

BRB Nos. 09-0216
and 09-0216A

DANIEL L. OBERTS)	
)	
Claimant-Respondent)	
Cross-Respondent)	
)	
v.)	
)	
McDONNELL DOUGLAS SERVICES)	
)	
and)	
)	
AIG CLAIMS SERVICES)	DATE ISSUED: 04/14/2010
)	
Employer/Carrier-)	
Respondents)	
)	
ALSALAM AIRCRAFT COMPANY,)	
LIMITED)	
)	
and)	
)	
INSURANCE COMPANY OF THE)	
STATE OF PENNSYLVANIA)	
)	
Employer/Carrier-)	
Petitioners)	
Cross-Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Cross-Petitioner)	DECISION and ORDER on RECONSIDERATION

PER CURIAM:

Alsalam Aircraft Company, Limited (Alsalam) and the Director, Office of Workers' Compensation Programs (the Director), have filed timely motions for reconsideration, and claimant has filed a timely petition for clarification, of the Board's decision in the captioned case, *D.O. [Oberts] v. McDonnell Douglas Services*, BRB Nos. 09-0216/A (Aug. 27, 2009)(unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §§802.407, 802.409.

To recapitulate, claimant initially injured his back and neck on October 28, 1997, during the course of his employment as a crew chief with McDonnell Douglas Services (MDS) in Saudi Arabia. MDS paid compensation to claimant from October 28 through November 3, 1997, and although claimant remained symptomatic, he then returned to his usual work. On January 13, 1998, claimant's employer, but not his job, changed when Alsalam bought MDS's operations. Claimant continued to work, and was subsequently diagnosed with disc herniations at C5-6 and C6-7 from the 1997 injury. On May 18, 1999, claimant injured his shoulder at work. He underwent surgery on his right shoulder on August 17, 1999, and by September 7, 1999, he was released to return to light duty. In March 2000, claimant returned to his usual employment after being released from care for his shoulder injury; claimant testified that he suffered pain in his neck when he performed certain aspects of his job. In April 2000, claimant learned that he needed surgery on his neck. Claimant underwent a second surgical procedure on his right shoulder on January 30, 2001, and on July 3, 2001, he underwent neck surgery at MDS's expense. Because claimant failed to return to work in Saudi Arabia, Alsalam ceased paying claimant's salary in February 2001, and terminated his employment on May 22, 2001. Claimant filed a claim for benefits under the Act for his 1999 shoulder injury, and Administrative Law Judge Rokenetz found Alsalam liable for temporary total disability benefits from February 8 through May 9, 2001, and permanent total disability benefits from May 10 through July 2, 2001, for claimant's shoulder injury, based upon an average weekly wage of \$1,195.46.¹ Cl. Exs.(ii) 5, 47. Following claimant's July 3, 2001 neck surgery, MDS paid claimant disability compensation from July 3, 2001, through May 4, 2004, at varying rates. MDS Ex. 62. According to claimant, on September 29, 2003, he learned that his first neck surgery had been unsuccessful and that he needed revision

¹ According to Judge Rokenetz's decision claimant sought permanent total disability benefits for the shoulder injury only through July 2, 2001, because of a previous agreement with MDS under which it would pay him compensation for his neck injury beginning on July 3, 2001, the date of the neck surgery. Cl. Ex.(ii) 47 at 3, 14.

surgery. After MDS denied authorization for this second neck surgery, claimant sought benefits against both MDS and Alsalam.²

In a 2005 decision, Administrative Law Judge Mills found that claimant's current neck disability is due solely to the natural progression of his October 28, 1997, work injury. Accordingly, Judge Mills held MDS liable for temporary total disability benefits, beginning on July 3, 2001, and continuing, as a result of claimant's neck condition, as well as future medical expenses. Judge Mills found claimant's average weekly wage to be \$1,235.50, pursuant to Section 10(c), 33 U.S.C. §910(c).

On MDS's appeal, the Board determined that the administrative law judge misapplied the aggravation rule in determining the employer responsible for the payment of claimant's benefits. The Board therefore vacated the administrative law judge's finding that MDS is the responsible employer and remanded the case for reconsideration of this issue. The administrative law judge's average weekly wage calculation and his award of an attorney's fee payable to claimant's counsel also were vacated by the Board. *Oberts v. McDonnell Douglas Services*, BRB Nos. 05-0445/A (Feb. 15, 2006)(unpub.) (*Oberts I*).

