BRB Nos. 03-0351
and 03-0351A

ROBIN CONLAN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NOVOLOG BUCKS COUNTY, INCORPORATED	)	DATE ISSUED: Feb. 12, 2004
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order and the Order on Motion to Reconsider and Supplemental Order Awarding Attorney Fees and Costs of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Daniel J. Boyce, Philadelphia, Pennsylvania, for claimant.

Francis M. Womack III (Field, Womack & Kawczynski), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Order on Motion to Reconsider and Supplemental Order Awarding Attorney Fees and Costs (2002-LHC-1491), and employer appeals the attorney's fee award, of Administrative Law Judge Ralph A. Romano 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 a fee award is discretionary and will not be set aside unless 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).

On November 17, 1999, claimant was working on the engine of a truck when it jumped into gear and hit a truck in front of it, causing the open cab to come down on claimant's feet. Claimant was taken to the emergency room, and was treated for injuries to his feet. Claimant testified that the pain in his left foot eventually subsided, but that he has a steady aching pain in his right foot which becomes sharp if he steps on it differently. Claimant sought permanent partial disability and medical benefits under the Act for his right foot injury. *See* 33 U.S.C. §§908(c)(4), 907.

In his decision and order, the administrative law judge found that claimant is entitled to permanent partial disability benefits for a 17 percent impairment of the right foot, based on Dr. Lefkoe's medical opinion, pursuant to Section 8(c)(4) of the Act. With regard to medical benefits, claimant sought to have his family physician, Dr. Manin, authorized to treat his foot injury after he was released from the care of Dr. Steinfield, an orthopedist. Employer authorized Dr. Manin to examine claimant and to prescribe medications, but stated that claimant would have to seek "serious" treatment from Dr. Steinfield. The administrative law judge stated that he understood employer's position to be that "all such medical treatment/prescription expenses shall be paid." Decision and Order at 8. The administrative law judge thus ordered employer to pay for all past and future medical costs related to the treatment of claimant's right foot. 33 U.S.C. §907. In an order on reconsideration, the administrative law judge denied claimant's request to address the "status of Dr. Manin." The administrative law judge stated that he had previously ordered employer to "[pay] all . . . medical treatment/prescription expenses . . . of [Dr. Manin]." Order on Motion to Reconsider at 1 (brackets in original). Subsequent to the issuance of the administrative law judge's Decision and Order, claimant submitted a petition for an attorney's fee in the amount of $12,116, representing 60.58 hours of legal services at the hourly rate of $200, and $4,741.69 in costs. The administrative law judge summarily denied claimant's request for 6.6 hours for preparation of the motion for reconsideration, but rejected employer's other objections to the attorney's fee petition. Thus, the administrative law judge awarded claimant a fee in the amount of $10,856 for legal services and $4,741.69 in costs.

On appeal, claimant contends that the administrative law judge erred in crediting Dr. Lefkoe's opinion regarding the extent of claimant's permanent impairment of the

right foot. In addition, claimant contends that the administrative law judge failed to specifically address whether Dr. Manin's treatment is compensable, as employer's representations regarding authorization were unclear. Finally, with regard to the attorney's fee award, claimant contends that the administrative law judge erred in disallowing all 6.6 hours for work on the motion for reconsideration as this work was necessary to request clarification of Dr. Manin's status. Employer has not responded to claimant's appeal. In its appeal of the attorney's fee award, employer contends that the administrative law judge failed to address its contentions that the fee request lacks "billing judgment" and that the post-hearing activities of counsel are excessive given that employer offered to settle the claim for the degree of impairment awarded by the administrative law judge. Claimant responds, urging affirmance of the administrative law judge's findings on these issues.

Initially, claimant contends that the administrative law judge erred in awarding permanent partial disability benefits under the schedule for a 17 percent impairment of the right foot based on the opinion of Dr. Lefkoe, rather than for a 60 percent impairment of the right foot as supported by the opinion of Dr. Schneidman. Claimant contends that the administrative law judge rejected Dr. Schneidman's opinion for invalid reasons. The administrative law judge is not bound by any particular standard or formula but may consider a variety of medical opinions and observations, in addition to claimant's description of symptoms and physical effects of his injury, in assessing the extent of claimant's disability under the schedule. *See Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154, 159 (1993). Moreover, the Act does not require impairment ratings based on medical opinions using the criteria of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) except in cases involving compensation for hearing loss and for voluntary retirees. *Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); 33 U.S.C. §§902(10), 908(c)(13), (23).

We agree with claimant that the case must be remanded for reweighing of the medical evidence. Three doctors of record assessed the degree of impairment to claimant's right foot. Dr. Schneidman opined that that claimant has a range of motion impairment of 26 percent and a sensory impairment of 6 percent, which is a 30 percent total foot impairment according to the combined values chart of the Fourth Edition of the AMA *Guides.* In addition, Dr. Schneidman assigned an additional 30 percent impairment to account for chronic pain, for a total impairment rating of 60 percent.[1] Cl. Ex. 13. Dr. Lefkoe reviewed the medical records and examined claimant, and applied the Fifth Edition of the AMA *Guides* to conclude that claimant has a 10 percent impairment due to loss of range of motion and a 7 percent sensory grade impairment for a combined

[1] Dr. Schneidman stated that claimant has moderate to marked pain, with restrictions in activities of daily living. Cl. Ex. 13.

total of 17 percent impairment. Cl. Exs. 14, 21. Dr. Korevaar opined that claimant suffers from a severe impairment of the great toe which is 7 percent of the foot. She also stated that claimant has a complaint of burning pain, but does not meet the threshold requirement for an additional impairment rating for pain given that he describes at least six hours of uninterrupted sleep and that he is taking minimal medications which do not affect his ability to function mentally or physically. Emp. Ex. 3.

The administrative law judge found that Dr. Schneidman's opinion regarding claimant's pain is exaggerated when compared with claimant's testimony. The administrative law judge observed that Dr. Schneidman stated that claimant is "never free of pain" and described his pain as "severe." Cl. Ex. 13. However, the administrative law judge then mischaracterized claimant's testimony in stating that claimant testified to an aching pain that occurred during climbing and other activity. To the contrary, claimant testified that he has a steady aching pain, which becomes sharp when he steps on it in different ways. H.Tr. at 16; Decision and Order at 3. In addition, the administrative law judge accorded little weight to Dr. Schneidman's opinion as he used the "dated" Fourth Edition of the AMA *Guides* and his report is unsupported by deposition testimony. However, the Act does not require that a physician use the AMA *Guides* to assess an impairment for a foot injury. *See Cotton*, 34 BRBS at 89. Moreover, an administrative law judge may accord less weight to an opinion which is not well reasoned, but the administrative law judge here did not explain how Dr. Lefkoe's opinion is better reasoned in light of his deposition testimony. Thus, the mere lack of deposition or hearing testimony by Dr. Schneidman cannot be the basis for the rejection of his opinion. Therefore, we hold that the three reasons the administrative law judge provided to accord Dr. Schneidman's opinion with less weight are invalid. We vacate the administrative law judge's finding that claimant has a 17 percent impairment of his right foot, and we remand the case for further findings regarding the extent of impairment.[2] *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994).

Claimant next contends that the administrative law judge erred in failing to specifically address whether the past and continuing treatment by Dr. Manin, claimant's family physician, is authorized. In his decision, the administrative law judge found that

[2] In addition, the administrative law judge found that Dr. Korevaar's impairment rating is "reliable." The administrative law judge noted, however, that Dr. Korevaar assumed claimant was getting at least six hours of sleep per night and thus was not in great pain. The administrative law judge found that claimant stopped taking one of his medications when he returned to work because it made him drowsy, and therefore is able to sleep for only three to four hours per night. H.Tr. at 20. The administrative law judge thus found Dr. Korevaar's opinion less reliable than that of Dr. Lefkoe due to her misunderstanding concerning claimant's sleeping pattern.

employer is liable for all past and future medical costs related to the treatment of claimant's right foot. Decision and Order at 8. Claimant requested clarification of the status of Dr. Manin by way of a motion for reconsideration. The administrative law judge stated that this request is "neither meritorious nor necessary in light of the unambiguous directive at page 8 of my decision that Employer will '[pay] all . . medical treatment/prescription expenses . . .[of Dr. Manin].'" Order on Motion to Reconsider at 1 (brackets & elipses in original). As it is the administrative law judge's understanding that he ordered treatment by Dr. Manin to be paid by employer, and employer has not appealed this finding or responded to claimant's appeal, we affirm the administrative law judge's finding that employer is liable for treatment by Dr. Manin, and thus there is no need for the administrative law judge to reconsider this issue on remand. 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406.

With regard to the attorney's fee award, claimant contends that the administrative law judge erred in reducing the hours requested by 6.6 for all time spent on research and preparation of the Motion for Reconsideration. In its appeal, employer contends that the administrative law judge failed to address its objections. Employer contends that it objected to the reasonableness of the overall fee request, arguing that claimant's counsel failed to exercise "billing judgment;" employer specifically contends that counsel's post-hearing activities were not reasonable in view of its offer at the hearing to settle the case for the degree of impairment ultimately awarded by the administrative law judge.

We agree with both parties that the case must be remanded for the administrative law judge to reconsider the amount of the fee award. The administrative law judge summarily reduced the total number of hours spent on the Motion for Reconsideration by 6.6 hours. As discussed, the administrative law judge found in his initial decision that employer is liable for claimant's medical treatment, but he did not specifically state whether claimant was authorized to seek treatment from Dr. Manin. Therefore, claimant filed a motion for reconsideration, seeking clarification. In his Order on Motion for Reconsideration, the administrative law judge stated that this request was not necessary, but specifically stated that employer is liable for all medical treatment by Dr. Manin. As employer's position on whether Dr. Manin's treatment was authorized was not clear, the administrative law judge's initial decision did not specifically address this issue, and the administrative law judge stated in the Order on reconsideration that Dr. Manin is authorized to treat claimant, we hold that the administrative law judge erred in rejecting claimant's request for a fee for time spent on the motion for reconsideration. However, as employer objected to the amount of time requested, and the administrative law judge did not address this objection in his summary rejection of the 6.6 hours, the administrative law judge is instructed on remand to reconsider the amount of time that is reasonably commensurate with the work done on the motion.

In otherwise awarding the full fee requested, the administrative law judge stated only that employer's objections are not valid and that the fee is "reasonably commensurate with the necessary work done, quality of representation, and complexity of issues involved." Order on Motion to Reconsider at 1; *see* 20 C.F.R. §702.132. In view of employer's specific contentions that certain itemized entries are excessive and thereby demonstrate a lack of billing judgment, *see Hensley v. Eckerhart*, 461 U.S. 424 (1983), the administrative law judge's failure to address employer's assertions in greater detail constitutes an abuse of discretion. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). However, we reject employer's contention that all post-hearing depositions in which claimant's counsel participated were unnecessary due to employer's offer at the hearing to settle the case for the 17 percent impairment ultimately awarded by the administrative law judge. The proper test for determining if the attorney's work is necessary is whether, at the time the attorney performs the work in question, he or she could reasonably regard the work as necessary to establish entitlement, rather than whether the evidence adduced was actually relied on by the administrative law judge. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Therefore, on remand, the administrative law judge must address employer's specific objections to the fee request.

Accordingly, the Decision and Order of the administrative law judge awarding permanent partial disability benefits for a 17 percent impairment of the right foot is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. Moreover, the administrative law judge's fee award is vacated. The administrative law judge should reconsider the fee award in light of claimant's success on the motion for reconsideration and in view of employer's detailed objections. The administrative law judge's award of medical benefits is 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