BRB Nos. 02-0321
and 02-0398

BENJAMIN ENCARNACION	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: Jan 15,
DEPARTMENT OF THE NAVY	)	2003
	)	
Self-Insured	)	
Employer-Petitioner	)	
		DECISION and ORDER

Appeals of the Decision and Order-Awarding Benefits and the Supplemental Decision and Order-Awarding Attorney Fees of David W. Di Nardi, Administrative Law Judge, United States Department of Labor, and the Compensation Order-Award of Attorney's Fees of Richard V. Robilotti, District Director, United States Department of Labor.

Keith A. Graffam (Graffam & Biaggi), San Juan, Puerto Rico, for claimant.

James M. Mesnard (Seyfarth Shaw), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits and the Supplemental Decision and Order-Awarding Attorney Fees (01-LHC-0321) of Administrative Law Judge David W. Di Nardi, and the Compensation Order-Award of Attorney's Fees (Case No. 02-0127066) of District Director Richard V. Robilotti, 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 the award 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 272 (1980).

Claimant was working on November 13, 1999, as a custodial worker at the Combined Bachelor Quarters in Puerto Rico when he slipped on a flight of stairs, falling to the floor. He sought treatment when he began experiencing back pain later that night, and eventually was diagnosed with a herniated disc. Claimant continued treatment for his ongoing back pain and also began to suffer from depression and suicidal thoughts. He also complained of pain in his right leg and right hand. Claimant has not returned to work since a failed attempt to resume his former duties in January 2000, and he sought temporary total disability benefits under the Act.

In his decision, the administrative law judge found that claimant's herniated disc with radiculopathy and his major depressive disorder resulted from his November 13, 1999 work injury. He also found that claimant has established that he cannot return to work as a custodial worker and that employer did not establish suitable alternate employment. Thus, as the administrative law judge found that claimant's disability has not yet become permanent, he awarded claimant ongoing temporary total disability benefits.

Subsequent to the issuance of the administrative law judge's decision, claimant's counsel filed a fee petition requesting $33,441.61, representing 164 hours of legal services at the hourly rate of $200, plus costs of $641.61. Employer submitted objections to the fee petition. After considering employer's objections, the administrative law judge found that the hours requested were necessary, reasonable, and appropriate at the time the services were rendered. The administrative law judge also awarded three hours for the time claimant's counsel spent defending his fee application, and costs in the amount of $641.61. Thus, the administrative law judge awarded claimant's counsel a fee in the amount of $34,041.61. In addition, the district director awarded claimant's counsel a fee in the amount of $2,550.99.

On appeal, employer contends that the administrative law judge erred in finding that the light duty job it offered claimant at the Bachelor Enlisted Quarters

(BEQ) is not suitable. Employer also appeals the administrative law judge's award of an attorney's fee contending that the hourly rate is excessive, that the administrative law judge erred in awarding a fee for time when the claim was before the Office of Workers' Compensation Programs, that the administrative law judge did not consider the amount of claimant's recovery, that the administrative law judge erred in relying on claimant's inability to speak English to deny employer's objections, and that the administrative law judge erred in allowing numerous specific items. In addition, employer contends that the administrative law judge improperly awarded costs for ordinary office overhead and that claimant should not have been awarded a fee for time spent preparing and defending his fee petition. BRB No. 02-0321. In addition, employer appeals the district director's award of an attorney's fee, contending that the district director improperly rejected employer's objections without reasons, that the fee awarded is too high, and that employer complied with the district director's recommendations such that it is not liable for any fee. BRB No. 02-0398. Claimant responds, urging affirmance of the administrative law judge's decision awarding temporary total disability benefits and of the fee awards of the administrative law judge and the district director.

Employer first contends that the administrative law judge erred in finding that claimant is totally disabled as there is light duty work available at its facility which claimant is capable of performing given his physical restrictions and his psychological condition. A claimant establishes his *prima facie* case of total disability if he is unable to perform his usual employment duties due to a work-related injury. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). Where, as in the instant case, it is uncontested that claimant is unable to perform his usual duties, the burden shifts to employer to establish the availability of suitable alternate employment, which it may do by providing claimant with a suitable light duty job at its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If suitable alternate employment is established, claimant is at most partially disabled. 33 U.S.C. §908(c); *Rivera v. United Masonry, Inc.*, 24 BRBS 78 (1990), *aff'd*, 948 F.2d 774, 25 BRBS 51 (CRT)(D.C. Cir. 1991).