On remand, Judge Mills found that, pursuant to the aggravation rule, Alsalam is the employer responsible for the payment of benefits due claimant as a result of his neck condition. The administrative law judge determined that claimant's average weekly wage was \$931.93 and approved claimant's counsel's request for an attorney's fee. Alsalam appealed, and claimant cross-appealed, this decision. In its second decision, the Board affirmed the finding that Alsalam is liable for the benefits due claimant for his neck injury. The Board vacated Judge Mills's calculation of claimant's average weekly wage and remanded the case for further consideration of that issue. The Board also directed the administrative law judge on remand to fully address claimant's claim for benefits for his work-related shoulder condition, which had been raised before the administrative law judge in the prior proceeding,³ should claimant pursue that claim on remand. *D.O.*

² Claimant thus filed 3 claims in this case: a claim against MDS for the 1997 neck and back injury, a claim against Alsalam for the 1999 shoulder injury, and a claim against Alsalam for the subsequent aggravation of his neck.

³ In describing the issues in his 2005 Decision, Judge Mills stated that, in addition to disability and medical benefits for his neck, claimant also asserted "entitlement to permanent total disability for his right shoulder from July 3, 2001 forward." 2005 Decision at 2. Judge Mills found it unnecessary to address the shoulder disability as he had found claimant totally disabled due to his neck. *Id.* at 29 n. 8. Following the Board's 2006 remand, Judge Mills found claimant entitled to a lower average weekly wage for the neck injury. On reconsideration, claimant requested leave to modify the award to one for permanent total disability due to the shoulder. The administrative law judge denied this request, stating it was not within the scope of the remand. On appeal, the Board rejected

[Oberts] v. McDonnell Douglas Services, BRB Nos. 07-0341/A (Dec. 21, 2007)(unpub.) (D.O. II).

The case on remand was reassigned to Administrative Law Judge Price (the administrative law judge). In his Decision and Order on Second Remand, the administrative law judge found that claimant's average weekly wage for his neck injury is \$1,235.50, and that this wage is greater than the average weekly wage, \$1,195.46, found by Judge Roketenetz to be applicable to claimant's shoulder injury. The administrative law judge awarded Alsalam relief from liability for the permanent total disability due to the shoulder injury pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In his Order Granting Motion for Reconsideration, the administrative law judge clarified his award of benefits to claimant to reflect the following: claimant is entitled to permanent total disability benefits as a result of his right shoulder injury from May 10, 2001, and continuing, based on an average weekly wage of \$1,195.46, subject to annual increases pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f); claimant is entitled to temporary total disability benefits as a result of his neck and back conditions from July 3, 2001, and continuing, based on an average weekly wage of \$1,235.50; Alsalam is entitled to offset its payment of permanent total disability benefits against its liability for temporary total disability benefits; Alsalam is entitled to relief from the Special Fund for any permanent total disability benefits which it paid to claimant subsequent to May 10, 2003.

On appeal, Alsalam challenged the administrative law judge's finding that it is the employer responsible for the payment of benefits to claimant for the neck injury; on cross-appeal, the Director asserted that the administrative law judge erred in awarding claimant permanent total disability benefits subsequent to July 2, 2001, and in determining that Alsalam is entitled to relief pursuant to Section 8(f) of the Act.

In its Decision and Order, the Board affirmed the administrative law judge's finding that Alsalam is the employer responsible for the payment of claimant's benefits. The Board also affirmed the administrative law judge's determination that claimant was entitled to permanent total disability compensation for his work-related right shoulder condition commencing May 10, 2001, as it was supported by substantial evidence. Since claimant was entitled to temporary total disability benefits commencing July 3, 2001, as a result of his neck condition, the Board stated that claimant established entitlement to both awards as he sustained distinct work-related injuries to his neck and shoulder which resulted in separate physical restrictions and substantial evidence supported the administrative law judge's determinations that claimant was totally disabled due to his neck and shoulder conditions individually. Finding no danger of claimant's receiving a double recovery since the lesser total disability award would be offset against the greater

this conclusion as the issue had been raised before the administrative law judge and never resolved.

award, the Board affirmed the administrative law judge's award of compensation benefits for both claimant's neck and shoulder conditions. The Board also rejected the Director's assertion that Section 8(f) relief was improper as the compensable disability to the neck was temporary, stating that at some point the permanent total disability for the shoulder injury would exceed the temporary total disability due, and Alsalam would be entitled to Section 8(f) relief at that point. The Board thus modified the administrative law judge's decision to reflect Alsalam's liability for the temporary total disability award for claimant's neck injury and for the Special Fund's liability for permanent total disability for claimant's shoulder injury after Alsalam paid 104 weeks of permanent total disability benefits for this condition. *D.O. [Oberts] v. McDonnell Douglas Services*, BRB Nos. 09-0216/A (Aug. 27, 2009)(unpub.) (*D.O. III*).

In its motion for reconsideration, Alsalam seeks reconsideration of the Board's decision to modify the administrative law judge's award of Section 8(f) relief; Alsalam challenges the Board's statement regarding the number of weeks of permanent total disability paid prior to July 2, 2001, and contends that as claimant's permanent total disability compensation exceeded the temporary total disability benefits payable as of October 1, 2001, its entitlement to Section 8(f) relief should commence as of August 6, 2003. In his motion, the Director seeks reconsideration of the Board's determination that concurrent total disability awards are appropriate in this case and clarification of the Special Fund's liability once 104 weeks of permanent total disability for the shoulder are paid. Claimant seeks clarification of the Board's decision, requesting that the Board specifically set forth the amount of benefits due claimant subsequent to July 3, 2001.

Initially, Alsalam points out that its payment of permanent total disability benefits to claimant from May 10 through July 2, 2001, constituted 7 5/7 weeks of benefits paid, not the 7 4/7 weeks stated in the Board's decision. *See D.O. III*, slip op. at 10 n.10. The prior decision is modified to reflect that Alsalam paid claimant 7 5/7 weeks of permanent total disability benefits between May 10 and July 2, 2001.

All parties essentially seek clarification of the payments due as a result of the separate awards for claimant's shoulder and neck. In his motion, moreover, the Director seeks reconsideration of the Board's affirmance of the decision that it is liable for Section 8(f) relief on the shoulder injury and clarification of the holding regarding the concurrent total disability awards due to the sequential injuries to claimant's neck and shoulder. We deny reconsideration, but grant the requests for clarification.

To reiterate, the Board has affirmed, based on substantial evidence, the administrative law judge's determination that claimant sustained two separate and distinct work-related injuries, one resulting in permanent total disability and one in temporary total disability. The Director has cited no case precedent or other authority in support of its contention that concurrent awards for these separate conditions are not permissible. It is true that claimant cannot receive more than total disability, but he has not been granted

a double recovery here, as the greater award will offset the lesser.⁴ *See generally I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999). Based on findings supported by substantial evidence, claimant became entitled to permanent total disability compensation for his work-related right shoulder condition commencing May 10, 2001, the date on which claimant's shoulder condition reached maximum medical improvement following January 2001 surgery,⁵ and to temporary total disability benefits as of July 3, 2001, when he underwent surgery for a work-related neck condition. Because claimant's disability due to his neck condition resulted in a higher compensation rate as of July 3, 2001, than that due as a result of the work-related shoulder condition, the parties agreed claimant's benefits would be paid for the neck injury commencing July 3, 2001.⁶

As a result of findings in the litigation thereafter regarding claimant's average weekly wage and the impact of Section 10(f) adjustments on permanent total disability awards, at some point claimant's entitlement to benefits due for his shoulder exceeded those due for the neck condition. Claimant raised the existing permanent total disability award for his shoulder in the initial proceedings before Judge Mills, and continued to do so. *See* n.3, *supra*. Judge Price ultimately reinstated this existing award. Contrary to Director's contention, there is no evidence claimant's shoulder disability ended; it was subsumed in the higher award and considered "irrelevant" by Judge Mills. 2005 Decision and Order at 29 n.8. Therefore, the Director's contention that it was improper for this

⁴ Judge Mills recognized the need for this offset in his initial decision. While he found claimant entitled to total disability benefits for his neck as of February 2001, since claimant had been paid total disability benefits for his shoulder during this period he commenced the neck award on the date of claimant's neck surgery, July 3, 2001. This determination rested on an agreement between the parties and claimant's desire to maximize his compensation, and not on any change in his shoulder condition.

⁵ The extent of disability sustained by claimant as a result of his work-related right shoulder condition was addressed by Judge Roketenetz in his November 5, 2002, decision wherein he found that substantial medical evidence supported a finding that claimant was unable to return to his usual work due to the shoulder injury. Alsalam did not establish suitable alternate employment. The resultant finding of permanent total disability as a result of the shoulder injury was never appealed. Alsalam subsequently acknowledged before Judge Mills that claimant was unable to resume his usual employment duties as a crew chief due to his shoulder condition. *See* May 13, 2004 Transcript at 46 – 47. The Director has, at no time, offered any evidence that claimant is not permanently totally disabled due to this injury. Moreover, claimant consistently pursued a continuation of benefits for the shoulder injury. *See* n.3, *supra*.

