BRB No. 10-0441

JOHN McALISTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 01/14/2011
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Dennis L. Brown and Mike N. Cokins, Houston, Texas, for claimant.

Jerry R. McKenney, Billy J. Frey and Wesley K. Young (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/ carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying Attorney's Fees (2009-LDA-00217) 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).

On May 6, 2004, claimant sustained serious and numerous injuries in a bomb blast during the course of his employment as a construction site mechanic in Iraq. After his initial treatment in Iraq and Germany, which included several operations, claimant returned to his home in the United States for treatment and recovery. Employer began paying temporary total disability benefits and medical benefits following the incident based on the stipulated average weekly wage of $1,745.04. Subsequently, claimant requested an informal conference regarding the nature of his disability, contending that his condition had reached maximum medical improvement. An informal conference was held on November 17, 2008, and the district director recommended that employer pay permanent total disability benefits, with corresponding Section 10(f) adjustments, as claimant had reached maximum medical improvement.[1] 33 U.S.C. §§908(a), 910(f). Employer subsequently disagreed with the recommendation on the ground that claimant's condition had not reached maximum medical improvement, and it filed a notice of controversion. Emp. Ex. 1 at 2. Employer, however, continued to pay temporary total disability benefits at the maximum compensation rate, $1,030.78. Claimant requested that the case be transferred to the Office of Administrative Law Judges for a hearing. *Id.* at 1.

In his decision on the merits, the administrative law judge found that claimant's condition has not reached maximum medical improvement. Although he also found that claimant cannot perform his former duties due to his work-related injury, the administrative law judge found that claimant is capable of some work and that employer established the availability of suitable alternate employment as of October 15, 2009. Thus, the administrative law judge awarded claimant temporary partial disability benefits in the amount of $995.02 per week pursuant to Section 8(e) of the Act, 33 U.S.C. §908(e), from that date and continuing.

Subsequently, claimant's counsel filed a fee petition for $10,800, representing 44.8 hours of legal services at the hourly rate of $225, plus expenses of $387.80. In his Supplemental Decision and Order Denying Attorney's Fees, the administrative law judge found that claimant did not obtain benefits greater than those paid voluntarily by employer, and that employer therefore is not liable for an attorney's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). Claimant appeals the denial of an employer-paid attorney's fee.

[1] Employer did not contend at the informal conference that claimant was only partially disabled.

On appeal, claimant contends that employer rejected the district director's recommendation and that claimant obtained a greater partial disability award than employer sought to pay before the administrative law judge. Therefore, claimant contends employer is liable for his attorney's fee. Employer responds, urging affirmance of the administrative law judge's decision. Claimant has filed a reply brief.

In order for an employer to be liable for an attorney's fee under Section 28(b) of the Act,[2] the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that the following are prerequisites to an employer's liability for an attorney's fee under Section 28(b): (1) an informal conference must have been held; (2) a written recommendation disposing of the controversy must have been made; (3) the employer must have rejected that recommendation; and (4) the claimant must have used the services of an attorney to secure greater compensation than the employer paid or tendered. *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000). In this case, the district director held an informal conference and issued a written recommendation, which employer rejected, as it declined to pay permanent total disability benefits. Claimant pursued a formal hearing, and the administrative law judge found that claimant did not satisfy the fourth prerequisite as he did not obtain greater compensation that that paid or tendered by employer. We affirm the administrative law judge's denial of an employer-paid attorney's fee.

Employer voluntarily paid claimant temporary total disability benefits at the rate of $1,030.78 per week from the date of the injury and continuing through the date of the administrative law judge's decision. Claimant, contending that his condition had reached maximum medical improvement and that he remained unable to return to any employment, sought permanent total disability benefits which would be subject to annual cost-of-living adjustments pursuant to Section 10(f). Following the informal conference, employer filed a notice of controversion and did not pay claimant permanent total disability benefits. Claimant requested transfer of the case for a formal hearing. Employer argued before the administrative law judge that claimant's condition had not reached maximum medical improvement and that he could perform alternate employment, and therefore was entitled to only temporary partial disability benefits. In support of its contention, employer submitted a vocational rehabilitation report and labor

[2] There is no contention that Section 28(a) of the Act, 33 U.S.C. §928(a), applies, and it appears employer paid claimant temporary total disability benefits from the date of injury, May 6, 2004. Emp. Ex. 1 at 5; *see Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).

market survey dated October 15, 2009, which identified seven jobs with wages ranging from $5,100 to approximately $1,200 per month. The administrative law judge rejected claimant's assertion that his condition had reached maximum medical improvement and found that the position as a customer service greeter, which paid $7.50 per hour, or $300 per week, constituted suitable alternate employment given claimant's restrictions due to his work-related injury. Thus, the administrative law judge awarded claimant temporary partial disability benefits in an amount less than that employer had been paying continuously and voluntarily. Accordingly, the administrative law judge denied claimant's request for an employer-paid fee under Section 28(b) because he obtained less than the permanent total disability benefits he sought as well as less than the temporary total disability benefits employer had been paying. As claimant did not obtain compensation greater than that paid or tendered by employer after its rejection of the district director's recommendation, we affirm the administrative law judge's finding that employer cannot be held liable for claimant's attorney's fee pursuant to Section 28(b) as it is in accordance with law. *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997); *Boe v. Dep't of the Navy/MW*R, 34 BRBS 108 (2000).

This case is distinguishable from the Fifth Circuit's recent decision in *Carey v. Ormet Primary Aluminum Corp.*, __ F.3d __, No. 10-60075, 2010 WL 4968693 (5th Cir. Dec. 8, 2010). In *Carey*, the employer voluntarily paid benefits at one rate but argued it was liable for benefits based on a lesser rate, as it contended that the claimant's average weekly wage should not include certain holiday, vacation, and container royalty payments. Following the district director's recommendation that the claimant's average weekly wage should include those amounts, employer continued to pay the higher rate but requested a formal hearing on the issue. The administrative law judge rejected the employer's argument that the premium pay should be excluded, but nevertheless calculated a lower average weekly wage than that which served as the basis for the district director's recommendation and the employer's voluntary payments. Claimant's counsel then filed a request for an attorney's fee under Section 28(b). The administrative law judge denied the request, and the Board affirmed the denial, on the grounds that claimant did not receive greater compensation than employer voluntarily paid.

The Fifth Circuit reversed the denial of an employer-paid fee. The court held that although the final award did not exceed the amount the employer voluntarily paid, it exceeded the amount the employer had argued was due, both before the district director and the administrative law judge. Thus, the court held that the claimant successfully established his entitlement to compensation greater than that which employer was willing to pay and that the employer is liable for the attorney's fee. *Carey*, 2010 WL 4968693 at *3-4. Specifically, the court relied on the qualifier in Section 28(b) which states that, following the refusal of the district director's recommendation, the employer "shall pay or tender to the employee in writing the additional compensation, if any, to which they

believe the employee is entitled" and, thus, the "amount paid or tendered" is the amount to which the employer believes the employee is entitled. 33 U.S.C. §928(b); *Carey*, 2010 WL 4968693 at *3-4. As the employer paid one amount but continued to argue for a lesser amount, the claimant was forced to hire an attorney to protect his interest in the greater benefits. Although the claimant did not retain the highest amount of benefits, he successfully obtained an amount greater than the amount the employer believed was due. Accordingly, the Fifth Circuit held that all the Section 28(b) requirements were met. *Id.; see Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981); *see also Pool Co.*, 274 F.3d 173, 35 BRBS 109(CRT).

To the contrary, in this case, claimant, not employer, pursued the formal hearing seeking permanent total disability benefits and disputing the temporary total disability benefits employer was paying. Employer did not seek to limit claimant's award to partial disability until after the case was transferred to the administrative law judge. As the administrative law judge awarded claimant temporary partial disability benefits, claimant's pursuit of a formal hearing resulted in his obtaining a lower award than he sought and than employer was voluntarily paying.[3] Consequently, as claimant did not obtain additional compensation greater than the amount paid or tendered, one of the Section 28(b) prerequisites has not been satisfied.[4] *Wilkerson*, 125 F.3d 904, 31 BRBS 150(CRT); *see generally Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT). Thus, employer is not liable for claimant's attorney's fee.

[3] Claimant also did not receive an award greater than that which employer "believed" claimant was entitled following employer's rejection of the district director's recommendation. *See Carey*, 2010 WL 4968693 at *3-4. Employer continued to pay claimant temporary total disability benefits after the informal conference and, at the hearing, employer contended for the first time that claimant was only partially disabled. Employer offered evidence of several jobs at different wage rates which it "believed" claimant could perform and the administrative law judge found claimant capable of performing one of the identified jobs and thus only partially disabled. This finding was not appealed.

[4] We also reject claimant's assertion that he is entitled to a fee as he successfully obtained an "award" of benefits before the administrative law judge. Section 28(b) requires a claimant to obtain greater compensation than that voluntarily paid by the employer and that was not accomplished in this case.

Accordingly, the administrative law judge's Supplemental Decision and Order Denying Attorney's Fee 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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JUDITH S. BOGGS
Administrative Appeals Judge