

BRB No. 91-816

MELVIN BUTLER)
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 Claimant-Respondent)
)
 v.)
)
 HUTCO, INCORPORATED)
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 and)
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 U.S. FIRE INSURANCE) DATE ISSUED:
 COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Jennings, Administrative Law Judge,
United States Department of Labor.

William S. Vincent, Jr., New Orleans, Louisiana, for the claimant.

David F. Bienvenu and Carrie A. Jourdan (Hoffman, Sutterfield, Ensenat & Bankston), New
Orleans, Louisiana, for the employer/carrier.

Before: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (89-LHC-3097) of Administrative Law Judge Kenneth A. Jennings awarding benefits 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his lower back on December 1, 1986 while working for employer as a heavy manual laborer; he has not been engaged in gainful employment since that time. Employer voluntarily paid claimant temporary total disability benefits from December 2, 1986 until February 9, 1987. 33 U.S.C. §908(b). Claimant subsequently filed this claim for benefits, seeking a continuing award of temporary total disability benefits.

In his Decision and Order, the administrative law judge found that claimant did not suffer from any continuing physical impairment, but that he suffered from a psychological impairment, resulting from the work-related back injury, which prevents him from performing his usual work. The administrative law judge therefore concluded that since employer submitted no evidence of suitable alternate employment, claimant is entitled to a continuing award of temporary total disability benefits.¹ Employer also was held liable for certain medical expenses pursuant to Section 7 of the Act, 33 U.S.C. §907. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel an attorney's fee of \$4845, representing 38.75 hours at an hourly rate of \$125, plus expenses of \$1298.52, to be paid by employer.

On appeal, employer contends that the administrative law judge's conclusion that claimant is unable to perform his usual job is not supported by the medical evidence. Employer asserts that the testimony of Dr. Walker, an orthopedist, is not sufficient to support a finding of any psychological disability. Employer further asserts that there are no opinions of record from any psychological examiners that claimant is unable to perform his usual work due to any psychological condition, and that several medical examiners, including Dr. Walker, opined that claimant either exaggerated his symptoms or made excessive complaints based upon his objective symptoms. Employer also appeals the administrative law judge's award of an attorney's fee, maintaining only that the award is premature as there has been no final adjudication in claimant's favor. Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

In order to establish a *prima facie* of total disability, claimant must establish he is unable to return to his usual work because of the work injury. *See generally Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In this case, the administrative law judge credited the reports and testimony of Dr. Walker, an orthopedist, who indicated that although there was no organic basis to support claimant's complaints of pain, he would not recommend returning claimant to heavy work simply based on his response to the injury. *See Tr.* at 133. The administrative law judge also credited the opinion of Dr. Morse, a psychiatrist, who diagnosed moderate chronic reactive depression, with personality change and a possible hysterical reaction, and the opinion of two other medical examiners who concluded that claimant suffers from a psychological overlay. Dr. Morse stated claimant needed physical and occupational therapy because of his long period of inactivity, and recommended that claimant enroll in a chronic pain program to improve his strength, range of motion, and pain coping skills.²

We reverse the administrative law judge's award of temporary total disability benefits, as his finding that claimant cannot perform his usual work due to a psychological impairment is not

¹The issue of permanency was not raised by either party.

²The administrative law judge discredited the opinion of employer's psychiatrist, Dr. Culver, who advised that claimant was malingering and stated that claimant was fabricating symptoms for the purpose of obtaining compensation and avoiding a return to work.

supported by substantial evidence in the record. In the instant case, the only opinion of record that advises that claimant not return to his usual work is that of Dr. Walker. Dr. Walker testified that:

I wouldn't recommend that [claimant] ever go back to heavy work simply based on his response to an injury, whether it be because he has a minor abnormal, anatomical structure in the back, or whether he just is an individual that cannot recover as expected from a relatively mild injury. I wouldn't expose him to that.

Tr. at 133. Dr. Walker further agreed that he would recommend claimant return to a non-strenuous, light-type activity. *Id.* at 133-134. However, Dr. Walker subsequently explained that the only reason he made this recommendation is that if someone like claimant is "scared of going back to any work," he would not return him to work because such an employee, "for the company's own protection and for his protection, should never go back to that work," even though there is no objective or medical basis for it. *Id.* at 134. This opinion does not diagnose a psychological condition and is insufficient to establish that claimant has a psychological condition that prevents him from performing his usual work.

Moreover, while the record contains notations from physicians that claimant suffers from a psychological overlay, there are no opinions of record that claimant cannot perform his usual work due to a psychological condition, although Dr. Morse did state that claimant needed physical and vocational therapy because of inactivity. *See* Cl. Ex. 2. Therefore, based on the lack of evidence supporting the administrative law judge's determination that claimant cannot return to his usual work because of a psychological condition, we hold that claimant has not established his *prima facie* case of total disability. *See generally Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242, 245 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). Accordingly, we reverse the award of temporary total disability benefits.

With regard to employer's appeal of the award of an attorney's fee, we reject employer's sole contention on appeal that the award was premature. An attorney's fee award may be entered before the case is finally adjudicated, but the award is not enforceable until all appeals are exhausted. *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT) (7th Cir. 1982). In this case, although we have reversed the award of temporary total disability benefits, claimant was successful in obtaining payment of certain medical expenses and future medical benefits for his psychological condition which employer resisted. *See* Jt. Ex. 1; Decision and Order at 8. We note that employer did not object to the fee request before the administrative law judge. We, therefore, affirm the award of an attorney's fee. *See generally Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987).

Accordingly, the Decision and Order awarding temporary total disability benefits is reversed. In all other respects, the administrative law judge's Decision and Order is affirmed. The Supplemental Decision and Order of the administrative law judge is affirmed.

SO ORDERED

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge