BRB No. 00-0385

WAYNE HOLMES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: Dec. 13, 2000
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

Arthur J. Brewster, Metairie, Louisiana, for claimant.

Christopher M. Landry (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fees (99-LHC-0201) 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*. (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 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 September 1, 1997, claimant injured his back during the course of his employment for employer as a warehouseman. Claimant had previously injured his back in 1993 during the course of his employment with Coca-Cola. He did not disclose this injury on his job application before he was hired by employer in 1996. Pursuant to a transfer request by claimant made before his injury, claimant was assigned duties as a materials handler, which he performed until November 16, 1997, when he was restricted to light-duty work, which employer could not provide. In April 1998, employer informed claimant that it had available work within his restrictions. Claimant returned to work on April 6, 1998, as a shipping clerk; however, he reported back pain and stopped working on April 7, 1998. He again attempted to return to work as a shipping clerk on April 15, 1998. However, he was discharged that day by employer because of his failure to disclose on his employment application his previous back injury with Coca-Cola.

In his Decision and Order, the administrative law judge credited claimant's testimony, as supported by the opinions of Drs. Brown, Bourgeois and Russo, to find that claimant is unable to return to his usual employment as a materials handler due to the amount of lifting and repetitive squatting and bending required of that position. The administrative law judge also credited claimant's testimony, as supported by the testimony of Nelson Perez, a co-worker, and the opinion of claimant's treating physician, Dr. Bourgeois, to find that the shipping clerk position employer provided at its facility was not suitable for claimant, and thus that this job did not establish the availability of suitable alternate employment. The administrative law judge concluded , however, that employer's May 19, 1998, labor market survey established the availability of suitable alternate employment at wages higher than claimant was earning with employer. Accordingly, claimant was awarded benefits under the Act for permanent total disability from April 15, 1998, to May 18, 1998. Employer appeals the award, contending that the administrative law judge erred by awarding claimant benefits. Claimant responds, urging affirmance.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting a fee of $10,845.62, representing 58.625 hours of attorney services at $185 per hour, plus expenses totaling $118.90. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge reduced the hourly rate to $175, rejected employer's other objections to the fee petition, but denied $18.90 requested for

[1]In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant's back condition reached maximum medical improvement on April 6, 1998. Decision and Order at 11-12. The parties also stipulated that employer voluntarily paid claimant compensation under the Act from November 6, 1997, until December 8, 1997; from December 23, 1997, until April 5, 1998; and from April 7, 1998, to April 14, 1998. *Id.* at 2.

photocopying. Accordingly, the administrative law judge awarded claimant's attorney a fee totaling $10,259.37, plus expenses totaling $100. On appeal, employer challenges the fee award. Claimant has not responded to employer's appeal of the fee award.

Employer contends that the position it provided claimant as a shipping clerk on April 6, 1998, established the availability of suitable alternate employment. Moreover, as claimant was discharged on April 15, 1988, for falsifying his job application, employer contends that the administrative law judge erred by awarding claimant compensation for permanent total disability. Where, as in the instant case, the administrative law judge's finding that claimant is unable to perform his usual employment duties is uncontested, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can satisfy this burden by providing at its facility a job suitable for claimant. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). If claimant successfully performs a suitable alternate position, but is discharged for breaching company rules, employer is not liable for total disability benefits. *See Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993), *aff'g Brooks v. Newport New Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992); *Walker v. Sun Shipbuilding & Dry Dock*, 19 BRBS 171 (1986). That a claimant is discharged due to his own misfeasance, however, does not negate his entitlement to any benefits to which he otherwise is entitled. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Walker,* 19 BRBS at 171.

In the instant case, the administrative law judge found that the shipping clerk position was not suitable for claimant. He credited claimant's testimony, as supported by the testimony of Nelson Perez, a co-worker, and the opinion of Dr. Bourgeois, over the job analysis of the shipping clerk position provided by Nancy Favaloro, a vocational consultant, photographs depicting job duties performed by a shipping clerk, a surveillance videotape of claimant playing softball, and medical opinions that claimant is able to work as a shipping clerk. In this regard, claimant testified that the shipping clerk position was essentially the same as his former position as a materials handler, and was therefore not within his work restrictions as to lifting, bending and squatting. *See* Tr. at 52-53, 102-103; *see also* EX 1 at 50; EX 2 at 16. Mr. Perez, a materials handler, testified he thought claimant had returned to work as a materials handler, rather than as a shipping clerk, and that their job duties included lifting pipes weighing 50 to 300 pounds and bending about 25 times an hour. Tr. at 110, 115-116, 118, 124-125. Dr. Bourgeois opined on April 9,

[2]The administrative law judge credited a Functional Capacities Exam (FCE) conducted on March 10, 1998, and the additional work restrictions of Dr. Russo. Decision and Order at 13 n.4, 14. The March FCE limited claimant to lifting no more than 25 pounds and to occasional bending, squatting and kneeling. EX 1 at 50. Dr. Russo opined on March

1998, that claimant had re-injured his back from performing work beyond his restrictions. EX 1 at 6. Moreover, the administrative law judge found that employer's still photographs fail to show how often claimant is required to perform the physical activities depicted, and that the surveillance videotape did not show claimant performing any activity outside his work restrictions. Decision and Order at 14-15. The administrative law judge further found unconvincing Ms. Favaloro's job analysis and the opinions of Drs. Bourgeois and Russo that were based upon her analysis, as she only observed employees performing the job duties of a shipping clerk for two hours and, during this time, she never witnessed handling of larger size pipes or pipes lying flush to the ground, which job duties, claimant testified, are required of a shipping clerk and are not within his work restrictions. *Id*. at 15.

In adjudicating a claim, it is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In the instant case, we hold that the administrative law judge's decision to credit the testimony of claimant and Mr. Perez, and the opinion of Dr. Bourgeois is rational. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge's finding that the shipping clerk position was not suitable for claimant therefore is supported by substantial evidence of record, and this finding is affirmed. *Mijangos*, 948 F.2d at 941, 25 BRBS at 78(CRT).

As a result, we reject employer's contention that the administrative law judge erred by awarding claimant compensation after he was discharged for falsifying his employment application. Inasmuch as the administrative law judge rationally found that the job employer provided was not suitable, claimant is entitled to total disability benefits irrespective of his discharge. Claimant is entitled to whatever benefits he would have been entitled to receive had he not been discharged, which in this case, is total disability benefits until the time that employer established the availability of suitable alternate employment on May 19, 1998. *See generally Mangaliman*, 30 BRBS at 43; *Walker*, 19 BRBS at 173; *see also Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996).

25, 1998, that claimant's bending from the waist should be limited to five to six times an hour or 50 times a day, that he should not lean over to work for more than 10 minutes at a time, and that squatting was prohibited. EX 2 at 16.

[3]The administrative law judge credited Dr. Bourgeois's statement that he would not approve as within claimant's work restrictions the shipping clerk position if claimant's description of the job duties, rather than Ms. Favaloro's, was accurate. Decision and Order at 15; *see also* EX 1 at 14.

Accordingly, we affirm the administrative law judge's award of permanent total disability benefits from April 15, 1998, to May 19, 1998.

We next address employer's appeal of the fee award. Employer's contention that the administrative law judge's award of an attorney's fee is premature is without merit. It is well established that while an attorney's fee award is not enforceable until the compensation order is final, an administrative law judge can award an attorney's fee during the pendency of an appeal. *See Story v Navy Exchange Service Center*, 33 BRBS 111 (1999). We also reject employer's contention that the claim was not successfully prosecuted as claimant was awarded compensation by the administrative law judge and claimant has now successfully defended his award on appeal. *See LaPlante v. General Dynamics Corp.*, 15 BRBS 83 (1982). Moreover, the administrative law judge acted within his discretion to find $175 is a reasonable hourly rate, *see McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998), and employer has failed to show that the administrative law judge abused his discretion in finding reasonable the entries for which counsel billed one-quarter of an hour. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Finally, the administrative law judge properly found compensable 1.75 hours counsel expended on preparation of his fee petition. *See Hill v. Avondale, Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 120 U.S. 2215 (2000). Accordingly, we affirm the administrative law judge's attorney's fee award.

Accordingly, the Decision and Order and the Supplemental Decision and Order Awarding's Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge