BRB No. 10-0720

RONNIE L. McDONALD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AECOM TECHNOLOGY CORPORATION	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	DATE ISSUED: 09/19/2011
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Steven M. Birnbaum, San Rafael, California, for claimant.

Alan G. Brackett and Jon B. Robinson (Mouledoux, Bland, LeGrand & Brackett, L.L.C.), New Orleans, Louisiana, for employer/carrier.

Jonathan P. Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Regarding Jurisdiction and the Supplemental Decision and Order Awarding Attorney's Fees (2009-LDA-0339) 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked for employer in Afghanistan. He was exposed to paint fumes and was diagnosed with respiratory problems. Claimant has suffered secondary medical problems which he attributes to his work-related lung conditions or to treatment for those conditions. The administrative law judge found that claimant's psychological condition is the natural and unavoidable result of his work injury but that his hypertension and diabetes are not work-related. He awarded claimant temporary total disability and medical benefits. 33 U.S.C. §§907, 908(b); Decision and Order at 2-4, 11-16.[1]

The parties disputed which law should apply to determine employer's liability for an attorney's fee. The administrative law judge found that the law of the United States Court of Appeals for the Ninth Circuit applies to this claim, rejecting employer's assertion that the law of the United States Court of Appeals for the Second, Fifth, or Tenth Circuit should apply. The administrative law judge explained that this Defense Base Act (DBA) case was originally filed in the Second Compensation District in New York, pursuant to 20 C.F.R. §704.101(e), and that, although claimant resides in Oklahoma, he hired counsel from San Francisco who had the case transferred to the Thirteenth Compensation District in San Francisco. The administrative law judge also stated that, despite employer's requests, the case was not reassigned to the Eighth Compensation District in Houston, the one closest to claimant's residence.[2] Accordingly,

[1]This decision was not appealed.

[2]This Defense Base Act case originated in the Second Compensation District, pursuant to 20 C.F.R. §704.101, and claimant's counsel requested transfer to the

the administrative law judge's Decision and Order was filed and served by the district director's office in San Francisco. Based on the decisions in *Service Employees Int'l, Inc. v. Director, OWCP [Barrios]*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010), and *Hice v. Director, OWCP*, 156 F.3d 214, 32 BRBS 164(CRT) (D.C. Cir. 1998), the administrative law judge found that Ninth Circuit law applies to this case. Decision and Order Regarding Jurisdiction at 2-3.

Counsel then filed a fee petition with the administrative law judge requesting a total fee of $74,731.65.[3] Employer objected to the fee on the following grounds: employer is not liable for a fee under 33 U.S.C. §928(a), (b); there is no evidence that an informal conference was held on the issues on which claimant succeeded; claimant had limited success; the hourly rates claimed are excessive; some work was performed before the district director and not the administrative law judge; and, some specific entries are objectionable.

The administrative law judge found that neither party contended that Section 28(a) is applicable because employer voluntarily paid benefits for claimant's work-related lung condition; therefore, because employer disputed claimant's entitlement to additional benefits, the administrative law judge found that Section 28(b) is applicable. He acknowledged the split among the circuit courts as to the proper application of Section 28(b), noting that the Ninth Circuit's application differs from that of the United States Courts of Appeals for the Fourth, Fifth, and Sixth Circuits. The administrative law judge found that, under Ninth Circuit law, claimant's counsel is entitled to an employer-paid

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Thirteenth Compensation District in San Francisco. Transfer occurred on July 18, 2007, absent an objection from employer. Employer asserts that, thereafter, it made multiple requests for the case to be transferred to the Eighth Compensation District in Houston, which is the closest district office to claimant's residence in Oklahoma, before and after the second informal conference was held, but that the district director in San Francisco did not acknowledge the requests, and, instead referred the claim to the Office of the Administrative Law Judges (OALJ). Employer states that, thereafter, it requested the case be assigned to the OALJ office in Covington, Louisiana, but the case was sent to the OALJ office in San Francisco. After addressing the argument that the case should be heard in Oklahoma, the San Francisco OALJ forwarded the case to Covington for assignment in Oklahoma. Employer's brief indicates claimant's counsel agreed at some point to hold the hearing in Covington. Thus, the hearing was held in Covington, Louisiana.