In this case, the administrative law judge found that claimant had not been released for work when he was first offered the light duty job at employer's facility and that employer did not authorize a cortisone injection prescribed by claimant's treating physician. Thus, the administrative law judge concluded that claimant cannot return to any job. Decision and Order at 36. The administrative law judge also found that employer failed to establish claimant's ability to return to work as

its experts limited their opinions regarding claimant's abilities to their area of expertise, *i.e.,* no expert opined on claimant's ability to work given the totality of his restrictions. Decision and Order at 36.

The administrative law judge correctly stated that he must consider claimant's combined disabilities in determining the suitability of alternate work. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT)(2d Cir. 1997); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995). However, it was error for the administrative law judge to reject the expert opinions of Dr. Cruz Igartua (Dr. Cruz) and Dr. De La Cruz Rosado (Dr. De La Cruz) based on the finding that the physicians offered their opinions only within the framework of their own area of expertise. It is the administrative law judge's responsibility to consider all relevant opinions regarding claimant's ability to work and to compare any restrictions with the requirements of the light duty position employer contends is available at its facility. *See, e.g., Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001)(*en banc*). It is not necessary that any one physician give an opinion discussing all of claimant's conditions. In fact, it is reasonable for employer to seek opinions from appropriate specialists, and it is the administrative law judge's responsibility to weigh the varying opinions in light of the requirements of any job employer contends is suitable. *Stratton*, 35 BRBS at 6. Dr. De La Cruz, an orthopedic surgeon, reported on October 24, 2000, that claimant could perform some type of sedentary job with restrictions such as avoiding repeated bending, stooping, squatting, lifting or carrying heavy loads, and standing or walking for prolonged times. Emp. Ex. 19. Subsequently, Dr. De La Cruz reviewed the requirements of the light duty position at employer's facility and opined that claimant should be able to perform the duties. Emp. Ex. 30. Dr. Cruz, a psychiatrist, examined claimant and reviewed his medical records. He concluded that claimant could perform a part time job that had low stress and low risk for exacerbating his back pain.

Employer does not contest the administrative law judge's finding that the positions identified by the vocational counselor as available on the open market are insufficient to establish suitable alternate employment. However, employer contends that the light duty job it offered to claimant in March 2000 has been continuously available since that time. Sandra Guzman, employer's business manager, described the light duty position as requiring claimant to: stencil and

[1] Dr. De La Cruz also stated on October 24, 2000, that "in consideration of the whole panorama" claimant could not be engaged in any productive activity at that time. Cl. Ex. 17; Emp. Ex. 19.

fold new towels when they arrive, put together amenity kits in packages; put together welcome aboard packages, prepare smaller packages of soap, garbage bags, coffee, *etc*., in order to refurbish maid carts, issue linens, and assist with conducting inventory. Emp. Ex. 6. Ms. Guzman testified she based the offer to work on the restrictions imposed by claimant's treating physician at that time, Dr. Rios Camacho.

While the administrative law judge correctly found that claimant had not been released for work at the time of the initial offer of light duty on March 17, 2000, and that claimant did not receive the recommended cortisone injection until several months after that, these are not valid reasons for finding that claimant continues to be unable to perform any job. Moreover, the administrative law judge failed to review the subsequent medical restrictions as described by Drs. Cruz and De La Cruz and compare them to the requirements of the light duty position at employer's facility. Therefore, we vacate the administrative law judge's finding that employer failed to establish suitable alternate employment and remand the case for further findings regarding the suitability of the position offered by employer. *See Stratton*, 35 BRBS at 7. If employer establishes the availability of suitable alternate employment, the administrative law judge must determine whether claimant has sustained a loss in wage-earning capacity. 33 U.S.C. §908(c)(21), (e), (h).

We next address employer's appeal of the district director's attorney's fee award. Employer contends that the district director erred in awarding any attorney's fee in the instant case, or in the alternative, that the amount of the fee award was excessive. Initially, we reject employer's contention that it is not liable for an attorney's fee for work before the district director. Section 28(b) of the Act provides that where the employer is voluntarily paying compensation and a controversy develops over additional compensation due, employer is liable for a reasonable attorney's fee when claimant successfully utilizes the services of an attorney to gain compensation greater than the amount paid. 33 U.S.C. §928(b); *see, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In the instant case, employer contends that it authorized the epidural injection prior to the informal conference which addressed only employer's liability for such an injection, and thus is not liable for an attorney's fee pursuant to Section 28(b). The Board has previously rejected the contention that Section 28(b) requires employer's rejection of the district director's recommendation after a conference before fee liability commences.

[2] Dr. Rios Camacho testified that claimant was restricted from "heavy lifting, upper bending, carrying, pulling and pushing." Emp. Ex. 33.

Caine v. Washington Metropolitan Area Transit Authority, 19 BRBS 180 (1986), *citing Nat'l Steel & Shipbuilding Co. v. U.S. Dept. of Labor,* 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); c*f. Pool Co. v. Cooper,* 274 F.3d 173, 35 BRBS 109 (CRT)(5th Cir. 2001) (informal conference necessary for fee liability under Section 28(b)). Employer, moreover, controverted claimant's entitlement to continued benefits on January 10 and March 17, 2000, Emp. Exs. 2, 8, and although employer began to voluntarily pay temporary total disability benefits on March 21, 2000, Emp. Ex. 11, it stopped voluntary payments in July 2000 and stated that "further indemnity benefits are controverted." Emp. Ex. 12. Subsequently, the case was transferred to the Office of Administrative Law Judges for resolution and claimant obtained an ongoing award of total disability benefits. Cl. Ex. 4. Therefore, as employer controverted claimant's entitlement to further benefits, and claimant was successful in obtaining additional compensation over that which employer initially paid, we affirm the district director's finding that claimant's attorney is entitled to a fee award to be assessed against employer pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). *See generally Barker v. U.S. Dept. of Labor,* 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998).

In addition, employer contends that the district director erred in awarding 3.5 hours for claimant's counsel to attend the informal conference on May 22, 2000, as this amount is excessive and duplicative since several conferences were held that day. Fees for travel time may be awarded only where the travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993). The district director reviewed employer's objections and found that a 3.5 hour charge was reasonable to attend a conference at the naval base given the distance to the base and the heightened security after a death at Vieques. Moreover, we reject employer's contention that the multiple conferences attended by claimant's counsel on May 22, 2000 indicate that counsel billed for the same time on different claims as the amounts shown on the different fee petitions submitted do not establish that the entries are duplicative. The time charged does not cover only counsel's travel time, but also his meeting with the claimants and attendance at the conferences. Finally, we reject employer's contention that the district director erred in awarding a fee based on the hourly rate of $200, as the district director specifically considered the applicable rate in the geographic locality involved, the experience of the attorney, and the complexity of the case. *See* 20 C.F.R. §702.132; *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996)(*en*

[3] Although the district director did not provide a rationale for his findings in the Compensation Order-Award of Attorney's Fees, the accompanying cover letter explained his reasoning for rejecting employer's objections to the fee petition.

banc)(Brown and McGranery, JJ. concurring and dissenting). Thus, we affirm the district director's attorney's fee award.

Employer also contends that the administrative law judge's fee award should be vacated as it constitutes an abuse of his discretion. Specifically, employer contends that the administrative law judge erred in awarding a fee based on the hourly rate of $200. The administrative law judge considered employer's objection regarding the hourly rate charged by claimant's counsel and found that $200 per hour is reasonable given the expertise and professionalism of claimant's counsel. Contrary to employer's contention, counsel is not required to establish what he charges other clients in his law practice, but rather the administrative law judge must look to the circumstances involved in the case before him in light of the regulatory criteria. *See generally Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979). As the administrative law judge in the present case considered the geographic locality involved, the experience of the attorney, and the complexity of the case, we affirm the administrative law judge's finding that claimant's counsel is entitled to a fee award based on the hourly rate of $200. *See* 20 C.F.R. §702.132; *Brown,* 30 BRBS at 34.

In addition, we reject employer's contention that the administrative law judge failed to consider the amount of claimant's recovery. This contention, which was not raised before the administrative law judge, cannot be raised for the first time before the Board. *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs],* 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). Moreover, the administrative law judge recognized that the amount of benefits awarded is a valid consideration in awarding a fee. *See* 20 C.F.R. §702.132. Claimant's counsel successfully established claimant's entitlement to continuing total disability benefits, not just back payments of compensation as employer alleges, and thus employer has not established that the administrative law judge abused his discretion in finding that the total amount of the fee was not excessive. *See Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

We also reject employer's contention that the administrative law judge erred in awarding claimant's counsel a fee for time spent on February 4, 2002,

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[4] On remand, the administrative law judge may reconsider the amount of the fee award commensurate with the benefits awarded on remand. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

preparing the attorney's fee petition, as the Board has held that this time is compensable. *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 S.Ct. 2215 (2000). Employer also contends that the administrative law judge erred in awarding an additional three hours for time spent in defending his fee application, although claimant did not request this amount in his fee petition. The administrative law judge has wide discretion in awarding an attorney's fee and may award a higher fee than that which the attorney requested if the administrative law judge finds the higher award is justified. *See generally Jensen v. Maryland Shipbuilding & Dry Dock Co.*, 15 BRBS 400 (1983); *Lilly v. Moon Engineering Co.*, 5 BRBS 132 (1976). Therefore, we reject employer's contention that the administrative law judge erred in awarding claimant's counsel three additional hours for successfully defending his fee application before the administrative law judge. *See generally Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982).

Employer also contends that the administrative law judge erred in awarding a fee for services that were performed prior to the transfer of the case to the Office of Administrative Law Judges. As employer correctly contends, an administrative law judge only can award attorney fees for work performed before the administrative law judge. The district director stated that the case was referred to the Office of Administrative Law Judges on September 1, 2000, and awarded claimant's counsel a fee for services provided to that date. Therefore, we reject employer's contention that the administrative law judge erred in awarding claimant a fee for time spent after September 1, 2000, as there is no overlap in claimant's counsel's fee awards.

With regard to employer's contentions that the administrative law judge's erred in awarding the full amount of time requested by counsel for answering employer's interrogatories, preparation for the hearing and depositions, and preparation of the post-hearing brief, the administrative law judge considered employer's objections to these entries and claimant's response to the objections and concluded that the time requested was not excessive. The administrative law judge found that "the case involved numerous depositions and required extensive trial preparation and research and development of legal argument for

the post-hearing brief." Supplemental Decision and Order at 5. The administrative law judge found that the number of hours was reasonable, necessary, and appropriate at the time the services were rendered, and stated that claimant's counsel provided detailed support for the number of hours expended in this case. *See* Supplemental Decision and Order at 5. As the administrative law judge thoroughly considered the necessity of the itemized entries, and employer has raised no reversible error on appeal, we affirm the administrative law judge's finding that the itemized services, with the exception of the items discussed below, were reasonable and necessary. *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997).

We vacate the administrative law judge's finding that employer is liable for one-half of an hour on July 31, 2000, claimant's counsel spent corresponding with claimant's creditors, as this service was not necessary to establish entitlement to benefits under the Act. *See Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J., dissenting on other grounds), *aff'd on recon. on banc*, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds). In addition, claimant conceded in his reply to employer's objections that one-quarter of an hour was double billed on January 9, 2001, and thus, we reduce the administrative law judge's fee award by this amount.

Lastly, employer contends that the administrative law judge erred in awarding reimbursement of costs for ordinary office overhead. While the administrative law judge is correct that photocopying expenses may be properly assessed against employer if they are reasonable and not a part of the attorney's overhead, *see Picinich v. Lockheed Shipbuilding Co.*, 23 BRBS 128 (1989)(Order), in the present case, claimant's counsel requested reimbursement for postage and phone calls as well as photocopying and facsimiles. As the administrative law judge did not address employer's specific objections to the expenses sought, we vacate the administrative law judge's finding that claimant's

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[5] The administrative law judge did not rely solely on claimant's limited knowledge of English to find that the number of hours requested was not excessive. Supplemental Decision and Order at 5. Thus, although it is not clear from the record how claimant's knowledge of English contributed to the number of hours expended by claimant's counsel, the administrative law judge's finding is not reversible error under the facts of this case.

[6] In addition, we reject employer's contention that the administrative law judge erred in awarding claimant's counsel time to prepare a reply brief that was not accepted, as the attorney could have reasonably regarded the work as necessary at the time it was performed. *O=Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000).

costs were reasonable and necessary and remand the case to the administrative law judge to render further findings. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001).

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits awarding claimant temporary total disability benefits is vacated, and the case is remanded for further consideration consistent with this opinion. The Compensation Order-Award of Attorney's Fees of the district director is affirmed. Finally, the Supplemental Decision and Order-Awarding Attorney Fees of the administrative law judge is affirmed in part, vacated in part, modified to reflect a reduction of .75 hour awarded, and the case remanded for further consideration of the reasonable and necessary expenses consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge