

JOSEPH RUSSO)
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 Claimant-Respondent)
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 v.)
)
 SEA-LAND SERVICE,)
 INCORPORATED) DATE ISSUED:
)
 Self-Insured Employer-)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order, Decision and Order on Reconsideration, and Decision and Order - Approval of Attorney's Fee of Nicodemo De Gregorio, Administrative Law Judge, United States Department of Labor.

James R. Campbell, Glen Cove, New York, for claimant.

Francis M. Womack III (Lawrie, Cozier and Vivenzio), Mount Arlington, New Jersey, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order, Decision and Order on Reconsideration, and Decision and Order - Approval of Attorney's Fee of Administrative Law Judge Nicodemo De Gregorio 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). An award of an attorney's fee 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).

On December 28, 1993, claimant sustained injuries to his neck, right elbow, lower back, and right knee when he caught his foot in a steel loop of a bale and fell onto a concrete speed bump in employer's warehouse during the course of his employment as a checker with employer. Employer voluntarily paid temporary total disability benefits to

claimant for the period of December 29, 1993 to April 3, 1994. 33 U.S.C. §908(b). Claimant returned to work as a checker for another employer in June 1994, but quit on the third day because of back pain; claimant has not worked since that time. In a Decision and Order issued March 12, 1996, the administrative law judge, relying on claimant's testimony regarding his ongoing pain as well as the testimony of Dr. Friedman, claimant's treating physician, and Dr. Post, concluded that claimant was incapable of resuming his usual employment duties with employer. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from April 3, 1994, and continuing. Subsequently, in a Decision and Order on Reconsideration issued April 29, 1996, the administrative law judge denied employer's motion for reconsideration. Thereafter, claimant's counsel sought an attorney's fee of \$12,225, representing 48.9 hours at \$250 per hour, for work performed before the administrative law judge in connection with the instant claim. Employer filed objections to the fee request. In a Decision and Order - Approval of Attorney's Fee, the administrative law judge, after considering the objections raised by employer, reduced the number of hours sought by counsel to 46.4, approved the hourly rate sought, and thereafter awarded claimant's counsel a fee of \$11,600.

Employer now appeals, challenging the administrative law judges's award of temporary total disability compensation to claimant. Specifically, employer asserts that the administrative law judge erred in relying on claimant's complaints of pain to establish total disability and in not addressing evidence of claimant's financial motivation for his failure to return to work. Employer additionally assigns error to the award of attorney's fees for those services performed prior to counsel's filing of a notice of representation. Claimant responds, urging affirmance of the administrative law judge's decisions.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. See *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. See *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

In finding that claimant had established a *prima facie* case of total disability, the administrative law judge credited claimant's complaints of ongoing pain, as supported by the medical opinions of Drs. Friedman and Post, over the contrary opinions of Drs. Sweeney and Seslowe. Decision and Order at 5. Claimant testified that he continues to suffer from pain and stiffness in his back, leg, arm, and neck which prevent him from performing his usual employment duties. See Tr. at 31-32, 79-83. Both Drs. Friedman and Post opined that claimant remains totally disabled by his back and neck injuries. In this regard, Drs. Friedman and Post noted that claimant's subjective complaints of pain were corroborated by the EMG showing nerve root irritation as well as by their objective findings on physical examination of spasm and right side atrophy. See Cl. Exs. 3, 4, 6, 7, 8. Drs. Sweeney and Seslowe, on the other hand, stated that claimant's back and neck problems have resolved, that he has no objective evidence of disability, and that he is capable of

returning to his usual employment. See Emp. Exs. 1, 2, 3, 6, 7.

It is well-established that an administrative law judge is not bound to accept the opinion of any particular medical examiner, but rather, is entitled to weigh the credibility of all witnesses and draw his own inferences from the evidence. See *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); *Anderson*, 22 BRBS at 20. In this instance, the administrative law judge could rationally credit claimant's subjective complaints of pain, as corroborated by the opinions of Drs. Friedman and Post. We hold, accordingly, that the administrative law judge committed no error in relying upon claimant's complaints, as supported by the opinions of Drs. Friedman and Post, rather than the opinions of Drs. Sweeney and Seslowe,¹ to find that claimant had established a *prima facie* case for total disability. See *Anderson*, 22 BRBS at 22; *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).²

¹In light of our holding that claimant's complaints and the opinions of Drs. Friedman and Post, properly credited by the administrative law judge, constitute substantial evidence to support a finding of total disability, employer's specific contentions regarding the administrative law judge's evaluation of the contrary opinions of Drs. Sweeney and Seslowe need not be addressed at length. We note, however, that the inferences drawn from the evaluation of these physicians' testimony are neither inherently incredible nor patently unreasonable, and, thus, are affirmed. See generally *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

²Employer's further assignment of error to the administrative law judge's failure to address alleged evidence of financial motivation for claimant's failure to return to work is

Claimant's award of temporary total disability benefits is therefore affirmed.

rejected as speculative and unsupported by record evidence. We note that employer's reliance on claimant's hearing testimony regarding layoffs at Pier II prior to claimant's injury as support for employer's allegation that claimant's failure to return to work was motivated by his lack of future job security is undercut by claimant's additional testimony that his attempted return to work post-injury occurred at Pier II. See Tr. at 36-39, 52-53. Moreover, as set forth *supra*, claimant's testimony is supported by the medical opinions of Drs. Friedman and Post.

Lastly, employer contends that the administrative law judge erred in awarding an attorney's fee to claimant's counsel for those services performed prior to the filing of a notice of representation by counsel. The administrative law judge specifically addressed and rejected this objection on the basis that the work in question was performed pursuant to claimant's request that counsel handle his case.³ Inasmuch as employer has failed to establish that the administrative law judge's allowance of a fee for these services constitutes an abuse of discretion, we affirm the awarded attorney's fee. *See generally Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Accordingly, the administrative law judge's Decision and Order, Decision and Order on Reconsideration, and Decision and Order - Approval of Attorney's Fee are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

³The services disputed by employer consist of 2 3/4 hours itemized on February 29, 1995 for contact by both claimant and claimant's prior attorney and review of the file and 2 hours itemized on February 7, 1995 for a conference with claimant, during which a retainer was signed, and a phone conversation with claimant's treating physician. We note that counsel filed an LS-18 and the retainer on February 10, 1995.