[3]Counsel requested a fee for 141.6 hours of attorney work at an hourly rate of $475, plus 26.85 hours of law clerk work at an hourly rate of $150, plus costs of $3,444.15.

fee under Section 28(b) because, following the informal conferences, issues remained in dispute, and claimant established employer's liability for his psychological condition as well as for a change in treating physician. Supp. Decision and Order at 3-4. The administrative law judge stated that claimant was unsuccessful on his claims for two of his three secondary injuries, and he "was successful on all the remaining issues" including obtaining continuing temporary total disability benefits; therefore, the administrative law judge rejected employer's contention that he should apply an across-the-board reduction in the fee award pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). With regard to the hourly rates, the administrative law judge found that, although counsel's documentation could support an hourly rate of up to $500, the rate claimed of $475 is excessive, and he awarded an hourly rate of $375 which is within the rates established in the evidence proffered. The administrative law judge denied a fee for work performed before the district director and addressed the objections to specific entries. Ultimately, he awarded a fee for 91.6 hours of attorney services at an hourly rate of $375, six hours of law clerk services at an hourly rate of $150, and expenses in the amount of $3,444.15, for a total fee of $38,694.15. Supp. Decision and Order at 4-12.

Employer appeals the administrative law judge's decision to apply Ninth Circuit law as well as its liability for and the amount of the fee award. Claimant responds, arguing that the application of Ninth Circuit law is proper and urging affirmance of the fee award. The Director, Office of Workers' Compensation Programs (the Director), also responds to employer's appeal, urging affirmance of the finding that Ninth Circuit law applies to this attorney's fee case but taking no position on the appeal of the fee award itself.

Applicable Law

Employer contends the administrative law judge erred in finding that Ninth Circuit law applies in this case. It asserts that the DBA is ambiguous on this subject and that the applicable law should be that of the jurisdiction in which is located the district director's office closest to claimant's residence – here, the Fifth Circuit. Employer also avers that the choice of Fifth Circuit law is appropriate because the administrative law judge is located in Louisiana. Claimant and the Director argue that the DBA plainly provides that the determination of the applicable law is governed by the location of the district director's office that files and serves the administrative law judge's Decision and Order – here, San Francisco in the Ninth Circuit.[4]

[4]Pursuant to 20 C.F.R. §701.301(a)(7), the term "district director" has replaced the term "deputy commissioner" used in the statute. The terms are used interchangeably in this decision.

Section 3(b) of the DBA provides:

> Judicial proceedings provided under sections 18 and 21 of the Longshore and Harbor Workers' Compensation Act [33 U.S.C. §§918, 921] in respect to a compensation order made pursuant to this chapter shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs.

42 U.S.C. §1653(b). With regard to an appeal to a federal court after the Board issues a final decision, the circuit courts are split as to the meaning of Section 3(b) of the DBA in view of the fact that the DBA was not explicitly amended after the Longshore Act was amended in 1972.[5] Citing *Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981), *Pearce v. Director, OWCP*, 603 F.2d 763, 10 BRBS 867 (9th Cir. 1979), and *Barrios*, 595 F.3d 447, 44 BRBS 1(CRT), employer notes that because the DBA was not amended in 1972 when the Longshore Act was amended, Section 3(b) of the DBA does not account for the functional changes made in the Longshore Act, *i.e.*, the administrative law judge taking over the fact-finding functions, *see* 33 U.S.C. §919(d). Thus, as deputy commissioners no longer have fact-finding powers, employer asserts there is no longer a "deputy commissioner whose compensation order is involved" by which to determine jurisdiction. Employer draws support for this argument from the Ninth Circuit's decision in *Pearce* which states that the amendments to the Longshore Act are to be incorporated

[5]*Compare Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981), *Pearce v. Director, OWCP*, 603 F.2d 763, 10 BRBS 867 (9th Cir. 1979), *and Barrios*, 595 F.3d 447, 44 BRBS 1(CRT), *with ITT Base Services v. Hickson*, 155 F.3d 1272, 32 BRBS 157(CRT) (11th Cir. 1998), *Lee v. Boeing Co., Inc.*, 123 F.3d 801, 31 BRBS 101(CRT) (4th Cir. 1997), *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 24 BRBS 154(CRT) (5th Cir.), *cert. denied*, 502 U.S. 906 (1991), *and Home Indemnity Co. v. Stillwell*, 597 F.2d 87 (6th Cir.), *cert. denied*, 444 U.S. 869 (1979). *Barrios*, *Pearce*, and *Pearce* hold that an appeal of a Board's decision in a DBA case is properly made in the first instance to the United States court of appeals in the circuit in which the district director sits whereas *Hickson*, *Lee*, *Felkner*, and *Stillwell* hold that appeals of Board decisions are properly made in the first instance to the federal district court where the district director's office is that served the Decision and Order. The opposing holdings are based on the differing views as to whether this section of the DBA incorporates the 1972 Longshore Act Amendments to Section 21(c), 33 U.S.C. §921(c).

into the DBA by general reference.[6] *Pearce*, 603 F.2d 763, 10 BRBS 867. Incorporating the Longshore Act by general reference, employer asserts, leads to the substitution of "administrative law judge" for "deputy commissioner," and, thereby results in the conclusion that Fifth Circuit law applies in this case, as the administrative law judge whose compensation order was involved was located in the Louisiana OALJ office.

Additionally, employer asserts that the case was improperly transferred to the Thirteenth Compensation District in the first place, as it was merely the closest office to claimant's attorney.[7] Employer argues that the district director in New York failed to take all factors of Section 19(g) of the Act, 33 U.S.C. §919(g), into account before transferring the case to San Francisco.[8] Moreover, employer asserts that, prior to a

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[6]42 U.S.C. §1651(a) (emphasis added) states:

> Except as herein modified, the provisions of the Longshore and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), *as amended* [33 U.S.C.A. § 901 et seq.], shall apply in respect to the injury or death of any employee engaged in any employment—

[7]We reject employer's suggestion that application of Tenth Circuit law is a possibility because claimant's "secondary injuries," for which the administrative law judge awarded continuing temporary total disability benefits, occurred in Oklahoma after claimant had returned from Afghanistan. Claimant's psychological condition was found to be the natural or unavoidable result of his work-related lung condition and, therefore, itself work-related, regardless of the fact that it became manifest while claimant was in the United States. *See Cyr v. Crescent Wharf & Warehouse Co*., 211 F.2d 454 (9th Cir. 1954); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). By their very nature, secondary injuries are governed by the law governing the initial injury. Thus, benefits for claimant's psychological condition must be assessed in terms of the DBA, and an injury occurring within the jurisdiction of the Tenth Circuit would not be an injury covered by the DBA. 42 U.S.C. §1651(a); *see Barrios*, 595 F.3d at 452, 44 BRBS at 4(CRT).

[8]Section 19(g) provides:

> At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Secretary, transfer such case to any other deputy commissioner for the purpose of making investigation, taking testimony, making physical examinations or taking such other necessary action therein as may be directed.

transfer between district offices, the Longshore Procedural Manual requires the district director to "insure that the transfer is for a proper purpose[,]" Procedure Manual, Ch. 1-501(3)(g),[9] and Industry Notice Number 122, dated September 20, 2007, and effective October 1, 2007, provides that existing DBA cases will be transferred from the New York District Office to the compensation district where the claimant resides, citing as authority Section 19(g) of the Act and Section 702.104 of the regulations.[10] 33 U.S.C. §919(g); 20 C.F.R. §702.104. Employer acknowledges that the transfer to the Thirteenth District occurred prior to the issuance of this Industry Notice. However, it argues that there is no time limit for transferring a case to the proper district office. *Id.* As claimant lives in Oklahoma, employer avers that the district director in charge of the administration of his case, particularly the medical aspects, should be closer to claimant's home, making it unreasonable for claimant's case to be under the charge of the San Francisco district director.

We express no opinion with respect to the merits of employer's contention regarding which district this case should be in, as the fact is that the district director in the Thirteenth Compensation District did not transfer or reassign claimant's claim to another district as requested by employer. As reassignment to another district is a discretionary act which requires approval of the Director, 20 C.F.R. §702.104, employer has no recourse at this late time for the district director's inaction on employer's request to transfer the claim.

Moreover, we reject employer's contention that *Pearce*, 603 F.2d 763, 10 BRBS 867, supports the proposition that Fifth Circuit law applies. *Pearce* involved a decision made, filed, and served by a deputy commissioner. *See also Pearce*, 647 F.2d 716, 13 BRBS 241. Nevertheless, the Ninth Circuit stated:

> the proper court of appeals is in the circuit 'wherein is located the office of the deputy commissioner whose compensation order is involved.' *We do not think the substitution of an administrative law judge for the deputy commissioner, when there is a hearing, makes any difference.* The language just quoted should now be treated as reading 'wherein is located the office of the deputy commissioner or the administrative law judge whose compensation order is involved.'

[9] http://www.dol.gov/owcp/dlhwc/lspm/lspm1-501.htm

[10] http://www.dol.gov/owcp/dlhwc/lsindustrynotices/industrynotice122.htm

Pearce, 603 F.2d at 770-771, 10 BRBS at 873 (internal footnote omitted) (emphasis added). Thus, pursuant to *Pearce,* employer argues that the administrative law judge erred in failing to apply Fifth Circuit law to the fee petition, as the "administrative law judge whose compensation order is involved" is in Louisiana in the Fifth Circuit. Claimant and the Director argue that the plain language of Section 3(b) of the DBA should govern, as the Ninth Circuit's sentence replacing "deputy commissioner" with "administrative law judge" is *dicta* because *Pearce* did not involve a compensation order of an administrative law judge. We agree with claimant and the Director that the Ninth Circuit did not specifically address the factual situation presented here and that the plain language of Section 3(b) is unambiguous.

The United States Court of Appeals for the D.C. Circuit has agreed with the Director's approach, and rejected the approach advocated by employer in this case. *Hice*, 156 F.3d 214, 32 BRBS 164(CRT). In *Hice*, the claimant suffered a heart attack while working in Australia and filed a claim for benefits with the district director in Hawaii. The district director transferred the case to the district director in Baltimore because that was the closest office to the claimant's residence. An administrative law judge in the Washington, D.C., OALJ denied the claim in an order filed and served by the district director in Baltimore, and the Board affirmed the decision. The claimant appealed the decision to the Ninth Circuit, but then sought transfer of the case to either the United States District Court in Washington, D.C. or the United States Court of Appeals for the D.C. Circuit. The Ninth Circuit transferred the case to the D.C. Circuit based on *Pearce,* "which said that judicial review of Defense Base Act Claims lies in the circuit court with jurisdiction over the office of the district director 'or the administrative law judge whose compensation order is involved.'" *Hice*, 156 F.3d at 216, 32 BRBS at 166(CRT) (quoting *Pearce,* 603 F.2d at 771, 10 BRBS at 873). The D.C. Circuit agreed with the Director's interpretation of Section 3(b) and held that the location of the office of the district director that served the administrative law judge's decision determines the forum for judicial review. It agreed that, despite the transfer of fact-finding powers to administrative law judges, the district directors remain the primary officials responsible for claims; therefore, the plain language of Section 3(b) of the DBA governs and the forum for judicial review of Board decisions is determined by the location of the office of the district director who filed and served the administrative law judge's decision. *Hice*, 156 F.3d at 215-218, 32 BRBS at 167(CRT).[11] The court viewed as *dictum* the language in *Pearce* concerning the location of the OALJ office as a basis for determining jurisdiction. *Id.; see also Barrios*, 595 F.3d at 454, 44 BRBS at 5(CRT) ("It is because

[11]The D.C. Circuit also stated it need not decide whether initial judicial review is in the district court or circuit court, as the district director's office was in Maryland and the Fourth Circuit has held that initial judicial appeals are taken to the district court. *Lee v. Boeing Co., Inc.*, 123 F.3d 801, 31 BRBS 101(CRT) (4th Cir. 1997).

the District Director who served [the administrative law judge's] orders in this case is located in New York that we have jurisdiction here."); *Lee v. Boeing Co., Inc.*, 123 F.3d 801, 805, 31 BRBS 101, 105(CRT) (4th Cir. 1997) (stating, "Section 3(b) of the DBA clearly and unambiguously provides that a party adversely affected by the administrative resolution of a DBA claim must file a petition for review in the United States District Court where the office of the appropriate deputy commissioner is located."); *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 24 BRBS 154(CRT) (5th Cir. 1991), *cert. denied*, 502 U.S. 906 (1991).[12] Accordingly, as the district director in Baltimore filed and served the decision, the D.C. Circuit transferred the case to the U.S. District Court for the District of Maryland. *Hice*, 156 F.3d at 218, 32 BRBS at 168(CRT).

We believe the better course is to follow the plain language of Section 3(b) as discussed in *Hice* and *Lee,* and therefore we hold that the applicable law is determined by the location of the office of the district director that filed and served the administrative law judge's decision. As the administrative law judge's decision now before the Board was filed and served by the district director in the Thirteenth District in San Francisco, Ninth Circuit law applies in this case. This result is consistent with the one the Board has followed recently in determining the law to apply in DBA cases. *See, e.g., Tisdale v. American Logistics Services*, 44 BRBS 29 (2010); *Sparks v. Service Employees Int'l, Inc.*, 44 BRBS 11, *recon. denied*, 44 BRBS 77 (2010). Moreover, this holding is consistent with the law regarding to which circuit or district court an appeal of a Board decision in a DBA case is taken. *Barrios*, 595 F.3d 447, 44 BRBS 1(CRT); *Hice*, 156 F.3d at 218, 32 BRBS at 168(CRT); *Lee*, 123 F.3d at 805, 31 BRBS at 105(CRT). As the district director in San Francisco filed and served the administrative law judge's decision, we affirm the administrative law judge's finding that Ninth Circuit law applies in this case.

[12]In the *Felkner* court's analysis of whether a DBA case was properly appealed to the federal district court in the first instance, bypassing Board review, the Fifth Circuit held that the district court does not have initial appellate review authority and properly dismissed the appeal. The court stated that Section 3(b) of the DBA provides that "judicial proceedings" begin with the federal district court; however, pursuant to Section 21(b) of the Act, 33 U.S.C. §921(b), administrative review rests with the Board. In analyzing the statutes, the Fifth Circuit noted that, following administrative review of a case by the Board, judicial review of a claim brought under the Longshore Act begins in the appropriate United States court of appeals while judicial review of a claim brought under the DBA begins in the federal district court "wherein is located the office of the deputy commissioner [district director] whose compensation order is to be reviewed." Although this constitutes *dicta* as it was unnecessary to the resolution of *Felkner*, it demonstrates Fifth Circuit support of our conclusion herein.

Fee Award

Employer challenges the administrative law judge's fee award, contending it is not liable for claimant's counsel's fee and, alternatively, objecting to the amount of the fee awarded. In rendering his decision on the merits, the administrative law judge stated that the parties disputed whether claimant suffered any injuries secondary to his work-related lung condition, the nature and extent of his disability, and his entitlement to medical benefits. Although he found that neither diabetes nor hypertension is related to the lung condition, the administrative law judge found that claimant's psychological condition is work-related, and he awarded claimant continuing temporary total disability benefits from May 10, 2006, as well as medical benefits for the pulmonary and psychological conditions, and, as claimant stated he did not receive his choice of physician, the administrative law judge permitted him to choose another doctor if he so wished. Decision and Order at 3, 12-16. The administrative law judge found that claimant was partially successful in pursuing his claim, and he approved 91.6 of the 141.6 hours requested, an hourly rate of $375 instead of the requested $475 for counsel, $150 per hour as requested for the law clerk's services, and the costs requested, $3,444.15, for a total fee of $38,694.15.

As we have determined that the administrative law judge properly found Ninth Circuit law applicable in assessing counsel's entitlement to an attorney's fee payable by employer, we shall review the fee award in light of that law. Pursuant to *National Steel & Shipbuilding Co. v. U. S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), a claimant is entitled to an employer-paid attorney's fee under Section 28(b) when liability is controverted and he successfully obtains increased compensation, "whether or not the employer had actually rejected an administrative recommendation." *Matulic v. Director, OWCP*, 154 F.3d 1052, 1060-1061, 32 BRBS 148, 154(CRT) (9th Cir. 1998) (quoting *National Steel*, 606 F.2d at 882, 11 BRBS at 73 and citing *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993)).[13] The Ninth Circuit also explained:

[13]The Ninth Circuit does not follow the stricter interpretation of Section 28(b) of the Fourth, Fifth, and Sixth Circuits. *See Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied* 546 U.S. 960 (2005); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on reh'g* 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000); *see also Devor v. Dep't of the Army*, 41 BRBS 77 (2007). Under this interpretation of Section 28(b), four requirements must be met for an employer to be held liable for an attorney's fee: (1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to

> The purpose of [Section 928(b)] is to authorize the assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the employee-claimant succeeds in establishing liability or obtaining increased compensation in *formal* proceedings in which he or she is represented by counsel.

Todd Shipyards Corp. v. Director, OWCP [Watts], 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991) (quoting *National Steel*, 606 F.2d at 882, 11 BRBS at 73) (emphasis in original); *see Matulic*, 154 F.3d at 1060-1061, 32 BRBS at 154(CRT). In *Matulic*, the court concluded that the claimant's attorney was entitled to a fee under Section 28(b) because the claimant "prevailed on issues that remained in dispute following the informal conference and obtained a greater award on appeal, . . . even though [the employer] did not reject the OWCP recommendation." *Matulic*, 154 F.3d at 1061, 32 BRBS at 154(CRT).

Employer argues that the administrative law judge erred in applying Section 28(b) to award an employer-paid fee because claimant did not obtain "greater compensation" than employer voluntarily paid. We reject employer's contention. Although employer voluntarily paid claimant benefits for his lung condition, claimant obtained additional benefits, medical and disability, for his work-related psychological condition, as well as medical benefits for his lung condition. That employer's voluntary payments were based on a compensation rate higher than the rate awarded by the administrative law judge does not alter the fact that claimant obtained "additional compensation," as even an inchoate right to additional benefits triggers the right to an employer-paid attorney's fee. *See generally E.P. Paup*, 999 F.2d 1341, 27 BRBS 41(CRT); Emp. Exs. 3, 21. Further, the Board historically has considered "compensation" in Section 28 to be a "generic term" incorporating "all forms of relief" under the Act. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987); *Timmons v. Jacksonville Shipyards, Inc.*, 2 BRBS 125, 128 (1975); *see also Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). Thus, even in cases arising within the jurisdiction of the Ninth Circuit, the Board has stated that obtaining disputed medical benefits constitutes "success" warranting a fee under Section 28(b). *Merrill*, 25 BRBS 140; *Geisler*, 20 BRBS 35. We reject employer's assertion that we should conclude otherwise based on cases that have not addressed this issue directly. *See Marshall v. Pletz*, 317 U.S. 383 (1943) (addressing Sections 2, 6, 8, 10, 13 and 14); *Barker v. U. S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998) (addressing Section 28(b) but declining to address whether medical benefits, which had all been paid and were not in dispute, are "additional

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accept the written recommendation; and (4) the employee's achieving a greater award than what the employer was willing to pay after the written recommendation.

compensation"); *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 15(CRT), 24 BRBS 49(CRT) (9th Cir. 1990) (addressing Section 33); *see also Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 43 BRBS 179 (2010), *aff'd*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir. 2011), *pet. for cert. pending*, No. 11-107 (July 21, 2011) (addressing Section 22). Employer's dispute of claimant's entitlement to additional compensation, and claimant's success before the administrative law judge, are sufficient to shift to employer liability for claimant's fee under Section 28(b). *Matulic*, 154 F.3d at 1060-1061, 32 BRBS at 154(CRT); *Watts*, 950 F.2d 607, 25 BRBS 65(CRT); *National Steel*, 606 F.2d at 882, 11 BRBS at 73. Accordingly, we affirm the administrative law judge's conclusion that claimant obtained additional compensation by virtue of the pursuit of his claim before the administrative law judge and is entitled to an employer-paid attorney's fee pursuant to Section 28(b).[14]

Employer also contends counsel did not submit sufficient documentation to establish hourly rates of $150 for law clerk work and $375 for attorney time. It asserts that using prevailing rates in San Francisco is inappropriate, as the hearing was held in Louisiana. Because claimant's counsel is in San Francisco, we cannot say that the administrative law judge erred in finding that San Francisco constitutes the relevant market in this DBA case, which may have required expertise not available in Oklahoma. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009); *see also Jeffboat, L.L.C. v. Director, OWCP [Furrow]*, 553 F.3d 487, 42 BRBS 65(CRT) (7th Cir. 2009). Additionally, the administrative law judge concluded that the requested rate was excessive and reduced counsel's rate from $475 to $375. This is within his discretionary authority and is supported by the evidence submitted, which demonstrated a range of prevailing rates. *B.C. [Christensen] v. Stevedoring Service of America*, 41 BRBS 107 (2007); *see also Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997). Absent any prevailing rate evidence for law clerks, the administrative law judge, as is within his discretion, found that $150 is a reasonable hourly rate. *See Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), *modified on other grounds on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, No. 10-73574 (9th Cir. Aug. 1, 2011). As employer has not demonstrated that the administrative law judge abused his

[14]Moreover, as the Ninth Circuit does not follow a strict interpretation of Section 28(b), it is not dispositive whether the issues raised before the district director are the same issues on which claimant succeeded before the administrative law judge.

discretion in determining the amount of the fee to which claimant's counsel is entitled in this case, we affirm the fee award.[15]

Accordingly, the administrative law judge's Decision and Order Regarding Jurisdiction and the Supplemental Decision and Order Awarding Attorney's Fees are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[15]We reject employer's contention that the administrative law judge erred in failing to apply an across-the-board reduction in addition to his other reductions pursuant to *Hensley*, 461 U.S. 424, due to claimant's limited success. The administrative law judge discussed and rejected this contention and employer has not established that the administrative law judge abused his discretion in this regard. *See generally Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).