⁶ That the temporary total award was based on this agreement is reflected in Judge Roketenetz's initial decision.

award to “become operative again in the absence of any fact finding to support the re-emergence of the disability from the earlier injury,” Dir. Brief at 2, is without merit. All necessary fact finding has occurred. Claimant’s established permanent total disability did not disappear merely because benefits were payable at a higher rate for temporary total disability due to a different injury. *See generally Henry v. George Hyman Constr. Co.*, 15 BRBS 175 (1983), *rev’d on other grounds*, 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984)(prior permanent partial disability continues to exist during exacerbation to temporary total disability).

Based on these awards, claimant is entitled to permanent total disability benefits commencing May 10, 2001, for his work-related shoulder injury and temporary total disability benefits commencing July 3, 2001, for his work-related neck injury. From July 3, 2001, for the period when the temporary total disability was the greater award, claimant is entitled to payment at this rate, and the lower, permanent total disability award is credited against these payments. As of the date the permanent total disability award exceeds this amount due Section 10(f),⁷ claimant is entitled to payments for the permanent total disability award. These benefits continue for the duration of claimant’s permanent total disability for his shoulder. As the administrative law judge awarded Section 8(f) relief on this award, the Special Fund is liable for claimant’s permanent total disability benefits, in full, after employer has paid 104 weeks of compensation. Alsalam asserts that it is possible to calculate the date on which it will have paid claimant 104 weeks of permanent total disability compensation and requests that the Board revise its decision to award Section 8(f) relief to Alsalam as of August 6, 2003.⁸ It appears that the Director agrees that August 6, 2003, is the appropriate date. *See* October 23, 2009, letter. Nonetheless, the calculation of specific amounts and dates is a ministerial act within the authority of the district director, and we do not believe it is necessary to verify these calculations in this decision. Once Alsalam has paid claimant a total of 104 weeks of permanent total disability benefits, the Special Fund is liable for all permanent total disability benefits due thereafter.

In this regard, we reject the Director’s assertion that, should Alsalam be entitled to relief from the Special Fund,⁹ the Special Fund’s liability will be limited to the difference

⁷ It appears that the parties agree that this date is October 1, 2001.

⁸ Similarly, claimant has submitted to the Board a table encompassing the cost-of-living increases to be applied to his award of permanent total disability benefits during the period of October 1, 2001, through October 1, 2008; claimant requests that the Board specifically set forth the amount of benefits that he is to receive subsequent to July 3, 2001.

⁹ The Director does not challenge the finding that the elements for Section 8(f) relief on the shoulder injury have been met.

between the amount of benefits due claimant for his permanently totally disabling shoulder condition and the amount of benefits due claimant for his temporarily totally disabling neck condition. There is no support for this contention. The fact that claimant had a separate injury resulting in temporary total disability does not affect claimant's entitlement to permanent total disability for his shoulder or the Special Fund's established liability for it. Thus, the Special Fund is liable for the full payment of permanent total disability compensation for claimant's shoulder injury after Alsalam has paid its 104 weeks of compensation.

Claimant's counsel has filed a complete, itemized fee petition requesting a fee for services performed during the pendency of this appeal before the Board. 20 C.F.R. §802.203. Specifically, counsel seeks a fee of \$4,443.75, representing 19.75 hours of legal services performed by counsel at a rate of \$225 per hour. MDS has responded, averring that Alsalam is the party responsible for any attorney's fee awarded to claimant's counsel.

As claimant has been successful in defending his award of benefits before the Board, he is entitled to an attorney's fee for work performed before the Board payable by employer. *See Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993); *Cutting v. General Dynamics Corp.*, 21 BRBS 108 (1988); 33 U.S.C. §928; 20 C.F.R. §802.203. After consideration of counsel's fee petition, we conclude that the number of hours spent in preparing this case and the requested hourly rate are reasonable. 20 C.F.R. §802.203(d)(4). As Alsalam is the liable employer, it is also liable for the attorney's fee. Accordingly, we award claimant's counsel a total fee in the amount of \$4,443.75, representing 19.75 hours of legal services performed at the hourly rate of \$225, payable directly to counsel by Alsalam. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, reconsideration of the Board's decision is denied, but the Board's decision is clarified as stated herein. Claimant's counsel is awarded a fee of \$4,443.75, payable directly to claimant's counsel by Alsalam.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge