BRB No. 92-1239

EDDIE HEBERT	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
TTT STEVEDORES OF TEXAS	)	
	)	
and	)	
	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	DATE ISSUED: _____
	)	
Employer/Carrier Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

V. William Farrington, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for employer/carrier.

Marianne Demetral Smith (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees (91-LHC-2107)

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 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).

On November 7, 1980, while working in the haul of employer's ship, claimant suffered a severe hypertensive crisis, and he has not worked since that date. Employer stipulated to liability for permanent total disability compensation and medical benefits since the date of the accident. The only issues pending for adjudication before the administrative law judge were employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f), and whether the Director, Office of Workers' Compensation Programs (the Director), should be held liable for employer's attorney's fee.

Based on medical records documenting longstanding elevated blood pressure readings in existence prior to the work injury and Dr. White's September 14, 1989, medical opinion, the administrative law judge found that employer established the existence of a manifest, serious lasting physical condition, which would have motivated a cautious employer to have been concerned because of a possible increase in compensation risk. The administrative law judge further determined that claimant's prior hypertension materially and substantially aggravated and contributed to claimant's permanent disability. In a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge found that inasmuch as the Director engaged in groundless conduct that was oppressive, vexatious, or willfully violated a court order in contesting employer's entitlement to relief under Section 8(f), employer was entitled to recover $2,437.50 in attorney's fees from the Special Fund, whether viewed as costs under Section 26 of the Act or as an exception to the American Rule under Section 28 of the Act. 33 U.S.C. §§926, 928.

On appeal, the Director challenges the administrative law judge's award of Section 8(f) relief. The Director argues that inasmuch as the medical reports in existence prior to the work injury contain only elevated blood pressure readings which were temporary and consistent with emotional trauma and do not reflect a diagnosis or need for treatment, the administrative law judge erred in finding that claimant's pre-existing hypertension was a manifest, pre-existing permanent partial disability for Section 8(f) purposes. The Director also argues that the administrative law judge erred in assessing employer's attorney fees against the Special Fund. Employer responds, urging affirmance.

Section 8(f) shifts liability to pay compensation for permanent total disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks if the employer establishes the following prerequisites: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) the permanent total disability is not solely due to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996).

The administrative law judge's finding that claimant's pre-existing hypertension constitutes a manifest, pre-existing permanent partial disability within the meaning of Section 8(f) is affirmed

because it is rational, in accordance with applicable law, and supported by substantial evidence, specifically the numerous medical reports documenting elevated blood pressure readings dating back as far as 1967, Exs. 3, 5, and the medical records of Dr. White, which the administrative law judge acted within his discretion in crediting. *See O'Keeffe*, 380 U.S. at 360; *Director, OWCP v. General Dynamics Corp. [Fantucchio]*, 787 F.2d 723, 18 BRBS 88 (CRT) (1st Cir. 1986); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Dugan v. Todd Shipyards, Inc*., 22 BRBS 42 (1989). The Director argues that claimant's elevated blood pressure readings do not constitute a pre-existing permanent partial disability because Dr. White did not believe claimant had hypertension and did not treat him for this condition. We note, however, that a St. Patrick's Hospital emergency room report dated September 15, 1974, reflects that when claimant was admitted for nerves and depression, Dr. White prescribed Serpasil for claimant's elevated blood pressure and thereafter had him monitored for this condition for approximately two hours. In addition, Dr. White's September 18, 1989, report, which described claimant's hypertension as a pre-existing condition which contributed to his present disability, also supports the administrative law judge's finding of a pre-existing permanent partial disability.[1] Ex. 26. Because the Director has failed to raise any reversible error made by the administrative law judge in evaluating the evidence and making credibility determinations, we affirm the administrative law judge's determination that claimant's pre-existing hypertension was a manifest, pre-existing permanent partial disability. Inasmuch as the Director does not otherwise contest the administrative law judge's findings with regard to Section 8(f), his award of Section 8(f) relief is affirmed.

We agree with the Director that the administrative law judge erred in awarding employer's counsel an attorney's fee payable by the Special Fund, inasmuch as the Act does not provides for an award of an employer's attorney's fees payable by the Special Fund. Under the "American Rule" regarding fee awards for legal representation, absent express statutory language or an enforceable contract, litigants pay their own attorney's fees and such fees are not recoverable as costs. *Alyeska Pipe Line Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). In awarding the fee at issue here, the administrative law judge relied on Sections 28 and 26 of the Act. As the Supreme Court noted in *Alyeska*, Section 28 of the Act is an example of one instance where Congress has made a "specific and explicit" provision for the allowance of attorneys' fees payable by another party to the case. *Id*., at 260 n.33. Section 28, however, provides for payment of claimant's attorneys' fees by an employer under specific circumstances, *see* 33 U.S.C. §928(a)(b); it does not provide for payment of an employer's attorney's fee or for the Special Fund to be held liable for an attorney's fee. Thus, Section 28 cannot support the fee award. *See Borderlon v. Republic Bulk Stevedores*, 27 BRBS 280 (1994). *Toscano v. Sun Ship, Inc.*, 24 BRBS 207, 212, 214 (1991); *Ryan v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 208 (1987); 33 U.S.C. §928(a), (b), (c).

The administrative law judge's award of an attorney's fee payable by the Special Fund also can not be upheld under Section 26 of the Act, for the reasons stated in *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 1003, 29 BRBS 43, 46 (CRT) (5th Cir. 1995). *See also Toscano*, 24 BRBS at 212, 214. Although the United States Supreme Court recently indicated that

[1]As this report post-dates the work-related injury, it can be considered only in addressing whether claimant had a serious lasting condition prior to his work injury. The administrative law judge properly found this condition manifest based on reports pre-dating the 1980 injury.

even if a statute governs the imposition of attorney's fees a court may "resort to its inherent power to impose attorneys's fees as a sanction for bad faith conduct," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991), a court should invoke this inherent power only when it finds that "fraud has been practiced upon it, or that the very temple of justice has been defiled." *Id.*, 501 U.S. at 46; *Boland Marine*, 41 F.3d at 1005, 29 BRBS at 49 (CRT). Inasmuch as this is not a case in which the conduct of the Director rises to this level, and the administrative law judge's fee award cannot be upheld either as an exception to the "American Rule" under Section 28 or as costs under Section 26, we reverse the administrative law judge's award of employer's attorney's fees payable by the Special Fund.

Accordingly, the administrative law judge's Supplemental Decision and Order holding the Special Fund liable for attorney's fees is reversed. The administrative law judge's Decision and Order awarding employer Section 8(f) relief is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge