osteoarthritis of the hip joint. Specifically, in his deposition, Dr. Richeimer testified that claimant's femur was elongated with peripheral spurs and subchondral bone cysts. There were subchondral cysts on the acetabular side of the hip joint as well. Subchondral means below the level of the attached cartilage and "in the bone" itself. Dr. Richeimer stated that the cartilage was completely worn off in parts of the femur and less worn on the acetabulum. *Id.* at 5, 10-13, 15. He opined that the work injury contributed to these conditions, which necessitated claimant's hip replacement surgery. Dr. Richeimer's

¹ In *Davenport v. Apex Decorating Co.*, 13 BRBS 1029 (1979), the claimant injured his right knee and left hip in a work accident and was awarded benefits under the schedule at Section 8(c)(2) for both injuries. On claimant's appeal, the Board held that the awards should run consecutively, pursuant to Section 8(c)(22), 33 U.S.C. §908(c)(22). The propriety of an award under Section 8(c)(2) for the hip injury was not at issue.

testimony establishes that claimant sustained work-related injuries to the femur, acetabulum, and the attached cartilage.

The administrative law judge found that claimant did not sustain a distinct leg injury. She found that the acetabulum and the head of the femur comprise the hip joint, and that claimant's injuries thus were to the hip joint, which is not a scheduled injury. Decision and Order at 5. The administrative law judge analogized this case to those involving shoulder injuries as both involve ball and socket joints. In such cases, it has been held that the claimants were not entitled to recover under the schedule for impairments to the arm resulting from shoulder injuries, because the shoulder is not part of the arm. *Keenan*, 392 F.3d 1041, 38 BRBS 90(CRT); *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990); *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990); *Grimes v. Exxon Co., U.S.A.*, 14 BRBS 573 (1981). These cases, however, do not dictate the result that claimant herein did not injure his leg in the work accident. In *Keenan* and *Burkhardt*, the facts establish only that the claimants injured their shoulders, with a residual impairment to the arm. In *Andrews*, the claimant injured his shoulder and scapula, and, in *Grimes*, the claimant dislocated his shoulder. There are no facts from which one could ascertain that the claimants injured their arms in addition to their shoulders. In contrast, in *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990), the claimant sustained both a shoulder injury and a biceps injury. The Board held that claimant is entitled to an award under Section 8(c)(1) of the schedule for the biceps injury, as well under Section 8(c)(21) for the shoulder injury. *Id.* at 236-237.

We hold that the cases cited by the administrative law judge do not preclude claimant's recovery under the schedule based on the facts of this case, as the uncontradicted medical evidence establishes that claimant sustained an injury to his leg, as that body part is defined under the Act, as well as to his hip. Medical dictionaries define the leg as extending only from the knee to the ankle. *Stedman's Medical Dictionary* 948 (26th ed. 1995); *Dorland's Illustrated Medical Dictionary* 906 (27th ed. 1988). For purposes of awarding compensation under the schedule, however, the "leg" includes the femur or thigh bone, as evidenced by Section 8(c)(15) of the Act, 33 U.S.C. §908(c)(15).² This section states:

Amputated arm or leg: Compensation for an arm or leg, if amputated at or above the elbow or knee, shall be the same as for a loss of the arm or leg;

² "Femur" is defined by *Stedman's* as the thigh bone, which is articulated with the hip bone. *Stedman's Medical Dictionary* 635 (26th ed. 1995). *Dorland's* states that the femur extends from the pelvis to the knee. *Dorland's Illustrated Medical Dictionary* 617 (27th ed. 1988).

but, if amputated between the elbow and the wrist, or the knee and the ankle, shall be the same as for loss of a hand or foot.

33 U.S.C. §908(c)(15). Thus, contrary to the medical definition of “leg,” Section 8(c)(15) defines the leg as extending above the knee and provides compensation for the amputation of such pursuant to Section 8(c)(2). *See Travelers Ins. Co. v. Norton*, 30 F.Supp. 119 (E.D. Pa. 1939); *accord Smith v. Robert N. Pyles, Inc.*, 316 A.2d 326 (Md. Ct. Spec. App. 1974) (in construing Maryland’s worker’s compensation schedule, the leg is defined as extending from the top of the femur to the ankle). There is no case law suggesting that a partially disabling injury to the femur is not compensable under the schedule at Section 8(c)(2).

While the medical definition of “hip” can support a finding that the femur is part of the hip joint,³ this conclusion does not end the legal inquiry. If the site of claimant’s injury included his femur, he is entitled to recover for that injury. In this case, the uncontradicted evidence of record establishes that claimant sustained a work-related injury to the femoral head, which, legally, is part of the thigh, or upper leg, bone. Dr. Richeimer testified that the cartilage was worn off the femur to the bone and the femoral head was elongated with peripheral spurs and subchondral cysts. CX 7 at 10-12, 15. Therefore, as claimant sustained an injury to his leg, which resulted in an impairment of the right lower extremity, we hold that claimant is entitled to recover under the schedule. *See generally Bivens*, 23 BRBS 233. The administrative law judge’s denial of benefits under Section 8(c)(2) is reversed. The parties stipulated that claimant has a 37 percent impairment of the right leg. Decision and Order at 2. Claimant is therefore entitled to compensation for a 37 percent leg impairment pursuant to Section 8(c)(2).

In its appeal, employer contends that claimant’s attorney is not entitled to an attorney’s fee since he was unsuccessful in seeking compensation for permanent partial disability pursuant to Section 8(c)(2). By virtue of this appeal, claimant was fully successful in establishing his entitlement to compensation under the schedule for a 37 percent leg impairment. Therefore, claimant’s counsel is entitled to a fee payable by employer for time expended before the administrative law judge. 33 U.S.C. §928; *Hole*

³ The hip is defined by *Stedman’s* as: “1. The lateral prominence of the pelvis from the waist to the thigh. **2. head, neck and greater trochanter of the femur.** It is the sense that is utilized in the common phrases “hip fracture” or “hip replacement.” 3. More strictly, the hip joint.” *Stedman’s Medical Dictionary* 798 (26th ed. 1995) (emphasis added). *Dorland’s* defines “hip” as the area of the body lateral to and including the hip joint. *Dorland’s Illustrated Medical Dictionary* 715 (27th ed. 1988). In medical terms, the femoral head is part of the thigh and also is considered part of the hip.

v. Miami Shipyard Corp., 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). The administrative law judge's attorney's fee award is affirmed.

Accordingly, the administrative law judge's finding that claimant is not entitled to compensation for his 37 percent impairment to the right lower extremity is reversed. Claimant is awarded compensation under Section 8(c)(2) of the Act for a 37 percent leg impairment. In all other respects, the administrative law judge's Decision and Order Awarding Benefits, Order Granting Reconsideration and Modifying Award of Attorney Fees, and Order Denying Reconsideration of Award of Attorney Fees are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent. I would affirm the administrative law judge's finding that claimant's disability is the result of an injury to the hip, and her conclusion that claimant is, therefore, not entitled to recover under Section 8(c)(2), 33 U.S.C. §908(c)(2), for his impairment to the right lower extremity. The medical evidence credited by the administrative law judge establishes that the situs of claimant's injury is the hip joint, and therefore, I would hold that the administrative law judge properly and reasonably found, based on this evidence, that claimant did not sustain an injury to his leg apart from the arthritis in this joint. Accordingly, I would affirm the administrative law judge's finding that an injury to the hip joint does not fall within the schedule even though claimant has a resulting disability to his right leg. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985).

NANCY S. DOLDER, Chief
Administrative Appeals Judge